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***Sent via Email and Certified Mail Return Receipt Requested***

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**Re: Notice of Intent to Sue for Violations of the Endangered Species Act for Failure to Implement the *Final Programmatic Biological Opinion and Conference Opinion on the United States Department of the Interior Office of Surface Mining Reclamation and Enforcement's Surface Mining Control and Reclamation Act Title V Regulatory Program***

Dear Sir/Madam:

The Center for Biological Diversity (“Center”)<sup>1</sup> and Appalachian Voices hereby provide formal notice pursuant to 16 U.S.C. § 1540(g) of our intent to sue the Office of Surface Mining Reclamation

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<sup>1</sup> The Center is a national, nonprofit conservation organization with more than 1.7 million members and online activists dedicated to the protection of endangered species and wild places. The Center and its members are concerned with the conservation of imperiled species and the effective implementation of the ESA.

and Enforcement (“OSMRE”) and the U.S. Fish and Wildlife Service (“FWS” or “Service”) for violations of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), in connection with the agencies’ failure to properly implement the *Final Programmatic Biological Opinion and Conference Opinion on the United States Department of the Interior Office of Surface Mining Reclamation and Enforcement’s Surface Mining Control and Reclamation Act Title V Regulatory Program* (“2020 BiOp”).

In 2019, the Center and allies sued FWS and OSMRE to overturn a 1996 programmatic biological opinion on OSMRE’s Surface Coal Mining and Reclamation Act (“SMCRA”) Title V program (“1996 BiOp”). The 1996 BiOp found that no jeopardy or adverse modification was likely to occur to any listed species or their designated critical habitat due to surface mining. However, because several species had been listed under the ESA due to surface mining impacts subsequent to the issuance of the 1996 BiOp, it was evident that it was ineffective and failed to ensure against jeopardy. In response to that litigation, FWS agreed to replace the 1996 BiOp, and on October 16, 2020, FWS published the 2020 BiOp.<sup>2</sup>

In order to comply with Section 7 of the ESA and guard against jeopardy and adverse modification in States with primacy over SMCRA implementation, the 2020 BiOp requires: a) States to provide draft Protection and Enhancement Plans (“PEPs”) to FWS early in the permitting process with species-specific protective measures (“SSPMs”) to protect species from jeopardy and adverse modification of critical habitat, and minimize incidental take during active mining and postmining reclamation; b) FWS to ensure that finalized PEPs and their SSPMs are sufficiently protective; and c) OSMRE to oversee the States’ implementation of SMCRA, and enforce the requirements of the statute when the States fail to do so, including the requirement to have PEPs in place to protect listed species.

Although OSMRE has delegated the implementation of its SMCRA Title V program to West Virginia, Kentucky, and Virginia, within their respective borders,<sup>3</sup> the 2020 BiOp relies on OSMRE retaining oversight and enforcement responsibility for these States’ implementation of the Title V program.<sup>4</sup> However, all three States are failing to faithfully implement the 2020 BiOp, putting imperiled species in jeopardy and risking the destruction or adverse modification of proposed or designated critical habitat. Yet, OSMRE is failing to oversee and ensure the effective implementation of these States’ Title V programs, as the 2020 BiOp requires. Furthermore, FWS is failing to fulfill its obligations under the 2020 BiOp to timely review and process draft PEPs for proposed and ongoing mining activities. Indeed, the Center is aware of hundreds of mines that are adversely affecting or would adversely affect listed species – in particular, the Guyandotte River crayfish and Big Sandy crayfish – for which no PEP has been developed or which were allowed to proceed with damaging activities prior to the Service’s approval of a PEP, in direct violation of the terms and conditions of the 2020 BiOp.

The Center and Appalachian Voices therefore intend to file a lawsuit challenging OSMRE’s and FWS’ failure to comply with the specific requirements of the 2020 BiOp, including the failure to enforce the requirements of SMCRA, the ESA, and the 2020 BiOp against West Virginia, Kentucky,

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<sup>2</sup> See Exh. 1 at 1, 5-6.

<sup>3</sup> <https://www.osmre.gov/programs/regulating-active-coal-mines/oversight> (last checked March 15, 2023).

<sup>4</sup> Exh. 1 at 80, 3.

and Virginia to ensure that adequate PEPs are in place prior to mining activities that adversely affect protected species. Since the agencies have failed to comply with the terms of the 2020 BiOp, take coverage for West Virginia, Kentucky, Virginia, and coal operators in all three states has been invalidated, opening up those parties to Section 9 liability for take of listed species resulting from coal mining operations,<sup>5</sup> and necessitating individual consultations and Habitat Conservation Plans<sup>6</sup> to comply with the ESA. Unless OSMRE and FWS create a process to ensure the faithful implementation of the 2020 BiOp, the Center and Appalachian Voices will have no choice but to bring suit to force the reinitiation of programmatic consultation for the SMCRA Title V program to ensure that the agencies craft a process that can actually be implemented to ensure that imperiled species do not continue to be jeopardized by SMCRA-regulated coal mining activities.<sup>7</sup>

Unless the violations described in this letter are remedied, we intend to bring suit and will seek declaratory and injunctive relief as well as reasonable litigation costs and attorneys' fees for the violations of the ESA described herein.

## **I. LEGAL BACKGROUND**

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

With the ESA, Congress intended endangered species to be afforded the highest of priorities.<sup>8</sup> The ESA's purpose is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."<sup>9</sup> Under the ESA, conservation means "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary."<sup>10</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>11</sup>

To fulfill the substantive purposes of the ESA, federal agencies are required to engage in Section 7 consultation with the Service to "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>12</sup> Section 7 consultation is required for "any action [that] may affect listed species or critical habitat."<sup>13</sup> Agency "action" is defined broadly in the ESA's implementing regulations to include "all activities or programs of any kind authorized, funded, or carried out, in

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<sup>5</sup> 16 USC § 1538.

<sup>6</sup> *Id.* § 1539(a)(2)(A).

<sup>7</sup> 50 C.F.R. § 402.16; *see also*, 16 USC § 1536(d).

<sup>8</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

<sup>9</sup> 16 U.S.C. § 1531(b).

