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*Via Email and Certified Mail with Return Receipt Requested*

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**Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act regarding continued reliance on the 1996 Biological Opinion and Conference Report on Surface Coal Mining and Reclamation Operations under SMCRA**

Dear Sir/Madam:

This letter serves as formal notice by the Center for Biological Diversity, the Sierra Club and its West Virginia Chapter, the West Virginia Highlands Conservancy and Ohio Valley Environmental Coalition (“Conservation Groups”) of their intent to sue the U.S. Fish and Wildlife Service (“FWS” or “Service”), the U.S. Office of Surface Mining Reclamation and Enforcement (“OSMRE”), and the West Virginia Department of Environmental Protection (“WVDEP”) for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”),

concerning FWS's, OSMRE's and WVDEP's continued reliance on the 1996 Biological Opinion and Conference Report on Surface Coal Mining and Reclamation Operations under the Surface Mining Control and Reclamation Act of 1977 ("1996 Biological Opinion") and accompanying incidental take statement ("ITS") to comply with the agencies' ESA duties regarding the impacts to listed species from activities regulated pursuant to the Surface Mining Control and Reclamation Act ("SMCRA") regulatory program.

OSMRE and FWS have reinitiated formal ESA Section 7 consultation on the SMCRA program in order to consider the effects of surface coal mining and reclamation on listed species, and to replace the 1996 Biological Opinion with a new programmatic ESA consultation.<sup>1</sup> The Service has acknowledged that the process for ESA compliance set forth in the 1996 Biological Opinion has failed to ensure that species are protected from the adverse effects of surface coal mining, and reinitiation of consultation on the SMCRA program is required pursuant to ESA Section (7)(a)(2) and the applicable regulation at 50 C.F.R. § 402.16 to prevent jeopardy to listed species. However, OSMRE has stated that the SMCRA regulatory authorities will continue to rely on the 1996 Biological Opinion during the reinitiated consultation, with no target for completing that process.<sup>2</sup>

The continuing approval of mining permits (including new permits, permit renewals and significant revisions to existing permits) in reliance on the 1996 Biological Opinion and ITS violates the agencies' duties to carry out programs for the conservation (*i.e.* recovery) of listed species and to ensure that agency actions are undertaken consistent with the purposes of the ESA and are not likely to jeopardize the continued existence of listed species pursuant to ESA Sections 7(a)(1) and 7(a)(2). Moreover, the April 13, 2017 reinitiation of consultation invalidates the 1996 Biological Opinion and ITS, and continued reliance on that opinion is therefore unlawful and violates the clear requirements of ESA Section 7(d), which prevents any irretrievable commitment of resources pending completion of the Section 7 consultation process. Given the harm that coal mining activities continue to have on listed species and FWS's statements regarding the ineffectiveness of the 1996 Biological Opinion, continued reliance on that opinion to ensure compliance with the ESA is patently arbitrary and capricious.

The WVDEP has continued to permit mines in reliance on the 1996 Biological Opinion following reinitiation of consultation. For example, the Berwind Deep Mine No. 1 on Dry Fork in McDowell County and the Turkeypen 2Gas Deep Mine on Elk Creek and Turkeypen Branch in Logan County were permitted by WVDEP *after* OSMRE and FWS reinitiated consultation on the 1996 Biological Opinion, yet WVDEP still unlawfully relies on that opinion for ESA compliance. These mines are located in watersheds occupied by either the Guyandotte River crayfish or the Big Sandy crayfish, which were listed under the ESA in 2016. Even if the 1996 Biological Opinion was still valid, it cannot apply to these imperiled crayfish, which were listed 20 years after that opinion was published. The continued reliance on the 1996 Biological

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<sup>1</sup> See letter from Glenda H. Owens to Gary Frazer reinitiating ESA Section 7 consultation on Title V of the Surface Mining Control and Reclamation Act (April 13, 2017).

<sup>2</sup> *Id.*

Opinion and ITS violates Section 7 of the ESA and subjects the permitting authorities and mine operators to Section 9 take liability.

Furthermore, WVDEP approved these and other mines in reliance on unlawful guidance regarding the analysis and mitigation required to prevent harm to protected crayfish. WVDEP devised its own guidance document for the development of protection and enhancement plans (“PEPs”) for the listed crayfish, ostensibly to comply with the requirements of the 1996 Biological Opinion. The WVDEP crayfish guidance circumvented approval by the Service, is inconsistent with the Service’s own guidance, and ignored the Service’s objections that WVDEP’s protocol lacked scientific support and would continue to jeopardize crayfish. The regional FWS office developed its own guidelines for crayfish protection with more rigorous standards for the development of PEPs; however, the Service was ultimately pressured to adopt a watered-down version that is similar to the WVDEP guidance. Importantly, neither the WVDEP guidance nor the Service’s guidance comply with the ESA’s best available science mandate, as they rely on state water quality standards that are insufficient to ensure that crayfish are not jeopardized by coal mining activities, and fail to require PEPs with sufficient mitigation and enhancement for crayfish habitat.

WVDEP, however, continues to rely on this inadequate guidance for ESA compliance, allowing mines that may affect listed crayfish to avoid the development of PEPs or the implementation of other essential protective measures, in violation of the ESA. The current guidance does not comply with the applicable regulations at 30 C.F.R. §780.16, is not based on the best available science and contains arbitrary thresholds that allow mining companies to avoid ESA compliance and to undertake mining activities that continue driving these species towards extinction.

For their part, the Service and OSMRE have failed to provide the necessary oversight to ensure that mining activities authorized by WVDEP do not jeopardize the continued existence of listed species, as the ESA and SMCRA require.<sup>3</sup> Although the Service is well aware that the scheme for crayfish developed by WVDEP—and ultimately approved by the Service following political pressure from mining companies, lobbyists, Trump-appointed officials, and the WVDEP—is inconsistent with the requirements of the ESA, it has allowed WVDEP to continue implementing the inadequate guidance. The Service has thereby abdicated its duty to ensure that listed species are not jeopardized, allowing WVDEP to employ a scheme that is insufficient and does not meet the basic requirements of the ESA (*i.e.* does not employ the best available science). By allowing WVDEP to implement inadequate PEP guidance and permit mining activities that will jeopardize listed species, the Service has unlawfully delegated ESA oversight authority to WVDEP, which is inconsistent with its statutory mandate, and is arbitrary and capricious in violation of the ESA and the Administrative Procedure Act (“APA”).

Unless you take immediate steps to correct these violations, we intend to file suit in 60 days, and will seek declaratory and injunctive relief as well as reasonable litigation costs and attorneys’ fees, for your violations of the ESA.<sup>4</sup>

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<sup>3</sup> See 16 U.S.C. § 1536(a)(2); 30 CFR § 780.16; 30 CFR § 773.15(j).

<sup>4</sup> 16 U.S.C. § 1540(g).

## **I. LEGAL BACKGROUND**

### **A. Endangered Species Act Compliance**

Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, plants and their natural habitats.<sup>5</sup> The ESA imposes substantive and procedural obligations on all federal agencies with regard to listed and proposed species and their critical habitats.<sup>6</sup>

Under Section 7 of the ESA, federal agencies must “utilize their authorities in furtherance of the purposes of” the ESA and carry out “programs for the conservation of endangered species and threatened species.”<sup>7</sup> Agencies must further “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical.”<sup>8</sup>

The definition of agency “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” including the granting of permits and programmatic actions that may affect land, water or air, such as mining permits under the SMCRA program.<sup>9</sup> Likewise, “action area” is defined broadly to include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”<sup>10</sup>

The duties in ESA Section 7 are only fulfilled by an agency’s satisfaction of the consultation requirements that are set forth in the implementing regulations for Section 7 of the ESA, and only after the agency lawfully complies with these requirements may an action that “may affect” a protected species go forward.<sup>11</sup> Pursuant to the consultation process, if the action agency concludes in a “biological assessment” that a proposed action is “not likely to adversely affect” a listed species that occurs in the action area—and the Service lawfully concurs in writing with the action agency’s determination—then the process is terminated. Under such a scenario, unless the Service’s concurrence was arbitrary and capricious and/or the action agency failed to adhere

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<sup>5</sup> *Id.* §§ 1531, 1532.

<sup>6</sup> *See id.* §§ 1536(a)(1), (a)(2) and (a)(4) and § 1538(a); 50 C.F.R. § 402.

<sup>7</sup> 16 U.S.C. § 1531(a)(1)

<sup>8</sup> 16 U.S.C. § 1536(a)(2).

<sup>9</sup> 50 C.F.R. § 402.02.

<sup>10</sup> *Id.*

<sup>11</sup> *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055-57 (9th Cir. 1994). Further, pursuant to ESA Section 7, Federal agencies must confer with FWS on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the ESA. 16 U.S.C. § 1536(a)(4).

to the ESA's requirements, no formal consultation is required.<sup>12</sup> If the Service's concurrence in a "not likely to adversely affect" finding is inconsistent with the best available science or otherwise unlawful, however, any such concurrence must be set aside.<sup>13</sup>

If the action agency concludes that an action is "likely to adversely affect" listed species or critical habitat, it must enter into "formal consultation" with the Service.<sup>14</sup> The ESA's threshold for triggering the formal consultation requirement is "very low."<sup>15</sup>

Formal ESA consultation commences with the action agency's written request for consultation and concludes with FWS's issuance of a "biological opinion."<sup>16</sup> The biological opinion states FWS's opinion as to whether the effects of the action are "likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat."<sup>17</sup>

Pursuant to the Services' revised regulations defining "framework programmatic action," programmatic consultations, such as for the SMCRA program, should not result in the issuance of an incidental take statement (ITS). Rather, any incidental take must be subsequently authorized under a project-specific Section 7 or Section 10 process.<sup>18</sup> For project-specific consultations, if FWS concludes that a project is not likely to jeopardize listed species, it must nevertheless provide an ITS with the biological opinion. The ITS must specify the allowed amount or extent of take that is incidental to the action (but which would otherwise be prohibited under Section 9 of the ESA), "reasonable and prudent measures" ("RPMs") necessary or

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<sup>12</sup> 50 C.F.R. §§ 402.12(k), 402.13(a), 402.14(b).

<sup>13</sup> See 5 U.S.C. § 706(2).

<sup>14</sup> 50 C.F.R. §§ 402.12(k), 402.14(a).

<sup>15</sup> See 51 Fed. Reg. 19,926, 19,949 (June 3, 1986).

<sup>16</sup> 50 C.F.R. § 402.02. During formal consultation, the Service and the action agency must evaluate the "effects of the action," including all direct and indirect effects of the proposed action, plus the effects of actions that are interrelated or interdependent, added to all existing environmental conditions—that is, the "environmental baseline." 50 C.F.R. §§ 402.02, 402.14. The environmental baseline includes the "past and present impacts of all Federal, State, or private actions and other human activities in the action area . . . ." The effects of the action must be considered together with "cumulative effects," which are "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." 50 C.F.R. § 402.02.

<sup>17</sup> *Id.* § 402.14(g)(4). To "jeopardize the continued existence of" means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." *Id.* § 402.02.

<sup>18</sup> See 80 Fed. Reg. 26,832 (May 11, 2015) (adding definition of "framework programmatic action" to 50 C.F.R. § 402.02 and adding 50 C.F.R. § 402.14(i)(1)(6) on incidental take statements not being required at the programmatic level).

appropriate to minimize such take, and the “terms and conditions” that must be complied with by the action agency to implement any RPMs.<sup>19</sup>

Allowing activities that harm federally-protected species absent valid take coverage opens up state and private actors to liability.<sup>20</sup> Under Section 9(a)(1)(B) of the ESA, it is illegal to engage in any activity that “takes” an endangered species.<sup>21</sup> Persons subject to the prohibition on take include individuals and corporations, as well as “any officer, employee, agent, department, or instrumentality of the Federal Government... [or] any State.”<sup>22</sup> Further, “[t]he ESA prohibitions apply to actions by state agencies where their regulatory programs approve actions by third parties that contribute to causing the take.”<sup>23</sup>

Where a violation of the Section 9 take prohibition is alleged, a court must issue an injunction if a plaintiff establishes by a preponderance of the evidence that there is “a reasonably certain threat of imminent harm to a protected species.”<sup>24</sup> Because Congress has accorded the protection of endangered species the “highest of priorities,” courts do not have the discretion to withhold injunctive relief where it is necessary to prevent an imminent and likely violation of the ESA.<sup>25</sup>

While incidental take can be authorized under Section 7 through the provision of and compliance with an ITS, it is well settled that violations of the terms and conditions of a biological opinion

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<sup>19</sup> 16 U.S.C. § 1536(b)(4), 50 C.F.R. § 402.14(i).

