



September 22, 2015

*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 Related to Surface Mine Permit Approval; Failure to Prevent Jeopardy to Northern Long-Eared Bat at Big Creek Mine (SMA S-4005-11) and Long Ridge Mine (SMA S-3001-15); Need for Reinitiation of Section 7 Consultation on Surface Mining Impacts.**

Dear Sir/Madam:

This letter serves as the Center for Biological Diversity, Coal River Mountain Watch, Ohio Valley Environmental Coalition, and Sierra Club's formal notice of intent to sue the U.S. Office of Surface Mining Reclamation and Enforcement ("OSM") and the U.S. Fish and Wildlife Service ("FWS") for violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), in connection with the issuance of permits for the Big Creek Mine (SMA S-4005-11) and Long Ridge Mine (SMA S-3001-15) (collectively "Mines") in West Virginia.<sup>1</sup>

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<sup>1</sup> This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

Permits for these Mines have been issued without required “protection and enhancement plans” (“PEPs”) for the northern long-eared bat (*Myotis septentrionalis*), a species that has been listed as “threatened” under the ESA. PEPs are intended to provide species-specific measures to minimize disturbance and adverse impacts to fish and wildlife from mining activities.

The absence of any PEPs for northern long-eared bats in connection with the permits for the Mines contravenes the 1996 Biological Opinion for surface coal mining under the Surface Mining Control and Reclamation Act of 1977 (hereafter “1996 BiOp”), which sets forth the terms by which OSM will ensure that the State of West Virginia’s coal-permitting program does not jeopardize any endangered or threatened species in contravention of the ESA.<sup>2</sup> Because these terms have been violated in connection with the Mines, OSM has failed to ensure that these projects will not jeopardize the continued existence of the northern long-eared bat, as required by ESA section 7(a)(2).<sup>3</sup>

We also hereby inform you that even full compliance with the terms of the 1996 BiOp will not ensure that surface coal mining and reclamation at these Mines does not jeopardize the continued existence of listed species. The 1996 BiOp suffers many legal flaws that bear on the survival and recovery of the northern long-eared bat. These flaws include the lack of reasonable and prudent measures that would minimize the impact of incidental take. The 1996 BiOp also fails to provide the allowed extent of incidental take, and to ensure that any take of bats is documented, so that – as the ESA requires – coal mine operators are required to carry out specific, common-sense measures to minimize and mitigate the destruction of thousands of acres of bat habitat, and so that future activities which affect northern long-eared bats may be considered within the context of take that has been authorized in connection with these Mines (and any other surface coal-mining and reclamation projects that may be approved in the future). Thus, because the

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The Center is a national non-profit conservation organization with more than 900,000 members and online activists, including members and supporters in West Virginia, who support the protection of endangered species and wild places.

Coal River Mountain Watch is a West Virginia nonprofit organization that works to stop the destruction of communities and environment by mountaintop removal mining, to improve the quality of life of residents, and to help rebuild sustainable communities. The group is working to pass the Appalachian Community Health Emergency Act (ACHE).

The Ohio Valley Environmental Coalition is national organization dedicated to the improvement of the environment and communities through education, grassroots organizing and coalition building, leadership development, strategic litigation and media outreach. Their work encompasses much of West Virginia.

Sierra Club is one of the oldest grassroots environmental organizations in the country with more than 2.4 million members and supporters. Sierra Club’s mission is “to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

<sup>2</sup> U.S. Fish & Wildlife Service, Formal Section 7 Biological Opinion and Conference Report on Surface Coal Mining and Reclamation Operations Under the Surface Mining Control and Reclamation Act of 1977 (1996) (hereinafter “1996 BiOp”).

<sup>3</sup> 16 U.S.C. § 1536(a)(2).

1996 BiOp does not comply with ESA section 7(a)(2), even full adherence to its terms will not excuse violations of the ESA.

Additionally, you are hereby notified that you are in violation of the ESA's requirement to reinitiate formal consultation on the impacts of surface mining on listed species. First, OSM is out of compliance with the 1996 BiOp's requirement that it reinitiate consultation when new information reveals that the action may affect listed species in a manner or to an extent not considered in the BiOp. Here, a species has been listed that is being devastated by a disease – white nose syndrome – which was not contemplated at the time the BiOp was developed. Second, like many endangered and threatened species that are impacted by surface coal mining, the northern long-eared bat was listed as a threatened species under the ESA since the 1996 BiOp was finalized nearly 20 years ago. Under the implementing regulations for ESA section 7(a)(2), OSM and FWS are required to request, and OSM is required to complete, reinitiation of formal consultation when new species are listed in order to evaluate the effects of OSM-authorized surface coal mining and reclamation on all potentially-affected threatened and endangered species, wherever they (or their habitats) occur and may be affected by such activities. Third, FWS and OSM have violated the 1996 BiOp by failing to develop and implement species-specific measures to minimize take of northern long-eared bats at the Big Creek and Long Ridge mines as required under the 1996 BiOp. This violation of the terms of the 1996 BiOp requires reinitiation of consultation.

The above-named organizations 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 unless you take immediate steps to correct these violations.<sup>4</sup>

## **I. LEGAL BACKGROUND**

### **A. The Duty to Ensure No Jeopardy to Listed Species Under Section 7(a)(2) of the ESA**

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 “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>7</sup>

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<sup>4</sup> 16 U.S.C. § 1540(g).

<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. § 1536(a)(2).

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 “actions directly or indirectly causing modifications to the land, water, or air,” such as the regulatory program and surface mining projects at issue here.<sup>8</sup> These duties 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 complies with these duties may an action that “may affect” a protected species go forward.<sup>9</sup>

Pursuant to these requirements, each federal agency must review its action at “the earliest possible time” to determine whether it “may affect” any listed species or its designated critical habitat in the “action area,” and must “use the best scientific and commercial data available” to determine whether these species are likely to be adversely affected by the action.<sup>10</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>11</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>12</sup>

If the action agency concludes that the proposed action is “not likely to adversely affect” a listed species that occurs in the action area, FWS must concur in writing with this determination.<sup>13</sup> If FWS concurs in this determination, then formal consultation is not required.<sup>14</sup> If FWS’s concurrence in a “not likely to adversely affect” finding is inconsistent with the best available science, however, any such concurrence must be set aside.<sup>15</sup>

If an agency concludes that an action is “likely to adversely affect” listed species or critical habitat, it must enter into formal consultation with FWS.<sup>16</sup> The threshold for triggering the formal consultation requirement is “very low;” indeed, “any possible effect ... triggers formal consultation requirements.”<sup>17</sup>

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<sup>8</sup> 50 C.F.R. § 402.02.

