ORAL ARGUMENT NOT YET SCHEDULED

No. 25-1005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN CEMENT ASSOCIATION, AMERICAN FARM BUREAU FEDERATION, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, AND NATIONAL MINING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Amici curiae submit the following statements pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.

The American Cement Association ("ACA") states that it is a non-profit, tax-exempt organization incorporated in the State of Illinois. ACA has no parent corporation, and no publicly held company has 10 percent or greater ownership in ACA.

The American Farm Bureau Federation ("AFBF") has no parent corporation and no publicly held corporation owns 10% or more of its stock.

The American Fuel & Petrochemical Manufacturers ("AFPM") has no parent corporation. No publicly held company has any ownership interest in AFPM.

The American Petroleum Institute ("API") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. API has no parent corporation, and no publicly held company has 10 percent or greater ownership in API.

The National Mining Association ("NMA") states that it is a non-profit national trade association incorporated in the state of Delaware. NMA has no parent corporation, and no publicly held company has 10 percent or greater ownership in NMA.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, *amicus curiae* hereby certifies the following as to parties, rulings, and related proceedings in this case:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioner:

The petitioner is the Center for Biological Diversity.

Respondents:

U.S. Environmental Protection Agency ("EPA" or "Agency") and Lee M. Zeldin, in his official capacity as Administrator of EPA.

Intervenors:

At the time of this filing, there are no intervenors.

***Amici Curiae*:**

The Chamber of Commerce of the United States of America, American Cement Association, American Farm Bureau Federation, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and National Mining Association are submitting herewith a Motion for Leave to File an *Amici* Brief in Support of Respondents.

B. Ruling Under Review

Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter, 89 Fed. Reg. 105,692 (Dec. 27, 2024), EPA Docket Number EPA–HQ–OAR–2014–0128.

C. Related Cases

In *Center for Biological Diversity v. EPA*, No. 21-1054 (D.C. Cir.), the Center for Biological Diversity is similarly challenging EPA's failure to engage in section 7 consultation under the Endangered Species Act when making a determination on the National Ambient Air Quality Standards for Particulate Matter related to secondary National Ambient Air Quality Standards (related to visibility, climate, and materials). *See* 85 Fed. Reg. 82,684 (Dec. 18, 2020). That case remains in abeyance pending the outcome of *Commonwealth of Kentucky v. EPA*, No. 24-1050 (D.C. Cir.), which otherwise is not related to this case. *See* Order, *Kentucky v. EPA*, No. 21-1054 (D.C. Cir. May 30, 2024), Doc. No. 2057116.

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GLOSSARY OF TERMS

APA	Administrative Procedure Act
CAA	Clean Air Act
CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
FEMA	Federal Emergency Management Agency
FWS	U.S. Fish and Wildlife Service
NAAQS	National Ambient Air Quality Standards
NMFS	National Marine Fisheries Service
NO_2	Nitrogen Dioxide
PM	Particulate Matter
SO_2	Sulfur Dioxide

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The American Cement Association ("ACA") is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. ACA represents a majority of U.S. cement production capacity. ACA promotes safety, sustainability, and innovation in all aspects of construction, fosters continuous improvement in cement manufacturing and distribution, and generally promotes economic growth and sound infrastructure investment.

The American Farm Bureau Federation ("AFBF") was formed in 1919 and is the largest nonprofit general farm organization in the United States. Representing

[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. Its mission is to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. To that end, AFBF regularly participates in litigation, including as *amicus curiae* in this and other courts.

The American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing most U.S. refining and petrochemical manufacturing capacity and the midstream companies that move feedstocks and products where they need to go. These companies provide jobs, directly and indirectly, to more than three million Americans, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the nation.

The American Petroleum Institute ("API") is a nationwide, non-profit trade association that represents approximately 600 companies involved in every aspect of the petroleum and natural-gas industry. Its members range from the largest integrated companies to the smallest independent oil and gas producers. API's members include producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the

industry. API is also the worldwide leading body for establishing standards that govern the oil and natural-gas industry.

