Growth Energy™
Expanding America's Bioeconomy

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RE: Growth Energy Comment on Proposed Amendment to Endangered Species Act Interagency Cooperation Regulations, Docket No. FWS-HQ-ES-2025-0044.

Dear Division Chiefs Aubrey and Dobrzynski:

Thank you for the opportunity to comment on the Services' proposal to amend the interagency consultation regulations implementing Section 7 of the Endangered Species Act ("ESA").

Growth Energy is the nation's largest association of biofuel producers, representing 97 U.S. plants that each year produce more than 9.5 billion gallons of low-carbon, renewable fuel; 131 businesses associated with the production process; and tens of thousands of biofuel supporters around the country. Our members are critical to the supply of biofuel in the United States and have substantial interests in ensuring the effective, efficient, and science-based implementation of the Renewable Fuel Standard ("RFS") Program under the Clean Air Act, including the Services' and EPA's ESA compliance obligations related to the RFS. Our industry is poised to assist the administration as it confronts the nation's energy security and energy affordability needs by providing low-cost, innovative, and American-made fuel; we remain committed to helping our country diversify its energy portfolio and provide consumers with better and more affordable choices at the fuel pump.[1]

In recent years, the RFS Program has faced a series of legal challenges arising from a lack of clarity regarding EPA's and the Services' respective consultation obligations under ESA Section 7 and its implementing regulations.[2] Growth Energy therefore welcomes the proposed amendments to clarify Section 7 consultation requirements to ensure the RFS program continues to deliver the energy security, economic development, clean air, and emissions reductions benefits Congress intended.

[1] *See* E.O. 14156, *Declaring a National Energy Emergency* (Jan. 20, 2025).
[2] *See, e.g. Center for Biological Diversity v. EPA*, 141 F.4th 153, (D.C. Cir. 2025).

The proposed amendments, which codify existing caselaw in this area, provide manageable and practical standards for agencies, and should help facilitate future Section 7 compliance for the RFS Program.

Regulatory Clarity is Greatly Needed in the Section 7 Consultation Process

The RFS Program presents a particularly challenging application of the ESA. The RFS is a nationwide program which impacts demand for renewable fuels. In ESA litigation challenging recent RFS rulemakings, petitioners have not alleged species impacts from the consumption of renewable fuel itself, nor from the production of such fuel. Rather, petitioners premise their challenges on alleged environmental impacts from the upstream production of commodity crops used as feedstock for such fuel that may—or may not—be indirectly influenced by market-mediated price impacts of EPA's annual renewable fuel volumes. And their allegations rely on an extremely attenuated and speculative chain of causation. Specifically, for such environmental impacts to occur: (1) the RFS volumes would need to drive biofuel demand significantly beyond existing market factors; (2) causing producers to purchase more crops for biofuel production, rather than divert existing biofuel surplus from exports and other uses; (3) thereby causing a sufficient spike in crop prices to spur farmers to plant additional crops; (4) thus leading farmers to plant new acres of crops, instead of intensifying yields; (5) thereby resulting in farmers planting on uncultivated land rather than land already in cultivation for other crops; and (6) ultimately, causing "land conversion" to occur in specific areas where endangered or threatened species or critical habitat could be impacted. It is hard to imagine alleged environmental impacts that are more removed from the activity actually being regulated, or that rely on as many intervening decisions by third parties completely outside the scope of regulation, as these.

In EPA's rulemaking setting biofuel volumes for 2023-2025 ("Set I rule"), three expert agencies—EPA, FWS, and NMFS—conducted extensive technical analyses of this highly attenuated causal chain. Each agency concluded that the RFS would either have "no effect" or be "not likely to adversely affect" species, and that therefore a biological opinion was not necessary. However, the three agencies suffered from the fact that they took different approaches to Section 7 compliance, resulting in a D.C. Circuit remand of the FWS' concurrence letter in *Center for Biological Diversity v. EPA*, ("*CBD v. EPA"*).[3] The Court identified "tensions" within the ESA Section 7 regulations, and between the Section 7 regulations and the FWS/NMFS Section 7 Handbook, that were not resolved to its satisfaction.

