



May 13, 2022

U.S. Environmental Protection Agency
EPA Docket Center, Room 3334
1301 Constitution Avenue, NW
Washington, DC 20004

**RE: Renewable Fuel Standard (RFS) Program: Canola Oil Pathways to Renewable Diesel, Jet Fuel, Naphtha, Liquefied Petroleum Gas and Heating Oil
(Docket#: EPA-HQ-OAR-2021-0845)**

Please accept the following comments from the Center for Biological Diversity (“Center”) on the Environmental Protection Agency’s (“EPA”) approval of canola oil fuel pathways for certain renewable fuels, including jet fuel (“RFS Pathway”). EPA’s approval would likely increase the production of canola crop to meet new market biofuel demands, with the increased production likely causing harmful effects that cross the “may effect” and “likely to adversely affect” threshold for at least five listed species, including the endangered Pallid sturgeon. Therefore, the EPA must consult under section 7 of the Endangered Species Act (“ESA” or “Act”) before issuing this approval.

EPA’s authorization of a new fuel pathway will likely have real world consequences involving business decisions and economic choices made in the canola oil and rapeseed market. The EPA’s authorization of a new pathway for renewable fuels will likely lead to an expansion of these crops for use in new biofuels like jet fuel, and since the aviation industry alone uses billions of gallons of fuel per year, it could result in a massive influx of canola production to meet the industry’s biofuel demands.¹ The increase in these crops is likely to result in increased soil runoff, pesticide use, and land-use conversions that cross the “may effect” and “likely to adversely affect” threshold for the endangered Pallid sturgeon, Poweshiek skipperling, and Whooping crane, as well as the threatened Dakota skipper and Western fringe prairie orchid. The EPA must initiate consultation with U.S. Fish and Wildlife Service (“USFWS”) at the beginning of this program to ensure that these imperiled species are not jeopardized by EPA’s approval of this new pathway.

Since this is a relatively targeted consultation involving a narrow geographic scope, the EPA should be able to complete this consultation prior to the finalization of this proposal, so that these listed species, and any others, can quickly receive any necessary protections. The endangered Pallid sturgeon is already threatened by water pollution and pesticide use, which are threats that EPA’s authorization of the RFS Pathway would likely increase.

Congress enacted the Endangered Species Act in response to growing concern over the extinction of plants, fish, and wildlife,² and recognized that certain species “have been so

¹ U.S. Dept. of Transportation, Airline Fuel Cost and Consumption (last accessed May 10, 2022)
<https://www.transtats.bts.gov/fuel.asp>

² 16 U.S.C. § 1531(a)(1).

depleted in numbers that they are in danger of or threatened with extinction.”³ As such, one of the stated primary purposes of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.”⁴

In passing the Endangered Species Act, Congress made a deliberate choice “to give endangered species priority over the ‘primary missions’ of federal agencies” in order to “halt and reverse the trend toward species extinction, *whatever the cost*.”⁵ Accordingly, Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”⁶ The ESA defines “conservation” to mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”⁷

While many of the ESA’s provisions work to effectuate the conservation goals of the statute, the “heart of the ESA” is the interagency consultation requirements of Section 7 of the ESA.⁸ To reach these goals, Section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species.”⁹ “Action” is broadly defined to include “all activities *or programs* of any kind *authorized*, funded, or carried out, in whole or in part” by federal agencies and includes conservation measures, granting permits and licenses, as well as actions that may directly or indirectly “cause modifications to the land, water, or air.”¹⁰ Section 7 consultations are required on an agency action “so long as the agency has ‘some discretion’ to take action for the benefit of a protected species.”¹¹ If “an agency has *any* statutory discretion over the action in question, that agency has the authority, and thus the responsibility, to comply with the ESA.”¹²

At the first step of the consultation process, an action agency must complete a biological assessment or biological evaluation to identify species that may be affected.¹³ If the agency determines that an action *may affect* a species — whether such effects are beneficial or unknown in character and even if the effect is small, indirect, or the result of cumulative actions — it must consult with the Services.¹⁴ The only exception to the consultation requirement for a discretionary federal action is if the agency concludes its action will have “no effect” on listed species or critical habitat.¹⁵ As the D.C. Circuit held — and held specifically with respect to the

³ *Id.* § 1531(a)(2).