<sup>10</sup> *Id.* § 1532(3).

<sup>11</sup> *Id.* § 1536(a)(1).

<sup>12</sup> *Id.* § 1536(a)(2).

<sup>13</sup> 50 C.F.R. § 402.14.

whole or in part, by Federal agencies,” such as the promulgation of regulations, the granting of permits, or actions directly or indirectly causing modifications to the land, water, or air.<sup>14</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,<sup>15</sup> and only after the agency lawfully complies with these requirements may an action that “may affect” a protected species or its critical habitat go forward. Each federal agency must review its actions at “the earliest possible time” to determine whether any action “may affect” listed species or their critical habitat in the “action area.”<sup>16</sup> The “action area” encompasses all areas that would be “affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”<sup>17</sup> The term “may affect” is broadly construed to include “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character,” and thus is easily triggered.<sup>18</sup>

If an action agency concludes that the action is “likely to adversely affect” listed species or critical habitat, the agency must engage in “formal consultation” with the Service to meet the ESA’s substantive “no jeopardy” mandate.<sup>19</sup> Formal ESA consultation commences with the action agency’s written request for consultation and concludes with Service’s issuance of a “biological opinion.”<sup>20</sup> 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.”<sup>21</sup> The environmental baseline includes the “past and present impacts of all Federal, State, or private actions and other human activities in the action area . . . .”<sup>22</sup> 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.”<sup>23</sup>

The biological opinion states the Service’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>24</sup> 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.”<sup>25</sup> The determination of whether an activity is likely to jeopardize the continued existence of a species must be based solely on “the best scientific and commercial data

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<sup>14</sup> *Id.* § 402.02.

<sup>15</sup> *Id.* §§ 402.10-402.16

<sup>16</sup> *Id.* § 402.14(a).

<sup>17</sup> *Id.* § 402.02.

<sup>18</sup> *Interagency Cooperation – Endangered Species Act of 1973, As Amended*, 51 Fed. Reg. 19,926 (June 3, 1986).

<sup>19</sup> 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

<sup>20</sup> 50 C.F.R. § 402.14(g)(4).

<sup>21</sup> *Id.* § 402.02.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 402.14(g)(4).

<sup>25</sup> *Id.* § 402.02.

available,”<sup>26</sup> and the Service must use the best available science in formulating its biological opinion and approving incidental take through formal consultation.<sup>27</sup>

It is illegal to engage in any activity that “takes”<sup>28</sup> an endangered species absent valid take coverage under ESA Sections 7 or 10.<sup>29</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>30</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>31</sup>

If, during Section 7 consultation, the Service determines that the action is not likely to jeopardize a species, it may issue an incidental take statement (“ITS”).<sup>32</sup> An 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 appropriate to minimize such take, and the “terms and conditions” that must be complied with by the action agency to implement any RPMs.<sup>33</sup> When all of the terms and conditions of the ITS and biological opinion are adhered to, the ITS provides “safe harbor” for the action agency, State regulators, and permittees, authorizing limited take of listed species that would otherwise violate Section 9’s prohibition.<sup>34</sup> However, while incidental take can be authorized under Section 7 through

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<sup>26</sup> 16 U.S.C. § 1536(a)(2).

<sup>27</sup> 50 C.F.R. § 402.14(g)(8).

<sup>28</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. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995). 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>29</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>30</sup> *Id.* § 1532(13).

<sup>31</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>32</sup> For programmatic consultations, such as the 2020 BiOp, which are intended to guide the implementation of Federal programs by establishing standards, guidelines, or governing criteria to avoid, minimize, or offset the effects of the program on listed species and critical habitat, the Service should not provide for incidental take at the programmatic level, but rather “any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate.” 50 C.F.R. § 402.14(i)(6). The 2020 BiOp clearly violates this provision.

<sup>33</sup> 16 U.S.C. § 1536(b)(4), 50 C.F.R. § 402.14(i).

<sup>34</sup> *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 637 F.3d 259, 261-62 (4<sup>th</sup> Cir. 2011) (citing 16 U.S.C. § 1536(o)(2)); *see also, Or. Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 990 (D. Or. 2010).

the provision of and compliance with an ITS, it is well settled that violations of the terms and conditions of a biological opinion and ITS expose agencies and private actors to take liability.<sup>35</sup> Courts have found that a violation of an ITS's terms "abrogates the safe harbor provision of the ITS."<sup>36</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>37</sup> This includes the action agency, which disregards an ITS "at its own peril (and that of its employees)."<sup>38</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 action agency and the Service must reinitiate formal consultation: "(1) [i]f the amount or extent of taking specified in the incidental take statement is exceeded; (2) [i]f 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; (3) [i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) [i]f a new species is listed or critical habitat designated that may be affected by the identified action."<sup>39</sup>

Section 7(d) of the ESA provides that once a federal agency initiates or reinitiates 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>40</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 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. SMCRA**

### **1. Cooperative Federalism Under SMCRA**

The environmental impacts of surface coal mining are regulated pursuant to Title V of SMCRA.<sup>41</sup> OSMRE is the primary regulator of coal mining under SMCRA<sup>42</sup> unless and until a State demonstrates that it has developed a regulatory program that meets all of the requirements of SMCRA

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<sup>35</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>36</sup> *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d at 995; see also *South Yuba*, 629 F. Supp. 2d at 1132.

<sup>37</sup> *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 637 F.3d 259, 260 (4th Cir. 2011).

<sup>38</sup> *Bennett v. Spear*, 520 U.S. at 170.

<sup>39</sup> 50 C.F.R. § 402.16.

<sup>40</sup> 16 U.S.C. § 1536(d).

<sup>41</sup> 30 U.S.C. §§ 1251a - 1279.

<sup>42</sup> *Id.* § 1211.

and the implementing regulations issued by OSMRE under 30 C.F.R. Chapter VII.<sup>43</sup> A State 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.<sup>44</sup>

Even after a SMCRA program has been delegated to a State, OSMRE retains oversight of that program through supervision of the State's implementation of the regulatory program.<sup>45</sup> OSMRE further maintains federal oversight over state SMCRA programs by funding them on an ongoing basis.