The National Mining Association ("NMA") is a nonprofit national trade association that represents the interests of the mining industry, including the producers of most of the nation's coal, metals, and agricultural and industrial minerals. The NMA has over 250 members, whose interests it represents before Congress, the administration, federal agencies, the courts, and the media. The NMA works to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing, national security, and economic security, all delivered under world-leading environmental, safety, and labor standards.

Amici have an interest in this litigation because their members are subject to the secondary National Ambient Air Quality Standards ("NAAQS"). Petitioner would require EPA to engage in Endangered Species Act ("ESA") interagency consultation procedures even though the Clean Air Act ("CAA") imposes on EPA a non-discretionary duty to set the NAAQS at the level "necessary" to protect the public welfare against adverse effects. *Amici* have an interest in ensuring that EPA

can complete its obligations to set the NAAQS under the CAA without being subjected to time-consuming and conflicting requirements.

Pursuant to D.C. Circuit Rule 29(d), *amici curiae* certify that they are not aware of any other *amici curiae* that intend to file briefs in this litigation.

INTRODUCTION

This case concerns the intersection of two important sets of statutory provisions—the provisions of the CAA governing the NAAQS, by which EPA sets limits on the amount of certain pollutants in a defined volume of air, and the provisions of the ESA that generally require agencies to ensure their actions do not jeopardize endangered or threatened species. Under section 109 of the CAA, EPA is required to set primary NAAQS at the level necessary to protect the public health and secondary NAAQS at the level necessary to protect the public welfare. 42 U.S.C. § 7409. Under section 7 of the ESA, an agency is required, for "action[s] authorized, funded, or carried out" by that agency, to consult with the U.S. Fish and Wildlife Service ("FWS"), the National Marine Fisheries Service ("NMFS"), or both, as appropriate ("the Services"), to ensure that the agency's actions do not jeopardize endangered or threatened species. 16 U.S.C. § 1536.

In this case, acting under the CAA, EPA issued a final rule[2] regarding the secondary NAAQS for nitrogen dioxide ("NO_2"), particulate matter ("PM"), and sulfur dioxide ("SO_2"), and did not undertake ESA consultation in doing so. The rule retains the standards for NO_2 and PM at previously set levels and revises the standard for SO_2. EPA concluded that because it was not changing the NAAQS for NO_2 and PM, it was not taking an "action" within the meaning of the ESA, and so was not required to engage in ESA consultation. EPA then independently explained that it was not required to engage in ESA consultation for any of the standards, including the SO_2 standards, because its determinations would, in all events, have "no effect" on endangered or threatened species.

Petitioner challenges EPA's decision not to undertake ESA consultation, asserting, among other things, that consultation is required even if EPA decides to retain a secondary NAAQS. This brief focuses on a few reasons why that contention is mistaken. First, applying ESA consultation is inconsistent with EPA's non-discretionary duties regarding NAAQS reviews. Second, when EPA does not alter a previously set air quality standard (and thus retains a NAAQS), EPA is not taking an "action" that triggers ESA consultation.

[2] Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter, 89 Fed. Reg. 105,692 (Dec. 27, 2024).

ARGUMENT

I. ESA consultation does not apply to secondary NAAQS determinations.

The CAA and the ESA have co-existed for over 50 years, with the CAA becoming law in 1970 and the ESA following three years later in 1973. During that time, EPA has conducted many NAAQS reviews. Yet, EPA has *never* engaged in ESA consultation as part of its review. Indeed, Petitioner previously challenged an EPA decision not to revise the secondary NAAQS for oxides of nitrogen and sulfur, and did not argue then that ESA consultation was required. *See Ctr. for Biological Diversity v. EPA*, 749 F.3d 1079 (D.C. Cir. 2014). And that's because Petitioner's new-found argument in *this* case is contrary to decades of past practice, as well as a common-sense understanding of how the relevant provisions of the CAA and the ESA operate. As explained below, ESA section 7 consultation does not apply when an agency is carrying out a non-discretionary duty, which EPA is doing in the NAAQS review process.