<sup>9</sup> *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055-57 (9th Cir. 1994).

<sup>10</sup> 50 C.F.R. §§ 402.14(a), (g)(8); 16 U.S.C. §§ 1536(a)(2), (a)(4).

<sup>11</sup> 50 C.F.R. § 402.02.

<sup>12</sup> *Interagency Cooperation – Endangered Species Act of 1973, as Amended*, 51 Fed. Reg. 19,926 (June 3, 1986).

<sup>13</sup> 50 C.F.R. §§ 402.13(a) and 402.14(b).

<sup>14</sup> *Id.* § 402.13(a).

<sup>15</sup> *See* 5 U.S.C. § 706(2).

<sup>16</sup> 50 C.F.R. §§ 402.12(k), 402.14(a).

<sup>17</sup> *See* 51 Fed. Reg. at 19,926.

Formal consultation commences with the action agency's written request for consultation and concludes with FWS's issuance of a "biological opinion."<sup>18</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>19</sup>

When conducting formal consultation, FWS 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>20</sup> The environmental baseline includes the past and present impacts of all Federal, state, and private actions and other human activities in the action area...<sup>21</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>22</sup>

If FWS concludes in a biological opinion that jeopardy is likely to occur, it must prescribe "reasonable and prudent alternatives" to avoid jeopardy.<sup>23</sup>

If FWS concludes that a project is not likely to jeopardize listed species, it must nevertheless provide an "incidental take statement" ("ITS") with the biological opinion, specifying the 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" necessary or appropriate to minimize such take, and the "terms and conditions" that must be complied with by the action agency to implement any reasonable and prudent measures.<sup>24</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

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<sup>18</sup> 50 C.F.R. § 402.02.

<sup>19</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>20</sup> 50 C.F.R. §§ 402.14 and 402.02.

<sup>21</sup> *Id.* § 402.02.

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

<sup>23</sup> *Id.* § 402.14(h)(3).

<sup>24</sup> 16 U.S.C. § 1536(b)(4), 50 C.F.R. § 402.14(i).

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>25</sup>

In addition, courts have found that a violation of the terms of an ITS obligates the action agency to reinitiate consultation, and “[w]hen an agency violates the terms of an ITS, a private party may bring a citizen suit alleging that by virtue of this violation, the agency’s failure to reinitiate consultation violates the agency’s statutory duty under ESA section 7(a)(2).”<sup>26</sup>

Furthermore, Section 7(d) of the ESA provides that once a federal agency initiates consultation on an action 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>27</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. The 1996 Biological Opinion and Incidental Take Statement**

Pursuant to ESA Section 7(a)(2), OSM must ensure that coal-mining activities undertaken pursuant to SMCRA will not jeopardize the continued existence of listed species. Hence, in 1995, OSM initiated formal consultation with FWS under Section 7 of the ESA for all SMCRA permitting programs, state or federal, nationwide. A year later, FWS issued a 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 – the 1996 BiOp.

Although it failed to include or analyze any site-specific or species-specific information about affected species or designated critical habitat, the 1996 BiOp concluded that surface coal mines regulated by “properly implemented” SMCRA programs “are not likely to jeopardize the continued existence of listed or proposed species” or “result in the destruction or adverse modification of designated or proposed critical habitats.”

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<sup>25</sup> 50 C.F.R. § 402.16.

<sup>26</sup> *South Yuba River Citizens League v. Nat’l Marine Fisheries Serv.*, 629 F. Supp. 2d 1123, 1133 (E.D. Cal. 2009).

<sup>27</sup> 16 U.S.C. § 1536(d).

The 1996 BiOp 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>28</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. According to the Service, “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, OSM and state agencies, which requires compliance with SMCRA regulations that purportedly prohibit the taking of an endangered or threatened species in violation of the Endangered Species Act, as well as compliance with the terms and conditions of the 1996 BiOp and ITS.<sup>29</sup>

To ensure that surface coal mining does not result in jeopardy to listed species, and “[a]s a condition of [the] non-jeopardy opinion and incidental take statement,” the 1996 BiOp requires FWS, in coordination with OSM and the relevant delegated state authority – here, the West Virginia Department of Environmental Protection (“WVDEP”) – to develop and implement site- and species-specific measures to minimize impacts to listed species.<sup>30</sup> Furthermore, OSM and WVDEP must also require mine operators to comply with those measures in order to satisfy OSM’s duty to avoid jeopardy to listed species and to retain the protections of the 1996 BiOp.<sup>31</sup>

To implement the species-specific measures that are required to minimize take under the 1996 BiOp, OSM and WVDEP must require PEPs for 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>32</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 and blackside dace, but not for all species that may be impacted by surface mining, such as the northern long-eared bat, as required by the 1996 BiOp.

Furthermore, pursuant to the 1996 BiOp OSM must ensure that adequate PEPs are being provided with species-specific measures to minimize take. The 1996 BiOp provides that OSM has a continuing responsibility to monitor compliance with the terms of the ITS (i.e. implementation of the species-specific measures), otherwise its protective coverage lapses.<sup>33</sup> Moreover, as noted in the 1996 BiOp, SMCRA requires that OSM evaluate the administration of

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<sup>28</sup> 1996 BiOp at 6.

<sup>29</sup> See 1996 BiOp at 10-13; 30 C.F.R. § 773.15.

<sup>30</sup> 1996 BiOp at 12, 13.

<sup>31</sup> *Id.*

<sup>32</sup> 30 C.F.R. § 780.16(b).

<sup>33</sup> 1996 BiOp at 11.

approved State programs.<sup>34</sup> According to the 1996 BiOp, “[f]ollowing approval of a State program, OSM assumes a monitoring role and provides funding and technical assistance” for state-delegated programs.<sup>35</sup> OSM has delegated the state SMCRA program to WVDEP but continues to fund that program, and retains the duty to ensure that species-specific measures be implemented for listed species affected by surface coal mines to prevent jeopardy as set forth in the 1996 BiOp.