<sup>20</sup> The term “take” is defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill wildlife. The term “take” is defined in the statute to include “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(18). The ESA’s implementing regulations define “harm” to mean “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. The term “harass” is defined to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* § 17.3.

<sup>21</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>22</sup> 16 U.S.C. § 1532(13).

<sup>23</sup> *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *see also Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010); *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1988); *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998); *Seattle Audubon Soc’y v. Sutherland*, 2007 U.S. Dist. LEXIS 31880, 2007 WL 1300964 (W.D. Wash. May 2, 2007).

<sup>24</sup> *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000); *Animal Welfare Institute v. Beech Ridge Energy*, 675 F. Supp. 2d 540, 563 (D. MD 2009).

<sup>25</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

and ITS expose agencies and private actors to take liability.<sup>26</sup> Courts have found that a violation of an ITS's terms "abrogates the safe harbor provision of the ITS."<sup>27</sup> Thus, if an applicant or regulatory authority does "not comply with all of the terms of the Biological Opinion, they would not be protected by the Biological Opinion's safe harbor" and would be subject to take liability.<sup>28</sup> This includes the action agency, which disregards an ITS "at its own peril (and that of its employees)."<sup>29</sup>

After the issuance of a biological opinion and "where discretionary Federal involvement or control over the action has been retained or is authorized by law," the agency must reinitiate formal consultation if, *inter alia*:

- The amount or extent of taking specified in the incidental take statement is exceeded;
- New information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- The identified action is subsequently modified in a manner that causes an effect to the listed species ... that was not considered in the biological opinion; or
- A new species is listed or critical habitat designated that may be affected by the identified action.<sup>30</sup>

The reinitiation of consultation invalidates any prior biological opinion, and nullifies the take coverage of an ITS until the reinitiated consultation has been completed and a new ITS is issued by the Service.<sup>31</sup> Furthermore, Section 7(d) of the ESA provides that once a federal agency initiates consultation under the ESA, the agency, as well as any applicant for a federal permit, "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."<sup>32</sup> The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. Section 7(d) prohibitions remain in effect throughout the

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<sup>26</sup> See 16 U.S.C. § 1536(o) ("[A]ny taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned."); *Bennett v. Spear*, 520 U.S. 154, 170 (1997); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007); *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1580 (9th Cir. 1993) (held that violation of an ITS would remove protective coverage from take liability).

<sup>27</sup> *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 995 (D. Or. 2010); see also *South Yuba*, 629 F. Supp. 2d at 1132.

<sup>28</sup> *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 637 F.3d 259, 260 (4th Cir. 2011).

<sup>29</sup> *Bennett v. Spear*, 520 U.S. at 170.

<sup>30</sup> 50 C.F.R. § 402.16.

<sup>31</sup> See e.g. *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1443 (9th Cir. 1992).

<sup>32</sup> 16 U.S.C. § 1536(d).

consultation period and until the federal agency has satisfied its obligations under Section 7(a)(2) that the action will not result in jeopardy to listed species or adverse modification of critical habitat.

## **B. Coal Mining Under SMCRA**

Surface coal mining is accomplished by logging or clearing the mine site, then removing overburden from the coal seam and blasting and removing the coal. This includes strip mining and open pit mining practices, as well as mountaintop removal mining, wherein excess mining waste is dumped into fills in nearby hollows or valleys, smothering streams and habitat. Surface coal mining requires large areas of land disturbance, destroying mountains and forest habitat. Further, the practice results in the deposition of sediment and heavy metals into waterbodies, resulting in adverse impacts to streams and local biodiversity. These impacts harm species, including an increasing number of species that are listed as endangered or threatened under the ESA, several of which were listed since OSMRE issued the 1996 Biological Opinion.<sup>33</sup>

Surface coal mining in the U.S. is regulated pursuant to SMCRA. OSMRE is the primary regulator of coal mining under SMCRA, until a State or Indian Tribe demonstrates that it has developed a regulatory program that meets all of the requirements of SMCRA and the implementing regulations issued by OSMRE under 30 C.F.R. Chapter VII. A State or Indian Tribe becomes the primary regulator within its jurisdiction when it submits and receives approval of its proposed regulatory program from OSMRE, assuming responsibility over permitting, inspection, and enforcement activities.

However, even after a SMCRA program has been delegated to a state, OSMRE retains oversight of that program through funding and supervision of the State's or Tribe's implementation of the regulatory program. In 2014, for example, OSMRE provided \$12,400,405 to West Virginia for the implementation of the SMCRA program through a regulatory grant distribution, and provided an additional \$12,500,570 in 2015, \$12,141,088 in 2016, \$11,696,446 in 2017 and allocated \$12,145,099 for 2018. OSMRE thereby maintains federal oversight over the West Virginia program by funding it on an ongoing basis. This oversight role was reaffirmed in a Memorandum of Understanding between the U.S. Department of the Army, the U.S. Department of the Interior ("DOI") and the U.S. Environmental Protection Agency ("EPA") regarding Appalachian coal mining, wherein OSMRE agreed to "determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities

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<sup>33</sup> See e.g. *Nat'l Parks Conservation Ass'n v. Jewell*, 62 F. Supp. 3d 7, 16 (D.D.C. 2014) (noting that "[d]irect effects of surface coal mining and reclamation operations on threatened, endangered, or proposed species or critical habitat consists [sic] primarily of habitat alteration by land clearing and earthmoving operations.... If a species of concern lacks individual mobility, land clearing and excavation activities may result in a direct take").

under SMCRA,” and to “remove impediments to its ability to require correction of permit defects in SMCRA primacy states.”<sup>34</sup>

SMCRA empowers OSMRE to take over state programs that fail to comply with the Act’s requirements and specifically requires that OSMRE evaluate and oversee the administration of approved State programs. Further, SMCRA requires that OSMRE enforce the terms of the statute should it find that the State has failed to adequately enforce its state-delegated SMCRA program.<sup>35</sup> As set forth in the 1996 Biological Opinion, “in this role, OSM conducts oversight inspections of selected mine sites and undertakes oversight reviews of selected topics in States with primacy.”<sup>36</sup>

To implement this oversight role, OSMRE has issued a directive stating that it must issue a Ten Day Notice (“TDN”) to a state regulatory authority whenever it has reason to believe that there has been a violation of SMCRA, the approved state regulatory program, or a permit condition.<sup>37</sup> Furthermore, “if the alleged violation or violation in fact exists or continues to exist, [OSMRE must] take an appropriate enforcement action to cause abatement of the violation.”<sup>38</sup> OSMRE therefore retains discretion and control over the SMCRA program, even where the program has been delegated to a state authority.

### **C. The 1996 Biological Opinion**

Pursuant to ESA Section 7(a)(2), OSMRE must ensure that coal-mining activities undertaken pursuant to SMCRA do not jeopardize the continued existence of listed or proposed species.<sup>39</sup> Hence, in 1995, OSMRE initiated formal consultation with FWS under Section 7 of the ESA to consider the effects of all SMCRA permitting programs, state or federal, nationwide, to listed species. A year later, FWS issued the 1996 Biological Opinion, which purported to “address[ ] all present and future Federally listed and proposed species and designated or proposed critical habitats that may be affected by” SMCRA-regulated surface coal mining throughout the nation.

Although OSMRE and FWS failed to include or analyze any site-specific or species-specific information in the 1996 Biological Opinion, they concluded that surface coal mines regulated by “properly implemented” SMCRA programs “are not likely to jeopardize the continued existence

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<sup>34</sup> Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior and U.S. Environmental Protection Agency Implementing the Interagency Action Plan on Appalachian Surface Coal Mining at 3 (June 11, 2009).

<sup>35</sup> 30 U.S.C. § 1271(b); 30 CFR §§ 780.16, 773.15(j).

<sup>36</sup> 1996 Biological Opinion at 5.

<sup>37</sup> OSMRE, Ten Day Notice Directive INE-35 at 4 (January 31, 2011); *see also* 30 C.F.R. § 842.11 (referenced in OSM Directive).

<sup>38</sup> *Id.*

<sup>39</sup> 16 U.S.C. § 1536(a)(2).

of listed or proposed species” or “result in the destruction or adverse modification of designated or proposed critical habitats.”<sup>40</sup>

The 1996 Biological Opinion provides authorization for the take of “all present and future Federally listed and proposed species” affected by SMCRA-regulated mining operations at any mine site.<sup>41</sup> It assigned “an unquantifiable level of take” to surface coal mining operations and authorized “the unavoidable taking of some individuals” of any listed species affected by surface coal mining.<sup>42</sup> According to FWS, “the likelihood and extent of incidental take” of all listed species by surface coal mining would be minimized by a “planning and coordination process” between FWS, OSMRE and state agencies. This process requires compliance with SMCRA regulations that purportedly prohibit the taking of an endangered or threatened species in violation of the ESA, as well as compliance with the terms and conditions of the 1996 Biological Opinion and ITS.<sup>43</sup>

To ensure that surface coal mining does not result in jeopardy to listed or proposed species, and “[a]s a condition of [the] non-jeopardy opinion and incidental take statement,” the 1996 Biological Opinion requires FWS, in coordination with OSMRE and the relevant delegated state authority – here, WVDEP – to develop and implement site- and species-specific measures to minimize impacts to listed species.<sup>44</sup> Additionally, OSMRE and WVDEP must require mine operators to comply with those measures in order to satisfy OSMRE’s duty to avoid jeopardy to listed species and to retain the protections of the 1996 Biological Opinion.<sup>45</sup>

To implement the species-specific measures that are required to minimize take under the 1996 Biological Opinion, OSMRE and WVDEP must require PEPs for affected species at specific mine sites, which must “include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act...”<sup>46</sup> FWS fulfills its duty to provide species-specific measures to minimize take of listed species by promulgating guidance documents for the development of PEPs. However, FWS has only provided PEP guidance for some listed species, such as the Indiana bat, blackside dace and recently-listed crayfish species (discussed further below), but not for all species that may be impacted by surface mining (i.e. northern long-eared bat).

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<sup>40</sup> 1996 Biological Opinion at 10.

<sup>41</sup> 1996 Biological Opinion at 6.

<sup>42</sup> *Id.* at 11. The ITS does not specify the amount or extent of take allowed as required pursuant to 50 C.F.R. §402.14(i)(1)(i), and therefore it does not contain an explicit trigger for reinitiation of consultation where take exceeds allowable levels.

<sup>43</sup> *See Id.* at 10-13; 30 C.F.R. § 773.15.

<sup>44</sup> 1996 Biological Opinion at 12, 13.

<sup>45</sup> *Id.*

<sup>46</sup> 30 C.F.R. § 780.16(b).

The 1996 Biological Opinion provides two specific pathways to reinitiation of Section 7 consultation. It states that reinitiation is necessary where: “(1) new information reveals that the agency action may affect listed species or critical habitats in a manner or to an extent not considered in this opinion, or (2) the agency action is modified in a manner that causes an adverse effect to listed species or critical habitat that was not considered in this opinion.”<sup>47</sup> The 1996 Biological Opinion fails to require reinitiation, however, when “a new species is listed or critical habitat designated that may be affected by the identified action,” as specifically required by the ESA implementing regulations.<sup>48</sup>

#### **D. The Stream Protection Rule and 2016 Biological Opinion**

OSMRE’s implementation of Title V of SMCRA includes the direct implementation and enforcement of the Stream Protection Rule (“SPR”), which is intended “to improve the balance between environmental protection and providing for the Nation’s need for coal as a source of energy.”<sup>49</sup> In 2015, OSMRE undertook efforts to revise the SPR, in order to better protect “streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations” and to provide mine operators “with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment.”<sup>50</sup>

As a result of the changes that were proposed to the SMCRA regulations as part of the revised SPR, OSMRE could no longer rely on the 1996 Biological Opinion to meet its ESA Section 7 duties, and therefore entered into formal programmatic consultation with FWS. On December 16, 2016, FWS issued a new biological opinion (“2016 Biological Opinion”), which specifically stated that “[t]he 1996 Biological Opinion is being superseded by this programmatic Opinion and will no longer provide protections against the take prohibitions of section 9 of the ESA for future permitting decisions.”<sup>51</sup>

In the 2016 Biological Opinion, FWS stated that “the 1996 Opinion’s technical assistance permit review process has not been implemented consistently and has led to insufficient protection of ESA-listed resources.”<sup>52</sup> In response to this finding, OSMRE and the Service developed a MOU to “improve interagency coordination and cooperation and ensure that proposed, threatened, and endangered species and proposed and designated critical habitat are adequately protected for all surface coal mining and reclamation operations and coal exploration conducted under SMCRA.”<sup>53</sup>

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<sup>47</sup> 1996 Biological Opinion at 14.