A. ESA section 7 consultation does not apply when an agency is carrying out a non-discretionary duty.

The Supreme Court has recognized that ESA section 7(a)(2) consultation does not apply when an agency lacks statutory discretion to "'insure'" that its proposed action "'is not likely to jeopardize'" protected species or their habitats. *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) (similar holding under the

National Environmental Policy Act). In *National Association of Home Builders*, the Clean Water Act ("CWA") required EPA to transfer certain permitting powers to state authorities upon an application and a showing that nine specified criteria had been met. *Nat'l Ass'n of Home Builders*, 551 U.S. at 649. The question in that case was how to reconcile ESA section 7 consultation, which would effectively operate as an additional criterion, with EPA's lack of discretion to deny transfer of authority once the nine CWA criteria were met. *Id.* at 661–62. As the Court explained, there was a "fundamental ambiguity . . . as to which command must give way." *Id.* at 666. And it ultimately concluded that the ESA must yield.

To resolve the conflict between the two provisions, the Court looked to the Services' regulation providing that § 7(a)(2) would not be read as impliedly repealing nondiscretionary statutory mandates. The Court held that the Services' interpretation harmonized the statutes, explaining that the reading was "reasonable in light of the statute's text and the overall statutory scheme," and therefore, "entitled to deference under *Chevron*."[3] *Id.* at 666. The Court explained that § 7(a)(2) requires that an agency "insure" that the actions it takes are not likely to jeopardize listed species or their habitats, and the regulation's focus on discretionary actions is consistent "with the commonsense conclusion that, when an agency is *required* to

[3] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 846 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species." *Id.* at 667.

The Court also explained that the Services' reading "*not only* is reasonable . . . but also comports with the canon against implied repeals." *Id.* at 669 (emphasis added). Reading section 7 "broadly would . . . partially override every federal statute mandating agency action by subjecting such action to the further condition that it pose no jeopardy to endangered species." *Id.* at 664. And while a later-enacted statute can expressly amend or repeal earlier-enacted statutory provisions, this broad reading would amount to an implied repeal, which is disfavored. *Id.* at 662 (citing *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)). Instead, the Court determined, section 7's consultation requirement should be read narrowly to apply only when an agency exercises discretion. *Id.* at 665.

Although *Chevron* deference is no more, the interpretation of the ESA upheld in *National Association of Home Builders* remains correct. Reading the consultation requirement to apply only when an agency has statutory discretion is not only a reasonable reading of the statute, it is the best reading. *Loper Bright*, 603 U.S. at 400. That reading is consistent with the text of section 7 of the ESA. *Nat'l Ass'n of Home Builders*, 551 U.S. at 666–67. It appropriately harmonizes the ESA with other statutes, by giving effect to ESA's no-jeopardy mandate when the agency has discretion to apply it, but not when the agency is prohibited from doing so. *Id.* at

665. And it avoids reading the ESA to implicitly abrogate or repeal "many mandatory agency directives" that would be implicitly repealed if § 7(a)(2) were construed to apply more broadly. *Id.* at 666.

B. EPA lacks discretion to insure that setting the NAAQS is not likely to jeopardize protected species or their habitats.

The interpretation of section 7 upheld in *National Association of Home Builders* squarely forecloses requiring ESA consultation here. Under the CAA, EPA has no discretion to set the NAAQS for any particular pollutant at a level that is any different from what EPA determines is necessary to protect the public welfare. CAA section 109(b)(2) provides that EPA "shall" set the secondary NAAQS at a level that "'is requisite,'" meaning "neither higher nor lower than necessary," *Center for Biological Diversity*, 749 F.3d at 1087, "to protect the public welfare" from adverse effects, 42 U.S.C. § 7409(b)(2). EPA thus lacks discretion to "insure" that its setting of the secondary NAAQS "is not likely to jeopardize" protected species or their habitats. As in *National Association of Home Builders*, ESA consultation would operate as an additional criterion for the NAAQS level that is not permitted by the CAA.