OSMRE's oversight role was reaffirmed in a Memorandum of Understanding between the U.S. Army Corps of Engineers, Department of the Interior and the Environmental Protection Agency regarding Appalachian coal mining, wherein OSMRE agreed to "determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA," and to "remove impediments to its ability to require correction of permit defects in SMCRA primacy states."<sup>46</sup>

SMCRA specifically requires that OSMRE evaluate and oversee the administration of approved state Title V programs, and requires that OSMRE enforce the terms of the statute and substitute its enforcement power for that of the State – or take back implementation authority from the State – should it find that the State has failed to adequately enforce its state-delegated SMCRA program.<sup>47</sup> OSMRE therefore retains discretion and control over the SMCRA program, even where the program has been delegated to a state authority.

This includes oversight and enforcement of the SMCRA provisions regarding protected species. The regulations specifically require the development of PEPs,<sup>48</sup> and prohibit any mining from being allowed to proceed that could jeopardize a listed species or harm designated critical habitat:

No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species... or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the [ESA].<sup>49</sup>

### **C. 2020 Biological Opinion on Implementation of Title V of SMCRA**

The 2020 BiOp ostensibly provides ESA Section 7 coverage for all listed species and designated or proposed critical habitat potentially affected by surface coal mining, surface effects of

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<sup>43</sup> *Id.* § 1253.

<sup>44</sup> *Id.*

<sup>45</sup> *See, e.g., Id.* § 1271.

<sup>46</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>47</sup> 30 U.S.C. § 1271(b); 30 C.F.R. §§ 842.11, 733.12, 733.13.

<sup>48</sup> 30 C.F.R. §§ 780.16(a)(1),

<sup>49</sup> 30 C.F.R. § 816.97(b); *see also, Id.* §§ 773.15(j), 772.12(d)(2)(ii), 772.13; 43 C.F.R. § 3410.2-2(a)(2).

underground coal mining, and coal mine reclamation, nationwide.<sup>50</sup> Specifically, it provides Section 7 coverage for OSMRE's implementation of Title V of SMCRA, including where states have primacy under the statute.<sup>51</sup> In the 2020 BiOp, FWS concludes that OSMRE's implementation of Title V of SMCRA "is not likely to jeopardize the continued existence of proposed or listed species and or destroy or adversely modify designated or proposed critical habitat."<sup>52</sup> To reach this conclusion, FWS explicitly relied upon: 1) the coordination process between the States and FWS that ensures the creation of adequate PEPs and SSPMs; and 2) OSMRE's oversight of state programs and enforcement of SMCRA in States with primacy, including the proper implementation of PEPs and their SSPMs.<sup>53</sup> It is only through compliance with the terms and conditions of the 2020 BiOp that OSMRE, and through it the States and mine operators, receive take coverage via ESA Section 7.

### **1. OSMRE's Oversight Role in States with Primacy**

The 2020 BiOp details OSMRE's indispensable oversight role in the implementation of SMCRA where States have primacy:

OSMRE's role under SMCRA does not end once it has approved a State or Tribal regulatory authority's program. SMCRA gives OSMRE ongoing authority to oversee the effectiveness of the State or Tribal regulatory authority's implementation of the approved program. OSMRE's responsibilities in this area also include conducting inspections as necessary to evaluate the State or Tribal regulatory administration of its approved program. OSMRE retains enforcement authority for States and Tribes with primacy and is responsible for ensuring that the State or Tribal regulatory authority is effectively implementing, administering, maintaining, and enforcing their program.<sup>54</sup>

In its RPMs, the ITS specifies that compliance with the 2020 BiOp requires OSMRE to implement SMCRA in order to protect listed species:

OSMRE will use its authorities to minimize impacts to listed species through oversight of State and Tribal programs. Oversight is the process of evaluating and assisting States and Tribes in the administration of the SMCRA regulations and the implementation, enforcement, and maintenance of approved State or Tribal regulatory programs.<sup>55</sup>

Indeed, OSMRE's oversight and enforcement authority over state-implemented SMCRA programs is both programmatic and permit-specific.<sup>56</sup> The Service identifies the oversight and enforcement of state implementation of PEPs for listed species as central to OSMRE's implementation of Title V of SMCRA:

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<sup>50</sup> Exh. 1 at 3-4.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 80.

<sup>53</sup> *Id.* at 80; *see also, id.* at 3.

<sup>54</sup> Exh. 1 at 4.

<sup>55</sup> *Id.* at 83.

<sup>56</sup> *Id.* at 72.



The Federal action that is the subject of this consultation is the Office of Surface Mining Reclamation and Enforcement's . . . implementation of Title V of the SMCRA, which includes the promulgation of implementing regulations; the direct implementation and enforcement of the SMCRA regulations at 30 U.S.C. §§ 1201 et seq. in Federal program States and on Indian lands; and **oversight of State regulatory programs with primacy, which includes oversight of State program compliance with requirements related to the protection and enhancement of proposed or listed species and proposed or designated critical habitats** (hereinafter referred to as "OSMRE's implementation of Title V of SMCRA")...<sup>57</sup>

Furthermore, upon receipt of any information from any source that any "person" has violated any requirement of SMCRA or a SMCRA permit condition, OSMRE is required to initiate corrective law enforcement procedures with – and potentially against – the States.<sup>58</sup> Once OSMRE has initiated such enforcement action via written notification of the violation to the State, that State then has ten days to take "appropriate" corrective action to resolve the violation, or to show good cause for why it has not taken action.<sup>59</sup>

As the 2020 BiOp observes, the purpose of such federal engagement with the States is to provide an early intervention in order to prompt the States to resolve legal violations before they rise to the level where more drastic corrective measures are required.<sup>60</sup> If OSMRE does not expect that the State will correct the identified violation within 180 days, however, OSMRE must intervene and develop a corrective action plan.<sup>61</sup> The corrective action plan provides a schedule and a strategy for the State to come back into compliance.<sup>62</sup> If the State does not comply with the corrective action plan, causing OSMRE to believe that the State is not effectively implementing or enforcing any part of its state program, OSMRE must initiate proceedings to determine whether to substitute its federal enforcement power for that of the State's, or whether to withdraw SMCRA delegation to the State altogether.<sup>63</sup>

The 2020 BiOp explicitly relied on the effectiveness of this cooperative federalism oversight and enforcement scheme to find that SMCRA permit compliance was assured:

For the reasons discussed above, the Service anticipates OSMRE and State regulatory authorities will utilize the full extent of their respective authorities to monitor and enforce the mining regulatory programs these agencies oversee.