The 1996 BiOp 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>36</sup> The 1996 BiOp fails to require reinitiation when “a new species is listed or critical habitat designated that may be affected by the identified action,” as set forth in the ESA implementing regulations.<sup>37</sup>

## **II. FACTUAL BACKGROUND**

### **A. Coal Mining under SMCRA**

Surface coal mining is accomplished by logging or clearing the mine site, then removing overburden from the coal seam and then blasting and removing the coal. This includes strip mining and open pit mining practices, as well as mountain top 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 to be disturbed, destroying mountains and forest habitat, and results in deposition of sediment and heavy metals into waterbodies, which results in adverse impacts on streams and local biodiversity. These impacts harm species, including an increasing number of species that are listed as endangered or threatened under the ESA.<sup>38</sup>

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<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 14.

<sup>37</sup> 50 C.F.R. § 402.16(d).

<sup>38</sup> See e.g. U.S. DEPARTMENT OF THE INTERIOR, DRAFT STREAM PROTECTION RULE ENVIRONMENTAL IMPACT STATEMENT 4-95 (2015) (stating that the removal of trees and habitat fragmentation associated with coal mining “may cause species to become threatened or endangered, and can contribute to species extinction”); *Id.* at 4-113 (“The negative effects of mining on specific features of habitats (soils, topography, water quality, and vegetation) may make it more difficult for wildlife species to reestablish after a mining disturbance and may increase the proliferation of non-native species on reclaimed landscapes.”); *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”).



Surface coal mining in the U.S. is regulated pursuant to SMCRA. The OSM 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 in the SMCRA and implementing regulations issued by OSM 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 OSM, assuming responsibility over permitting, inspection, and enforcement activities.

However, even after a SMCRA program has been delegated to a state, OSM retains oversight of that program. OSM provides funding and supervision of the State's or Tribe's implementation of the regulatory program, and OSM 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. Army, Department of the Interior and the EPA regarding Appalachian coal mining, wherein OSM 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>39</sup> This indicates that OSM maintains an active role in the implementation of state-delegated SMCRA programs.

SMCRA in fact specifically requires that OSM evaluate and oversee the administration of approved State programs, and requires that OSM enforce the terms of the statute should it find that the State has failed to adequately enforce its state-delegated SMCRA program.<sup>40</sup> As set forth in the 1996 BiOp, "in this role, OSM conducts oversight inspections of selected minesites and undertakes oversight reviews of selected topics in States with primacy."<sup>41</sup>

## **B. The Mines**

### *i. The Big Creek Mine*

The Big Creek mine in McDowell County, West Virginia is proposed by Justice Low Seam Mining, Inc. owned by Jim Justice, a democratic candidate for governor in the state. The mine will cover 468 acres, and is adjacent to a second mine in Virginia, making this a hotspot for surface mining impacts.<sup>42</sup>

When bat surveys were performed for the Big Creek mine, both Indiana and northern long-eared bats were captured. The Big Creek mine therefore has a PEP for Indiana bats; however, that PEP fails to discuss northern long-eared bats and does not include any mitigation measures

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<sup>39</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>40</sup> 30 U.S.C. § 1271(b).

<sup>41</sup> 1996 BiOp at 5.

<sup>42</sup> EMPIRE CONSULTING SERVICES, L.L.C., INDIANA BAT PROTECTION AND ENHANCEMENT PLAN FOR THE BIG CREEK SURFACE MINE 3 (Nov. 2014).

specifically tailored to these newly listed bats. Moreover, the permit application requests a variance from the stream buffer requirement, which would increase habitat fragmentation and negate protections for important feeding areas for these bats.

ii. *The Long Ridge Mine*

The Long Ridge mine site is on Coal River Mountain in Raleigh County, West Virginia. The mine is proposed by Republic Energy, Inc. and covers 664 acres, and is one of several mines currently approved for Coal River Mountain.<sup>43</sup>

Bat surveys at the mine site revealed the presence of northern long-eared bats but not Indiana bats. However, due to the presence of Indiana bats (including a known hibernacula, which may also contain northern long-eared bats) at a nearby mine (Eagle 2), the application materials included a PEP for Indiana bats prepared for that mine, which purports to cover all mines within five miles, including the Long Ridge mine, with an ITS issued by the state. No protective measures specific to northern long-eared bats were included in the application materials, and the state-issued ITS does not purport to cover this species.

C. **The Northern Long-Eared Bat**

On April 2, 2015, FWS protected the northern long-eared bat as a threatened species under the ESA.<sup>44</sup> The northern long-eared bat is a medium-sized bat, with dark fur and a tawny underside. As its name suggests, this bat has long ears for its size. Like most bats, northern long-eared bats emerge at dusk to feed. They 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.

Northern long-eared bats have been decimated by a disease known as White Nose Syndrome (“WNS”), which is caused by the fungus *Pseudogymnoascus destructans* (*Pd*), and the bats are threatened by habitat loss and exposure to chemicals across their range. WNS arrived in West Virginia in 2009. Based on reports, the 2015 survey of northern long-eared bats by WVDNR counted 15 bats. The state agency has documented a population decrease of 55.9 percent since WNS arrived in the state.

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<sup>43</sup> APOGEE ENVIRONMENTAL AND ARCHAEOLOGICAL, A SUMMER SURVEY AND WINTER HABITAT ASSESSMENT FOR THE FEDERALLY ENDANGERED INDIANA BAT (*MYOTIS SODALIS*) AT A PROPOSED LONG RIDGE NO. 1 SURFACE MINE NEAR STOVER FORK, RALEIGH COUNTY, WEST VIRGINIA, Attachment H-4 at 4 (Aug. 2011).

<sup>44</sup> Threatened Species Status for the Northern Long-Eared Bat With 4(d) Rule, 80 Fed. Reg. 17,973 (Apr. 2, 2015).

