Legal Sidebar

ESA "God Squad" Exemption for Gulf Oil and Gas Activities: Background and Current Litigation

April 20, 2026

On March 31, 2026, the Endangered Species Committee—colloquially referred to as the "God Squad" because of its power to determine the fate of species—voted to grant an exemption from Endangered Species Act (ESA; 16 U.S.C. §§ 1531-1544) agency consultation requirements for oil and gas leasing activity in the Gulf of Mexico. This was the first time such an exemption had been granted in more than 30 years, when the Committee last convened in 1992, and the first exemption ever sought or granted for reasons of national security. This Legal Sidebar describes the ESA framework for consultation and exemption therefrom, as well as the ensuing litigation surrounding threats to endangered species, such as the Rice's whale, from Gulf oil and gas development.

Exemptions from ESA Section 7

Section 7 of the ESA requires all federal agencies to use their authorities to conserve threatened and endangered species (i.e., listed species) and to limit harmful effects on listed species or their critical habitat. To ensure such effects are considered and mitigated, the statute prescribes a consultation process—referred to as *Section 7 consultation*—through which the U.S. Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS) (together, the Services) assess the effects of federal agencies' proposed actions and identify ways to mitigate those effects. This process may result in the agency changing its proposed action, or deciding not to proceed with the action. In some rare cases, the agency may seek to move forward with an action that would otherwise violate Section 7. For such cases, the statute provides an exemption process, which was added to the statute in 1978 after the listing of the snail darter halted construction on the Tellico Dam Project.

Section 7 Consultation

Section 7(a)(2) of the ESA requires federal agencies to ensure their actions do not jeopardize the continued existence of listed species or adversely modify or destroy critical habitat designated for listed species. This requirement applies to actions carried out, authorized, or funded by federal agencies. Federal agencies fulfill this requirement "in consultation with and with the assistance of" the Services. In general,

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FWS administers the act for terrestrial and freshwater species, and NMFS administers the act for marine species. Federal agencies consult with one or both of the Services, depending on the listed species and critical habitat found in the area affected by the action. If a proposed action may adversely affect listed species or critical habitat, the federal agency generally is required to initiate a formal consultation process to assess the effects of the action. Once a federal agency initiates formal consultation, Section 7(d) prohibits the federal agency or any permittee or license applicant from making "any irreversible or irretrievable commitment of resources" to the action that might preclude pursuing alternatives.

The formal consultation process culminates in the Services issuing a *biological opinion* (BiOp). In a BiOp, the Services determine whether the action is likely to jeopardize listed species or adversely modify critical habitat. If so, the Services are required to identify any *reasonable and prudent alternatives* (RPAs) that the federal agency can take to avoid jeopardy. The Services' regulations define RPAs as actions that are consistent with the proposed action's purpose, can be undertaken within the scope of the federal agency's authority, are "economically and technologically feasible," and would avoid jeopardizing listed species or adversely modifying critical habitat. If the Services either find no jeopardy or identify an RPA, they issue the BiOp with an *incidental take statement* (ITS) that prescribes terms and conditions for mitigating the effects of the action on listed species. In that case, the federal agency may proceed with the proposed action or RPA, as applicable, and so long as the federal agency complies with the terms and conditions of the ITS, any incidental take of the species in the course of carrying out the action does not violate the act.

If the Services issue a jeopardy BiOp without identifying any RPAs, or the federal agency otherwise determines that it cannot proceed with the action without violating Section 7(a)(2) (e.g., if the federal agency does not want to use the RPAs), the agency may apply for an exemption under Section 7(h). If granted, an exemption allows the federal agency to proceed without violating Section 7(a)(2) and allows the agency to take listed species as needed to carry out the action without violating the act. For more information on the Section 7 consultation process, see CRS Report R46867, *Endangered Species Act (ESA) Section 7 Consultation and Infrastructure Projects*, by Erin H. Ward and Pervaze A. Sheikh (2021).