Thus, the Service finds that OSMRE, as the action agency implementing the proposed action, has included a mechanism to adequately monitor and enforce permit compliance for activities covered by OSMRE's Program.<sup>64</sup>

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<sup>57</sup> *Id.* at 3 (emph. added).

<sup>58</sup> *Id.* at 72-74. *See also*, 30 U.S.C. § 1271(a)(1); *see also* 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2).

<sup>59</sup> Exh. 1 at 72-74. *See also*, 30 U.S.C. § 1271(a)(1); *see also* 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2).

<sup>60</sup> *Id.* at 73; *see also*, 30 C.F.R. 733.12.

<sup>61</sup> Exh. 1 at 73; *see also*, 30 C.F.R. 733.12.

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

<sup>63</sup> Exh. 1 at 73-74; *see also*, 30 C.F.R. 733.13.

<sup>64</sup> Exh. 1 at 74.

The 2020 BiOp further made clear that the successful implementation of a PEP's active mining and post-mining SSPMs is a prerequisite to regulatory agencies and operators availing themselves of the ITS:

[T]he PEP must include protective measures that will be used during the active mining phase of operation (e.g., the establishment of buffer zones, selective location and design of haul roads and powerlines, and monitoring of surface water quality and quantity) and enhancement measures that will be used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat ( *Id.* at §§ 780.16(b)(3)(i)-(ii) and 784.21(b)(3)(i)-(ii)) . . .

Species-specific protection measures . . . are activities deemed necessary to avoid, minimize, and monitor the effects of the proposed mining action on ESA-listed and -proposed species . . . The Service uses the term in this Opinion to describe measures that minimize the impacts of incidental take and **must be implemented as a mandatory condition in the permit if the regulatory authority and/or applicants choose to avail themselves of incidental take coverage under this Opinion's incidental take statement.**<sup>65</sup>

The Service's no jeopardy determination and ITS in the 2020 BiOp is therefore premised on OSMRE ensuring SMCRA permit compliance, including the effective drafting and implementation of PEPs and protective measures within the states.<sup>66</sup>

### 3. Coordination Process Between States and FWS for the Development of PEPs

The 2020 BiOp requires that the States initiate "coordination" with FWS to ensure that adequate PEPs and SSPMs are in place to avoid harm to listed species and their critical habitat.<sup>67</sup> As early as possible in the SMCRA permitting process where the proposed action may affect listed or proposed species or designated or proposed critical habitat, the State must submit a proposed PEP to FWS. FWS then works with the State through a "technical assistance process" whereby the Service ensures that the PEP's SSPMs are adequately protective to avoid jeopardy and adverse modification.<sup>68</sup> Should the State disagree with the PEP provisions that the Service considers necessary, the agencies are required to follow a prescribed dispute resolution process to resolve the disagreement.<sup>69</sup>

States must also reinitiate coordination with the Service upon the newly-proposed or final listing or designation of potentially-affected species or critical habitat under the ESA:

[A]s new species become listed or proposed under the ESA or as critical habitat is proposed or designated, and operators or regulatory authorities become aware that those newly listed or proposed species or proposed or designated critical habitat would be

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<sup>65</sup> *Id.* at 17-18 (emph. added).

<sup>66</sup> *See also*, Exh. 1 at 83 (RPM 2).

<sup>67</sup> *See* Exh. 1, Appendix A.

<sup>68</sup> *Id.*

<sup>69</sup> Exh. 1, Appendix B.

affected by individual mining projects, those operators and/or the regulatory authority must coordinate with the local Service Field Office to determine if the permit and other related documents (e.g., PEP, where applicable) need to be reexamined, particularly where these resources were not addressed in the previous technical assistance or step-down ESA Section 7(a)(2) consultation (as appropriate)<sup>70</sup>

The States must also reinitiate coordination when potentially affected listed species are discovered by the operator in the project area, and mining activities may need to be halted during coordination to ensure against harm to a listed species:

The regulations at 30 C.F.R. § 816.97(b) also state, “[t]he operator shall promptly report to the regulatory authority any State- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, **after consultation, shall identify whether, and under what conditions, the operator may proceed.** (30 C.F.R. § 816.97(b)). We interpret this to include, for example, rare or infrequent circumstances, where, after the permit has been issued, the operator may become aware of endangered or threatened species that enter the action permit area that had not previously considered or addressed during previous coordination or step-down ESA section 7(a)(2) consultation with the Service, as applicable. We generally anticipate this coordination would be largely consistent with the coordination process described in the biological assessment and its appendices (and provided for reference this to document in Appendix A) where the State has primacy, or according to ESA section 7 procedures, where OSMRE is the regulatory authority.<sup>71</sup>

## II. FACTUAL BACKGROUND

The coal-bearing regions of West Virginia, Kentucky, and Virginia are home to many threatened and endangered species that are adversely affected by coal mining activities undertaken pursuant to SMCRA. Surface coal mining is accomplished by logging and/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, and results in the deposition of sediment and heavy metals into waterbodies, which adversely impacts streams and local biodiversity.<sup>72</sup>

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<sup>70</sup> Exh. 1 at 23.

<sup>71</sup> Exh. 1 at 22-23 (emph. added).

<sup>72</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”).