The Center petitioned to list the species in 2010, and in 2013 it was proposed for listing as endangered under the ESA. On April 2, 2015, the FWS listed northern long-eared bats as a threatened species.<sup>45</sup>

The ranges of endangered Indiana and threatened northern long-eared bats overlap, but the two bat species differ in several respects. Northern long-eared bats prefer forests with greater canopy closure (especially when compared to Indiana bats).<sup>46</sup> Unlike Indiana bats, northern long-eared bats are an interior forest dependent species. 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.<sup>47</sup> Northern long-eared bats have also been documented as using edge habitat and fields less than other bat species and preferring more densely vegetated environments than other bats.<sup>48</sup>

A study in West Virginia found that northern long-eared bats and Indiana bats preferred different water sources, and while Indiana bats were found at manmade water structures, northern long-eared bats avoid these areas.<sup>49</sup> Northern long-eared bats differentially gravitate toward denser forest habitats and their anatomy, flight pattern, and call frequency are indicative of a bat which is specialized to forage in extensive continuous forest patches with abundant trees and multiple, dense canopies. Therefore, species-specific measures intended to mitigate the take of Indiana bats would be insufficient to ensure protection of northern long-eared bats.<sup>50</sup>

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<sup>45</sup> The threatened listing was accompanied by a 4(d) rule that exempts many activities from the prohibition on take in Section 9 of the ESA. None of those exemptions should be applicable here. Moreover, the 4(d) rule does not alter the need for Section 7 consultations or the jeopardy analysis.

<sup>46</sup> Jordi L. Segers & Hugh G. Broders, *Interspecific effects of forest fragmentation on bats*. CANADIAN JOURNAL OF ZOOLOGY, 92(8), 665-673 (2014).

<sup>47</sup> *Id.*

<sup>48</sup> Meredith K. Jantzen & M. Brock Fenton, *The depth of edge influence among insectivorous bats at forest-field interfaces*. CANADIAN JOURNAL OF ZOOLOGY, 91(5), 287-292 (2013) (“The distance from the edge at which peak activity occurred ranged from 0.8 m into the field for *M. septentrionalis* to 12.6 m into the field for *L. cinereus* (Table 3). Activity levels in the forest were significantly lower for all species, relative to the edge and field, with the exception of *M. septentrionalis*, which had significantly lower activity in the field.”); JOSHUA JOHNSON ET AL., NIGHTLY AND YEARLY BAT ACTIVITY BEFORE AND AFTER WHITE-NOSE SYNDROME ON THE FERNOW EXPERIMENTAL FOREST IN WEST VIRGINIA. U.S. Dep’t of Agric. Research Paper NRS-24 (2013).

<sup>49</sup> JOSHUA JOHNSON ET AL., NIGHTLY AND YEARLY BAT ACTIVITY BEFORE AND AFTER WHITE-NOSE SYNDROME ON THE FERNOW EXPERIMENTAL FOREST IN WEST VIRGINIA. U.S. Dep’t of Agric. Research Paper NRS-24 (2013) (“Northern myotis activity was higher at the smaller water sources, including Big Springs, than at larger water sources, such as Elklick (Table 2, Fig. 3). Indiana myotis activity was highest at Fork Mountain (Table 2, Fig. 4).”). In West Virginia, researchers confirmed that: “...northern myotis have low wing-loading and high-frequency echolocation calls, making cluttered water sources such as at Big Springs a preferred place to forage.” *Id.*

<sup>50</sup> It is further evident from the Indiana bat PEPs that were included with the application materials for the Mines that PEPs for Indiana bats do not provide sufficient protections for northern long-eared bats. For example, the PEPs for the Big Creek mine and Eagle 2 mine only restrict logging until October 15. This

Given 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>51</sup>
- “Other sources of mortality could further diminish the species’ ability to persist as it experiences ongoing dramatic declines.”<sup>52</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>53</sup>

### **E. Impacts of Big Creek and Long Ridge Mines on Northern Long-Eared Bats**

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.

The Big Creek mine will require clearing of 468 acres of forest, and is contiguous with another proposed mine in VA.<sup>54</sup> The Long Ridge mine calls for “approximately 664.88 surface acres” of clearing, and is one of several mining projects currently approved for Coal River Mountain.<sup>55</sup> Cumulatively, this land clearing will result in a large loss of forest and northern long-eared bat habitat.

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is a concern because according to the FWS, northern long-eared bats do not hibernate in West Virginia until November 15. *See* U.S. Fish and Wildlife Service, Northern Long-Eared Bat Interim Conference and Planning Guidance, USFWS Regions 2, 3, 4, 5 & 6 (2014) (hereafter “NLEB Interim Guidance”). As a result, there will be one month where northern long-eared bats are unprotected and could be taken as a result of the projects. Furthermore, the mining activities approved by WVDEP fail to contain buffering “for 3 miles” around the area where the northern long-eared bats were mist netted, as required in the FWS NLEB Interim Guidance. The PEPs also fail to address the fact they are for projects that would result in “[e]xtensive forest removal/conversion” and that the FWS has identified such “[p]rojects [as] most likely to result in lethal impacts or significant adverse impacts to NLEB.”<sup>50</sup> The PEPs do not contain any species-specific measures to minimize take that are specific to the mining site, as required under the 1996 BiOp nor do they specifically address northern long-eared bats and their particular needs.

<sup>51</sup> NLEB Interim Guidance at 4.

<sup>52</sup> NLEB Interim Guidance at 4.

<sup>53</sup> NLEB Interim Guidance at 4.

<sup>54</sup> EMPIRE CONSULTING SERVICES, L.L.C., INDIANA BAT PROTECTION AND ENHANCEMENT PLAN FOR THE BIG CREEK SURFACE MINE 3 (Nov. 2014).

<sup>55</sup> APOGEE ENVIRONMENTAL AND ARCHAEOLOGICAL, A SUMMER SURVEY AND WINTER HABITAT ASSESSMENT FOR THE FEDERALLY ENDANGERED INDIANA BAT (*MYOTIS SODALIS*) AT A PROPOSED LONG RIDGE NO. 1 SURFACE MINE NEAR STOVER FORK, RALEIGH COUNTY, WEST VIRGINIA, Attachment H-4 at 4 (Aug. 2011).

The Big Creek and Coal River Mountain mine areas are unique in that they have not recently seen as extensive surface coal mining as some other areas of the Appalachia. As a result, these Mines contain interior forest ecosystems that, as discussed above, support northern long-eared bats. Given the extensive logging and land clearing required for these mines, as well as the fact that northern long-eared bats are being decimated by disease in this region, it is apparent that this significant habitat loss could further diminish the species' ability to persist, and absent the species-specific measures to minimize take required by the 1996 BiOp, these Mines may jeopardize the continued existence of this imperiled species.