Endangered Species Committee and the Section 7 Exemption Process

The Section 7 exemption process is administered by the Endangered Species Committee. Section 7(e) establishes the Committee and directs its composition and general operation. The act provides that the Committee is to be composed of at least seven members: the Secretaries of Agriculture, the Army, and the Interior; the Chairman of the Council of Economic Advisors; the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration; and an individual from each state affected by the action, to be appointed by the President. The Services determine which state, or states, are affected by the action. If no states are affected by a particular action, the Secretary of the Interior or Commerce, as applicable, submits a list of individuals with relevant expertise to the President to select an appointee for the committee.

The Secretary of the Interior chairs the Committee. Five members constitute a quorum, and a meeting may be called by the chair or any five members. All Committee meetings and records related to an application for an exemption must "be open to the public." The act provides the Committee with an array of authorities to gather information for purposes of making exemption decisions, including issuing subpoenas, holding hearings, taking testimony, and receiving evidence. The Committee members may assign representatives to carry out various Committee tasks, but only members can vote.

Section 7(g) governs the process for applying for an exemption. The federal agency, the governor of a state where the action would occur, or an applicant for a permit or license may apply for an exemption for a particular agency action if the Services determine, through the consultation process, that the action would violate Section 7(a)(2). The exemption applicant submits a written application to the Secretary of

the Interior or Commerce, as applicable, that includes information related to the proposed action, the associated consultation process, and alternatives to the action, as prescribed in regulations. Upon receipt, the relevant Secretary notifies governors of affected states and publishes notice of the application in the *Federal Register*. The Secretary also "promptly transmit[s]" the application to the Secretary of State to determine if granting the exemption and carrying out the action as proposed would violate an international treaty obligation or other international obligation of the United States. Within 20 days, the Secretary must determine whether the exemption applicant meets three criteria: (1) carried out consultation responsibilities in good faith with a "reasonable and responsible effort" to consider RPAs, (2) conducted any required biological assessments, and (3) refrained from making irreversible or irretrievable commitments of resources in violation of Section 7(d).

If the exemption applicant meets the three criteria, the act directs the Secretary to hold a hearing on the application, in consultation with the Committee, and prepare a report. The report addresses four topics: (1) the availability of RPAs and the benefits of those RPAs as compared to the proposed action, (2) the proposed action's regional or national significance and whether it is in the public interest, (3) reasonable mitigation measures for the Committee to consider, and (4) compliance with Section 7(d)'s restrictions. The Secretary submits the report to the Committee.

The Secretary of State also reviews the application and the hearing materials to determine whether granting the exemption would be consistent with the United States' treaty or other international obligations. If the Secretary of State certifies, after reviewing the application and the hearing, that granting the exemption and carrying out the action would violate an international obligation of the United States, the Committee is prohibited from considering the exemption.

The Committee makes the final determination on whether to exempt a particular agency action from the requirements of Section 7(a)(2). The Committee makes its determination based on the record of the agency action, the Secretary's report, the hearing held by the Secretary, and any other testimony or evidence gathered. The statute directs the Committee to grant the exemption if four criteria are met, which parallel the information provided in the report: (1) there are no RPAs; (2) the benefits of the action clearly outweigh the benefits of RPAs, "consistent with conserving the species or its critical habitat," and the action is in the public interest; (3) "the action is of regional or national significance"; and (4) neither the federal agency nor any permit or license applicant violated Section 7(d)'s restrictions. The Committee must also establish "reasonable mitigation and enhancement measures . . . as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned." The Committee must agree to an exemption with at least five votes, and the voting must be in person. If granted, the statute directs the Committee to issue an order that grants the exemption and specifies the required mitigation and enhancement measures for the exemption applicant to carry out.

Separately, the act directs that "the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." The statute does not define "reasons of national security," or specify any format or content for the Secretary of Defense's "finding."

Section 7(n) authorizes judicial review of any exemption decision by the Committee in the U.S. Court of Appeals, either in the circuit where the action is to be or is being carried out or, if it is outside any circuit, in the District of Columbia Circuit. For more information on the exemption process and previous exemption applications, see CRS Report R40787, *Endangered Species Act (ESA): The Exemption Process*, by Pervaze A. Sheikh (2017).