<sup>48</sup> 50 C.F.R. § 402.16(d).

<sup>49</sup> <https://www.OSMRE.gov/programs/rcm/streamprotectionrule.shtm>

<sup>50</sup> *Id.*

<sup>51</sup> 2016 Biological Opinion at 3.

<sup>52</sup> *Id.* at 123

<sup>53</sup> *Id.*

The 2016 Biological Opinion made it clear that the 1996 Biological Opinion would no longer be valid for new permits:

The incidental take statement accompanying the 1996 Biological Opinion will remain valid for all existing permits that comply with the Terms and Conditions of the 1996 Biological Opinion. However, all new permits, as well as all revisions to previously approved permits where a revision would change the manner or extent of effects to species, must complete the technical assistance process identified in this programmatic Opinion and the 2016 MOU, or a separate section 7 consultation (if another Federal nexus exists) or habitat conservation plan under section 10 of the ESA.

Moreover, FWS was very specific as to the failure of the 1996 Biological Opinion to protect listed species, and the need to reinitiate programmatic consultation:

Even if the Stream Protection Rule did not constitute a significant change to the regulatory environment, the 1996 Biological Opinion would require reinitiation of consultation because there have been effects to ESA resources (listed and proposed species and designated and proposed critical habitat) not considered in the 1996 analysis and because the technical assistance process analyzed in the 1996 Biological Opinion has not been consistently implemented nationwide, as analyzed in that consultation. As a result of new effects and inconsistent implementation of the technical assistance process, many fish and wildlife species continue to decline. Several species in coal mining regions have been listed since conclusion of the 1996 consultation, suggesting the protections afforded to fish and wildlife resources from the existing SMCRA regulations and implementation of the 1996 Biological Opinion may not be as protective as previously considered. Given the contribution of surface coal mining to the decline of some species and the new listing of species that previously did not require protection under the ESA, and evidence that the technical assistance process outlined in the 1996 Biological Opinion is not being followed, it is no longer possible to rely on the 1996 Biological Opinion to conclude that the existing regulatory environment (prior to 2016 MOU and Stream Protection Rule implementation) would not result in jeopardy or adverse modification of ESA-listed resources.<sup>54</sup>

FWS concluded that “despite the environmental protections granted by SMCRA and the permit review process set forth in the 1996 Biological Opinion, surface coal mining operations continue to negatively impact threatened and endangered species and the habitats upon which they depend.”<sup>55</sup>

FWS was, in fact, more than critical of the 1996 Biological Opinion. The Service determined that “the regulatory environment prior to implementation of the Stream Protection Rule and 2016

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<sup>54</sup> *Id.* at 31-32 (emphasis added).

<sup>55</sup> *Id.* at 107.

MOU is not sufficiently protective of species and their habitats, as indicated by a failure to adequately address four of the 7 programmatic analytics:

- Can the physical, chemical, or biotic stressors that are likely to be produced as a direct or indirect result of the action be reliably estimated?
- Will adverse effects of such activities on ESA-listed species and designated critical habitat be minimized?
- Will likely adverse effects on listed species and critical habitat be continuously evaluated and monitored? and
- Will permit compliance be monitored and enforced?

“Based on the existing regulations and the Service’s twenty years of experience implementing the 1996 Biological Opinion, we determined the answers to each of these questions to be negative.”<sup>56</sup>

FWS further noted that new species listings required OSMRE and FWS to revisit the efficacy of the 1996 Biological Opinion, stating that the recent listing of the Big Sandy crayfish and the Guyandotte River crayfish “illustrate the inadequacy of the current SMCRA regulatory environment in protecting fish and wildlife and the habitats upon which they depend.”<sup>57</sup>

On February 2, 2017, Congress used the Congressional Review Act to rescind the new SPR. As a result, the 2016 Biological Opinion and the MOU will not become effective. Regardless, the statements in the 2016 Biological Opinion demonstrate why OSMRE, FWS and WVDEP can no longer rely on the 1996 Biological Opinion and ITS for ESA compliance.

#### **E. 2017 Reinitiation of Consultation on the SMCRA Program**

Following the demise of the 2016 SPR, OSMRE formally requested reinitiation of ESA consultation on the SMCRA program by letter to the Service dated April 13, 2017. OSMRE specifically stated in its letter that reinitiation is appropriate pursuant to 50 C.F.R. § 402.16, and that it expects the reinitiated consultation “to include new science and cover all aspects of OSMRE’s implementation of Title V..., oversight of state programs under the existing regulations, and OSMRE’s oversight of state program compliance with requirements related to the protection and enhancement of proposed or listed species and proposed or designated critical habitat.”<sup>58</sup> OSMRE further states in the letter that during the reinitiation of consultation “OSMRE will resume its reliance on the 1996 Biological Opinion....”<sup>59</sup> At this time, it is not clear when or if the reinitiated consultation will be completed.

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<sup>56</sup> *Id.* at 122 (emphasis added).

<sup>57</sup> *Id.*

<sup>58</sup> *See* letter from Glenda H. Owens to Gary Frazer reinitiating ESA Section 7 consultation on Title V of the Surface Mining Control and Reclamation Act (April 13, 2017).

<sup>59</sup> *Id.*

OSMRE and FWS have also issued a document outlining the SMCRA-ESA coordination and elevation process;<sup>60</sup> however, that document provides no requirements for site-specific ESA consultations or species-specific analysis beyond what is required pursuant to the 1996 Biological Opinion, and relies on the same “protection and enhancement plan” (“PEP”) process as the 1996 Biological Opinion.<sup>61</sup> Moreover, the procedures outlined in this document continue to allow OSMRE and state agencies to ignore species-specific protection measures that the Service determines are necessary to protect listed species, allowing the regulatory authority to decide not to accept measures set forth by FWS.<sup>62</sup>

OSMRE has also issued a letter accompanying the request for reinitiation of consultation that addresses ESA Section 7(d).<sup>63</sup> This letter claims that the continued issuance of SMCRA permits in reliance on the 1996 Biological Opinion would not result in an irretrievable or irreversible commitment of resources in violation of Section 7(d). This is apparently based on OSMRE’s commitment to ensuring that state regulatory authorities are adequately coordinating with FWS to ensure that “all surface coal mining and reclamation operations minimize disturbances and adverse impacts on fish, wildlife and related environmental values....”

However, this letter does not explain exactly how OSMRE will address the deficiencies FWS previously found in the existing SMCRA-ESA program (*see above*: “it is no longer possible to rely on the 1996 Biological Opinion to conclude that the existing regulatory environment ... would not result in jeopardy or adverse modification of ESA-listed resources”). OSMRE’s letter also fails to address how, following reinitiation of consultation, an agency may lawfully rely on an outdated and invalid ITS to fulfill its duties pursuant to Section 7 of the ESA.<sup>64</sup> Moreover, it does not explain its specious claim that issuing permits for mining activities is not an irretrievable commitment of resources. This claim is illogical, since granting the permits creates an ownership interest in the permit holder, and allows for activities that may cause habitat degradation or direct mortality to listed species.

#### **F. The WVDEP and FWS Crayfish Guidance**

Following the listing of the Guyandotte River crayfish and Big Sandy crayfish in 2016, WVDEP began developing guidance for mining projects that may affect those species, entitled “Guide to Consideration of Potential Mining-related Impacts on the Guyandotte River and Big Sandy River

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<sup>60</sup> This document, entitled “1996 Biological Opinion - SMCRA ESA Coordination and Elevation Process,” is undated and it is unclear who the author is.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Glenda H. Owens, Endangered Species Act Section 7(d) Determination for the SMCRA Title V Program (April 13, 2017).

<sup>64</sup> *See, e.g., Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992) (Reinitiation of consultation requires the Service to issue a new biological opinion before a project may go forward).

Crayfishes” (“WV Crayfish Guidance”). The WV Crayfish Guidance provides a key that establishes when crayfish PEPs will be required for mining projects, but provides no information on what information those PEPs must contain. It does require that water quality standards be maintained at mining sites to prevent harm to crayfish, claiming that no additional criteria are needed to protect the species. It also provides guidelines for sediment monitoring and adaptive management. Pursuant to the WV Crayfish Guidance, PEPs are not required unless a survey indicates that listed crayfish are present in relevant stream segments. However, the guidance limits the requirements for presence/absence surveys to those streams that “immediately impact” 3<sup>rd</sup> order streams with a known occurrence of crayfish, or tributaries of such stream segments when the project is less than 500m from the confluence of the 3<sup>rd</sup> order segment.

The Service personnel at the regional office did not agree with the WV Crayfish Guidance, and made it very clear in communications with WVDEP that the WV Crayfish Guidance was insufficient and not based on the best available science. Specifically, the Service stated that the WV Crayfish Guidance’s 500m “impact” threshold is arbitrary, and that existing WQS are insufficient to ensure that crayfish are protected from mining activities. The Service provided suggested changes to the WV Crayfish Guidance. These edits would have required a PEP for all new mines in the watersheds of listed crayfish, and removed the state’s reliance on WQS to prevent take of crayfish from sediment and other pollutants.<sup>65</sup>

Rather than adopt these proposed changes, the WVDEP ignored the Service and lobbied Interior Secretary Ryan Zinke to force the Service to back off from ESA oversight in West Virginia, and to allow WVDEP to continue to rely on its own guidance for crayfish. The WV Crayfish Guidance was ultimately signed on June 28, 2017 by Vincent Devito, the former Counselor to the Secretary for Energy Policy for DOI. Mr. Devito signed the WV Crayfish Guidance without consulting the Service personnel at the regional office that had provided commentary indicating that the WV Crayfish Guidance did not comply with the law, and was insufficient to ensure that crayfish were adequately protected.

Meanwhile, the Service developed its own guidance document setting forth the protocols that Service personnel (i.e. biologists at the regional office) believe are necessary to ensure that crayfish are not jeopardized by coal mining activities.<sup>66</sup> That document is dated July 12, 2017, and required a PEP for all projects within a HUC-10 watershed that has known occurrences of crayfish, as well as any HUC-12 watershed that is “likely important to the recovery of” the crayfish.<sup>67</sup> That guidance document does not rely on state WQS for protection as with the WV

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<sup>65</sup> The Service has itself acknowledged that the WV Crayfish Guidance allows mines that would be required to develop PEPs under the Service’s guidance to avoid doing so due to the arbitrary 500m threshold.

<sup>66</sup> See West Virginia Coal Mining Guidance for protecting Guyandotte River (*Cambarus veteranus*) and Big Sandy River (*Cambarus callainus*) Crayfishes.

<sup>67</sup> As the Service explained in comments to WVDEP, the Service believes that the HUC-10 protocol uses scientifically-developed, commonly used, aquatic-based units to delineate areas that may affect these species, rather than the arbitrary 500m threshold that the WVDEP employs. (“Therefore, using a watershed based approach is more scientifically sound than using some

Crayfish Guidance, but rather provides “methods needed to collect information for a complete consultation on the species.” The regional Service personnel were unaware that while they were working on their guidance document, the WV Crayfish Guidance had meanwhile been signed by Mr. Devito, a Trump-appointed DOI official, at a meeting with the WV Director of Mining. At that point, it became necessary for the Service and WVDEP to reconcile the differences between the various guidance documents. According to emails obtained through FOIA, the regional FWS personnel were told by their superiors at DOI and FWS to take the WV Guidance signed by Devito and create a version that removed those provisions that were most concerning. Under political pressure, the regional FWS office made minor changes to the WV Crayfish Guidance, which was re-issued on March 28, 2018. The March 28, 2018 version of the Service’s crayfish guidance is the same as the WV Crayfish Guidance, except for two provisions: it removed the threshold of 500m from a 3<sup>rd</sup> order stream for tributaries that require a PEP, and removed language suggesting that implementing the protocol would result in no take of crayfish.