### **III. VIOLATIONS**

#### **A. OSM and FWS have Failed to Ensure that Mining Operations will not Jeopardize Northern Long-Eared Bats in Violation of Section 7 of the ESA**

OSM has a duty to ensure that SMCRA-regulated mining activities will not jeopardize the continued existence of listed species.<sup>56</sup> OSM has elected to fulfill that duty through programmatic consultation that resulted in the 1996 BiOp, which provides incidental take coverage for OSM and state-delegated SMCRA programs. OSM continues to oversee and annually fund the West Virginia SMCRA program and has a continuing duty pursuant to the 1996 BiOp to ensure that the West Virginia program is adhering to the requirements of the ITS. This includes the requirement that species-specific measures to minimize take be implemented for threatened and endangered species affected by surface coal mining.

Northern long-eared bats were found during mist-net surveys for the Big Creek and Long Ridge mines, therefore they are known to utilize these currently-intact forest areas. WVDEP has issued permits for the Big Creek and Long Ridge mines; however, these permits do not contain the required species-specific measures to minimize take of the northern long-eared bat, as required under the 1996 BiOp as well as the SMCRA regulations, with no site-specific PEPs for this species in place.<sup>57</sup> Therefore, OSM and WVDEP have failed to ensure that these projects will not cause jeopardy to this imperiled species.

The incidental take coverage of the 1996 BiOp is predicated on FWS' finding that "properly implemented" SMCRA programs "are not likely to jeopardize the continued existence of listed or proposed species." This, in turn, is based on assumed compliance with applicable SMCRA regulations, and the development by FWS and OSM of species-specific measures to minimize take.<sup>58</sup> The development by FWS and OSM of species-specific measures to minimize take is a clear condition of the ITS, and implementation of those measures is required through the SMCRA permit.<sup>59</sup>

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<sup>56</sup> 16 U.S.C. § 1536(a)(2).

<sup>57</sup> 30 C.F.R. § 780.16(b).

<sup>58</sup> 1996 BiOp 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>59</sup> *Id.* at 13.

The 1996 BiOp leaves no doubt that the development and inclusion of these species-specific measures to minimize take is necessary to ensure that the actions authorized by the ITS do not result in jeopardy to listed species. The 1996 BiOp 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>60</sup>

However, FWS and OSM have failed to provide species-specific measures (i.e. guidelines for the development of PEPs) for northern long-eared bats, in direct violation of the terms of the 1996 BiOp. Moreover, WVDEP approved the Big Creek and Long Ridge mines absent PEPs for northern long-eared bats not only violating the terms of the 1996 BiOp, but also the SMCRA regulations pertaining to the protection of listed species.<sup>61</sup> It is important to note that both mines were in the application process *after* northern long-eared bats were listed under the ESA.

OSM thereby failed in its continuing responsibility to monitor compliance with the terms of the ITS, and the SMCRA program is not being “properly implemented,” putting species at risk of jeopardy in clear violation of Section 7 of the ESA. Based on the extensive loss of habitat in an area where northern long-eared bats are known to be present, land clearing and mining activities at the Big Creek and Long Ridge sites may cause jeopardy to the species, especially given that bat populations in West Virginia are particularly vulnerable to threats given the effects of WNS. Absent the species-specific measures to minimize take required pursuant to the 1996 BiOp, FWS and OSM have failed to ensure that these projects will not jeopardize the continued existence of the species, as required by Section 7 of the ESA.

**B. Compliance with the 1996 BiOp will not Satisfy OSM’s Duties Pursuant to Section 7 of the ESA, as the 1996 BiOp is Invalid as Applied to Northern Long-Eared Bats**

Full compliance with the terms of the 1996 BiOp will not ensure that surface coal mining and reclamation at the Big Creek and Long Ridge mines will not jeopardize the continued existence of listed species, since the 1996 BiOp itself does not meet the requirements of Section 7(a)(2) of the ESA. Here, a species has been protected under the ESA due to disease (and other factors) and the ramifications of WNS were never addressed by or contemplated in the 1996 BiOp. Therefore, the terms of that opinion are insufficient to protect northern long-eared bats.

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<sup>60</sup> *Id.* at 12 (emphasis added).

<sup>61</sup> 1996 BiOp at 13; 30 C.F.R. § 780.16(b) (requiring a PEP for listed species); 30 C.F.R. § 773.15 (requiring the regulatory authority to find in writing that the activities will not jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat).

Additionally, the 1996 BiOp suffers many legal flaws that bear on the survival and recovery of the northern long-eared bat. These flaws include the lack of reasonable and prudent measures (“RPMs”) to minimize take of the species, such as seasonal restrictions on tree clearing and maintenance of forest canopy.<sup>62</sup> The only RPM provided in the 1996 BiOp 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 NLEBs, hence the 1996 BiOp 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>63</sup>

Therefore, the 1996 BiOp does not ensure that coal mine operators are required to carry out specific, common-sense measures to minimize and mitigate the destruction of thousands of acres of bat habitat, as the ESA requires, so that future activities that affect northern long-eared bats may be considered within the context of take that has been authorized in connection with these Mines (and any other surface coal-mining and reclamation projects that may be approved in the future).

The PEPs for the Indiana bat included in the applications for the Mines do not satisfy the ESA requirements for the northern long-eared bat, as they do not quantify take of the species, and because they are not based on measures created by the FWS, the expert biological agency. Furthermore, PEPs are unique to specific species and mines, so there has been no overarching programmatic assessment of take of this specific species. Although the 1996 BiOp’s ITS requires mine operators to quantify take whenever possible, it is not clear that this is occurring. More importantly, 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. The ITS term requiring the regulatory authority to quantify take conflates the requirement that take be quantified in the ITS itself, and therefore does not comply with the regulatory requirements.

Moreover, the 1996 BiOp 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.<sup>64</sup>

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<sup>62</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>63</sup> 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>64</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

Thus, because the 1996 BiOp does not comply with ESA section 7(a)(2), even full adherence to its terms will not excuse violations of the ESA. Therefore, the development of PEPs for northern long-eared bats will not satisfy OSM's duty to ensure that listed species are not jeopardized by SMCRA regulated mining activity.