⁴ *Id.* § 1531(b).

⁵ *Tenn. Valley Authority v. Hill* (“TVA”), 437 U.S. 153, 175, 184, 185 (1978).

⁶ 16 U.S.C. § 1531(c)(1).

⁷ *Id.* § 1532(3).

⁸ *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011); 16 U.S.C. § 1536.

⁹ *Id.* § 1536(a)(2).

¹⁰ 50 C.F.R. § 402.02.

¹¹ *NRDC v. Jewell*, 749 F.3d 776, 779-80 (9th Cir. 2014).

¹² *Am. Rivers v. United States Army Corps of Eng’rs*, 271 F.Supp.2d 230, 251 (D.D.C. 2003) (emph. added)).

¹³ 16 U.S.C. § 1536(c).

¹⁴ 50 C.F.R. §§ 402.02, 402.14(a), (g).

¹⁵ 50 C.F.R. § 402.14(b); *Am. Fuel*, 937 F.3d at 597.

Renewable Fuel Standard — the “inability to ‘attribute’ environmental harms ‘with reasonable certainty’ to...is not the same as a finding that [it] ‘will not affect’ or ‘is not likely to adversely affect’ listed species or critical habitat,” and does not absolve the agency’s consultation duty.¹⁶ If the action agency determines, after a biological evaluation or through informal consultation with the Services, that the proposed action “may affect,” but is “not likely to adversely affect,” any listed species or habitat,¹⁷ then it must obtain the written concurrence of the Services, and no further consultation is required.¹⁸ If an action agency determines that its action will “likely adversely affect” any listed species, then a formal consultation must occur. In making these effects determinations, agencies must use the “best scientific and commercial data available.”¹⁹

Under the formal consultation process, the Services must complete a biological opinion that evaluates the agency action. If the Services find that the action will jeopardize a species or result in the destruction or adverse modification of critical habitat, they must identify “reasonable and prudent alternatives” for the action that comply with Section 7.²⁰ If the action will not result in jeopardy, then they must provide “reasonable and prudent measures” to minimize take of any listed species, as well as an “incidental take statement,” which provides the action agency legal coverage for any remaining take that is unavoidable.²¹

Critically, strict adherence to the procedural requirements of Section 7 and the consultation regulations is absolutely necessary to ensure against the extinction of the nation’s biodiversity. As the Ninth Circuit aptly explained, “because the procedural requirements are designed to ensure compliance with the substantive provisions...the strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements.”²²

I. EPA’s Approval of the RFS Pathway Represents Discretionary Programmatic Action with a Sufficient Causal Link of Harm to Listed Species

Congress always understood that the ESA’s consultation process should apply broadly to federal agency actions. The law requires that each agency “insure that any action *authorized*, funded, or carried out by such agency” not jeopardize listed species or their critical habitats. Almost by definition, an agency authorization covers those situations where a federal agency has a role whereby the consequences of the agency action are somewhat casually remote from the actual harms to listed species. Indeed, this is why the Services’ joint regulations specifically contemplate consultations applying to the promulgation of regulations, and why the Services also developed additional procedures for both a “framework programmatic action” and a “mixed programmatic action.”²³

¹⁶ *Am. Fuel Mfrs.*, 937 F.3d at 597-598 (D.C. Cir. 2019) (“the EPA concluded that it is impossible to know whether the 2018 [Renewable Fuels Program] Rule will affect listed species or critical habitat. That is not the same as determining that the 2018 Rule ‘will not’ affect them.”)

¹⁷ A finding that the action “may affect” but is “not likely to adversely affect” means all effects are expected to be “discountable, insignificant, or completely beneficial.” *Id.* at xv, 3-12, 3-13.

¹⁸ 16 U.S.C. § 1536(c); 50 C.F.R. §§ 402.13(a), 402.14(b)(1).

¹⁹ 16 U.S.C. §§ 1536(a)(2), (c)(1).