These impacts harm species, including an increasing number of species that are listed as endangered or threatened under the ESA. The Service has even created a convenient chart acknowledging and explaining the extent of harm that coal mining activities inflict on downstream aquatic species, complete with references to numerous studies showing significant habitat degradation and population impacts up to 12 miles downstream.<sup>73</sup>

Several of the species harmed by coal mining have been listed under the ESA since the Service issued the 1996 Biological Opinion. In fact, among the stated reasons why OSMRE reinitiated programmatic consultation for its Title V program was the ESA-listing of species imperiled by surface mining impacts subsequent to the publication of the 1996 biological opinion:

In its April 2017 reinitiation request, OSMRE noted that “new information obtained by OSMRE in the intervening years since 1996 makes it appropriate to reinitiate consultation at this time,” and that “new species have been listed that may be affected by the SMCRA regulatory program.”<sup>74</sup>

For example, both the Guyandotte River crayfish (“GRC”) and Big Sandy crayfish (“BSC”) were listed pursuant to the ESA primarily due to current impacts and threats from coal mining activities, which have led to severe habitat degradation and dramatic population declines across the ranges of both species.<sup>75</sup> Indeed, the GRC has been wiped out from 93% of its known historical range.<sup>76</sup> It only survives in Pinnacle Creek and potentially Clear Fork in southern West Virginia’s Wyoming and Logan Counties, both of which watersheds are heavily impacted by coal mining activities.<sup>77</sup> The BSC survives in the upper Big Sandy River basin across southern West Virginia, eastern Kentucky, and southwest Virginia in watersheds that are also heavily impacted by coal mining.<sup>78</sup> The BSC has also been extirpated from most of its range, recently found in only 34% of likely sites surveyed for the crustacean.<sup>79</sup>

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<sup>73</sup> Exh. 10 (produced to Center by FWS in response to a 2008 Freedom of Information Act request seeking all records and correspondence generated by FWS concerning the impacts of a coal mine in Wise County, Virginia on species listed under the ESA); *see also*, Exhs. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22. *See also*, Exh. 9 (indicating sedimentation impacts 14 miles downstream from a coal mine).

<sup>74</sup> Exh. 1 at 6; *see also*, Exh. 2 at 122-123 (“Two species, recently listed under the ESA illustrate the inadequacy of the current SMCRA regulatory environment in protecting fish and wildlife and the habitats upon which they depend. The Big Sandy crayfish (*Cambarus callainus*) and the Guyandotte River crayfish (*C. veteranus*) were listed as endangered and threatened, respectively, on April 7, 2016.... Excessive erosion, sedimentation, and water quality degradation from surface coal mining operation are key factors affecting their decline.... Therefore, despite the protections afforded by [SMCRA], both the Big Sandy and Guyandotte River crayfishes continue to be affected by degraded water quality and habitat conditions.”).

<sup>75</sup> 80 Fed. Reg. at 18723-28; *see also*, e.g., Exh. 2 at 122-123 (“Of particular concern to the Guyandotte River crayfish are several active surface coal mines in the Pinnacle Creek watershed that may pose an immediate threat to the continued existence of that subpopulation, one of only two known to exist. Some of these mines have reported violations related to mandatory erosion and sedimentation control measures (e.g., 3 to 37 violations) within the last 3 years....”); Exh. 10.

<sup>76</sup> 80 Fed. Reg. at 18716 (April 7, 2015).

<sup>77</sup> 87 Fed. Reg. at 14673, 14682 (March 15, 2022).

<sup>78</sup> *Id.* at 14673, 14677-14682.

<sup>79</sup> 80 Fed. Reg. at 18721.

To make matters worse for these beleaguered animals, the coal industry has a track record of chronic non-compliance with the water protection requirements of SMCRA across the ranges of both species. Since April 17, 2015, West Virginia has logged at least 490 SMCRA cessation orders, permit violations and violation extensions that threaten to degrade crayfish habitat for coal mining facilities within 3 miles upstream from designated critical habitat for the GRC.<sup>80</sup> During the same period of time, Kentucky has logged over 520 SMCRA cessation orders, permit violations, and violation extensions that threaten to degrade crayfish habitat from coal mining facilities within 3 miles upstream from designated critical habitat for the BSC.<sup>81</sup>

The manifest harm that the GRC and BSC have suffered due to coal industry pollution underscores the need for mine operators, the States, and FWS to fashion and effectively implement appropriate PEPs and SSPMs for mines that threaten these crayfish and their designated critical habitat. Yet at this time, 30 months after the issuance of the 2020 BiOp, state regulators have taken no action to initiate the process of developing PEPs for the vast majority of coal mining facilities threatening these species and their designated critical habitat.<sup>82</sup>

Indeed, based upon the available public information, 388 of 460 – or 84% – of SMCRA-permitted mining facilities in close proximity upstream from GRC and BSC designated critical habitat lack PEPs for these species. For the GRC, 112 of 114 – or 98% of – relevant mining facilities<sup>83</sup> lack a

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<sup>80</sup> Exh. 11.

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

<sup>82</sup> See Exhs. 5, 6, and 7.

<sup>83</sup> Here, the term “relevant mining facilities” is used to refer to SMCRA-permitted mining facilities that are especially close to designated critical habitat for the GRC and BSC. Due to differences in available data from state regulatory agencies in West Virginia, Kentucky, and Virginia, this term has different meanings in the various states. In West Virginia and Kentucky, the term is defined as those discharging directly into, or within 3 miles upstream from GRC or BSC designated critical habitat. In Virginia, it is defined as those discharging directly into, or upstream from BSC designated critical habitat within the same HUC-12 watershed.

This definition of “relevant mining facilities” by no means captures all SMCRA-permitted operations that may affect the GRC, BSC, or their critical habitat. See, e.g., Exhibit 9 (documenting a breach of a coal mine’s sediment pond that sent a plume of sediment 14 miles downstream on Clear Fork in West Virginia, which is one of the last two streams where the GRC may yet survive. The spill became the first in a series of four sediment pond failures on Clear Fork from the same mine over a four-month period. FWS’ Barbara Douglas also reports that these spills occurred during coordination between FWS and West Virginia about protections for crayfish, in which the State argued that mining had no effects on crayfish in West Virginia, and that no enhancements were required to the State’s sediment control measures in order to protect crayfish. Far from “coordinating” with FWS, West Virginia withheld essential material facts from the agency. While it boasted to FWS about its perfect sediment control record, the State neglected to report to the agency the second, third, and fourth sediment spills on Clear Fork, now designated critical habitat for the GRC. West Virginia’s egregious malfeasance in this instance reveals a predisposition towards refusing to enforce SMCRA and the 2020 BiOp against coal operators, and weighs in favor of OSMRE withdrawing its delegation of SMCRA implementation power to the State (see Exh. 1 at 73-74; 30 C.F.R. 733.13). See also, Exh. 10 (documenting a loss of aquatic species and sedimentation impacts 12 miles downstream from the source of coal mine pollution).