The Service’s revised March 28, 2018 guidance document uses presence/absence surveys to determine when a PEP will be required, but as with the WV Crayfish Guidance it merely provides a key to establish when a PEP is required, but offers no guidance as to what information the PEP must contain. The Service’s 2018 guidance also relies on compliance with state WQS to ensure that crayfish will not be adversely impacted, ignoring the Service’s own prior comments regarding the inability of West Virginia’s WQS to protect listed crayfish. It is readily apparent from emails obtained through FOIA that these changes from the draft guidance were the result of political influence. Therefore, the Service’s March 28, 2018 guidance does not reflect the best available science and is insufficient to ensure that listed crayfish are not jeopardized by coal mining activities, as discussed in detail below.

Importantly, neither the WV Crayfish Guidance nor the Service’s 2018 watered-down guidance comply with the applicable regulations at 30 C.F.R. §780.16 or Section 7 of the ESA. The regulations require not only that the PEP set forth in detail the protective measures that will be implemented during active mining to prevent harm to the species, such as buffer zones and water quality monitoring, but also enhancement measures that will be implemented after mining to restore streams and develop aquatic and terrestrial habitat. The WV Crayfish Guidance and Service guidance fail to provide any discussion of enhancement measures whatsoever, and WVDEP has approved PEPs (e.g. Berwind Deep Mine No. 1) that do not contain any discussion of enhancement measures as required by the regulations. Moreover, both the WV and the Service’s crayfish guidance rely on state WQS to ensure that these imperiled species will be protected, yet the Service itself has acknowledged that the West Virginia WQS do not adequately control for sedimentation or other pollutants, such as conductivity, and may allow for selenium levels that will harm crayfish. The guidance documents will therefore not provide adequate protections for these listed crayfish, which will continue to be jeopardized by coal mining activities under either the West Virginia or Service protocol.

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arbitrary distance from a stream to determine when a project is within an area that may affect the species.”). *See* Service’s Response to WVDEP’s Comments (attached hereto).

## II. FACTUAL BACKGROUND

### A. Impacts to Listed Species from Coal Mining

The Appalachian Coalfield Region has been extensively mined. A 2005 EPA study found that an estimated 1,200 miles of headwater streams were impacted between 1992 and 2002, and 724 stream miles were covered by valley fills from 1985 to 2001.<sup>68</sup> Many additional miles of streams have been impacted since the EPA's study. The net results of the impacts of coal mining have been significant water pollution, loss of natural areas, and great reductions in biological diversity in mined places.

Coal mining practices have adverse effects on several aspects of the biological, chemical, and physical environment. These adverse impacts include: fragmentation of habitats; degradation of habitat quality; exposure of biota to changed chemical conditions in aquatic environments; and permanent loss of terrestrial and aquatic habitat. Furthermore, data published since 1996 document increasingly significant declines in numerous imperiled and federally protected taxa, and degradation of their habitats, as the result of surface coal mining.<sup>69</sup>

Appalachia has become an energy sacrifice zone, where biodiversity and human health are being devastated for coal production. Home to the greatest freshwater biological diversity in the U.S., Appalachia is a true biodiversity hot spot. Yet, coal mining is contributing to the alarming loss of species and the habitats they depend on. This has been evidenced by the vast upswing in aquatic dependent species requiring ESA protection in the Southeast region. FWS's findings in its listing decisions for such species illustrate that coal mining is a significant threat leading to species' decline. Further, already-listed species in the region are also experiencing ongoing declines due to downstream impacts from surface mining, and existing regulations are utterly failing to protect species from these impacts.

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<sup>68</sup> USEPA (2005) Mountaintop mining/valley fills in Appalachia. Final Programmatic Environmental Impact Statement, Region 3. Philadelphia.

<sup>69</sup> See Melvin Warren & Wendell Haag, *Spatio-temporal patterns of the decline of freshwater mussels in the Little South Fork Cumberland River, USA*, Biodiversity and Conservation 14: 1383–1400 (2005); James Wickham et al., *The effect of Appalachian mountaintop mining on interior forest*, Landscape Ecology 22: 179-187 (2007); Douglas Becker, D.A. et al., *Impacts of mountaintop mining on terrestrial ecosystem integrity: identifying landscape thresholds for avian species in the central Appalachians, United States*, Landscape Ecology 30: 339- 356 (2015); Emily Bernhardt & Margaret Palmer, *The environmental costs of mountaintop mining valley fill operations for aquatic ecosystems of the Central Appalachians*, Annals of the New York Academy of Sciences 1223: 39–57 (2011); Emily Bernhardt et al., *How many mountains can we mine? Assessing the regional degradation of Central Appalachian rivers by surface coal mining*, Environmental Science and Technology 46: 8115–8122 (2012).

**i. Harm to Guyandotte River and Big Sandy Crayfish from Coal Mining**

The Service recently listed two species of crayfish that are adversely affected by coal mining. The Guyandotte River crayfish (*Cambarus veteranus*) and Big Sandy crayfish (*Cambarus callianus*) are freshwater crustaceans that resemble a miniature lobster, ranging from 3-4 inches in size. Suitable instream habitat for the crayfish is generally described as clean, third order or larger (width of 4 to 20 meters (m) (13 to 66 feet (ft))), fast-flowing, permanent streams and rivers with unembedded slab boulders on a bedrock, cobble, or sand substrate. They are usually found in faster moving sections of the water, in areas with large boulders and rocks, and little sedimentation or pollution. Widespread habitat loss and fragmentation of streams have significantly reduced places where these species can be found.

The Guyandotte River crayfish was listed by FWS as an endangered species on April 7, 2016.<sup>70</sup> Today, after suffering a 92% decline across its historic range in the Upper Guyandotte River drainage of West Virginia's coalfields, this species is only found in two streams, both in Wyoming County.<sup>71</sup>

The Big Sandy crayfish was listed by FWS as a threatened species on April 7, 2016.<sup>72</sup> Overall, this species has lost 62% of its historic range across the Appalachian coalfields, including in the Upper Big Sandy drainage in southern West Virginia.<sup>73</sup> In recent years, the species has experienced short-term declines of 50-70%.<sup>74</sup>

Surface coal mining-related activities, including mountaintop removal and construction and operation of mine-related haul roads, are the primary causes of habitat loss and degradation for the Guyandotte River crayfish and Big Sandy crayfish.<sup>75</sup> These extractive activities drastically change the stream-bottom habitats these crayfish require, burying the substrate they rely on for food and shelter in sediment and degrading water quality through chemical pollution.<sup>76</sup> Mountaintop removal and associated valley fill activities also completely eradicate the streams necessary for the survival of these species.

FWS has determined that existing state and federal regulatory mechanisms, including the 1996 Biological Opinion and its related ITS, have proven inadequate to prevent the rapid habitat

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<sup>70</sup> 81 Fed. Reg. 20,450 (Apr. 7, 2016).

<sup>71</sup> *Id.* at 20,459; 20,461-62.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 20,459-61.

<sup>74</sup> R. Thoma, pers. comm., 2009.

<sup>75</sup> *Id.* at 20,466-68; 20,471-72.

<sup>76</sup> *Id.* at 20,459; 20,466-68; 20,471-72. *See also* 2016 Biological Opinion at 161-62.

destruction and extirpation of these species from their ranges.<sup>77</sup> FWS emphasized that these species are at risk of extinction due primarily to the above-listed surface mining impacts, and due to their small population sizes.<sup>78</sup> Continued surface mining within these species' historic ranges will only exacerbate their continuing slide towards extinction.

## ii. Harm to Listed Bats from Coal Mining

Coal mining activities also pose a significant risk to bats, including species listed under the ESA such as Indiana and northern long-eared bats. FWS listed the Indiana bat as endangered in 1967,<sup>79</sup> and the northern long-eared bat as a threatened species in 2015.<sup>80</sup> These are medium-sized bats that primarily fly through the understory of forested areas feeding on moths, flies, leafhoppers, caddisflies, and beetles, which they catch using echolocation or by gleaning motionless insects from vegetation.

These bats have been decimated by a disease known as white nose syndrome ("WNS"), which is caused by the fungus *Pseudogymnoascus destructans*. WNS arrived in West Virginia in 2009. The West Virginia Department of Natural Resources has documented a population decrease of nearly 60 percent since WNS arrived in the state. The bats are also threatened by habitat loss and exposure to chemicals across their range.

Due to the threat of WNS to northern long-eared bats, the FWS has recognized that:

- "WNS has reduced the redundancy and resiliency of the species."<sup>81</sup>
- "Other sources of mortality could further diminish the species' ability to persist as it experiences ongoing dramatic declines."<sup>82</sup>
- "Specifically, declines due to WNS have significantly reduced the number and size of NLEB populations in some areas of its range. This has reduced these populations to the extent that they may be increasingly vulnerable to other stressors that they may have previously had the ability to withstand."<sup>83</sup>

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<sup>77</sup> 81 Fed. Reg. 20,473 (Apr. 7, 2016). See also 2016 Biological Opinion at 162, describing FWS' expectation that continued mortality and habitat loss can only be prevented by adding numerous protections for crayfish not currently afforded under the regulatory scheme implemented pursuant to the 1996 Biological Opinion.

<sup>78</sup> *Id.* at 20,477.

<sup>79</sup> 32 Fed. Reg. 4,001 (March 11, 1967).

<sup>80</sup> USFWS, Northern Long-Eared Bat Interim Conference and Planning Guidance at 4 (January 6, 2014) (available at <https://www.fws.gov/northeast/virginiafield/pdf/nlebinterimguidance6jan2014.pdf>).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Given the extensive logging and land clearing required for coal mines, as well as the fact that bats are being decimated by WNS in this region, it is apparent that this significant habitat loss will further diminish the species' ability to persist. Absent compliance with ESA Section 7 and the implementation of species-specific measures to minimize take, these activities pose a real risk to listed bats. In fact, the Service itself has stated that:

Effects to bats from mining may occur through direct mortality, harassment, and habitat loss and degradation by elimination of forested roosting and foraging habitat. Harassment of individuals living adjacent to surface coal mining operations may occur from the increased presence of human activity, noise, and dust generated during the mining process. Such harassment could result in increased energetic costs associated with stress and abandonment of normal behaviors. Habitat could be lost directly through clearing and grubbing in riparian areas or through groundwater pumping. Groundwater pumping may result in depletion of surface flows, degradation, and loss of riparian habitats, and local declines or extirpations of aquatic and riparian plants and animals (OSMRE 2011). Loss of suitable breeding, roosting, or foraging habitat could result in reduced breeding success and stress due to competition for remaining suitable habitat. Fragmentation of forested habitats as a result of coal mining would affect connectivity of bat breeding areas and therefore reduce genetic dispersal. Population viability would be affected if populations become isolated to the extent that adults and juveniles cannot successfully disperse between remaining patches. These effects would result in fewer offspring and lowered population size.<sup>84</sup>

The Service has not issued guidance for the development of PEPs for Northern Long-Eared bats, but relies on PEP guidance for Indiana bats, even though these species have different habitat needs.<sup>85</sup> On information and belief, permits for coal mining projects that may adversely affect listed bat species have been issued in West Virginia, as well as in other states such as Virginia and Kentucky, in reliance on the 1996 Biological Opinion *after* reinitiation of consultation was commenced on the SMCRA program in April of 2017.

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<sup>84</sup> 2016 Biological Opinion at 167.

<sup>85</sup> The ranges of endangered Indiana and threatened northern long-eared bats overlap, but the two species differ in several respects. Northern long-eared bats prefer forests with greater canopy closure, since unlike Indiana bats, northern long-eared bats are an interior forest-dependent species. Jordi L. Segers & Hugh G. Broders, *Interspecific effects of forest fragmentation on bats*. CANADIAN JOURNAL OF ZOOLOGY, 92(8), 665-673 (2014). In fact, scientific research on the species documents the need for “crown closures of between 51 percent and 75 percent,” and determined that this species “may be much more negatively impacted by increased forest fragmentation” than Indiana bats. *Id.* Therefore, species-specific measures intended to mitigate take of Indiana bats would be insufficient to ensure protection of northern long-eared bats.