²⁰ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

²¹ 16 U.S.C. § 1536(b); 50 C.F.R. §§ 402.14(h), (i).

²² *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985).

²³ 50 C.F.R. § 402.02

RFS Pathways are no more or less complicated than other programmatic consultations that potentially apply over large portions of the country on programmatic agency actions. For example, in 2011, the Services completed consultations on the nationwide wildland firefighting program's potential impact on listed species, especially aquatic species that are harmed by the chemicals in fire-retardants dropped from aircraft.²⁴ No one would ever claim that the Forest Service can predict the place that any specific wildfire would occur in the future, or if during the course of any particular wildfire that the use of fire-retardant would be needed, or that the retardant chemical would be applied over or near a specific body of water. Nonetheless, because there existed a potential for harm — even indirect and causally distant harm — a consultation was completed.

Similarly, the EPA has completed several biological opinions on aspects of its water program, including a consultation for its 316(b) regulations,²⁵ a consultation on the NPDES general permit for stormwater,²⁶ and consultations on the use of organophosphate pesticides.²⁷ For each of these programmatic types of action, the EPA could not predict exactly when or where a third party will choose to apply a pesticide, or the choice by a third party of technology at any specific facility to address thermal impacts or the amount of pollution from a third party will seek in a general permit for stormwater (not to mention predicting when or how much it will rain). Nonetheless, the EPA's authorizations provided the necessary legal approval for such activities to eventually occur, influenced and shaped the actions of numerous (perhaps countless) third parties, and ultimately impacted the conservation status of numerous endangered species.

The EPA's RFS Pathway will have a significant, if not overwhelming, influence on canola and rapeseed crop production for use in renewable diesel, jet fuel, naphtha, liquefied petroleum gas and heating oil. The RFS Pathway will have a clear effect on business decisions and economic choices in the crop production sector, as canola production will massively increase to meet the new market demands, such as the billions of gallons of fuel used by the aviation industry. The approval of new RFS Pathways is connected to increases in crops grown for biofuels, which in turn results in significant impacts on the environment through land-use conversion and downstream pollution impacts from fertilizers, pesticides, and soil runoff.

In past RFS rulemakings, EPA has argued that certain RFS rules have no effect on the amount of crops grown for biofuel. In this rulemaking, EPA does in fact mention potential effects on crop production in relation to modeling scenarios designed to isolate greenhouse gas impacts associated with the RFS Pathway. EPA maintains that its modeling of domestic land use changes and farm inputs is not a projection or forecast and is merely meant to simplify real-world expectations to simplify their GHG analysis. However, the Forest and Agriculture Sector Optimization Model (FASOM) is a model that is “designed to provide information about the

²⁴ US Forest Service, 2011. Nationwide Aerial Application of Fire Retardant on National Forest System Land; *see also, Forest Serv. Employees. for Envtl. Ethics v. U.S. Forest Serv.*, 726 F. Supp.2d 1195 (D. Mont. 2010).

²⁵ *Cooling Water Intake Structure Coalition v. US EPA*, 905 F. 3d 49 (2nd Cir. 2018)

²⁶ EPA, Stormwater Discharges <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-threatened-and-endangered-species> (last accessed May 13, 2022).

²⁷ NOAA, Pesticide Consultations <https://www.fisheries.noaa.gov/national/consultations/pesticide-consultations> (last accessed May 13, 2022).

effects of a wide range of potential policies on . . . land allocation . . .” for crop use.²⁸ the EPA seems to be making a reasonable assumption that the RFS Pathway will produce a net effect. This being the case, EPA has an obligation to make a “may effect” determination. As discussed below, this effect is one that will have a sufficient causal harm to listed species.