The scenario at issue here is materially different from the one in *American Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559 (D.C. Cir. 2019) (per curiam), where this Court rejected EPA's argument that it did not have discretion to act differently based on consultation with the Services in specifying renewable fuel

requirements. This Court explained that EPA could have invoked its authority to issue a general waiver allowing it to reduce statutory volumes that "'would severely harm the … environment,'" *id.* at 597 (quoting 42 U.S.C. § 7545(*o*)(7)(A)(i)) or used its statutory discretion to rely on "environmental considerations," including wildlife habitat concerns, *id.* (citing 42 U.S.C. § 7545(*o*)(2)(B)(ii)(I)). Here, there is no statutory exemption, and EPA has no discretion to set the NAAQS at any level "higher nor lower than necessary" to protect the public welfare.

But that is not all. EPA's discretion is further limited by the CAA's requirement to complete a NAAQS review every five years, a process that includes numerous mandatory obligations. When completing a NAAQS review, EPA must also "complete a thorough review of the [air quality] criteria." 42 U.S.C. § 7409(d)(1). The criteria must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [the] pollutant in the ambient air, in varying quantities." *Id.* § 7408(a)(2). EPA's current practice is to satisfy this requirement by issuing a document, called an Integrated Science Assessment, that often spans several hundred or even thousands of pages. *See, e.g.*, U.S. EPA, EPA/600/R-19/188, *Integrated Science Assessment for Particulate Matter* (Dec. 2019), EPA-HQ-OAR-2015-0072-1586 (over 1,900 pages);[4] U.S. EPA,

[4] https://www.regulations.gov/document/EPA-HQ-OAR-2015-0072-1586.

EPA/600/R-20/012, *Integrated Science Assessment for Ozone and Related Photochemical Oxidants* (Apr. 2020), EPA-HQ-OAR-2021-0668-0078 (over 1,400 pages).[5] EPA may also prepare other documents, including risk and exposure assessments. *See, e.g.*, U.S. EPA, EPA-452/R-20-002, *Policy Assessment for the Review of the National Ambient Air Quality Standards for Particulate Matter* (Jan. 2020), EPA-HQ-OAR-2015-0072-0237.[6] The Agency solicits public comment on a draft of each document and must seek public comment and hold hearings on a rulemaking proposal before issuing its final decision. 42 U.S.C. § 7409(a)–(b).

EPA thus often finds it very difficult to complete the NAAQS review process on the five-year timetable. Indeed, there have been only three completed reviews of the primary NO_2 NAAQS in the last thirty years: a 1996 decision not to revise, 61 Fed. Reg. 52,852 (Oct. 8, 1996); a 2010 revision, 75 Fed. Reg. 6474 (Feb. 9, 2010); and a 2018 retention of the NAAQS, 87 Fed. Reg. 17,226 (Apr. 18, 2018). And the review of the secondary NAAQS at issue in this case was the first since a 2012 decision retaining the then-existing standards. 77 Fed. Reg. 20,218 (Apr. 3, 2012). Prior to that, EPA's last review of these standards came in 1985. 50 Fed. Reg. 25,532 (June 19, 1985). This trend seems likely to continue. EPA's draft plan for its current

[5] https://www.regulations.gov/document/EPA-HQ-OAR-2021-0668-0078.
[6] https://www.regulations.gov/document/EPA-HQ-OAR-2015-0072-0237.

review of the ozone NAAQS that were set in 2015 and retained in 2020 shows that the review started on August 25, 2023 and completion is planned for 2030.[7]

This Court should not assume Congress intended to further undermine EPA's ability to meet its statutorily imposed deadline by also requiring EPA to engage in ESA section 7 consultation. ESA section 7 consultation, especially for large projects or rulemakings, can take several years to complete. For example, consultation with the FWS for the Federal Emergency Management Agency's ("FEMA's") implementation of the National Flood Insurance Program in Monroe County, Florida took approximately two years.[8] Similarly, consultation with the NMFS for FEMA's implementation of the same program for Puget Sound took approximately two and a half years.[9] A third example is EPA's regulations establishing requirements for cooling water intake structures at existing facilities under section 316(b) of the

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[7] U.S. EPA, EPA-452/R-24-001a, *Integrated Review Plan for the National Ambient Air Quality Standards for Ozone and Related Photochemical Oxidants*, Vol. 1, pp. 1-9, 2-2 (Dec. 2024), https://www.epa.gov/system/files/documents/2024-12/o3_irp-vol-1_final_1.pdf.

