



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Craig Aubrey
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VIA EMAIL: Craig_Aubrey@fws.gov

Lisamarie Carrubba
Acting Chief, Interagency Cooperation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910
VIA EMAIL: lisamarie.carrubba@noaa.gov, nmfs.hq.esa.consultations@noaa.gov

Re: Request for Concurrence on the Not Likely to Adversely Affect Determinations to Listed Species and their Designated Critical Habitat Areas for EPA's Renewable Fuel Standard (RFS) Set Rule

May 19, 2023

Dear Mr. Aubrey and Dr. Carrubba:

In accordance with Endangered Species Act (ESA) and 50 C.F.R. § 402.13, please find enclosed a revised Biological Evaluation (BE) for the *Renewable Fuel Standard (RFS) Program: Standards for 2023–2025 and Other Changes* rulemaking, also known as the “Set Rule.”¹ With this transmittal of the BE, EPA requests concurrence from the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS) and the Department of Interior, Fish and Wildlife Service (FWS) (together, “the Services”) on EPA’s Not Likely to Adversely Affect (NLAA) determinations for listed species and their designated critical habitat areas associated with the Set Rule.

Section 7(a)(2) of the ESA requires federal agencies to consult with the Services to ensure that federal actions are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Pursuant to a court order, by June 14, 2023, EPA must issue the final RFS Set Rule.² EPA submits these effects determinations to the

¹ On January 30, 2023, EPA submitted an initial BE, which is superseded by the revised BE submitted today.

² Specifically, EPA is subject to a court-ordered deadline to finalize the 2023 standards by June 14, 2023. See *Growth Energy v. Regan*, No. 22-cv-01191-RC (D.D.C.), Doc. No. 12.

Services for the RFS Set Rule pursuant to 50 C.F.R. § 402.13(c)(1) and, pursuant to 50 C.F.R. § 402.13(c)(2), EPA requests the Services' concurrence on EPA's Not Likely to Adversely Affect determinations for 712 listed species (810 populations) and their designated critical habitat areas for the Set Rule. These species and our determinations are detailed in Attachment 1. Out of the 712 species within the action area, 672 species are FWS species, 32 are NMFS species, and 8 are both FWS and NMFS species.

The analyses of potential effects on ESA-listed species and designated critical habitat associated with this EPA action promulgating the RFS and other program changes for 2023 through 2025 are discussed in the enclosed BE (Attachment 2). Based on these analyses, EPA has made the determination that the Set Rule may affect, but is not likely to adversely affect, any of the 810 populations within the Set Rule action area or their critical habitat. Any potential impacts would be insignificant or discountable due to the various uncertainties and conservative assumptions made in our analyses, together with minimal potential impacts identified for listed species and critical habitat from land use and water quality impacts.

We certify that EPA used the best scientific and commercial data available to complete our analyses. As such, we respectfully request the Services' concurrence with EPA's NLAA effects determinations.

We appreciate your continued engagement and assistance with bringing the consultation on the RFS Set Rule to a timely conclusion on or before June 14, 2023.

If you require additional information, please contact Tuana Phillips (Phillips.tuana@epa.gov; 202-565-0074).

Sincerely,

SarahW Dunham

Sarah Dunham, Director
Office of Transportation and Air Quality
Office of Air and Radiation

Enclosures: Attachment 1: Listed Populations and Designated Critical Habitats for the Set Rule and EPA's Effects Determinations
Attachment 2: Biological Evaluation of the Renewable Fuel Standard (RFS) Set Rule
Attachment 3: Redline-Strikeout (RLSO) version of the Biological Evaluation of the Renewable Fuel Standard (RFS) Set Rule showing changes that have been made since the initial January 30, 2023, version of the Biological Evaluation
Attachment 4: Document with EPA responses to NMFS and FWS comments