To model these outcomes, the EPA uses a “reasonable and appropriate” assumed market shock of 200 million gallons of canola oil-based biofuels from the RFS Pathway. This is of a similar order of magnitude to the volume of canola oil biodiesel currently produced. The estimate seems conservative, especially given the demand from the aviation industry to use billions of gallons of biofuels that will likely substantially increase canola production. While airlines already use billions of gallons of fuel per year, industry groups have committed to using substantial biofuels in jet fuel,²⁹ while government-wide efforts have been made to reduce costs associated with biofuels to support their increased production.³⁰ Any net effect assumed by EPA’s model is likely underestimating the canola-oil jet fuel demand that will be created once the RFS Pathway is approved. EPA has the key role in authorizing the RFS Pathway, and in doing so, it is likely to increase very substantially the amount of acreage used for canola production, while also increasing the demand and desire to do so. This action will clearly cross the “may effect” threshold, meaning that EPA must consult with the Services.

EPA’s modeling found that approval of the RFS Pathway would likely cause an additional 17,600 additional acres of land to be planted with canola, with over 16,300 acres of coming from North Dakota alone. EPA’s model found that the RFS Pathway will also incidentally incentivize a shift in livestock production in North Dakota, due to additional canola seed being crushed into meal and lowering livestock feed prices in the region. This regional price decrease is modeled to lead to an estimate increase of 86,800 acres of wheat. Since livestock feed requires several different components, this would also result in an increase in several different feed crops, totaling a 115,000-acre increase. Ultimately, the RFS Pathway modeling assumes an increase of 218,300 acres of crop area.

It is important to note that neither members of Congress nor industry groups believe that the approval of the RFS Pathway is irrelevant, inconsequential, or otherwise meaningless in determining what happens in the real world. Last year, nine Midwest senators wrote to the EPA to expedite consideration of the canola industries petition that inspired this rulemaking.³¹ Industry groups have for years been writing the highest levels of government, including the White House, asking them to intervene and set a new RFS Pathway for canola oil.³² In fact, the

²⁸ Darius M. Adams et. al *The Forest and Agricultural Sector Optimization Model (FASOM): Model Structure and Policy Applications* Res. Pap. PNW-RP-495 USDA (1996) <https://www.fs.usda.gov/treesearch/pubs/2876>

²⁹ Philip Brasher *Biofuel-Hungry Airlines Push for Federal Aid, Raising Fears Of Veg Oil Squeeze* AGRIPULSE (June 9, 2021) <https://www.agri-pulse.com/articles/16007-biofuel-hungry-airlines-push-for-federal-incentives-raising-fears-of-soy-oil-squeeze>.

³⁰ Justin Bredlau *Biofuels: Ready to Fly into the Future* USDA BLOG (Sep. 13, 2021) <https://www.usda.gov/media/blog/2021/09/13/biofuels-ready-fly-future>

³¹ Letter to Michael Regan, Administrator of the Environmental Protection Agency (June 21, 2021) <https://www.uscanola.com/wp-content/uploads/2021/07/USCA-RD-Senate-Canola-Pathway-Letter-2021.pdf>

³² Letter to President Donald Trump on Renewable Fuel Standard – Canola Oil Renewable Diesel Pathways (Sep. 30, 2020) <https://www.uscanola.com/wp-content/uploads/2020/09/USCA-RD-Coalition-POTUS-Letter-2020-September.pdf>

canola industry's petition is what started this very rulemaking. Why is there such an interest in the approving a new RFS Pathway if the program has no impact on the business decisions and profits of so many entities throughout the crop production sector?