**B. Mines permitted by WVDEP in reliance on the 1996 Biological Opinion following reinitiation of consultation**

OSMRE and FWS reinitiated formal ESA Section 7 consultation on the SMCRA program on April 13, 2017, thereby voiding and nullifying the 1996 Biological Opinion, as discussed herein.<sup>86</sup> Since that date, WVDEP has issued numerous mining permits in the habitat of listed crayfish, and in reliance on the invalid 1996 Biological Opinion and the unlawful WV Crayfish Guidance. Internal FWS communications demonstrate the agency's awareness that WVDEP had been continuously relying on the unlawful WV Crayfish Guidance from the time of its issuance on June 28, 2017 until at least as recently as February 22, 2018.<sup>87</sup> It is not clear whether WVDEP now relies on the 2018 version of the Service's guidance, which as set forth herein is inadequate, or whether it continues to rely on its own 2017 version, which is likewise deficient. Below are examples of mines permitted by WVDEP after the reinitiation of consultation, in reliance on the 1996 Biological Opinion and the WV Crayfish Guidance. This list is limited to information obtained through FOIA requests. However, there may be other mines that have been permitted under the 1996 Biological Opinion, and which are likewise in violation of the law.

- WVDEP granted a SMCRA permit renewal to Rockwell Mining, LLC ("Rockwell") for the Huff Creek Surface Mine No. 1 (Permit ID# S400508) on April 13, 2017.<sup>88</sup> This 745-acre surface mine is located in Logan County, West Virginia, and includes two valley fills that drain into Huff Creek. FWS has identified Huff Creek as important to the recovery of the Guyandotte River crayfish. Subsequent to its permit renewal, WVDEP granted Rockwell multiple relevant SMCRA permit revisions and modifications, including on July 13, 2017, October 19, 2017, and December 19, 2017.<sup>89</sup> On information and belief, WVDEP relied upon the WV Crayfish Guidance to avoid producing a PEP for this mine.
- WVDEP granted Rockwell a SMCRA permit revision for the Eagle Surface Mine (Permit ID# S500613) on May 5, 2017.<sup>90</sup> This 436-acre surface mine is located in Wyoming County,

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<sup>86</sup> See letter from Glenda H. Owens to Gary Frazer reinitiating ESA Section 7 consultation on Title V of the Surface Mining Control and Reclamation Act (April 13, 2017).

<sup>87</sup> See February 22, 2018 email from John Schmidt to Paul Phifer (stating that "DEP continues to use Devito template"). See also February 5, 2018 email from Martin Miller to Jesse Coleman (stating that WVDEP "[is] . . . continuing to follow the Devito-approved protocol"). The WV Crayfish Guidance was authorized by DOI's Vincent Devito, as discussed herein.

<sup>88</sup> See WVDEP SMCRA permit for Huff Creek Surface Mine No. 1 (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/OMR/Permit\\_details.cfm?permit\\_id=S400508&dep\\_office\\_id=OMR&responsible\\_party\\_name=ROCKWELL%20MINING%2C%20LLC](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S400508&dep_office_id=OMR&responsible_party_name=ROCKWELL%20MINING%2C%20LLC))

<sup>89</sup> *Id.*

<sup>90</sup> See WVDEP SMCRA permit for Huff Creek Surface Mine No. 1 (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/OMR/Permit\\_details.cfm?permit\\_id=S500613](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S500613))

West Virginia, and drains into Clear Fork. Clear Fork is one of only two streams known to be occupied by the Guyandotte River crayfish.<sup>91</sup> WVDEP granted Rockwell its permit revision shortly after WVDEP notified FWS of a sediment-laden spill from the Eagle Surface Mine into Clear Fork on February 7, 2017. On March 31, 2017, WVDEP issued a show cause order (SC#1445) for the mine that resulted in Rockwell being saddled with a consent order for over a year.<sup>92</sup> In spite of Rockwell's record of noncompliance, WVDEP relied upon the WV Crayfish Guidance to avoid producing a PEP for this mine.<sup>93</sup> Additionally, WVDEP granted Rockwell multiple relevant modifications of its permits, including a SMCRA permit revision for this mine on June 13, 2017.<sup>94</sup> WVDEP also granted Rockwell a NPDES permit modification (Permit ID# WV1027956) for the mine on September 11, 2018.<sup>95</sup>

On July 16, 2018, the Service issued a letter to Appalachian Technical Services, Inc. (owner of Eagle No. 2), which states that surveys at the mine site have confirmed the presence of Guyandotte River crayfish in areas that would be affected by mining activities. Therefore, the Service concludes that:

based on the results of this survey, and the recent black water and sediment laden discharges from mining in federally listed crayfish watersheds affecting up to approximately 14.0 miles of stream, there is a likelihood that the Project could affect Guyandotte River crayfish. Therefore, the Service recommends that the Project continue its coordination with the West Virginia Department of Environmental Protection – Division of Mining and Reclamation and the Service; as well as its development of a Guyandotte River Crayfish Protection and Enhancement Plan.

It is not clear from the information provided in response to FOIA requests whether a PEP was ever developed for the Eagle Surface Mine, or whether any such PEP complies with the applicable laws and regulations, as set forth herein. It also remains unclear whether WVDEP allowed ground-disturbing activities to occur at the Eagle Surface Mine prior to the completion of the Section 7 ESA process. Regardless, this mine would impact one of the only remaining

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<sup>91</sup> 81 Fed. Reg. 20,450; 20,462 (April 7, 2016).

<sup>92</sup> See WVDEP SMCRA permit for Eagle Surface Mine, *supra* note 91.

<sup>93</sup> In response to the Center for Biological Diversity's Freedom of Information Act request, FWS provided no PEP records for this mine.

<sup>94</sup> *Id.*

<sup>95</sup> See WVDEP NPDES permit for Eagle Surface Mine (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/HPU/HPU\\_Permit\\_details.cfm?permit\\_id=WV1027956&dep\\_office\\_id=HPU&responsible\\_party\\_name=ROCKWELL%20MINING%2C%20LLC](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/HPU/HPU_Permit_details.cfm?permit_id=WV1027956&dep_office_id=HPU&responsible_party_name=ROCKWELL%20MINING%2C%20LLC)).

populations of Guyandotte River crayfish, and therefore this project has the very real potential to jeopardize the continued existence of the species.

- WVDEP granted Ramaco Resources, LLC (“Ramaco”) multiple relevant modifications of its permits, including a permit revision for the Ram Surface Mine No. 1 (Permit ID# S500713) on May 30, 2017.<sup>96</sup> This 470-acre surface mine is located in Logan County, West Virginia, and includes a valley fill that drains into Elk Creek. Elk Creek is known to FWS to be a stream that may be occupied by Guyandotte River crayfish. On information and belief, WVDEP relied upon the WV Crayfish Guidance to avoid producing a PEP for this mine.<sup>97</sup>
- In addition to multiple relevant permit modifications, WVDEP granted Ramaco a SMCRA permit for the Berwind Deep Mine No. 1 (Permit ID# U300816) on June 26, 2017.<sup>98</sup> This 29-acre underground mine is located in McDowell County, West Virginia, and drains into Right Fork of Beech Fork of Dry Fork.<sup>99</sup> Dry Fork is known to support one of the few remaining robust populations of Big Sandy crayfish.<sup>100</sup> WVDEP relied upon the 1996 Biological Opinion for take coverage for this mine, without the benefit of adequate guidance for the protection and enhancement of listed crayfish. Additionally, FWS’ concurrence with Ramaco’s PEP explicitly relied upon the 1996 Biological Opinion for take coverage prior to the issuance of the WV Crayfish Guidance and FWS crayfish guidance discussed herein.<sup>101</sup>
- WVDEP granted Consol of Kentucky, Inc. (“Consol”) a SMCRA permit (Permit ID# S500515) for the Twin Branch Surface Mine No.2 on August 14, 2017.<sup>102</sup> This 1,302-acre surface mine includes a valley fill and pond that drain into Riffe Branch in Mingo County,

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<sup>96</sup> See WVDEP SMCRA permit for Ram Surface Mine No. 1 (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/OMR/Permit\\_details.cfm?permit\\_id=S500713&dep\\_office\\_id=OMR&responsible\\_party\\_name=RAMACO%20RESOURCES%2C%20LLC](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S500713&dep_office_id=OMR&responsible_party_name=RAMACO%20RESOURCES%2C%20LLC)).

<sup>97</sup> In response to the Center for Biological Diversity’s Freedom of Information Act request, FWS provided no PEP records for this mine.

<sup>98</sup> See WVDEP SMCRA permit for Berwind Deep Mine No.1 (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/OMR/Permit\\_details.cfm?permit\\_id=U300816&dep\\_office\\_id=OMR&responsible\\_party\\_name=RAMACO%20RESOURCES%2C%20LLC](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=U300816&dep_office_id=OMR&responsible_party_name=RAMACO%20RESOURCES%2C%20LLC)).

<sup>99</sup> See letter from John Schmidt to Curtis Whitt approving the Protection and Enhancement Plan for the Berwind Deep Mine No. 1 (June 19, 2017).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See WVDEP SMCRA permit for Twin Branch Surface Mine No.2 (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/OMR/Permit\\_details.cfm?permit\\_id=S500515&dep\\_office\\_id=OMR&responsible\\_party\\_name=SOUTHEASTERN%20LAND%2C%20LLC](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=S500515&dep_office_id=OMR&responsible_party_name=SOUTHEASTERN%20LAND%2C%20LLC)).

West Virginia.<sup>103</sup> Riffe Branch drains into Pigeon Creek, a stream known to be occupied by the Big Sandy crayfish.<sup>104</sup> On August 2, 2017, WVDEP issued a letter to Consol indicating that the mine was “not likely to adversely affect” the Big Sandy crayfish. This letter relied on the 1996 Biological Opinion and the WV Crayfish Guidance. This letter listed WVDEP, WVDMR, and DOI as the consulting parties, and made no reference to FWS whatsoever. WVDEP subsequently issued a permit transfer for this mine to Southeastern Land, LLC (“Southeastern”) on December 8, 2017.<sup>105</sup> WVDEP then issued a permit revision to Southeastern for contemporaneous reclamation on July 25, 2018.<sup>106</sup> WVDEP relied upon the WV Crayfish Guidance to avoid producing a PEP for this mine.<sup>107</sup>

- In addition to multiple relevant permit modifications, WVDEP granted Ramaco a SMCRA permit (Permit ID# U500316) for the Turkeypen Branch 2Gas Deep Mine on September 27, 2017.<sup>108</sup> This 9-acre underground mine in Logan County, West Virginia drains into Turkeypen Branch of Elk Creek.<sup>109</sup> Elk Creek is known to FWS to be a stream that may be occupied by Guyandotte River crayfish. Upon information and belief, WVDEP relied upon the WV Crayfish Guidance to avoid producing a PEP for this mine. In response to the Center for Biological Diversity’s Freedom of Information Act request, FWS provided no PEP records for this mine.
- WVDEP approved the Newhall Surface Mine No. 2, Amendment No. 1, Permit Number S-4013-11, near Cucumber, WV in McDowell County in August of 2017. This 37.7 acre mine site is currently a forested area that provides habitat for the endangered Indiana bat and is within the range of the Big Sandy crayfish; however, a PEP for these species was not developed. On information and belief, WVDEP allowed this mine to avoid the development of a PEP for crayfish because it is more than 500m from a 3<sup>rd</sup> order stream with known crayfish occurrence, in reliance on the unlawful WV Crayfish Guidance.
- WVDEP approved the Jupiter Surface Mine near Maybeury, WV in Mercer and McDowell counties in July of 2017 (no permit number available). This 921.98 acre mine site is within the watershed of the Big Sandy crayfish, yet WVDEP allowed this mine to avoid the need for

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<sup>103</sup> *Id.*

<sup>104</sup> 81 Fed. Reg. 20,450; 20,460 (April 7, 2016).

<sup>105</sup> *See* WVDEP SMCRA permit for Twin Branch Surface Mine No.2, *supra* note 103.

<sup>106</sup> *Id.*

<sup>107</sup> In response to the Center for Biological Diversity’s Freedom of Information Act request, FWS provided no PEP records for this mine.