In particular, the Court struggled with a perceived conflating of the "reasonable certainty" standard, for determining the effects of an action, with the "discountable" standard for evaluating consequences to species. The Court posed the question: "if a consequence must be 'reasonably certain to occur' to constitute an 'effect' of an agency action, 50 C.F.R. § 402.02, how can an action's effects ever be identifiable because they 'may affect' species, yet be 'discountable,'

[3] 141 F.4th 153, (D.C. Cir. 2025).

which the Handbook defines as one that is 'extremely unlikely to occur'?"[4] The Court remanded, in part, for the agencies to answer this question and, more generally, to address the perceived points of tension in their regulations and guidance.

The D.C. Circuit's decision plainly illustrates the need for additional clarity and coordination from the agencies regarding Section 7 consultation, and in particular the need for greater explanation of the "reasonable certainty" requirement. Growth Energy therefore encourages the Services to finalize the proposal and provide such clarity. We urge FWS and NMFS to use the final rulemaking as an opportunity to respond to the questions posited by the D.C. Circuit and to resolve any potential tensions with the Handbook by explaining the appropriate analytical framework for interagency consultation, including—as discussed below and in our prior comments to EPA[5]—the threshold causal analysis that is used to identify the "effects of the agency action" that are within the scope of the consultation.

Existing ESA Regulations Require Agencies to Conduct a Threshold Scoping Analysis to Identify "Effects of the Action" Prior to Evaluating Any Potential Harm to Species

Under ESA Section 7(a)(2), federal agencies must ensure that their actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[6] To serve that objective, Section 7 establishes a federal agency consultation process with FWS and/or NMFS, depending on the species at issue.

In elucidating the Section 7 inquiry, agencies should draw upon the recent Ninth Circuit decision (decided this June) in *Center for Biological Diversity v. Bureau of Land Management* ("*CBD v. BLM*").[7] In that case, the Court clarified that "[a]n agency must consider the [regulatory definition of] 'effects of the action' at each stage of the § 7 process" (quoting 50 C.F.R. § 402.02, defining "effects of the action").[8] Thus, as an initial threshold question, the relevant agency must determine the "scope" of its Section 7 analysis by identifying which potential environmental consequences should be included in its analysis.[9] In particular, only those potential environmental consequences that are capable of meeting the regulatory definition of "effects of the action" should be within scope. That is, the agency must decide which potential environmental consequences are to be evaluated because they are capable of meeting

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[4] *CBD v. EPA* at 181.
[5] *Growth Energy Comments on EPA's Renewable Fuel Standard (RFS) Program: Standards for 2026 and 2027, Partial Waiver of 2025 Cellulosic Biofuel Volume Requirement, and Other Changes,* Comment # EPA-HQ-OAR-2024-0505-0646 (August 8, 2025). Growth Energy incorporates these prior comments to the present docket by reference herein.
[6] 16 U.S.C. § 1536(a)(2).
[7] 141 F.4th 976 (9th Cir. 2025).
[8] *Id.* at 1012.
[9] *Id.* at 1013 (discussing 50 C.F.R. § 402.02 as key to determining which potential environmental effects should be included within "the scope of the § 7 consultations").

the regulatory definition, and which potential environmental consequences should be excluded from the analysis because they are not.

Following the Ninth Circuit's framework, agencies must, as part of this threshold inquiry, carefully consider the causal link between the agency action in question and the range of potential environmental consequences. Potential environmental consequences whose causal relationship to the action is too attenuated, overly speculative, or "only reached through a lengthy causal chain" should be excluded from the Section 7 analysis.[10]

This threshold inquiry flows from the plain text of the existing Section 7 regulations, which define "effects of the action" in two parts:

- (1) "all consequences to listed species or critical habitat that are ***caused*** by the proposed action" (50 C.F.R. § 402.02) (emphasis added) – which covers the direct effects of the action; and
- (2) "the consequences [to listed species or critical habitat] of other activities that are ***caused*** by the proposed action but that are not part of the action" (*id.*) (emphasis added) – which covers effects caused by the activities of third parties that are themselves caused by the action.