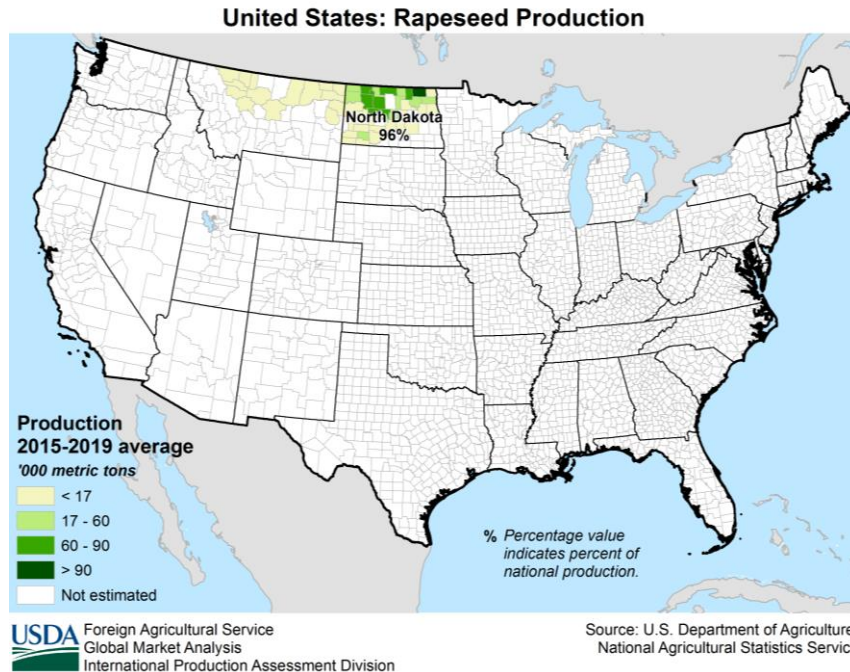
The simple fact is that approving the RFS Pathway represents a programmatic action with programmatic, landscape-level *negative* consequences for endangered species. Even EPA's conservative modeling assumes that additional crops will be grown as a result of the RFS Pathway approval, which in turn results in significant impacts on the environment through land-use conversion and downstream pollution impacts from fertilizers, pesticides, and soil runoff. Below we outline how the EPA must conduct a biological evaluation and then consult with the Services.

Importantly, the EPA must complete the consultation process *before* they approve the RFS Pathway. Once this program is approved, it will be more complicated for the EPA to meaningfully determine the effect on canola crop production, especially as this program grows and evolves. Completing consultation at the outset is critical to developing meaningful protections for endangered species while fully considering the scope of the EPA's approval.

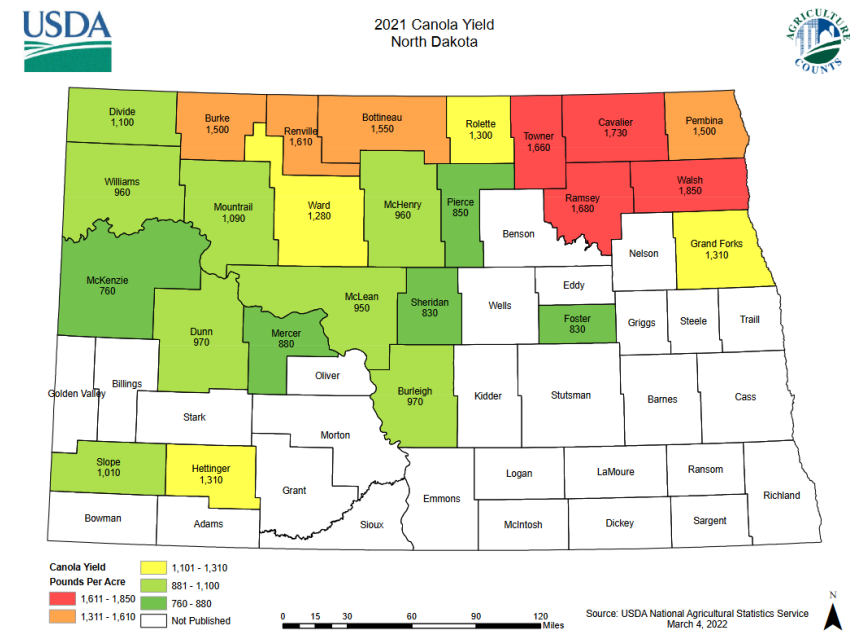
II. Defining the Scope of Consultation on the RFS Pathway is Narrow, Straightforward, and Clearly Leads to a "May Affect" Determination.

As noted above, the RFS Pathway clearly requires a programmatic consultation that focuses on landscape level impacts. Determining which landscapes require a consultation is simply not difficult, as the primary growing areas for canola are well understood and well documented. The narrow geographic scope of this consultation, and the fact that EPA must consult before approving the RFS Pathway, make this a straightforward and targeted process that could be completed without major difficulty.

