

# DC CIRCUIT SAYS EPA'S 2018 RENEWABLE FUEL RULE DID NOT PROPERLY CONSIDER ENDANGERED SPECIES

Under the Renewable Fuel Program of the Clean Air Act, the US Environmental Protection Agency (EPA) must establish the amount of renewable fuel that must be introduced into the fuel supply. In late 2017, EPA established the amount for 2018 (the 2018 Rule).



## **Rule Upheld, Except for ESA Consideration**

In *American Fuel & Petrochemical Manufacturers v. EPA*, industry and environmental groups challenged the 2018 Rule, some claiming the 2018 Rule too strict, some too lax. The DC Circuit dismissed all challenges, except for the claim that EPA failed to consider the 2018 Rule's effect on endangered species. In upholding the endangered species claim, the DC Circuit did not dismiss or vacate the 2018 Rule; the 2018 Rule will remain in place while EPA performs the required analysis to comply with the Endangered Species Act (ESA).

## **ESA Applied to the Process**

Much of the DC Circuit's opinion concerns its decision to uphold, in large part, the 2018 Rule. However, the DC Circuit determined EPA had not made a proper finding under the ESA that the 2018 Rule will not affect any listed species or critical habitat. EPA argued this ESA provision only applied to discretionary agency actions, and the 2018 Rule did not include agency discretion. The DC Circuit acknowledged that much of the 2018 Rule was not discretionary, but some aspects did involve EPA discretion, and thus ordered EPA to make the determination.

If EPA makes a "no effect" finding, its ESA responsibilities for the 2018 Rule will end; if EPA determines the 2018 Rule may affect endangered species or critical habitat, EPA must consult with other federal agencies charged with ESA implementation, the US Fish and Wildlife Service and the National Marine Fisheries Service. However, the 2018 Rule remains in effect as EPA addresses the ESA issues.

This case is a reminder that courts may find ESA applicability in a wide range of actions by agencies other than those directly responsible for implementing it.

For a copy of the DC Court's opinion

[https://www.cadc.uscourts.gov/internet/opinions.nsf/FCCF06867362544B8525846D004F3193/\\$file/17-1258-1805279.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FCCF06867362544B8525846D004F3193/$file/17-1258-1805279.pdf)