ALERT
ENVIRONMENTAL

Court Revives Lawsuit Challenging Implementation of Endangered Species Act for Coal Mining Projects

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Environmental Alert

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A federal court has revived a dormant lawsuit challenging a fundamental procedure for implementation of the federal Endangered Species Act (ESA) for coal mining projects. The outcome of this lawsuit will likely have a substantial impact on the permitting and regulation of coal mining operations in the United States.

Section 7 of the ESA prohibits any federal agency from authorizing an action that is likely to "jeopardize the continued existence of" any endangered or threatened species, or cause "the destruction or modification of [designated critical habitat] of such species." 16 U.S.C. § 1536(a). To ensure that their permitting or other actions will not violate this prohibition, federal agencies are required to consult with the U.S. Fish and Wildlife Service (Service) within the U.S. Department of the Interior. The Service is the primary federal agency responsible for enforcing the ESA. Somewhat related to the Section 7 prohibition, Section 9 of the ESA forbids any person from "taking" an endangered species, which includes actions that "harm" such species in any way (whether permitted under a separate regulatory program or not). 16 U.S.C. § 1538 (a)(1)(B).

The federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) is a comprehensive, multi-media statute regulating the environmental aspects of coal mining. SMCRA created the Office of Surface Mining Reclamation and Enforcement (OSM), a sister agency to the Service within the Interior Department, to promulgate and administer rules for issuing mining permits and establishing environmental protection performance standards for permitted mining operations. SMCRA recognizes that, due to differences in geology and other environmental conditions among the States, governmental responsibility for implementing its requirements "should rest with the States." SMCRA § 101(f). Therefore, SMCRA allows the Secretary of the Interior to delegate the primary authority for administering its requirements (known as "primacy") to a State, upon approval of a detailed State regulatory program and subject to continued oversight by OSM.

To promote continued compliance with both statutes, OSM and the Service engaged in a programmatic ESA Section 7 consultation in 2017 with respect to all mining permits that may be issued under SMCRA, either by OSM or by a regulatory authority in a State that has been granted primacy (Primacy State). This consultation was intended to support the possible development of a new "Biological Opinion" for ESA compliance, which would replace one issued in 1996. This consultation was based upon (among other things) OSM's existing regulations that mirror ESA's Section 7 prohibition; OSM's oversight rules for approved programs administered by Primacy States; a comprehensive 2020 Biological Assessment addressing the coal mining industry and possible impacts on endangered species and critical habitats; and a detailed "SMCRA Coordination Process" that was developed to build upon OSM regulations to ensure that ESA requirements are fulfilled prior to Primacy State issuance of mining permits.

The results of the 2017 – 2020 consultation are reflected in a "Final Programmatic Biological Opinion and Conference Opinion" between those agencies dated October 16, 2020 (the "2020 BiOp"). Under the 2020 BiOp, a Primacy State is required to engage in a detailed ESA-specific "technical assistance process" with the Service and applicants for mining permits, renewals of permits, and significant revisions. Assuming the steps outlined in the 2020 BiOp are followed, the Service determined that OSM and a Primacy State satisfies ESA Section 7 with respect to such permitting actions. In addition, the Service found that compliance with specific "Terms and Conditions" set forth in an accompanying "Incidental Take Statement" will exempt actions authorized by such permits from the "take"

prohibitions of ESA Section 9.

On November 8, 2023, the Center for Biological Diversity and Appalachian Voices filed a complaint in the District Court for the District of Columbia against OSM and the Service, alleging that the named federal officials (and several Primacy States, who were not joined in the litigation) failed to comply with the 2020 BiOp. Therefore various mine permitting actions taken under the 2020 BiOp violated ESA Sections 7 and 9. *Center for Biological Diversity, et al. v. OSM, et al.,* Civil Action No. 23-cv-3343 (D.D.C.) (*OSM Litigation*). Based on that claim, the challengers asked that the 2020 BiOp be set aside, which would make it unavailable for future use and would also likely invalidate any permits issued by those Primacy States under the 2020 BiOp, as well as ESA Section 9 protection for the permittees under those permits. In the alternative, the complaint in the *OSM Litigation* claims that even if there has been compliance with the 2020 BiOp, its provisions are inadequate to comply with the ESA. Thus, it should be vacated as part of an order requiring that OSM and the Service re-initiate the Section 7 consultation process.

Since the OSM Litigation involves a record-based challenge to the issuance of the 2020 BiOp, the case will be decided on cross-motions for summary judgment. Following various procedural disputes concerning the administrative record and other matters, the *OSM Litigation* was scheduled for summary judgment briefing to start in late June, 2025. However, on June 6, 2025, the challengers filed a motion to stay the case and defer briefing pending the outcome of another case pending in the U.S. Court of Appeals for the District of Columbia Circuit, *Center for Biological Diversity v. Environmental Protection Agency,* Appeal No. 24-5101 (D.C. Circuit) (*EPA Appeal*). The challengers asserted that the *EPA Appeal* involves similar issues arising under EPA's delegation of the Clean Water Act's Section 404 permitting program to the State of Florida that was deemed to satisfy the agencies' ESA Section 7 requirements upon completion of a technical assistance process between the Service and Florida officials. Though OSM and the Service did not agree that the *EPA Appeal* is relevant to the *OSM Litigation,* they initially agreed not to oppose the stay motion, which was granted on June 13, 2025.

On February 11, 2026, the court lifted the stay and entered a new briefing schedule in the *OSM Litigation* at the request of the federal agencies and over the objection of the challengers. The challengers' summary judgment motion is due on March 4, 2026; responses and cross-motions for summary judgment by the agencies are due March 25, 2026; replies and opposition briefs by the challengers are due April 8, 2026; and the agencies' replies are due April 22, 2026. Although there is no deadline for when a decision must be made, a ruling is expected before the end of 2026.

Whichever way the court rules, it will be a very significant decision with respect to administration of ESA requirements in the context of SMCRA permitting, which will have important implications for the majority of coal mining projects in the United States. Anyone involved in coal mining or related activities should certainly stay tuned.

For questions about the *OSM Litigation* or other issues arising under SMCRA or the ESA, please contact Christopher B. (Kip) Power at (681) 265-1362 or **cpower@babstcalland.com**; Robert M. Stonestreet at (681) 265-1364 or **rstonestreet@babstcalland.com**; or your Babst Calland relationship attorney.