The U.S. Department of Agriculture's ("USDA") maps illustrate the main canola growing areas in the United States. While there are some significant pockets of production in Montana, the vast bulk of canola is produced in North Dakota, concentrated in 26 counties, but produced across the entire state. Parts of the North Dakota watershed bears the brunt of the impacts from expansion of this biofuel crop through increased sedimentation, fertilizer loading, and pesticide pollution. Terrestrial invertebrates, rare plants, and endangered birds will also be affected by the increase in pesticide use and land-use conversion associated with the expansion of canola production in the region. It is abundantly clear that canola production is concentrated in North Dakota, and that listed species found in parts of this state's watershed and near crop production areas are the ones that the EPA must assess for impacts to listed species at a programmatic, landscape scale.



A county level map provides an even clearer picture on areas EPA must assess for impacts to listed species, though this map fails to capture the full scope of canola production in the state:



We do not dispute that EPA can accurately predict exactly which specific areas an acre of rapeseed or other crop might be grown on, or if a particular acre of habitat of an endangered species will or will not be converted to non-habitat. But this fact does not obviate the EPA's duty to make a landscape level assessment of the overall, aggregate impact of its decision as they apply to listed species, and then more importantly seek the input of the U.S. Fish and Wildlife Service

The line of causation between EPA's actions and the impacts to listed species are clear, and while there may be additional factors that influence human behavior, the purpose of the consultation process is to both avoid jeopardy and for the action agency to minimize and mitigate the take that it is legally responsible for. The EPA cannot drive species extinct and not even attempt to account for its fair share of responsibility. Thus, failing to consult would represent a clear violation of the Act.

Based on the best available science and the patterns of rapeseed crop use, we believe that the EPA's approval of the RFS Pathway will clearly cross the "may affect" and "likely to adversely affect" threshold for the endangered Pallid sturgeon, Poweshiek skipperling, and Whooping crane, as well as the threatened Dakota skipper and Western fringe prairie orchid. Without consultation as required by law, these species would be harmed in violation of the ESA.

Pallid Sturgeon (*Scaphirhynchus albus*)

The Pallid Sturgeon is an endangered fish characterized by their prehistoric appearance. They can be found throughout the upper Missouri river in North Dakota. This sturgeon is already threatened by water pollution and pesticide use associated with crop production in the region.³³ Despite ongoing conservation efforts to protect their species, their numbers remain low, and additional stressors could be highly detrimental to the survival of the species.³⁴ There is a clear overlap between rapeseed production and the habitat range of the Pallid sturgeon.



Authorization of the RFS Pathway will increase the production of rapeseed, thereby increasing sedimentation, fertilizer loading and pesticide pollution within the range of the Pallid sturgeon. It is apparent that this approval will cross the may affect threshold and also the likely to adversely affect threshold for the Pallid sturgeon. Thus, the EPA must consult before approving the RFS Pathway, as required by Section 7 of the ESA.

³³ U.S. EPA, Risk of Atrazine Use to Federally Listed Endangered Pallid Sturgeon (Aug. 31, 2007) https://www3.epa.gov/pesticides/endanger/litstatus/effects/pallid_sturgeon_eff_deter_08-31-07.pdf

³⁴ U.S. FWS 5-Year Status Review for Pallid Sturgeon (Aug. 23, 2021) https://ecos.fws.gov/docs/tess/species_nonpublish/3456.pdf

Whooping Crane (*Grus americana*)

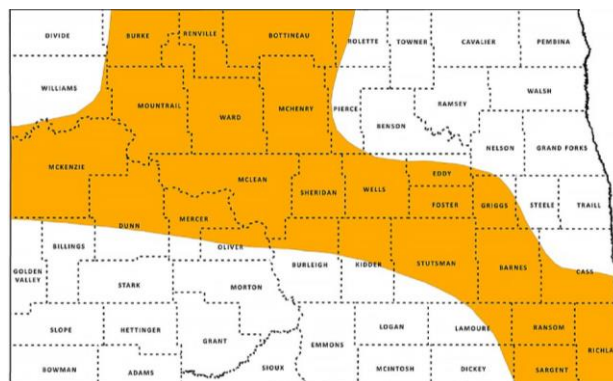
The Whooping crane is an endangered bird that migrates through North Dakota, resting in wetlands and cropland ponds. These birds are continuing to face threats to their habitat from agriculture.³⁵ There is a clear overlap between rapeseed production and the habitat range of the Whooping crane.