Gulf Oil and Gas Leasing Consultation and NMFS Biological Opinion

In May 2025, NMFS issued a BiOp titled "Biological Opinion on the Federally Regulated Oil and Gas Program Activities in the Gulf of America," the culmination of a lengthy Section 7 consultation process with two agencies within the Department of the Interior—the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE)—that oversee oil and gas leasing activity on the outer continental shelf. The 2025 BiOp replaced a previous opinion that had been successfully challenged in court by environmental NGOs and vacated upon a determination that NMFS had underestimated risks to species, among other things.

In the new BiOp, NMFS considered potential impacts of various Gulf oil and gas development activities on potentially impacted listed species and their critical habitat. The 2025 BiOp concluded that "the proposed action is likely to jeopardize the continued existence of the Rice's whale" due to "the risk of injurious and lethal vessel strike interaction." The BiOp identified an RPA centered on developing a technological approach to minimizing vessel strikes of Rice's whales. The BiOp also included an ITS authorizing incidental take of various species in carrying out the RPA.

A coalition of environmental groups—largely the same plaintiffs who had successfully challenged the prior BiOp—sued NMFS in the U.S. District Court for the District of Maryland over the 2025 BiOp, alleging among other things that it underestimated risks to listed species and seeking to have the BiOp vacated. The State of Louisiana and industry groups sued NMFS in the U.S. District Court for the Eastern District of Louisiana, alleging among other things that the 2025 BiOp *over*estimated risks to species and requesting the BiOp be remanded to the agency for revision (but not vacated). The court in the Louisiana case granted summary judgment to the plaintiffs, and remanded the 2025 BiOp to NMFS for revision without vacatur. It is unclear what impact that remand will have on the case in the District of Maryland.

The National Security Exemption

On March 13, 2026, the Secretary of Defense, who is using "Secretary of War" as a "secondary title" under Executive Order 14347 dated September 5, 2025, sent a letter to the Secretary of the Interior stating that national security required that the oil and gas activities considered in the 2025 BiOp be exempted from ESA requirements and requesting to convene the Endangered Species Committee. The letter and attached findings expressed concern over litigation surrounding the 2025 BiOp and the potential that the BiOp would be vacated. The Secretary noted that judicial vacatur of the opinion and associated ITS would disrupt oil and gas exploration and development and jeopardize safety of critical infrastructure. The findings emphasized the import of domestic production for economic stability and geopolitical strength, while also noting that certain military bases obtain fuel directly from Gulf oil refineries.

On March 16, 2026, the Office of the Secretary of the Interior published a notice in the *Federal Register* that the Endangered Species Committee would meet on March 31 regarding an ESA exemption under 16 U.S.C. § 1536(h).

Preliminary Litigation

On March 18, 2026, the Center for Biological Diversity (CBD) filed suit in the U.S. District Court for the District of Columbia, seeking to block the meeting from occurring. The complaint alleged that the decision to convene the Committee must be set aside under the Administrative Procedure Act (APA) as contrary to various procedural and substantive ESA requirements. Procedural allegations included, among others, that any exemption application must be summarized in a *Federal Register* notice and that the published notice did not do so, and that the proposed format—a closed-door meeting streamed over the internet—violated the ESA requirement that the meeting be "open to the public." Substantively, CBD argued, among other things, that the ESA allows for an exemption only after a determination by NMFS or

FWS that the Gulf oil and gas activities violated Section 7(a)(2) based on a finding of jeopardy and lack of RPAs, and that no such determination had been made. CBD requested a temporary restraining order (TRO) to prevent the meeting from taking place.

The government responded that emergency injunctive relief was improper for a number of reasons. To issue a TRO, a court must find among other things that the requester is likely to succeed on the merits of their claims. The government argued this was not the case because the meeting announcement was not a "final agency action" subject to judicial review under the APA, and because CBD had filed suit in the wrong venue and lacked standing to sue.