<sup>108</sup> *See* WVDEP SMCRA permit for Turkeypen Branch 2Gas Deep Mine (available at [https://apps.dep.wv.gov/WebApp/\\_dep/search/Permits/OMR/Permit\\_details.cfm?permit\\_id=U500316&dep\\_office\\_id=OMR&responsible\\_party\\_name=RAMACO%20RESOURCES%2C%20LC](https://apps.dep.wv.gov/WebApp/_dep/search/Permits/OMR/Permit_details.cfm?permit_id=U500316&dep_office_id=OMR&responsible_party_name=RAMACO%20RESOURCES%2C%20LC))

<sup>109</sup> *Id.*

development of a PEP because it is more than 500m from a 3<sup>rd</sup> order stream with known crayfish occurrence, in reliance on the unlawful WV Crayfish Guidance. On information and belief, no surveys were conducted for crayfish for this project.

These and other such mines that were approved based upon compliance with the 1996 Biological Opinion and the unlawful crayfish guidance, and absent sufficient PEPs or other protections for listed species, are in violation of the ESA as set forth below.

## **II. VIOLATIONS**

### **A. The agencies violated the ESA by permitting mines in reliance on the invalid 1996 Biological Opinion and ITS**

#### **i. Reinitiation of consultation invalidated the 1996 Biological Opinion and ITS**

The April 2017 reinitiation of programmatic ESA Section 7 consultation on the SMCRA program invalidated the prior 1996 Biological Opinion and ITS, annulling the take coverage that the agencies continue to rely on for ESA compliance when permitting surface coal mines. Ongoing reliance on the 1996 Biological Opinion and ITS is therefore unlawful. At this time, the only way to comply with the ESA is to require mining projects to be authorized under a project-specific Section 7 or Section 10 process pending completion of the programmatic consultation.

It is well settled that the reinitiation of consultation invalidates the prior biological opinion and ITS, “requir[ing] the Fish and Wildlife Service to issue a new Biological Opinion before a project may go forward.”<sup>110</sup> This is especially true where consultation has been reinitiated on a program that has proven to be entirely ineffective. In fact, FWS has concluded that “despite the environmental protections granted by SMCRA and the permit review process analyzed in the 1996 Biological Opinion, surface coal mining operations continue to negatively impact threatened and endangered species and the habitats upon which they depend.”<sup>111</sup> It is therefore entirely arbitrary and capricious for the agencies to continue to rely on the 1996 Biological Opinion where the Service itself has determined that it must be replaced to ensure that species are not being jeopardized by surface coal mining activities, and a formal consultation process is underway to create a new program for SMCRA-ESA compliance.

Furthermore, pursuant to the Service’s revised regulations defining “framework programmatic action,” programmatic consultations, such as for the SMCRA program, should not result in the issuance of an ITS, but rather any incidental take must be subsequently authorized under a project-specific Section 7 or Section 10 process.<sup>112</sup> Therefore, continuing to rely on an outdated

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<sup>110</sup> See e.g. *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1451 (9th Cir. 1992).

<sup>111</sup> 2016 Biological Opinion at 107 (emphasis added).

<sup>112</sup> See 80 Fed. Reg. 26,832 (May 11, 2015) (adding definition of “framework programmatic action” to 50 C.F.R. § 402.02 and adding 50 C.F.R. § 402.14(i)(1)(6) on incidental take

1996 programmatic ITS to approve mining activities under the SMCRA program is inconsistent with the Service's current regulations requiring site-specific consultation, and is especially troubling given that the Service has itself called into question the efficacy of the 1996 Biological Opinion's broad take coverage. Rather, at this time the agencies can only fulfill their ESA duties by obtaining site-specific take coverage under ESA Sections 7 or 10.<sup>113</sup>

In sum, OSMRE, FWS and WVDEP may no longer rely on the 1996 Biological Opinion and ITS for take coverage now that programmatic consultation has been reinitiated.<sup>114</sup> The permitting of mines in reliance on the 1996 Biological Opinion and ITS after the reinitiation of consultation is unlawful, arbitrary and capricious agency action.<sup>115</sup>

**ii. The 1996 Biological Opinion and ITS are otherwise invalid and cannot provide take coverage for SMCRA-regulated activities**

Even if OSMRE and the Service had not reinitiated consultation on the SMCRA program, the 1996 Biological Opinion cannot provide valid take coverage for surface coal mining activities. As the Service itself has acknowledged, the 1996 Biological Opinion cannot ensure that surface coal mining and reclamation activities will not jeopardize the continued existence of listed species. Since the 1996 Biological Opinion itself does not meet the requirements of Section

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statements not being required at the programmatic level where subsequent actions resulting in incidental take will be separately consulted on).

<sup>113</sup> Those site-specific consultations, however, must incorporate the new scientific information being analyzed for the programmatic SMCRA consultation, or else the agencies must wait until that process is completed to conduct ESA review. This is consistent with the Service's Consultation Handbook, which states that "[i]f relevant data are known to be available to the agency or will be available as the result of ongoing or imminent studies, the Services should request those data and any other analyses required by the regulations at 50 CFR §402.14(c), or suggest that consultation be postponed until those data or analyses are available..." U.S. Fish and Wildlife Service, Endangered Species Consultation Handbook (March 1998) at 1-6 (emphasis added). Here, the letter reinitiating consultation specifically states that OSMRE expects the reinitiated consultation "to include new science and cover all aspects of OSMRE's implementation of Title V..." Since there is admittedly "new science" regarding the impacts to listed species from surface coal mining, any Section 7 consultation on such activities must include that new information or should be postponed until after the programmatic consultation has been completed, so that this "new science" can be properly incorporated into the SMCRA ESA process to ensure that listed species are not continuing to be jeopardized by SMCRA-regulated activities.

<sup>114</sup> This also applies to other regulatory authorities that continue to rely on the 1996 Biological Opinion for ESA compliance, including Virginia and Kentucky where, on information and belief, permits for coal mining activities that may adversely affect listed bat species are being issued in reliance on the unlawful 1996 Biological Opinion.

<sup>115</sup> See *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (citing 5 U.S.C. § 706(2)(A)); also see *Mount Graham Red Squirrel*, 954 F.2d at 1451.

7(a)(2) of the ESA and the terms of that opinion are insufficient to protect listed species, continued reliance on the 1996 Biological Opinion is arbitrary and capricious.

The 1996 Biological Opinion suffers many legal flaws that bear on the survival and recovery of listed species. These flaws include the lack of RPMs to minimize the impact of incidental take.<sup>116</sup> The only RPM provided in the 1996 Biological Opinion is compliance with the terms and conditions of the ITS; however, the terms and conditions of the ITS do not include any quantification of take for any listed species and there is no provision in the ITS whereby FWS may assess the level of take in order to ensure that authorized take levels are not being exceeded, thereby putting species in jeopardy. Hence, the 1996 Biological Opinion and ITS cannot serve one of the most important functions: tracking the authorized take of a species in order to avoid authorizing so much take that jeopardy results.<sup>117</sup>

Moreover, even though no specific amount of take was authorized under the 1996 Biological Opinion and ITS, SMCRA-regulated coal mining activities have clearly exceeded the amount of take that was contemplated. For example, FWS noted that new species listings required OSMRE and FWS to revisit the efficacy of the 1996 Biological Opinion, stating that the recent listing of the Big Sandy crayfish and the Guyandotte River crayfish “illustrate the inadequacy of the current SMCRA regulatory environment in protecting fish and wildlife and the habitats upon which they depend.”<sup>118</sup> Similarly, FWS concluded that “despite the environmental protections granted by SMCRA and the permit review process analyzed in the 1996 Biological Opinion, surface coal mining operations continue to negatively impact threatened and endangered species and the habitats upon which they depend.”<sup>119</sup> Therefore, it is readily apparent that the amount of take that was expected to occur under the process set forth in the 1996 Biological Opinion has been exceeded.

The Service’s Consultation Handbook states that “[i]n instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.”<sup>120</sup> While the 1996 Biological Opinion provides for “an unquantifiable level of take” and authorized “the unavoidable taking of some individuals” of any listed species affected by surface coal

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<sup>116</sup> 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii) (specifying that incidental take statements must include reasonable and prudent measures to minimize incidental take of species).

<sup>117</sup> See 16 U.S.C. § 1536(b)(4)(C)(i); 50 C.F.R. §§ 402.14(i)(1)(i), 402.14(i)(3) and 402.14(i)(4) (requiring that incidental take statements specify the impact, i.e., the amount or extent, of incidental take allowed and requiring FWS to monitor the impacts and reinitiate consultation if the amount or extent of take exceeds the allowed take).

<sup>118</sup> 2016 Biological Opinion at 121.

<sup>119</sup> *Id.* at 107.

<sup>120</sup> See e.g. Endangered Species Consultation Handbook at 4-64, B-12.

mining,<sup>121</sup> it is evident from the Service’s statements in the 2016 SPR and 2016 Biological Opinion that SMCRA-regulated activities are exceeding an acceptable level of take, and all operations causing such take must therefore cease.

In addition, the 1996 Biological Opinion purports to provide incidental take coverage for all coal operations as to all species for all time. This overly broad coverage does not meet the requirements of FWS’s programmatic ITS regulations, nor does it meet the basic requirements regarding reinitiation of consultation when new species are listed.<sup>122</sup> Thus, because the 1996 Biological Opinion does not comply with ESA section 7(a)(2), even full adherence to its terms will not excuse violations of the ESA. Therefore, the continued reliance on the 1996 Biological Opinion will not satisfy OSMRE’s and WVDEP’s duty to ensure that listed species are not jeopardized by SMCRA-regulated mining activities.

The activities causing this harm to listed species must therefore cease pending completion of the reinitiated consultation. That includes the issuance of permits as well as any ground-disturbing activities undertaken pursuant to a SMCRA-regulated program that was authorized under the 1996 Biological Opinion, in West Virginia as well as other states, such as Virginia and Kentucky. OSMRE and WVDEP and other regulatory authorities may not rely on the 1996 Biological Opinion and ITS for take coverage, and at this time all such activities may only be authorized under a project-specific Section 7 or Section 10 process, as discussed herein.

**iii. The 1996 Biological Opinion and ITS are invalid as applied to the Guyandotte River crayfish and Big Sandy crayfish**

Even if the 1996 Biological Opinion was still legally in effect, the incidental take coverage of that Biological Opinion cannot possibly apply to the Guyandotte River crayfish or the Big Sandy crayfish, which were listed 20 years after the 1996 Biological Opinion was published. The continued reliance on the 1996 Biological Opinion to approve mines that may adversely affect these crayfish is in direct violation of ESA Section 7 and its implementing regulations, which further exposes the responsible agencies (and mining companies) to Section 9 take liability.

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<sup>121</sup> 1996 Biological Opinion at 11. The ITS does not specify the amount or extent of take allowed as required pursuant to 50 C.F.R. §402.14(i)(1)(i), and therefore it does not contain an explicit trigger for reinitiation of consultation where take exceeds allowable levels.

<sup>122</sup> See 50 C.F.R. § 402.14(i)(1)(i) (requiring ITS for “mixed programmatic actions” to “[s]pecific[y] the impact, i.e., the amount or extent, of such incidental taking on the species....);” 50 C.F.R. § 402.16(d) (requiring reinitiation when new species are listed). Pursuant to Section 402.14(i)(1)(i), “[a] surrogate ... may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.” The 1996 Biological Opinion does not specify the anticipated take of any species, nor does it provide a surrogate for this analysis.

First, the 1996 Biological Opinion cannot provide take coverage for a species listed after the 1996 Biological Opinion was approved. Pursuant to the applicable regulations, reinitiation of consultation is required when “a new species is listed or critical habitat designated that may be affected by the identified action.”<sup>123</sup> OSMRE appears to acknowledge this, stating in its April 2017 reinitiation letter that reinitiation is appropriate in part because “new species have been listed that may be affected by the SMCRA regulatory program.”

An ITS simply cannot provide take coverage for a later-listed species unless and until the Biological Opinion and ITS are amended or updated to include the new species. That is the purpose of requiring reinitiation of consultation when new species are listed. If the agencies could continue to act in reliance on an outdated ITS, it would risk jeopardizing the newly listed species, in direct violation of ESA Section 7.