### **C. FWS and OSM's Violations of the 1996 BiOp Require Reinitiation of Consultation**

To fulfill its duties pursuant to the 1996 BiOp, FWS must issue PEP Guidelines that are specifically intended to provide the species-specific measures to minimize anticipated take that must be implemented at mine sites. It is readily apparent that FWS is aware of its duty to generate these guidelines, and that it considers such guidelines to be the means by which it fulfills its responsibilities under the 1996 BiOp. In fact, the PEP Guidelines for Indiana bats acknowledges that it "identifies the measures that must be implemented by RAs and mining applicants to ensure compliance with the 1996 BO."<sup>65</sup> FWS further acknowledges in the Indiana Bat PEP Guidelines that:

The 1996 BO 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 permitting process relative to the preparation of a Protection and Enhancement Plan (PEP) by an applicant.<sup>66</sup>

However, FWS has failed to issue Guidelines for the northern long-eared bat or develop any other species-specific measures.<sup>67</sup> Mining activities that may jeopardize this species have been approved absent the required safeguards to ensure adequate protection to prevent jeopardy, as set forth above. Therefore, FWS has violated the clear terms of the 1996 BiOp, and cannot ensure that the Big Creek and Long Ridge mines or any other mines approved in northern long-eared bat habitat will not result in jeopardy to the continued existence of northern long-eared bats, as contemplated in the 1996 BiOp.

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when the level of anticipated take has been exceeded." The 1996 BiOp does not specify the anticipated take of northern long-eared bats, nor does it provide a surrogate for this analysis.

<sup>65</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>.

<sup>66</sup> *Id.*

<sup>67</sup> 1996 BiOp at 13 ("As a condition of this non-jeopardy opinion and incidental take statement, the Service and the appropriate regulatory authority, acting in accordance with the applicable State, Federal, or Federal and Indian lands program, must develop species-specific measures to minimize anticipated incidental take."). While FWS has issued Guidelines for the development of PEPs for some species in order to fulfill its obligation pursuant to the 1996 BiOp (i.e. the Indiana bat and blackside dace), it has failed to provide such guidance for the northern long-eared bat.



Likewise, as set forth above, OSM has violated the 1996 BiOp by failing to ensure that such species-specific measures were implemented by WVDEP when it approved the Big Creek and Long Ridge Mines absent PEPs for northern long-eared bats. The result is that mines are being permitted absent any ESA review and without specific guidelines and measures necessary to minimize take and prevent jeopardy. This is a complete abdication of the ESA's duty to ensure that surface mining does not jeopardize the continued existence of listed species, such as northern long-eared bats, and directly violates the requirements of the 1996 BiOp.

Due to these clear violations of the 1996 BiOp, there can be no incidental take coverage for the Big Creek and Long Ridge mines, since a violation of an ITS's terms "abrogates the safe harbor provision of the ITS."<sup>68</sup> Moreover, Courts have found that a violation of an ITS is not merely a violation of a permit; it is also a violation of a statutory provision.<sup>69</sup> Courts have therefore held that a violation of the terms of an ITS obligates the action agency to reinitiate consultation.<sup>70</sup> Thus, "when an agency violates the terms of an ITS, a private party may bring a citizen suit alleging that by virtue of this violation, the agency's failure to reinitiate consultation violates the agency's statutory duty under ESA section 7(a)(2)."<sup>71</sup>

The 1996 BiOp has proven to be insufficient to protect imperiled species from the impacts of surface coal mining, and only through careful consideration of the impacts of these activities can FWS ensure that surface mining activities will not jeopardize the continued existence of any threatened or endangered species.<sup>72</sup> In fact, recent scientific and policy documents show that surface mining is increasingly imperiling numerous species of many taxa, contrary to the conclusions of the 1996 BiOp (and perhaps specifically because OSM and FWS have failed to properly implement and oversee the implementation of the requirements of the 1996 BiOp).<sup>73</sup>

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<sup>68</sup> *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 1005 (D. Or. 2010); *See also South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 629 F. Supp. 2d 1123, 1132 (E.D. Cal. 2009).

<sup>69</sup> *South Yuba*, 629 F. Supp. 2d at 1132-33.

<sup>70</sup> *See e.g. id.* at 1133.

<sup>71</sup> *Id.*

<sup>72</sup> 16 U.S.C. § 1536(a)(2).

<sup>73</sup> STEVEN AHLSTEDT ET AL., LONG-TERM TREND INFORMATION FOR FRESHWATER MUSSEL POPULATIONS AT TWELVE FIXED-STATION MONITORING SITES IN THE CLINCH AND POWELL RIVERS OF EASTERN TENNESSEE AND SOUTHWESTERN VIRGINIA 1979-2004(2005); Nathaniel Hitt & Douglas Chambers, *Temporal changes in taxonomic and functional diversity of fish assemblages downstream from mountaintop mining*, *Freshwater Science* 33(3): 915-926 (2014); Brenee Muncy et al., *Mountaintop removal mining reduces stream salamander occupancy and richness in southeastern Kentucky (USA)*, *Biological Conservation* 180: 115-121 (2014); U.S. ENVIRONMENTAL PROTECTION AGENCY, THE EFFECTS OF MOUNTAINTOP MINES AND VALLEY FILLS ON AQUATIC ECOSYSTEMS OF THE CENTRAL APPALACHIAN COALFIELDS, EPA/600/R-09/138F (2011); Gregory Pond, *Patterns of Ephemeroptera taxa loss in Appalachian headwater streams (Kentucky, USA)*, *Hydrobiologia* 641:185-201 (2010); Todd Petty et al., *Landscape indicators and thresholds of stream ecological impairment in an intensively mined Appalachian watershed*, *Journal of the North American Benthological Society* 29(4):1292-1309 (2010); Endangered status for the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and

Such a clear violation of the 1996 BiOp and the tenets of the ESA requires reinitiation of Section 7 consultation for surface coal mining impacts to listed species.

**D. New Species Listings and New Information Regarding Impacts to Listed Species Requires Reinitiation of Consultation**

Since the issuance of the 1996 BiOp, the factors requiring reinitiation of consultation under the ESA regulations and the terms of the 1996 BiOp have been met. First, 50 C.F.R. §402.16 requires reinitiation of consultation when “a new species is listed or critical habitat designated that may be affected by the identified action.”<sup>74</sup> As noted above, FWS listed the northern long-eared bat as threatened on April 2, 2015. This new listing requires reinitiation of consultation to ensure that coal mining activities, especially at the Big Creek and Long Ridge mine sites, do not jeopardize the continued existence of the species.