Authorization of the RFS Pathway will increase the production of rapeseed, thereby increasing habitat conversion and pesticide use within the range of the Whooping crane. It is apparent that this approval will cross the may affect threshold and also the likely to adversely affect threshold for the Whooping crane. Thus, the EPA must consult before approving the RFS Pathway, as required by Section 7 of the ESA.

Dakota Skipper (*Hesperia dacotae*)

The Dakota Skipper is a threatened butterfly species that is native to the northern Great Plains and can be found throughout North Dakota. The species faces loss and degradation of its prairie habitat from pesticide use and land-use conversion associated with crop production.³⁶ There is a clear overlap between rapeseed production and the habitat range of the Dakota skipper.



³⁵ USFWS, International Recovery Plan Whooping Crane at 20 (Mar. 2007)

https://ecos.fws.gov/docs/recovery_plan/070604_v4.pdf

³⁶ Xerces Society, Dakota Skipper <https://xerces.org/endangered-species/species-profiles/at-risk-butterflies-moths/dakota-skipper> (last accessed May 12, 2022).

Authorization of the RFS Pathway will increase the production of rapeseed, thereby increasing pesticide use and pollution within the range of the Dakota skipper. It is apparent that this approval will cross the may affect threshold and also the likely to adversely affect threshold for the Dakota skipper. Thus, the EPA must consult before approving the RFS Pathway, as required by Section 7 of the ESA.

Western Prairie Fringed Orchid (*Platanthera praeclara*)

The Western prairie fringed orchid is a threatened plant found mainly in eastern North Dakota, with approximately 90 percent of known plants occurring in the Red River Valley, which includes Richland and Ransom counties.³⁷ The orchid is threatened by both habitat fragmentation and pesticide use which reduces the amount of suitable habitat for sphinx moth pollinators.³⁸



While not captured by USDA's production maps, canola has been grown in Richland and Ransom counties in moderate amounts since 1999³⁹ and authorizing the new RFS Pathway will greatly expand canola production, land-use conversion, and pesticide use in this region and within range of the Western prairie fringed orchid. It is apparent that this approval will cross the may affect threshold and also the likely to adversely affect threshold for the Dakota skipper. Thus, the EPA must consult before approving the RFS Pathway, as required by Section 7 of the ESA.

Poweshiek Skipperling (*Oarisma poweshiek*)

The Poweshiek Skipperling is an endangered butterfly threatened by loss of native prairie vegetation and increased pesticide use from crop production.⁴⁰ Canola is grown throughout southeastern Michigan, and more importantly, in some of the only counties where Poweshiek

³⁷ USFWS, Western Prairie Fringed Orchid Recovery Plan at v (Sep. 30, 1996) https://ecos.fws.gov/docs/recovery_plan/960930a.pdf

³⁸ USFWS, 5-Year Review Western prairie fringed orchid at 2 (May 12, 2021)

³⁹ USDA, National Agriculture Statistics Service <https://quickstats.nass.usda.gov/results/C06C1A54-86EC-3F60-ACDE-0B7E338C0903> (last accessed May 13, 2022).

⁴⁰ Two Prairie Butterflies Gain More Than 45,000 Acres of Protected Critical Habitat in Minnesota, Wisconsin, Iowa, Michigan, Dakotas (Sep. 30, 2015) https://www.biologicaldiversity.org/news/press_releases/2015/prairie-butterflies-09-30-2015.html

Skipperling can be reliably found.⁴¹ In Minnesota, canola is grown in Polk county, near an area where this species was last sighted in 2013.⁴² In North Dakota, USFWS has finalized protections for 166 acres of critical habitat for this butterfly in Richland county, North Dakota, where canola is grown in moderate amounts.⁴³ Approval of the RFS Pathway will greatly expand canola and rapeseed production in these areas and within the range of the Poweshiek skipperling, increasing pesticide use and habitat conversion that threatens this endangered butterfly. It is apparent that this approval will cross the may affect threshold and also the likely to adversely affect threshold for the Poweshiek skipperling. Thus, the EPA must consult before approving the RFS Pathway, as required by Section 7 of the ESA.