As noted above, FWS listed the crayfish in 2016—twenty years after the 1996 Biological Opinion was issued. Therefore, at the time of the 1996 consultation the Service was likely not even aware of the threat posed by surface coal mining to these species, and could not possibly have considered the specific threats and mitigation needs of the crayfish. In fact, the listing decision for the crayfish notes that “physical changes to local waterways associated with coal mining include increased erosion and sedimentation . . . which can contribute to stream bottom embeddedness . . . and are of particular concern for these species, which, as tertiary burrowers, rely on unembedded slab boulders for shelter,”<sup>124</sup> and “surface coal mining causes significant geomorphic disturbances with long-term consequences for the region’s streams,” including the “complete burial of headwater streams.”<sup>125</sup> The listing decision also notes that metals (e.g., selenium), salinity and pH impairments associated with coal mining are adversely affecting crayfish, relying on studies from 2005-2015. This is all new information that was unavailable when the 1996 Biological Opinion was drafted.<sup>126</sup>

The 2016 listing of these species therefore presents new species-specific issues and concerns that were not addressed in the 1996 Biological Opinion, and thus take coverage is not available under the 1996 ITS. The listing of these crayfish requires OSMRE and FWS to reinitiate formal consultation to ensure that coal mining activities do not jeopardize the continued existence of these species, and at this time the 1996 Biological Opinion’s ITS cannot provide take coverage for coal mining operations that will adversely affect listed crayfish.

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<sup>123</sup> 50 C.F.R. § 402.16(d). While the 1996 Biological Opinion itself does not provide for reinitiation when new species are listed, this is contrary to the ESA and the plain terms of the Section 7 regulations, rendering the Biological Opinion *ultra vires* invalid, but certainly invalid as it applies to species listed after the 1996 Biological Opinion issued.

<sup>124</sup> 81 Fed. Reg. 20,466 (April 7, 2016).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 20,471. This new information is yet another reason why OSM and FWS needed to reinitiate consultation on the 1996 Biological Opinion, rendering the take coverage invalid for the crayfish at this time. 50 C.F.R. § 402.16(b).

Second, the 1996 Biological Opinion is predicated on FWS's finding that "properly implemented" SMCRA programs "are not likely to jeopardize the continued existence of listed or proposed species."<sup>127</sup> This finding, in turn, is based on assumed compliance with applicable SMCRA regulations and the development by FWS and OSMRE of species-specific measures to minimize take.<sup>128</sup> The development by FWS and OSMRE of species-specific measures to minimize take is a clear condition of the 1996 Biological Opinion's ITS, and implementation of site-specific measures is required through the SMCRA permit.<sup>129</sup>

The 1996 Biological Opinion leaves no doubt that the development and inclusion of site- and species-specific measures to minimize take is necessary in order to ensure that the actions authorized by the ITS do not jeopardize listed species. The 1996 Biological Opinion provides for an "unquantifiable level" of take based on the programmatic nature of the consultation, but adds that:

To insure protection for species expected to be taken at an unquantifiable level, the Service must have a mechanism to develop, in close coordination and cooperation with OSM and State regulatory authorities, any necessary site-specific measures to minimize potential take. These measures must be enforceable under the mining permit.<sup>130</sup>

To fulfill its duties pursuant to the 1996 Biological Opinion, FWS must issue PEP Guidelines to ensure that PEPs are developed with the mitigation necessary to "minimize disturbances and adverse impacts" to listed species.<sup>131</sup> Such guidelines are the means by which OSMRE and states fulfill their responsibilities under the 1996 Biological Opinion. In fact, the PEP Guidelines for Indiana bats acknowledge that such guidelines are "the measures that must be implemented by [regulatory agencies] and mining applicants to ensure compliance with the 1996 [Biological Opinion]."<sup>132</sup> FWS further acknowledges in the Indiana Bat PEP Guidelines that:

The 1996 [Biological Opinion] requires that each State "must implement and require compliance with any species-specific protective measures developed by the FWS field office and the regulatory authority with the involvement, as appropriate, of the permittee and OSM." This document sets the minimum standards for development of the species-specific protective measures and provides predictability in the SMCRA

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<sup>127</sup> 1996 Biological Opinion at 10.

<sup>128</sup> *Id.* at 10, 13 ("As a condition of this non-jeopardy opinion and incidental take statement, the Service and the appropriate regulatory authority. . . must develop species-specific measures to minimize anticipated incidental take.").

<sup>129</sup> *Id.* at 13.

<sup>130</sup> *Id.* at 12 (emphasis added).

<sup>131</sup> 30 C.F.R. § 780.16(b).

<sup>132</sup> U.S. FISH AND WILDLIFE SERVICE, RANGE-WIDE INDIANA BAT PROTECTION AND ENHANCEMENT PLAN GUIDELINES (2009), *available at* <http://www.fws.gov/frankfort/pdf/INBATPEPGuidelines.pdf>.

permitting process relative to the preparation of a Protection and Enhancement Plan (PEP) by an applicant.<sup>133</sup>

However, FWS failed to issue guidance for the Guyandotte River crayfish or the Big Sandy crayfish until 2018 – 2 years after the crayfish were listed – and several mines that may affect crayfish were permitted under the 1996 Biological Opinion prior to the promulgation of that guidance. Furthermore, the crayfish guidance developed by FWS does not provide the guidance necessary to ensure that adequate PEPs are developed for the crayfish, since it fails to provide species-specific measures to minimize take, and relies on inadequate state WQS to ensure protection of crayfish. In fact, the current, 2018 version of the FWS crayfish guidance (which was developed by WVDEP) merely sets forth a process for determining when a PEP will be required, along with water quality monitoring guidelines; yet, the Service itself has acknowledged that existing state WQS are not protective of crayfish. FWS has failed to provide the specific information that must actually be included in a PEP, and there is no discussion or analysis as to how listed crayfish will be protected (much less enhanced) from the continuing contamination of their habitat from mining activities.<sup>134</sup> As set forth herein, the Service’s guidance does not meet the requirements of the applicable regulations for PEPs,<sup>135</sup> and is insufficient to ensure that listed crayfish will not be jeopardized.

Since there is no legally sufficient PEP guidance from the Service, there is no way to know whether states are approving mines with the mitigation necessary to ensure that these species are protected. In West Virginia, the Service even allowed the state to follow its own guidance, though the Service was well aware that the WV Crayfish Guidance is not based on the best available science and will not prevent continued harm to crayfish. The Service therefore failed to comply with the express provisions of the 1996 Biological Opinion, rendering it impotent to provide take coverage for the crayfish, since it is well-settled that violations of the terms and conditions of a biological opinion and ITS “abrogates the safe harbor provision of the ITS,” and exposes agencies to take liability.<sup>136</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> When you compare the Service’s crayfish guidance with the PEP guidance that it promulgated for Indiana bats, the inadequacy of the crayfish guidance becomes readily apparent. While the Indiana bat guidance contains detailed information on the species, the process for developing a PEP, and several pages of mitigation measures, the crayfish guidance provides a key for determining when a PEP is required, followed by a protocol that merely requires monitoring to ensure that existing water quality standards are met; yet, these same “protective measures” (*i.e.* compliance with state WQS) have been in place for years, and the crayfish have clearly not been protected from the adverse impacts of mining activities, as evidenced by the need to list them under the ESA. The guidance fails to provide measures to actually protect these species, and is patently insufficient and incomplete.

<sup>135</sup> 30 C.F.R. §780.16.

<sup>136</sup> See *Bennett v. Spear*, 520 U.S. 154, 170 (1997); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007); *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1580 (9th Cir. 1993) (held that violation of an ITS would remove protective coverage

In sum, the 1996 Biological Opinion and ITS cannot provide take coverage for mining activities that harm Guyandotte River crayfish or Big Sandy crayfish. The issuance of permits in reliance on the 1996 Biological Opinion for mining activities that may affect these crayfish violates the ESA.

**B. No mines or mining activity may be permitted in reliance on the 1996 Biological Opinion pursuant to ESA Section 7(d)**

As set forth above, the 1996 Biological Opinion can no longer be considered valid, and there is currently no lawful ITS providing take coverage for the SMCRA program. Pursuant to ESA Section 7(d), following the reinitiation of consultation on the SMCRA program, OSMRE, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures...” pending completion of that consultation.<sup>137</sup> The purpose of Section 7(d) is to maintain the environmental status quo pending the completion of consultation. WVDEP’s issuance of permits for the mines described above in reliance on the outdated 1996 Biological Opinion after reinitiation of consultation commenced is in direct violation of Section 7(d).

Contrary to the unsubstantiated and illogical claims in OSMRE’s 7(d) determination letter, the issuance of permits for surface coal mining is clearly an irretrievable and irreversible commitment of resources. OSMRE fails entirely to explain how the issuance of such permits will not result in activities that may adversely affect listed species, such as land clearing and mining activities that would foreclose the implementation of mitigation or other measures (*i.e.* avoidance protocols and riparian buffers) to prevent harm to affected species. Rather, OSMRE relies solely on its commitment to ensuring, through oversight and enforcement, that state programs implement the regulatory requirements under SMCRA and the terms and conditions of the 1996 Biological Opinion.<sup>138</sup> However, these are the same measures that have been in place for the past twenty years, and which FWS has found to be inadequate to protect listed species, requiring reinitiation of consultation. It remains entirely unclear how OSMRE’s continued implementation of an admittedly failed program that has resulted in significant harm to listed species would prevent further irreversible harm in such a manner as to comply with ESA Sections 7(a)(2) and 7(d). That is simply illogical.

Rather, pursuant to the clear language of Section 7(d), pending the completion of the reinitiated consultation no regulatory authority, including OSMRE and WVDEP, may issue any permits in reliance on the 1996 Biological Opinion and ITS, and must not allow land-clearing or other

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from take liability); *Or. Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 995 (D. Or. 2010); *see also South Yuba*, 629 F. Supp. 2d at 1132; *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 637 F.3d 259, 260 (4th Cir. 2011).

<sup>137</sup> 16 U.S.C. § 1536(d).

<sup>138</sup> *See* Glenda H. Owens, Endangered Species Act Section 7(d) Determination for the SMCRA Title V Program (April 13, 2017).

mining activities to occur at any mine sites absent compliance with the requirements of Section 7(a)(2) of the ESA.<sup>139</sup>

In sum, the regulatory authorities must maintain the environmental status quo while a new programmatic biological opinion is developed. The issuance of permits for the above-described mines in reliance on the 1996 Biological Opinion violates ESA Section 7(d). All such permits must be revoked, and no further permits may be issued in reliance on the invalid 1996 ITS.

### **C. OSMRE and the Service are in violation of ESA Sections 7(a)(1) and 7(a)(2)**

The Service has admitted that the regulatory environment under the 1996 Biological Opinion is “not sufficiently protective of species and their habitats,” as indicated by the failure to adequately address the physical, chemical, or biotic stressors that are a direct or indirect result of surface coal mining, and because adverse effects on listed species are not being sufficiently evaluated, monitored or minimized.<sup>140</sup> There is, therefore, no program in place to ensure that species are not being jeopardized by SMCRA-regulated surface coal mining activities, in violation of ESA Sections 7(a)(1) and 7(a)(2).

Consultation was reinitiated nearly two years ago, and there is no indication that this process will be completed anytime soon. The continued reliance on the 1996 Biological Opinion and ongoing permitting of mines absent valid Section 7 consultation and take coverage is a clear violation of the agencies’ duties to carry out programs for the conservation of listed species and to ensure that agency actions are undertaken consistent with the purposes of the ESA pursuant to ESA Section 7(a)(1). Furthermore, any ongoing permitting pending completion of valid Section 7 consultation violates the agencies’ duties to ensure that agency actions are not likely to jeopardize the continued existence of listed species pursuant to ESA Section 7(a)(2).

As set forth above, ESA Section 7(a)(1) imposes a mandatory duty on all federal agencies, in consultation with the Service, to “carry[] out programs for the conservation”—*i.e.* recovery—of listed species, and section 7(a)(2) requires agencies to avoid jeopardy and adverse modification of critical habitat, through the consultation process.<sup>141</sup> If ever there were a situation in which an agency must be required to consult with the Service in order to develop and implement a conservation program as required by section 7(a)(1) and 7(a)(2) *this is that case*. As set forth above, the impacts of surface coal mining on listed species are well-documented, and even the Service has acknowledged the inadequacy of the current SMCRA regulatory environment in protecting fish and wildlife and the habitats upon which they depend from the adverse impacts of coal mining.<sup>142</sup>

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<sup>139</sup> See *e.g. Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992) (Reinitiation of consultation requires the Service to issue a new biological opinion before a project may go forward).

<sup>140</sup> 2016 Biological Opinion at 122.

<sup>141</sup> 16 U.S.C. § 1536(a)(1) and (a)(2); see also *id.* § 1532(3).