The regulations, in turn, are specific as to the nature of the causal nexus that is required for both parts of this threshold inquiry. They provide that: "A consequence is caused by the proposed action" only if two tests are satisfied:

- "if it would not occur but for the proposed action" (i.e., the "but for test" causal test), *and*
- "it is reasonably certain to occur." *Id.*

EPA has described the "reasonably certain" test as similar to the test for proximate cause.[11] In an analogous context, involving environmental review under the National Environmental Policy Act (NEPA), the Supreme Court recently elaborated on the proximate cause concept as an important limitation on the scope of environmental review of agency actions:

> [I]f the project at issue might lead to the construction or increased use *of a separate project*—for example, a housing development that might someday be built near a highway—the agency need not consider the environmental effects *of that separate project*. To put it in legal terms, the separate project breaks the chain of proximate causation between the project at hand and the environmental effects of the separate project. The effects from a separate project may be factually foreseeable, but that

[10] *Id.* at 1012.
[11] Fed. Defs.' Motion to Remand or Stay and Cross Mot. for Sum. Judg., N.D. Cal. Case No 3:24-cv-04651-JST; *see also Babbitt v. Sweet Home Ch. of Cmtys. for a Great Or.*, 515 U.S. 687, 696 n.9, 709-715 (incorporating proximate cause principles into the ESA).

> does not mean that those effects are relevant to the agency's decisionmaking process or that it is reasonable to hold the agency responsible for those effects. In those circumstances, the causal chain is too attenuated. In other words, there is no reasonably close causal relationship between the project at hand and the environmental effects of those other projects.

Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado, 605 U.S. 168, 187–88, (2025) (internal citations omitted) (emphasis in original).

The Court further emphasized the role of regulatory jurisdiction in assessing the boundaries of the proximate cause test: "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. In other words, agencies are not required to analyze the effects of projects over which they do not exercise regulatory authority."[12]

Returning to the context of ESA Section 7, the agencies should make clear that only those potential environmental consequences that are *both* factually caused by the agency action and proximately caused by the agency action can be considered an "effect of the action." And only "effects of the action" should be included within the scope of the Section 7 analysis. A potential environmental consequence that is not reasonably certain to occur in any particular location relied on by a listed species, for example, does not quality as an "effect of the action," and thus should be considered outside the scope of Section 7 consultation.[13] Similarly, a potential environmental consequence caused by an activity that the agency does not regulate, and has no authority to prevent, should also be considered outside the scope.[14] Only after the in-scope "effects of the action" have been identified—as a threshold inquiry—should the agency proceed to consider the impacts of those "effects" on listed species or designated critical habitat.

Returning to the question posed by the D.C. Circuit, this two-step analytical framework resolves the "tensions" perceived by the Court. Whether, at the threshold stage of the analysis, a consequence is reasonably certain to be *caused by an agency action*, is a separate inquiry from whether the consequence is likely to occur in a manner that adversely affects any species. We encourage the agencies to make this response to the Court explicit in the final rule.

The Proposed Amendments Appropriately Restore Emphasis and Clarity to the Threshold Scoping Analysis

The proposed reinstatement and expansion of § 402.17 clarifies and affirms the importance of the threshold causal analysis discussed above.

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[12] *Seven Cnty. Infrastructure Coal.*at 188 (citing *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770).
[13] *See CBD v. BLM* at 1013-14.
[14] *Seven Cnty. Infrastructure Coal.*at 18.