III. The EPA has Failed to Develop a Proactive Conservation Program as Required by Section 7(a)(1) of the Endangered Species Act.

Finally, we note that the EPA has also utterly failed to develop a Section 7(a)(1) program to proactively conserve listed species with respect to the harms brought about by new RFS Pathways and RFS program. The EPA has an independent obligation under Section 7(a)(1) to utilize its authorities by “carrying out programs for the conservation of endangered species and threatened species.”⁴⁴ To the best of the Center’s knowledge, the EPA’s Office of Transportation and Air Quality has zero programs for the conservation of endangered species and has completely failed to abide by this clear, non-discretionary, statutory mandate. There is no indication on any website or in any EPA budget proposal or other document that the Office of Transportation and Air Quality, is undertaking any programs for the conservation of listed species. In fact, given the extensive and pervasive failure to meet its mandatory requirements under Section 7(a)(2), it is almost certain that the EPA is in violation of the Section 7(a)(1) of the Act here.

The Fifth Circuit explained the nature and extent of the Section 7(a)(1) duty in *Sierra Club v. Glickman*:

By imposing a duty on all federal agencies to use “all methods and procedures which are necessary to bring *any* endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary,” 16 U.S.C. § 1532(2) (emphasis added), Congress was clearly concerned with the conservation of each endangered and threatened species. To read the command of § 7(a)(1) to mean that the agencies have only a generalized duty would ignore the plain language of the statute.

⁴¹ USDA, National Agriculture Statistics Service <https://quickstats.nass.usda.gov/results/2C247545-1842-37BA-BB1A-6B799C411AC7> (last accessed May 13, 2022).

⁴² USDA, National Agriculture Statistics Service <https://quickstats.nass.usda.gov/results/846E0694-ACC2-3602-9B72-322A07C17030> (last accessed May 13, 2022).

⁴³ Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Dakota Skipper and Poweshiek Skipperling Docket No. FWS–R3–ES–2013–0017 (Oct. 1, 2015); USDA, National Agriculture Statistics Service <https://quickstats.nass.usda.gov/results/C06C1A54-86EC-3F60-ACDE-0B7E338C0903> (last accessed May 13, 2022).

⁴⁴ 16 U.S.C. § 1536(a)(1).

...The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out.... [T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*⁴⁵

Thus, Section 7(a)(1) requires all agencies of the federal government to develop specific programs to conserve endangered species.⁴⁶ EPA's Office of Transportation and Air Quality has not complied with this mandate at any level. Although courts have disagreed about the level of discretion an agency has in how they go about implementing Section 7(a)(1) programs,⁴⁷ it is well settled that "total inaction is not allowed."⁴⁸ For example, an action agency may adopt a program developed by another agency, but "[t]his does not mean [the agency] can simply 'rubberstamp' a conservation program...."⁴⁹ Similarly, courts have also found that an "'insignificant' measure that does not, or is not reasonably likely to, conserve endangered or threatened species," is not sufficient to satisfy 7(a)(1) requirements.⁵⁰

Respectfully submitted,



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⁴⁵ 156 F.3d 606, 618 (5th Cir. 1998).

⁴⁶ See *Northwest Envtl Advocates v. EPA* 268 F. Supp. 2d 1255 (D. Ore. 2003); see also *Cal. Native Plant Soc'y v. Norton*, U.S. Dist. LEXIS 9414 (D. Cal. 2004); see also *Strahan v. Linmon*, 967 F. Supp. 581 (D. Mass. 1997).

⁴⁷ *Pyramid Lake Paiute Tribe v. United States Dept. of the Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990).

⁴⁸ *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1145, 1146 (11th Cir. 2008).

⁴⁹ *Defs. of Wildlife v. United States Fish & Wildlife*, 797 F. Supp. 2d 949, 959 (D. Ariz. 2011).

⁵⁰ *Id.*