PEP for the species. For the BSC, 276 of 346 – or 80% of – relevant mining facilities lack a PEP for the species.<sup>84</sup>

A closer inspection of this problem reveals that this pattern of noncompliance is heavily concentrated in Kentucky and West Virginia.<sup>85</sup> In Kentucky, out of 157 relevant mining facilities impacting BSC designated critical habitat, none have PEPs for the species, resulting in a noncompliance rate of 100%.<sup>86</sup> In West Virginia, out of 215 relevant mining facilities impacting GRC and BSC designated critical habitat, 6 have PEPs for the species, resulting in a noncompliance rate of 97%.<sup>87</sup> In Virginia, out of 88 relevant mining facilities impacting BSC designated critical habitat, 66 have PEPs for the species, resulting in a noncompliance rate of 25%.<sup>88</sup>

Kentucky, West Virginia, and Virginia provide varying explanations for why they have failed to comply with the 2020 BiOp's PEP requirements. The Kentucky Energy and Environment Cabinet reports that it believes that over 200 SMCRA permits within the state may require PEPs for BSC due to their potential impacts to designated critical habitat.<sup>89</sup> The State asserted that due to what it described as the slow nature of the permit-by-permit analysis, it has yet to determine which permits will require a PEP, and therefore has not begun drafting any PEPs.<sup>90</sup>

The West Virginia Department of Environmental Protection has also failed to comply with the PEP requirement, generating only 6 final PEPs for the GRC and BSC out of 215 relevant mining facilities under its purview. West Virginia reports that FWS has “several” proposed PEPs from the State under review, but that the Service is “backlogged” and therefore the State has not received a response on those PEPs.<sup>91</sup> West Virginia also states that it is developing “multiple” other proposed PEPs to submit to FWS,<sup>92</sup> and that it is waiting on guidance from the Service for how to proceed on “several” other SMCRA permits.<sup>93</sup>

Virginia provided two explanations for why it has not completed PEPs for all relevant mines. First, the State cited the departure of a staff person in the southwest Virginia FWS field office, which it describes as grinding the Service's work on Virginia's PEPs to a halt.<sup>94</sup> Secondly, it stated that the use of the 2020 BiOp's dispute resolution process<sup>95</sup> for Ball Ridge application # 1010685 is holding up

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<sup>84</sup> See Exhs. 5, 6, and 7.

<sup>85</sup> See, e.g., Exh. 3.

<sup>86</sup> Exh. 4; see also, Exh. 5.

<sup>87</sup> Exh. 6.

<sup>88</sup> Exh. 7.

<sup>89</sup> Exh. 4.

<sup>90</sup> *Id.*

<sup>91</sup> Exh. 8.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Videoconference meeting with Jared Worley, Virginia Department of Energy (February 27, 2023).

<sup>95</sup> Exh. 1, Appx. B.

progress on PEPs in general across Virginia.<sup>96</sup> The dispute resolution process for this application was initiated on March 16, 2021.<sup>97</sup>

The United States Department of Interior appears to be aware that Virginia is the only one of these three States that has made any appreciable progress towards compliance with the terms of the 2020 BiOp.<sup>98</sup> However, upon information and belief, OSMRE has not taken any corrective action to ensure the faithful implementation of the terms of SMCRA and the 2020 BiOp in West Virginia, Kentucky, or Virginia. On the contrary, upon information and belief, West Virginia, Kentucky, Virginia and OSMRE all have commonly allowed – and continue to allow – mining operations to take place at relevant mining facilities, in the absence of PEPs.

### III. VIOLATIONS

#### A. OSMRE's Violation of ESA Section 7 for Failure to Oversee and Enforce Compliance with the 2020 BiOp

As set forth above, the no jeopardy determination in the 2020 BiOp was premised on state regulatory agencies and mine operators complying with the SMCRA regulations – in particular, the regulations requiring PEPs and SSPMs, and that mining activities not jeopardize listed species<sup>99</sup> – which FWS assumed OSMRE would enforce through its oversight role in States with primacy.<sup>100</sup> Indeed, one of the 2 RPMs in the ITS is that “OSMRE will use its authorities to minimize impacts to listed species through oversight of State and Tribal programs.”<sup>101</sup> Thus, the fact that OSMRE has failed to ensure that hundreds of mines that “may affect” listed crayfish do not have PEPs in place is a direct violation of the agency's duties under the 2020 BiOp.

As detailed, *supra*, West Virginia, Kentucky, and Virginia have failed to fulfill their roles with regards to the coordination, PEP, and SSPM requirements of the 2020 BiOp for more than 387 relevant mining facilities under their purview. And pursuant to the 2020 BiOp, OSMRE is the authority charged with the enforcement of coordination, PEP, and SSPM requirements against the States.<sup>102</sup> However, based on the publicly available information, OSMRE has failed to utilize enforcement measures against any of these three States or any of the 387 noncompliant SMCRA permits that we have identified herein.<sup>103</sup> Consequently, OSMRE has failed to ensure that the States are getting PEPs

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<sup>96</sup> Videoconference meeting with Jared Worley, Virginia Department of Energy (February 27, 2023).

<sup>97</sup> See Exh. 12 at 1-2.

<sup>98</sup> Exh. 3.

<sup>99</sup> 30 C.F.R. §§ 780.16(a)(1), 784.21(a)(1), and 816.97(b).

<sup>100</sup> See Exh. 1 at 3 (discussing 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 habitats").

<sup>101</sup> *Id.* at 83.

<sup>102</sup> See, e.g., *Id.* at 72-74, 83; 30 U.S.C. § 1271; 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2), 733.12, 733.13.