<sup>142</sup> See 2016 Biological Opinion, discussed *supra* (“[i]t is no longer possible to rely on the 1996 Biological Opinion to conclude that the existing regulatory environment (prior to 2016 MOU and

FWS and OSMRE's pattern and practice of failing to ensure that species will be protected under the existing program has, in fact, been recognized by courts. In *West Virginia Highlands Conservancy*, for example, the court detailed the damage done by OSMRE's refusal to properly oversee the inadequate West Virginia program. It noted many direct impacts and wide-ranging indirect impacts, finding:

[A] climate of lawlessness, which creates a pervasive impression that continued disregard for federal law and statutory requirements goes unpunished, or possibly unnoticed. Agency warnings have no more effect than a wink and a nod, a deadline is just an arbitrary date on the calendar and, once passed, not to be mentioned again. Financial benefits accrue to the owners and operators who were not required to incur the statutory burden and costs attendant to surface mining; political benefits accrue to the state executive and legislators who escape accountability while the mining industry gets a free pass. Why should the state actors do otherwise when the federal regulatory enforcers' findings, requirements, and warnings remain toothless and without effect?<sup>143</sup>

The systematic pattern of renegade lawlessness described by the *Highlands Conservancy* court remains firmly entrenched under the circumstances described herein. OSMRE is manifestly not fulfilling its duty to evaluate and oversee the administration of the West Virginia SMCRA program (or elsewhere), and consequently the program is not being properly implemented. Ultimately, species are being jeopardized by SMCRA-regulated surface coal mining activities, because no program is in place to conserve listed species, in clear violation of ESA Section 7.<sup>144</sup>

Furthermore, as set forth above, data published since 1996 document increasingly significant declines in numerous species and degradation of their habitats as the result of surface coal mining. FWS has, in fact, noted that new species listings required OSMRE and FWS to revisit the efficacy of the 1996 Biological Opinion, stating that the recent listing of the Big Sandy

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Stream Protection Rule implementation) would not result in jeopardy or adverse modification of ESA-listed resources.”).

<sup>143</sup> *West Virginia Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676, 684 (S.D. W.V. 2001).

<sup>144</sup> In interpreting Congress's intent behind section 7(a)(1), the Supreme Court has explained that this provision requires agencies to engage in *affirmative* activities to protect endangered species. See *Hill*, 437 U.S. at 183-84 (The Department of “Agriculture . . . will have to take action to see that [the imperilment of species] is not permitted to worsen, and that these [species] are not driven to extinction. . . . [T]he agencies of Government can no longer plead they can do nothing about it. They can, and they must. The law is clear.”) (citing 119 Cong. Rec. 42913 (1973)); see also *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1417 (9th Cir. 1990) (finding that “agencies have affirmative obligations to conserve under section 7(a)(1)”); *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998) (“Given the plain language of the statute and its legislative history, we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each of the species.”).

crayfish and the Guyandotte River crayfish “illustrate the inadequacy of the current SMCRA regulatory environment in protecting fish and wildlife and the habitats upon which they depend.”<sup>145</sup>

The agencies have therefore failed to ensure that SMCRA-regulated mining activities are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of their habitat. OSMRE and FWS are clearly not fulfilling their duty to evaluate and oversee the administration of the SMCRA program. Therefore, there is no program in place to ensure that species are not being jeopardized by SMCRA-regulated surface coal mining activities, and the agencies have failed to properly implement the ESA to ensure that species are not jeopardized by coal mining. The agencies have not acted in a timely manner to correct these violations of the ESA by completing the reinitiated consultation, and are erroneously relying on the invalid 1996 Biological Opinion in the interim. This is a clear violation of ESA Sections 7(a)(1) and 7(a)(2).

**D. The WV and Service Crayfish Guidance Violate the ESA and the Service has Abandoned Its ESA Responsibilities to Protect Species**

While it remains unclear whether WVDEP continues to rely on the WV Crayfish Guidance or the watered-down version of the Service’s guidance that was issued in March of 2018, in either case the issuance of permits in reliance on these documents is unlawful and will result in harm, and even jeopardy, to imperiled crayfish species.

As set forth above, the Service itself has made it clear that the WV Crayfish Guidance does not meet even the most basic requirement of the ESA: that it employ the best available science to ensure that listed species are not jeopardized. The WV Crayfish Guidance arbitrarily requires the development of a PEP only when the mining activities impact a tributary to a 3<sup>rd</sup> order stream that is within 500m of a 3<sup>rd</sup> order stream with known crayfish occurrence, and when surveys show that crayfish are present. This ignores feedback provided by the Service stating that there is simply no science to support that threshold, which furthermore does not account for downstream effects that may occur from other mining projects within the watershed.<sup>146</sup> This faulty standard has resulted in numerous mines being permitted absent sufficient analysis and implementation of protective and enhancement measures necessary to ensure that these crayfish are not jeopardized. The WV Crayfish Guidance also fails to include measures for habitat enhancement that will be implemented after mining to restore streams and develop aquatic and terrestrial habitat, as required by 30 C.F.R. §780.16.

The Service’s March 2018 guidance is not much better – in fact it is nearly identical to the WV Crayfish Guidance. While the Service’s guidance removes the arbitrary 500m threshold, it continues to rely on existing state WQS to protect the crayfish. However, as set forth above, statements made by Service biologists at the regional office indicate that maintaining these

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<sup>145</sup> 2016 Biological Opinion at 121.

<sup>146</sup> The Service also inexplicably failed to elevate the matter using the dispute resolution guidelines set forth in the 1996 Biological Opinion.

standards is insufficient to prevent continued harm to crayfish habitat. Therefore, either protocol will continue to allow mining operations to jeopardize these imperiled species. In fact, the Service explained to WVDEP that the West Virginia WQS have not been reviewed to determine if they are protective of crayfish, as the prior review of those standards was conducted before the crayfish were listed, and noted that the Service has provided comments to the EPA regarding the need for additional analysis to determine if the proposed revisions to the selenium criteria will be protective of crayfish. Moreover, crayfish are thought to be affected by high conductivity levels, which are exacerbated by coal mining activities.<sup>147</sup> Yet, West Virginia's WQS do not directly address conductivity at all. It is therefore clear that the state WQS are inadequate to protect crayfish, and continuing to rely on them violates the best available science standard of the ESA, and is arbitrary and capricious. The fact that these WQS have been in place for decades, yet the crayfish species were recently listed specifically because of harm from coal mining activities, indicates that WVDEP's continued reliance on those WQS will not prevent further harm to the species. Therefore, the scheme that both West Virginia and the Service (in 2018) adopted for ESA compliance with regard to these crayfish is in violation of the ESA.

Both the WV and the Service's 2018 guidance also fail to ensure that PEPs will be completed for all mining projects that may affect listed crayfish, since they rely on surveys that cannot possibly ensure the avoidance of adverse effects to crayfish or their habitat. Since the crayfish are listed as threatened and endangered, they are by definition hard to find. As such, the WV Crayfish Guidance and the 2018 FWS guidance both allow for mines to proceed in potential crayfish habitat without the protections of a PEP, simply because a particular survey may have failed to turn up individual crayfish. Therefore, altering the scheme to rely on surveys, rather than requiring PEPs when potential habitat would be affected, as in the Service's draft guidance (dated July 12, 2017), is inconsistent with sound science and is insufficient to prevent further harm, and possible jeopardy, to crayfish.

Moreover, these guidance documents merely set forth a process for determining when a PEP will be required. They do not provide the specific information that must actually be included in a PEP, and there is no discussion or analysis as to how listed crayfish habitat will be protected (much less enhanced) from the continuing contamination from mining activities. The Service has therefore failed to implement the best available science or to adhere to the requirements of 30 CFR § 780.16. The existing crayfish guidance is inconsistent with the requirements of the ESA, and is arbitrary and capricious.

In sum, the Service has failed to ensure that adequate guidance is implemented for crayfish, ultimately approving guidance that does not meet the requirements of the ESA. Unfortunately, even though the Service made it explicit that the WV Crayfish Guidance is insufficient, it allowed WVDEP to employ that guidance and to ignore the guidance that the Service itself developed in 2017. It is clear from agency correspondence obtained through FOIA that the Service changed its draft guidance based on political pressure from mining companies and lobbyists, Trump-appointed officials, the WVDEP, and the WV state Division of Mining and Reclamation. Most importantly, the correspondence reveals that these politically-motivated

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<sup>147</sup> See 81 Fed. Reg. 20,454.

changes were not based on sound science and undermined the professional, expert work that was done at the regional office based on the best available science. OSMRE has likewise simply put its head in the sand and ignored its duty to oversee and ensure state compliance with SMCRA and the ESA.<sup>148</sup> The agencies have thereby abdicated and/or unlawfully delegated their duties under SMCRA and the ESA, and have failed to ensure that listed species will not be jeopardized by coal mining activities in violation of the ESA and APA.<sup>149</sup>

#### **E. The WVDEP is in Violation of Section 9 of the ESA**

Allowing activities that may harm federally-protected species absent valid take coverage opens up state and private actors to liability under Section 9 of the ESA.<sup>150</sup> The WVDEP permitted the Huff Creek Surface Mine No. 1, Eagle Surface Mine, Ram Surface Mine No. 1, Berwind Deep Mine No. 1, Twin Branch Surface Mine No. 2, Turkeypen Branch 2Gas Deep Mine, and potentially other such mines in reliance on the 1996 Biological Opinion and ITS after the Service had reinitiated consultation on the SMCRA program, and on information and belief it continues to rely on the 1996 Biological Opinion for ESA compliance. WVDEP also issued many of these permits in the absence of PEPs, in reliance on the unlawful WV Crayfish Guidance that allowed several mines that would potentially harm crayfish habitat to move forward. As set forth above, the 1996 Biological Opinion and ITS no longer provide valid take coverage for surface coal mining activities, and certainly cannot cover impacts to the recently-listed crayfish.

Furthermore, the state cannot rely on the WV Crayfish Guidance or the Services 2018 crayfish guidance for ESA compliance, since neither of those documents complies with the law. As set forth above, both protocols lack provisions for the enhancement or crayfish habitat, and rely on inadequate state WQS to prevent take.

WVDEP is thereby subject to ESA Section 9 take liability for authorizing, and continuing to authorize, land clearing and mining activities at these and other mines if any such activities result in harm to listed species. WVDEP must take immediate action to prevent harm from occurring (*i.e.* by issuing stop work orders and/or revoking permits until the agency complies with the ESA).

It is further evident that surface mining-related activities at the aforementioned WVDEP-permitted mine sites would indeed cause harm to the federally endangered Guyandotte River crayfish and the federally threatened Big Sandy crayfish. In the absence of additional, meaningful protections, physical harm to populations and individuals of these species will result in unlawful “take in the form of harassment, mortality, and harm through habitat loss and degradation.”<sup>151</sup> Here the substantial land clearing, soil disturbance and valley fill activities

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<sup>148</sup> 30 U.S.C. § 1271(b); 30 CFR §§ 780.16, 773.15(j).

<sup>149</sup> See *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 955 (9th Cir. 2003) (in the context of consultation requirements to prevent jeopardy pursuant to section 7(a)(2) of the ESA, stating that federal agencies cannot delegate the protection of the environment to outside parties).

<sup>150</sup> 16 U.S.C. §§ 1532(13), 1532(18); 1538(a)(1)(B); 50 C.F.R. § 17.3.

<sup>151</sup> 2016 Biological Opinion at 162.

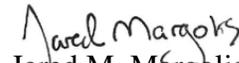
authorized by WVDEP will cause habitat modification resulting in death or injury to the Guyandotte River crayfish and Big Sandy crayfish by destroying and degrading in-stream habitat relied upon by these species for breeding, feeding and sheltering.

### **III. CONCLUSION**

For the forgoing reasons, OSMRE, WVDEP and FWS may not rely on the 1996 Biological Opinion and ITS for compliance with the ESA. The approval of mines in reliance on the 1996 Biological Opinion, the WV Crayfish Guidance, and/or the 2018 FWS crayfish guidance violates the ESA, and is arbitrary and capricious agency action. Furthermore, the agencies must maintain the environmental status quo until the reinitiated consultation is complete. No land clearing or mining activities should be allowed to move forward absent full compliance with the ESA.

Please do not hesitate to contact me if I can provide additional information or otherwise assist in this matter, rather than having to resort to the judicial remedies provided by the ESA. We look forward to your prompt response.

Sincerely,

  
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