While the 1996 BiOp itself does not provide for reinitiation when new species are listed, this is contrary to the ESA and the Section 7 regulations, rendering the BiOp *ultra vires* invalid, but certainly invalid as it applies to the northern long-eared bat. The 1996 BiOp states that it pertains to “all present and future Federally listed and proposed species . . . ;”<sup>75</sup> however, the Section 7 regulations are clear that a newly listed species affected by the action triggers reinitiation of Section 7 consultations. The situation with northern long-eared bats illustrates why reinitiation is necessary when a new species is listed under the ESA. At the time of consultation, the Service cannot possibly envision all the other species that will be listed and the threats to those species, such as the dire circumstances of northern long-eared bats from WNS. Therefore, reinitiation is necessary to address a new listing that presents new issues that have not been addressed in the 1996 BiOp.

Further, while the 1996 BiOp purports to provide take coverage for “both current and future listed species,” the lack of species-specific measures to minimize take of northern long-eared bats, and the lack of PEPs for the species, undermines the application of the ITS to mines that are impacting this newly-listed species, such as the Big Creek and Long Ridge mines. The ITS states that:

Surface coal mining and reclamation operations in existence when a species is listed or critical habitat is designated need not cease operation pending submission and approval of a permit revision so long as mining and reclamation activities are conducted in accordance with any species-specific standards and protective measures approved by the Service and the regulatory authority. Until such measures are developed and approved, existing surface coal mining and

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Laurel Dace, Final Rule, 76 Fed. Reg. 48,722 (Aug. 9, 2011); Endangered species status for the Big Sandy Crayfish and the Guyandotte River Crayfish, Proposed Rule, 80 Fed. Reg. 18,710 (Apr. 7, 2015).

<sup>74</sup> 50 C.F.R. § 402.16(d).

<sup>75</sup> 1996 BiOp at 6.

reclamation operations may continue provided they adhere to all requirements of the approved SMCRA regulatory program.<sup>76</sup>

While this provision does allow for mines to continue to operate “until such measures are developed and approved,” FWS’ failure to promulgate species-specific measures as specifically required by the 1996 BiOp allows mines to continue to operate with impunity with regards to impacts to this listed species.<sup>77</sup> There is thus a failure on all sides (FWS, OSM, and the WVDEP) to adhere to the requirements of the ITS, and this violation of the 1996 BiOp and the specific requirements of the ITS requires the reinitiation of consultation, since “[w]hen an agency violates the terms of an ITS, a private party may bring a citizen suit alleging that by virtue of this violation, the agency’s failure to reinitiate consultation violates the agency’s statutory duty under ESA section 7(a)(2).”<sup>78</sup>

Second, new information reveals that coal mining may affect listed species in a manner or to an extent not considered in the 1996 BiOp, requiring reinitiation of consultation. WNS is now ravaging a threatened species, which was not contemplated by the 1996 BiOp, nor was it addressed by the SMCRA regulations relied upon in the BiOp or the BiOp’s terms and conditions. The 1996 BiOp relies upon various SMCRA regulations that are supposed to protect against jeopardy to threatened and endangered species;<sup>79</sup> however, the terms and conditions of the 1996 BiOp and applicable SMCRA requirements are failing to prevent surface coal mining that is jeopardizing the continued existence of northern long-eared bats in West Virginia.

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<sup>76</sup> *Id.* at 12.

<sup>77</sup> *Id.* at 13 (stating that FWS “must develop species-specific measures to minimize anticipated incidental take”) (emphasis added).

<sup>78</sup> *South Yuba*, 629 F. Supp. 2d at 1133.

<sup>79</sup> The following provisions are cited to in the 1996 BiOp:

§ 772.12 “Paragraph (d)(2)(ii) requires that the regulatory authority (State or OSM) find in writing that the exploration and reclamation activities described in the application will not jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat of those species”

§ 816.97 and 817.97 “Paragraph (b) prohibits the taking of an endangered or threatened species in violation of the Endangered Species Act and prohibits mining activity which is likely to jeopardize the continued existence of endangered or threatened species. Under this rule, the operator must promptly notify the regulatory authority of the presence of a protected species within the permit area. The regulatory authority must consult with appropriate State and Federal fish and wildlife agencies to determine whether and under what conditions the operation may proceed.”

“816.97, and 817.97 [these provisions require operators to minimize disturbance of and adverse impacts on fish, wildlife, and related environmental values. Furthermore, these provisions prohibit the taking of an endangered or threatened species in violation of the Endangered Species Act and prohibits mining activity which is likely to jeopardize the continued existence of endangered or threatened species. The regulatory authority must consult with appropriate State and Federal fish and wildlife agencies to determine whether and under what conditions the operation may proceed].”

In other words, northern long-eared bats stand at a critical juncture, and in fact the FWS has found that this species requires additional protections due to its vulnerable state as a result of white nose syndrome. Thus, the typical mechanisms under SMCRA and the 1996 BiOp are undeniably insufficient to protect this species, whether they were ever sufficient in the first place. Because this situation was not contemplated nor addressed by the 1996 BiOp, reinitiation is necessary.

Furthermore, information has come to light since the 1996 BiOp suggesting that OSM and West Virginia are failing to ensure that the SMCRA-mandated protections that FWS relied upon when it issued the 1996 BiOp are being properly employed. In *West Virginia Highlands Conservancy*, the court detailed the damage done by OSM'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>80</sup>

OSM is clearly not fulfilling its duty to evaluate and oversee the administration of the West Virginia SMCRA program. This new information reveals that the agency action may affect listed species or critical habitats in a manner or to an extent not considered in the 1996 BiOp, requiring reinitiation of consultation.

Third, 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>81</sup> triggering the requirement for reinitiation of formal consultation under §402.16(b). OSM and FWS thus must reinitiate consultation immediately to ensure that regulated mining is not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of their habitat.

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<sup>80</sup> *West Virginia Highlands Conservancy v. Norton*, 161 F. Supp. 2d 676, 684 (S.D. W.V. 2001).

<sup>81</sup> 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).