<sup>103</sup> See, e.g., Exh. 3 (indicating that OSMRE has had no communications with Kentucky or West Virginia about compliance with the 2020 BiOp).

approved before allowing mining activities to move forward that may affect the GRC and BSC or their designated critical habitat, as the 2020 BiOp requires.<sup>104</sup>

OSMRE has therefore failed to insure against jeopardy and adverse modification for listed species and critical habitat via compliance with the substantive provisions of the 2020 BiOp and ITS. Indeed, as explained, to the extent that the 2020 BiOp is able to provide any means to protect the GRC and BSC from jeopardy and adverse modification, it does so via the coordination process described in the BiOp, which is premised on the development of PEPs with SSPMs that OSMRE can enforce. Therefore, in order for the 2020 BiOp to protect listed species, OSMRE must ensure that the coordination process of the 2020 BiOp is being implemented, with the end result of adequate PEPs and SSPMs produced for each permit that needs them. The failure to do so is a blatant abdication of the agency's duties under the 2020 BiOp, and thus a clear violation of its duty to ensure against jeopardy, as the ESA requires.<sup>105</sup>

Furthermore, due to the States' failure to effectively implement SMCRA and the 2020 BiOp within their borders, OSMRE is under a duty to initiate its SMCRA enforcement procedures against the States per the terms and conditions of the 2020 BiOp<sup>106</sup> and SMCRA for the 387 documented, relevant mining facilities lacking Appendix A coordination, PEPs, and SSPMs.<sup>107</sup> Due to the chronic nature of noncompliance among the States, OSMRE may need to substitute its enforcement powers for that of the States', or, in light of the chronic nonfeasance by the States documented herein, it may need to withdraw its delegation of SMCRA implementation authority altogether.<sup>108</sup>

In sum, by failing to comply with the oversight and enforcement provisions of SMCRA, and by violating 30 C.F.R. § 816.97(b), OSMRE has undermined the provisions of the 2020 BiOp that FWS explicitly relied upon to make its no jeopardy determination and provide safe harbor to SMCRA activities in the states. Thus, OSMRE has failed to fulfill its duties to ensure against jeopardy and adverse modification for the GRC and BSC, in violation of Section 7(a)(2) of the ESA.<sup>109</sup>

## **B. Violations of ESA Section 9**

Allowing or undertaking 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>110</sup> As discussed above, even after obtaining take coverage through ESA Section 7, it is well settled that violations of

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<sup>104</sup> See Exh. 1 at 7 ("The proposed action also includes OSMRE's oversight of State or Tribal programs, such as State or Tribal regulatory authority compliance with requirements related to the protection and enhancement of proposed or listed species and proposed or designated critical habitats.").

<sup>105</sup> 16 U.S.C. § 1536(a)(2).

<sup>106</sup> Exh. 1 at 72-74, 83.

<sup>107</sup> This letter is intended to provide notice pursuant to 30 U.S.C. § 1271(a)(1) of violations of SMCRA, requiring OSMRE to notify the state regulatory authority, which then has ten days to take appropriate action to cause the violation to be corrected or show good cause for not taking action. See also 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2), 733.12, 733.13.

<sup>108</sup> 30 C.F.R. § 733.13.

<sup>109</sup> 16 U.S.C. § 1536(a)(2).

<sup>110</sup> 16 U.S.C. §§ 1532(13), 1532(18), 1538(a)(1)(B); 50 C.F.R. § 17.3.



the terms and conditions of a biological opinion and ITS abrogate the take coverage and expose agencies and private actors to take liability.<sup>111</sup>

Here, none of the parties have complied with the terms and conditions of the 2020 BiOp, since they have failed to ensure that adequate PEPs are being created, approved by FWS, and implemented prior to the commencement of activities that harm listed crayfish. The States have failed to provide hundreds of timely proposed PEPs to FWS<sup>112</sup>; FWS has failed to timely review and help finalize numerous proposed PEPs from West Virginia and Virginia<sup>113</sup>; and OSMRE has failed to oversee and enforce proper implementation of Title V of SMCRA by the States.

Since OSMRE, the States, and FWS have all violated the terms and conditions of the 2020 BiOp, the ITS has been abrogated and no longer provides safe harbor from take liability.<sup>114</sup> As a result, OSMRE, Kentucky, West Virginia, and Virginia, as well as all mining operators for the relevant mining facilities, are all subject to take liability for any take caused by mining activities at the 387 documented relevant mining facilities (and any others that have not yet been identified) for which there are no PEPs.<sup>115</sup>

### **C. Reinitiation**

It is the Center's and Appalachian Voices' preference that OSMRE, FWS, and the state regulatory authorities fulfill their responsibilities and implement the 2020 BiOp's terms and conditions and ensure that adequate PEPs and SSPMs are in place prior to any activities that would harm listed species. However, in light of OSMRE's ongoing failure to enforce proper implementation of SMCRA and FWS' failure to provide technical assistance to properly complete PEPs through the coordination process, it is readily apparent that the parties have failed to comply with the clear requirements of the 2020 BiOp, and that there is no plan in place to come into compliance. Therefore, if FWS, OSMRE, and the States are unable to implement the 2020 BiOp, then the only remedy will be reinitiation of programmatic consultation for the Title V SMCRA program.<sup>116</sup>

The Center and Appalachian Voices therefore put the parties on notice that unless, within the next 60 days, OSMRE and FWS provide a reasonable, expedited schedule to come into compliance with the 2020 BiOp, we intend to bring suit to compel reinitiation of Section 7 consultation on the SMCRA program.<sup>117</sup> Here, reinitiation is mandated, since the failure to comply with the 2020 BiOp

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<sup>111</sup> *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. at 995; *see also*, *South Yuba*, 629 F. Supp. 2d at 1132.

<sup>112</sup> *See, e.g.*, Exhs. 4, 5.

<sup>113</sup> *See* Section II at 15, *supra*.

<sup>114</sup> *South Yuba*, 629 F. Supp. 2d at 1132-33 ("[W]hen the terms of an ITS are violated, the agency is liable under section 9[.]" and "an agency's violation . . . may also cause an actionable violation of [Section 7].") (emphasis added).