First, both § 402.17(a) and § 402.17(b) restore the requirement that "conclusions of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available."[15] Growth Energy strongly agrees that "the determination of a consequence or activity to be reasonably certain to occur must be rooted in the best scientific and commercial information available, and should not be based on speculation or conjecture."[16]

Further, the restoration of § 402.17(a)(3) and addition of § 402.17(a)(4) provide a framework for determining whether "activities" that are not part of the proposed action may be considered "reasonably certain to occur." As the proposed regulations help to clarify, the greater the "remaining economic, administrative, and legal requirements necessary for the activity to go forward"[17]—or the greater the "amount of State, tribal, territorial, or local administrative discretion remaining to be exercised"[18]—the less likely an activity will be considered "reasonably certain to occur."[19]

In the context of the RFS Program, the "activity" alleged by litigants to give rise to environmental effects is an increase in land used for specific types of crop cultivation by private farmers. This "activity" is not "part of the proposed action"—indeed, the RFS Program does not regulate farming activity at all. But even if the RFS Program caused some price-mediated stimulus to the agricultural economy in general, there are a multitude of other economic, administrative, and legal requirements that drive whether any particular farmer chooses to expand his or her agricultural activity by acquiring and developing new lands. Similarly, there is significant State and local administrative discretion regarding zoning requirements and local environmental protections that dictate whether and where farming may occur. As such, § 402.17(a)(3) and § 402.17(a)(4) appropriately screen out private-sector farming activity that is not part of the proposed action and not reasonably certain to occur in any particular location.

Finally, the proposed § 402.17(b) provides much-needed guidelines to identify consequences to species that should **not** be considered an "effect of the action." This includes when "[t]he consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur."[20] This same language was invoked by the Ninth Circuit in *CBD v. BLM*, which affirmed the agencies' reasoning that the causal chain between greenhouse gas emissions and sea ice loss in any specific location in the arctic is too attenuated to be considered reasonably certain.[21]

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[15] § 402.17(a); § 402.17(b).
[16] 90 Fed. Reg. 52,600, 52,603 (Nov. 21, 2025).
[17] § 403.17(a)(3).
[18] § 402.17(a)(4).
[19] 90 Fed. Reg. at 52,604.
[20] § 402.17(b)(3).
[21] *CBD v. BLM* at 1014.

Similarly, in the RFS context, any causal chain between the production of renewable fuels and expansion of cropland is extremely attenuated, even at an aggregate level, and is impossible to determine with any geographic specificity using current best available science. Indeed, as EPA noted in its Biological Evaluation of the RFS Set I rule, "there is no modeling tool that we are aware of at this time that can predict with any certainty the precise location of these likely very small land use changes." [22]

Other circumstances where consequences should not be considered an "effect of the action" under the proposed rule include where the "agency has no ability to prevent the consequence due to its limited statutory authority."[23] As explained by the Services, this new regulatory requirement is directly drawn from recent Supreme Court jurisprudence applying standards of proximate causation to the evaluation of agency actions.[24] And, as applied to the RFS program, EPA simply has no statutory authority to decide where or how agricultural activity occurs or to dictate the land use decisions of individual farmers.

In sum, the regulatory amendments proposed by the Services' are well-supported by the case law and provide important additional guidance to facilitate the proper and consistent application of the Section 7 consultation framework.

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Thank you for the opportunity to provide comments on this proposal. Growth Energy urges the Services to swiftly finalize the proposed amendments. Growth Energy further urges the Services to incorporate the concepts emphasized in these proposed amendments into the upcoming consultation for the proposed RFS Set II rule.[25]

Sincerely,

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Growth Energy

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[22] *Biological Evaluation of the Renewable Fuel Standard Set Rule and Addendum*, EPA-420-R-23-029, at 133 (May 2023), available at https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1017XZS.pdf.
[23] § 402.17(b)(4).
[24] 90 Fed. Reg. at 52,604.
[25] Docket No. EPA-HQ-OAR-2024-0505.