[8] *See* U.S. Fish & Wildlife Service, Biological Opinion on FEMA's Administration of the National Flood Insurance Program in Monroe County, Florida (June 1997), https://www.monroecounty-fl.gov/DocumentCenter/View/8061/1997-06-09-FEMAs-administration-of-the-National-Flood-Insurance-Program-in-Monroe-County-4-1-96-F-45?bidId=.

[9] *See* Nat'l Marine Fisheries Service, *Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the on-going National Flood Insurance Program carried out in the Puget Sound area in Washington State* (Sept. 22, 2008), https://ecology.wa.gov/getattachment/56d82d6b-5a68-411e-97d5-5a432aec30c1/NFIP_Puget-Sound_Biological_Opinion_w_Errata_2008.pdf.

CWA. ESA consultation with the FWS and NMFS for that regulation took nearly two years for the agency to complete.[10] Requiring EPA to complete this multi-year process in addition to its other obligations for reviewing the NAAQS would only further interfere with EPA's ability to meet the statutorily required five-year deadline.

II. EPA's decision not to undertake ESA consultation is correct on other grounds, including the reason that ESA consultation is not required when EPA *retains* NAAQS, because that is not agency "action."

Amici recognize that the government's brief does not advance the argument above, though it is in the rulemaking record.[11] If this Court does not reach that argument, it should still uphold EPA's decision not to undertake ESA consultation. First, as explained below, and in EPA's brief (at 19–28), EPA correctly concluded that ESA consultation is, at minimum, not required when EPA retains a NAAQS, as it did here with the NO_2 and PM standards. And second, as explained in EPA's brief,

[10] U.S. Fish & Wildlife Service, *Endangered Species Act Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act* (May 19, 2014), https://www.epa.gov/sites/default/files/2015-04/documents/final_316b_bo_and_appendices_5_19_2014.pdf.

[11] U.S. EPA, Responses to Additional Significant Comments on the 2024 Proposed Action on the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter, at 10–11 (Apr. 15, 2024; 89 FR 26620) (Dec. 2024), EPA-HQ-OAR-2014-0128-0529, https://www.regulations.gov/search?filter=EPA-HQ-OAR-2014-0128-0529.

EPA correctly found "no effect" from its change to the NO_2, PM, and SO_2 standards. EPA Br. 39–43.

A. ESA consultation is not required unless the agency makes an affirmative act or approval.

The plain language of section 7(a)(2) shows that Congress intended the consultation requirement to apply only when the agency takes an affirmative step that alters the status quo. EPA's decision retaining the secondary NAAQS for NO_2 and PM does not change any legal requirements that apply to EPA, state agencies tasked with implementing the NAAQS, or regulated entities. Nor does it make any change to air quality. It is therefore not an "action" that triggers ESA consultation.

The relevant principles of statutory interpretation are well familiar. This Court's analysis must begin with the text. *Ross v. Blake*, 578 U.S. 632, 638 (2016). In doing so, courts look to the ordinary meaning of statutory terms where a definition is not provided. *HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass'n*, 594 U.S. 382, 388 (2021) ("Where Congress does not furnish a definition of its own, we generally seek to afford a statutory term 'its ordinary or natural meaning.'"). And to determine a statutory term's ordinary or natural meaning, courts often turn to dictionaries. *See, e.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 676 (2020) (use of dictionaries to define "provide").

Under these principles, ESA consultation applies only if EPA takes some affirmative step, not when EPA maintains the status quo, as it did here. Section

7(a)(2) provides that ESA consultation is required for "any *action authorized*, *funded*, or *carried out* by [a federal] agency (hereinafter referred in this section referred to as an 'agency action')"). 16 U.S.C. § 1536(a)(2) (emphases added). Each of the italicized words supports the understanding that ESA consultation applies only where an agency takes an affirmative step that changes the status quo. The terms "authorized" and "funded" assume some affirmative underlying activity that is undertaken by a third party but not the agency itself. The term "carried out" plainly refers to actions that the agency itself is taking. And the word "action" itself is defined as "the bringing about of an alteration by force or through natural agency: an act of will; a thing accomplished," WEBSTER'S NEW COLLEGIATE DICTIONARY 12 (1974).