<sup>115</sup> 16 U.S.C. § 1538(a)(1)(B); 16 U.S.C. § 1532(13); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997);

<sup>116</sup> 50 C.F.R. § 402.16.

<sup>117</sup> Here, the "reasonableness" of any compliance schedule is constrained by the imminent extinction threat to the GRC caused by decades of inadequate regulation of SMCRA activities within the species' range.

and ITS is new information bearing on the impacts to listed species, as well as a modification<sup>118</sup> of the action that was not considered in the 2020 BiOp.<sup>119</sup> Should reinitiation be necessary, then pursuant to ESA Section 7(d) all mining activity at all mines within the range of the GRC and BSC would have to cease, pending completion of a new programmatic consultation or permit-specific ESA Section 7 consultations or individualized Habitat Conservation Plans under ESA Section 10.<sup>120</sup>

#### IV. CONCLUSION

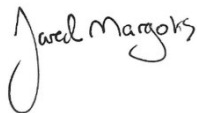
The Center and Appalachian Voices urge OSMRE and FWS to promptly respond to this notice by faithfully implementing, and ensuring State implementation of, the 2020 BiOp's terms and conditions, without the need for litigation and reinitiation of programmatic consultation. However, if OSMRE and FWS do not cure these violations within 60 days, the Center and Appalachian Voices will file suit and seek appropriate remedies.

Please do not hesitate to contact us if we 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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<sup>118</sup> Here, OSMRE's failure to oversee the state SMCRA programs and FWS' failure to timely review PEPs is a modification of the action.

<sup>119</sup> *Id.* at § 402.16(a)(2), (3).

<sup>120</sup> 16 U.S.C. § 1536(d); 16 U.S.C. §1539(a)(2)(A).

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Attachments:

Exhibit 1: U.S. Fish and Wildlife Service. Final Programmatic Biological Opinion and Conference Opinion on the United States Department of the Interior Office of Surface Mining Reclamation and Enforcement's Surface Mining Control and Reclamation Act Title V Regulatory Program. October 16, 2020.

Exhibit 2: U.S. Fish and Wildlife Service. Programmatic Biological Opinion and Conference Opinion on the Office of Surface Mining Reclamation and Enforcement's Regulatory Program as Modified by the Issuance and Implementation of the Final Regulation: Stream Protection Rule and as outlined in the 2016 Memorandum of Understanding. December 16, 2016.

Exhibit 3: Office of Surface Mining Reclamation and Enforcement. Email correspondence with Julia Moore. February 13, 2023.

Exhibit 4: Kentucky Energy and Environment Cabinet. Email correspondence with Jessica Sutton. September 28, 2022.

Exhibit 5: Center for Biological Diversity. Relevant Mining Facilities in Kentucky with PEP status. April 4, 2023.

Exhibit 6: Center for Biological Diversity. Relevant Mining Facilities in West Virginia with PEP status. April 4, 2023.

Exhibit 7: Center for Biological Diversity. Relevant Mining Facilities in Virginia with PEP status. April 4, 2023.

Exhibit 8: West Virginia Department of Environmental Protection. Email correspondence with Dennis Stottlemeyer. September 29, 2022.

Exhibit 9: U.S. Fish and Wildlife Service. Email correspondence with Barbara Douglas. August 18, 2017.

Exhibit 10: U.S. Fish and Wildlife Service. Table of authorities for Service position on downstream distance of coal mining impacts on downstream aquatic species. Date unkn. (circa 2008).

Exhibit 11: Appalachian Voices. SMCRA Violations Threatening Water Quality in Critical Habitat for GRC and BSC in West Virginia and Kentucky. February 2, 2023.

Exhibit 12: Paramont Contura, LLC. Ball Ridge Dispute Resolution Letter. June 18, 2021.

Exhibit 13: Anderson, R. M., Layzer, J. B., & Gordon, M. E. (1991). Recent catastrophic decline of mussels (*Bivalvia*, *Unionidae*) in the Little South Fork Cumberland River, Kentucky. *Brimleyana*, (17), 1-8.

Exhibit 14: Layzer, J. B., & Anderson, R. M. (1992). Impacts of the coal industry on rare and endangered aquatic organisms of the upper Cumberland River Basin. Kentucky Department of Fish and Wildlife Resources.

Exhibit 15: Warren Jr, M. L., & Haag, W. R. (2005). Spatio-temporal patterns of the decline of freshwater mussels in the Little South Fork Cumberland River, USA. *Biodiversity & Conservation*, 14(6), 1383-1400.

Exhibit 16: Houpp, R. E. (1993). Observations of long-term effects of sedimentation on freshwater mussels (*Mollusca*: *Unionidae*) in the North Fork of Red River, Kentucky. *Transactions of the Kentucky Academy of Science*, 54(3-4), 93-97.

Exhibit 17: Pond, G. J., Passmore, M. E., Borsuk, F. A., Reynolds, L., & Rose, C. J. (2008). Downstream effects of mountaintop coal mining: comparing biological conditions using family-and genus-level macroinvertebrate bioassessment tools. *Journal of the North American Benthological Society*, 27(3), 717-737.

Exhibit 18: Vannote, R. L., & Minshall, G. W. (1982). Fluvial processes and local lithology controlling abundance, structure, and composition of mussel beds. *Proceedings of the National Academy of Sciences*, 79(13), 4103-4107.

Exhibit 19: Sutherland, A. B., & Meyer, J. L. (2007). Effects of increased suspended sediment on growth rate and gill condition of two southern Appalachian minnows. *Environmental Biology of Fishes*, 80(4), 389-403.

Exhibit 20: Jones, E. B., Helfman, G. S., Harper, J. O., & Bolstad, P. V. (1999). Effects of riparian forest removal on fish assemblages in southern Appalachian streams. *Conservation biology*, 13(6), 1454-1465.

Exhibit 21: Zamor, R. M., & Grossman, G. D. (2007). Turbidity affects foraging success of drift-feeding rosyside dace. *Transactions of the American Fisheries Society*, 136(1), 167-176.

Exhibit 22: U.S. Environmental Protection Agency (EPA). (2002). Clinch and Powell Valley Watershed Ecological Risk Assessment. EPA/600/R-01/050.