ALERT
ENVIRONMENTAL

# D.C. District Court Invalidates Procedure Allowing State Implementation of Endangered Species Act for Coal Mining Projects

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(by **Christopher (Kip) Power** and **Robert Stonestreet**)

A federal judge in the District of Columbia has invalidated a procedure in place since 2020 governing review and evaluation of coal mine-related permitting activity under the federal Endangered Species Act (ESA). The federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) is a comprehensive, multi-media statute mandating the evaluation of a broad range of potential environmental impacts of coal mining as part of a permitting program. SMCRA created the Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSM) to promulgate and administer specific rules for issuing mining permits and establishing environmental protection performance standards for mining operations. Among many other requirements, OSM regulations require that mine permit applications include detailed fish and wildlife information pertaining to the proposed permit and adjacent areas, and a description of how the permit applicant will minimize impacts on any threatened or endangered species and their habitat from permitted mining operations.

SMCRA recognizes that, due to differences in geology and other environmental conditions among the States, 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 State regulatory program that meets the requirements of SMCRA (and subject to continued oversight by OSM). Currently, there are 24 States that have been granted primacy under SMCRA (a.k.a. "Primacy 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 compliance with this prohibition, federal agencies issuing permits or taking other authorizing actions (known as "action agencies") are required to consult in advance with the Interior Department's U.S. Fish and Wildlife Service (Service). Under Service regulations, when a proposed action is likely to adversely affect a listed species or designated critical habitat, the action agency is required to complete formal consultation with the Service under ESA Section 7 for the purpose of making a "jeopardy" determination, taking into consideration the effects of the proposed action (including the cumulative effects from other State or private actions not subject to the ESA) on listed species and critical habitat. Following formal consultation on a proposed action, the Service issues a Biological Opinion conveying its jeopardy determination and the basis for it.

Separate from the ESA 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). Should the Service issue a "no jeopardy" determination but also find the proposed action will nonetheless cause a take, the second step in the Section 7 consultation process is the Service's publication of an incidental take statement (ITS), identifying the extent of take that is considered to be incidental to the authorized action, along with terms and conditions aimed at minimizing any take. Compliance with an ITS provides a "safe harbor" for the action agency against claims that it has violated ESA Section 9, and may similarly serve as the basis for issuance of a protective Incidental Take Permit issued to a private party under ESA Section 10.

Service regulations expressly authorize "programmatic" consultations under ESA Section 7, applicable to "multiple similar, frequently occurring or routine actions." 50 C.F.R. § 402.02. Recognizing that such multiple actions may not be ready for full Section 7 consultation when the action agency first creates the conditions allowing them to occur, the regulations allow for creation of a "framework" for consideration of "future proposed actions." *Id.* As indicated by their development of programmatic Biological Opinions in 1996 and 2016, OSM and the Service have operated under the belief that programmatic ESA Section 7 consultation fits OSM's approval of primacy (i.e., exclusive mine permitting responsibility) to the Primacy States and its oversight of the implementation of SMCRA in those States.

In an effort to update the previous Biological Opinion governing issuance of mine permits in Primacy States, OSM and the Service began a new programmatic ESA Section 7 consultation in 2017. The result of that 3-year effort was a "Final Programmatic Biological Opinion and Conference Opinion" between OSM and the Service 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. Assuming the steps outlined in the 2020 BiOp are followed, the Service determined that OSM and the Primacy State satisfy 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 ITS will exempt actions authorized by such permits from the "take" prohibitions of ESA Section 9.

As described in more detail in an *Environmental Alert* published earlier this year (*see* *Court Revives Lawsuit Challenging Implementation of Endangered Species Act for Coal Mining Projects*), in 2023 two national environmental organizations filed a lawsuit in the District Court for the District of Columbia against OSM and the Service, challenging the 2020 BiOp. On May 29, 2026, that Court (Sooknanan, J.) issued its **opinion finding that the 2020 BiOp is facially invalid and vacating it.** *Center for Biological Diversity, et al. v. OSM, et al.,* Civil Action No. 23-cv-3343 (D.D.C.) (May 29, 2026) (*2020 BiOp Decision*). In light of this ruling, the status of coal mine permitting in any Primacy State is uncertain, unless a mine permit applicant is prepared to engage in the full ESA Section 7 review process directly with the Service.

The D.C. District Court's decision was nearly entirely based upon the March 27, 2026 opinion of the D.C. Circuit Court of Appeals in *Center for Biological Diversity v. Environmental Protection Agency*, 171 F.4th 356 (D.C. Cir. 2026) (*Zeldin*). *2020 BiOp Decision,* at 26. *Zeldin* involved a challenge to EPA's delegation of the Clean Water Act's Section 404 (a.k.a., "dredge and fill") permitting program to the State of Florida, which was deemed to satisfy the agencies' ESA Section 7 requirements upon completion of a technical assistance process between the Service and Florida officials.

With very little, if any, discussion of the substantially different factual and legal circumstances presented by the two cases, the District Court held that, as in *Zeldin*, the 2020 BiOp issued by the Service does not satisfy the agencies' Section 7 obligations because the ITS that is attached to it does not set "a clear and enforceable incidental take limit." *Id.* And again, very similar to the court's ruling in *Zeldin*, the District Court also found that the 2020 BiOp is invalid because it does not require "a robust effects analysis" and is based upon technical assistance process that is "not as protective as Section 7 consultation…." Whether any biological opinion could be developed that would satisfy the District Court without requiring as much (or more) effort than individual State mine permit application review by the Service is unknown. Excluding any post-decisional motions to the District Court, OSM and/or the Service will have 60 days to appeal the May 29, 2026 decision.

For questions about the *BiOp Decision* 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.