This understanding is further supported by section 7(a)(2)'s requirement that the agency ensure that the action it authorizes, funds, or carries out is not "likely to jeopardize" listed species or their habitats. As EPA explains, only conduct with sufficient potential to harm a species or habitat triggers the consultation obligation. EPA Br. 28–29. If the activity at issue makes no change to the environment, it cannot be "'likely' to jeopardize" protected species or their habitats. *Id.* at 29.

This reading is also compelled by statutory context. *Territory of Guam v. United States*, 593 U.S. 310, 316 (2021) ("Statutes must be read as a whole.") (internal quotation marks and citation omitted). Section 7(a)(2)'s focus on agency

"action" that changes the status quo sharply contrasts with other sections of the ESA that expressly include an agency's failure to act. For example, ESA section 11 authorizes citizen suits "where there is alleged a failure of the Secretary to perform any act or duty . . . which is not discretionary." 16 U.S.C. § 1540(g)(1)(C); *see also id.* § 1533(i) (requiring the Secretary to submit a written justification to a State agency explaining its "failure to adopt regulations consistent with the agency's comments or petition"). When Congress intended an agency's failure to act to trigger certain consequences, it said so directly. But in section 7(a)(2), Congress took a different approach, requiring consultation only where the agency takes an affirmative step that alters the status quo.

Importantly, section 7(a)(2) of the ESA differs from an earlier statute like the Administrative Procedure Act ("APA"), which uses the similar term "agency action" but provides a broader definition. The APA expressly defines "agency action" to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). Thus, Congress made unmistakably clear that the APA applies to a broad universe of agency decisions, *including the agency's failure to act*. Congress could have provided that ESA consultation applied to a similar universe, but did not do so. Instead, Congress provided that ESA consultation applies only when the agency authorizes, funds, or carries out an action.

The FWS's and NMFS's longstanding interpretation of "action" in their ESA regulations is consistent with and provides yet more support for this reading. The regulations define "action" as "activities or programs," 50 C.F.R. § 402.02—i.e., affirmative steps or authorizations that change the status quo. The regulation's examples of agency actions are consistent, including "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." *Id.*

The only potentially debatable example in this list is "promulgation of regulations," which could be read to apply to an agency's decision to maintain the status quo so long as that decision was issued in a rule. But that provision must be read in context and with reference to the other examples. *See Yates v. United State*s, 574 U.S. 528, 543 (2015) (under "the principle of *noscitur a sociis*," "a word is known by the company it keeps"). And all of the other examples—granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid or actions directly or indirectly causing modification to the land, water, or air—all change circumstances in some way. These examples authorize conduct that otherwise would not be permitted, provide funding that otherwise would be denied, or alter the land, water, or air. In other words, these examples are all "activities or

programs," as opposed to a decision not to change an activity or program. Read in its appropriate context, "promulgation of regulations" is in fact the opposite of what EPA did here; EPA *declined* to promulgate a new or revised regulation. 50 C.F.R. § 402.02(b).

Finally, the decisions of the Supreme Court and this Court are consistent with this interpretation of section 7(a)(2), uniformly applying ESA consultation to affirmative actions by agencies that resulted in changed circumstances. For example, the Supreme Court has made clear that ESA consultation is required when an agency "issu[es] a permit," *Weyerhauser Co. v. U.S. Fish & Wildlife Service*, 586 U.S. 9, 15 (2018), which unquestionably changes the status quo by authorizing conduct that otherwise would be prohibited. Likewise in *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980), this Court recognized that section 7 applied to the Secretary of the Interior's decision to carry out a lease sale of federal properties and the subsequent oil exploration program activities off the north coast of Alaska. *Id*. at 592, 608. That decision changed the status quo by allowing oil and gas production on the property.