**E. No Mining May Occur at the Big Creek and Long Ridge Sites Until OSM Complies With Section 7 of the ESA**

Allowing land-clearing or mining activities to occur at the Big Creek and Long Ridge sites absent compliance with the requirements of Section 7(a)(2) of the ESA would be in direct violation of Section 7(d), which prevents any irreversible or irretrievable commitment of resources that would foreclose the formulation or implementation of any reasonable and prudent measures to minimize take of listed species.<sup>82</sup> Allowing land-clearing at the Mines would irreversibly and irretrievably eradicate the forest habitat resources that northern long-eared bats depend upon, and foreclose the implementation of measures to minimize take of the species, such as the preservation of forest canopy and buffering for 3 miles around the area where the northern long-eared bats were mist netted. These forest areas must not be cleared in order to preserve the current habitat status quo until OSM complies with its duties pursuant to Section 7 of the ESA.

Furthermore, the 1996 BiOp specifically states that:

Surface coal mining and reclamation operations in existence when a species is listed or critical habitat is designated need not cease operation pending submission and approval of a permit revision so long as mining and reclamation activities are conducted in accordance with any species-specific standards and protective measures approved by the Service and the regulatory authority. Until such measures are developed and approved, existing surface coal mining and reclamation operations may continue provided they adhere to all requirements of the approved SMCRA regulatory program.<sup>83</sup>

Here, the listing of northern long-eared bats occurred prior to any mining operations at the Big Creek and Long Ridge mine sites, so they were not existing operations when the species was listed, and this provision provides no basis for proceeding with mining activities pending completion of species-specific standards for northern long-eared bats. Moreover, these Mines do not adhere to the requirements of SMCRA. The SMCRA regulations require PEPs that provide how the mine operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the ESA.<sup>84</sup> No such PEPs have been provided for northern long-eared bats. Therefore, pursuant to the 1996 BiOp and applicable SMCRA regulations, mining operations at the Big Creek and Long Ridge mines may not proceed until the regulatory authorities comply with Section 7 of the ESA.

In addition, the Indiana bat PEP for the Eagle 2 mine, which was included in the application materials for the Long Ridge mine, indicates that a hibernacula exists on that site, in close proximity to the Long Ridge mine. This hibernacula may be providing winter habitat for northern long-eared bats, requiring additional measures to protect this species from harm during

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<sup>82</sup> 16 U.S.C. § 1536(d).

<sup>83</sup> 1996 BiOp at 12.

<sup>84</sup> 30 C.F.R. § 780.16(b).

site-clearing activities. It does not appear that this hibernacula has been surveyed for northern long-eared bats, nor do the application materials for the Long Ridge mine indicate that measures will be taken to protect northern long-eared bats utilizing this hibernacula from harm. Therefore, until further analysis is undertaken regarding this hibernacula and the potential impacts that the Long Ridge mine may have on the bats utilizing it, there can be no assurance that the mine will not jeopardize the species as required under Section 7 of the ESA. Until such analysis is complete, no site-clearing activities may take place pursuant to Section 7(d).

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

Allowing activities that may harm federally-protected species, such as surface coal mining, opens up the state and private actors to liability under Section 9 of the ESA. Under section 9(a)(1)(B) of the ESA, it is illegal to engage in any activity that “takes” an endangered species.<sup>85</sup> Regulations adopted by the FWS under section 4(d) of the Act apply the ESA’s take prohibition to threatened species.<sup>86</sup>

It is well settled that violations of the terms and conditions of a BiOp and ITS open up the parties to ESA take liability.<sup>87</sup> Courts have found that a violation of an ITS’s terms “abrogates the safe harbor provision of the ITS.”<sup>88</sup> If an applicant does “not comply with all of the terms of the BiOp, they would not be protected by the BiOp’s safe harbor” and would be subject to take liability.<sup>89</sup> This includes the action agency, which disregards an ITS “at its own peril (and that of its employees), for ‘any person’ who knowingly ‘takes’ an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment.”<sup>90</sup>

WVDEP permitted the Big Creek and Long Ridge mines absent the required species-specific measures to minimize take of this species, since no PEPs for northern long-eared bats were developed. Therefore, WVDEP has violated the clear terms of the 1996 BiOp/ITS.

WVDEP is thereby subject to ESA Section 9 take liability for authorizing mining activities at the Big Creek and Long Ridge mines. It is important to note that both mines were in the application process *after* northern long-eared bats were listed under the ESA; yet WVDEP failed to require

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<sup>85</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>86</sup> *Id.* § 1533(d); 50 C.F.R. §§ 17.31(a), 17.21 (making it “unlawful for any person ... to commit, to attempt to commit, to solicit another to commit or to cause to be committed ... take”).

<sup>87</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 from take liability).

<sup>88</sup> *Or. Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 1005 (D. Or. 2010); See also *South Yuba*, 629 F. Supp. 2d at 1132.

<sup>89</sup> *Dow AgroSciences LLC v. Nat’l Marine Fisheries Serv.*, 637 F.3d 259, 266 (4th Cir. 2011).

<sup>90</sup> *Bennett*, 520 U.S. at 170. The language of the statute includes both action agencies and applicants, if any. The Court refers only to action agencies, as that scenario comported with the facts of that case. There is no suggestion in this opinion or others I have found that applicants would be treated differently than action agencies on this issue.

PEPs for the northern long-eared bat, and no determination has been made that the projects will not take the species in violation of Section 9.

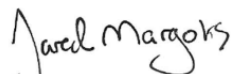
It is further evident that mining activities at these sites would indeed cause harm to the northern long-eared bat, thereby resulting in unlawful take of this protected species, and opening up both the state and mine operators to ESA take liability. This species has been decimated by WNS, making it extremely vulnerable to further stress. The loss of thousands of acres of forest habitat on which northern long-eared bats currently depend would almost certainly result in harm to this imperiled species.

#### **IV. CONCLUSION**

For the forgoing reasons, FWS and OSM have violated the 1996 BiOp and Section 7 of the ESA by failing to ensure that these projects will not jeopardize the continued existence of northern long-eared bats. No land clearing or mining activities should be allowed to move forward at the Big Creek and Long Ridge mine sites absent full compliance with Section 7 of the ESA. FWS must develop PEP Guidelines for the northern long-eared bat, and OSM and WVDEP must ensure that PEPs are developed to implement those measures. Furthermore, OSM and FWS must reinitiate formal ESA Section 7 consultation on surface mining impacts.

Please do not hesitate to contact me if I can provide additional information on this topic 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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