The same is true of numerous other decisions of this Court. *See, e.g., Ctr. for Biological Diversity v. EPA*, 141 F.4th 153, 165–66, 176–77 (D.C. Cir. 2025) (per curiam) (applying section 7(a)(2) where EPA set new blending requirements for biofuel and renewable fuel); *El Puente v. U.S. Army Corps of Eng'rs*, 100 F.4th 236,

242 (D.C. Cir. 2024) (applying section 7(a)(2) to U.S. Army Corps of Engineers plans to dredge San Juan Harbor to widen and deepen channels through which ships travel); *Shafer & Freeman Lakes Env't Conservation Corp. v. FERC*, 992 F.3d 1071, 1081 (D.C. Cir. 2021) (applying section 7(a)(2) to FERC licensing decisions); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 44 (D.C. Cir. 2015) (applying section 7(a)(2) to grant of permission to build a pipeline); *City of Tacoma v. FERC*, 460 F.3d 53, 61 (D.C. Cir. 2006) (applying section 7(a)(2) to FERC's relicensing of a previously existing license to operate a hydroelectric project involving dams and hydroelectric power plants).

Indeed, the Ninth Circuit has expressly held that "'section 7(a)(2) consultation stems only from 'affirmative actions' of an agency,'" *Cal. Sportfishing Prot. All. v. FERC*, 472 F.3d 593, 598 (9th Cir. 2006) (internal citations omitted), and that "'inaction is not 'action' for section 7(a)(2) purposes.'" *Nat. Res. Def. Council v. EPA*, 38 F.4th 34, 58 (9th Cir. 2022) (quoting *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1108 (9th Cir. 2006)); *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1511 (9th Cir. 1995) ("a BLM 'action' will implicate section 7(a)(2) only if it legitimately authorizes [private] activity"). As the Ninth Circuit has explained, that also means the statute does not require consultation "about activities conducted . . . pursuant to a previously issued, valid license from [the agency]." *Cal. Sportfishing Port. All.*, 472 F.3d at 595. There is no affirmative action in those cases, unlike the

ones that Petitioner cites, which involve "renewed" contracts or permits upon the expiration of a previous contract or permit. EPA Br. 24–25.

B. EPA's decision to maintain the NO_2 and PM NAAQS is not an "action" for purposes of ESA section 7(a)(2).

Retaining the NAAQS is not an "action" for purposes of ESA section 7(a)(2) because it does not change the status quo in any way. It has simply left in place standards that were previously operative, a result that the CAA expressly allows. EPA Br. 23–24 (citing 42 U.S.C. § 7409(d)(1)). Thus, the law literally remains the same; there is no change to the relevant provisions in the Code of Federal Regulations. Further, retaining the NAAQS does not require EPA to make any new air quality designations because the CAA instructs EPA to make air quality designations only in response to the "promulgation or revision of" the NAAQS, not the retention of the NAAQS. 42 U.S.C. § 7407(d)(1)(B)(i).

Nor has EPA given its official permission to any third-party action. States are not required to submit a state implementation plan when EPA retains the NAAQS because that obligation, likewise, applies only in response to "promulgation" or "revision" of the NAAQS. *Id.* § 7410(a)(1). And they are also not required to undertake any new planning or control efforts when EPA retains the NAAQS, because those obligations are tied to air quality designations. *See id.* § 7513a.

Finally, EPA also has not done anything similar to renewing contracts or permits or reauthorizing conduct. In *Natural Resources Defense Council v. Houston*,

146 F.3d 1118 (9th Cir. 1998), the court found that the agency was required to complete ESA consultation before entering into new water service contracts to replace contracts that had expired. And in *Center for Biological Diversity v. Branton*, 126 F. Supp. 3d 1090 (D. Ariz. 2015), the agency completed ESA consultation on a new 10-year grazing permit that replaced a prior permit. Here, however, EPA's previously issued secondary NAAQS have not expired and remain in effect. EPA Br. 24.

In sum, issuing a final rule retaining the NAAQS has the same practical effect as if EPA had issued no rule at all, and thus is not an "action" within the meaning of section 7(a)(2).

CONCLUSION

The petition for review should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel states that this document complies with Federal Rules of Appellate Procedure 27(d)(2) and 29(a)(5) because it contains 4,864 words, as counted by Microsoft Word, excluding the parts excluded by Federal Rules of Appellate Procedure 27(d)(2) and 32(f) and D.C. Circuit Rule 32(e)(1).

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/s/ Elbert Lin

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2025, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Elbert Lin