The court denied CBD's TRO motion, finding that the court likely lacked subject matter jurisdiction over CBD's claims. The court did not elaborate on this conclusion, but cited cases addressing district court versus appellate court jurisdiction over particular claims, as well as the judicial review provision for Endangered Species Committee decisions. The court further held that the meeting announcement likely did not constitute a final agency action, and concluded CBD had not met its burden to demonstrate likely success on the merits of its claims.

Endangered Species Committee Meeting and Decision

Members of the Endangered Species Committee convened as scheduled on March 31, 2026. Committee members gave prepared statements, and the meeting was live-streamed. Various members emphasized the import of domestic energy sources; that ESA litigation was impairing oil and gas development in the Gulf; and that disruptions to Gulf oil and gas operations degraded military readiness. Members generally expressed the view that the Committee was without discretion to deny the exemption in light of the Secretary of Defense's findings, and voted unanimously to grant it. A *Federal Register* notice published on April 3, 2026, announced that the BOEM and BSEE Outer Continental Shelf Oil and Gas Program, including "the oil and gas exploration, development, and production activities, as well as the avoidance or minimization measures" described in the 2025 BiOp, would be exempt from ESA requirements and take prohibitions. The notice further stated that the Committee was not required to specify mitigation and enhancement measures under 16 U.S.C. § 1536(l)(1) because that requirement applied only where the Committee received an exemption "application," which did not occur in connection with the national security exemption; nonetheless, the notice stated that mitigation measures specified in the Secretary of Defense's findings would satisfy this requirement in any case. Finally, the notice expressed the Committee's understanding that, pursuant to 16 U.S.C. § 1536(n), judicial review of its decision would be available only in the U.S. Courts of Appeals for the Fifth and Eleventh Circuits.

Subsequent Litigation and Likely Legal Issues

CBD filed an amended complaint alleging further APA violations immediately after the Endangered Species Committee meeting (but prior to publication of the *Federal Register* notice announcing the exemption). The alleged APA violations are that (1) the Committee met in the absence of an exemption application and without threshold findings that there were no potential mitigations or RPAs to the proposed agency action, contrary to ESA requirements; (2) the Committee conducted the meeting in violation of the ESA's public notice and information access requirements; and (3) the Secretary of Defense's national security findings lacked a rational basis. CBD also seeks a writ of mandamus requiring the Committee to publicize records related to the decision.

Another coalition of environmental groups filed a lawsuit on April 2, 2026, also in the U.S. District Court for the District of Columbia. These plaintiffs claim that the exemption was contrary to law under the APA because (1) the Committee can only consider an exemption after the expert agency has found the proposed action will jeopardize a species and there are no RPAs, such that an irreconcilable conflict exists; (2) an exemption may only be granted after thorough consideration of an application pursuant to

statutory procedures, including required mitigation measures; and (3) an exemption can only be granted for an "agency action," not a set of unspecified or speculative activities. The plaintiffs also claim that the Secretary of Defense's finding that an exemption was necessary for national security was arbitrary and capricious and should be set aside under the APA because it was speculative and failed to consider available evidence.

As these cases proceed, the parties will likely file additional briefs in support of their positions. The government's response to the TRO motion in the CBD case may serve as a preview of the government's substantive response to the complaints. If so, the federal defendants may argue that when the Secretary of Defense makes a national security finding under 16 U.S.C. § 1536(j), the Committee *must* grant an exemption under § 1536(h) and the "procedural provisions that apply to applications for exemptions, such as the submission itself, the hearing on the application, and the report of the Secretary of the Interior or Commerce on the application," do not apply. The federal defendants may also renew their arguments with respect to venue that the cases can only be litigated in the U.S. Courts of Appeals under 16 U.S.C. § 1536(n). (The TRO opposition brief, unlike the notice of exemption in the *Federal Register*, did not take a position on *which* federal circuit(s) would be appropriate venues.)

Meanwhile, the federal and industry defendants in the District of Maryland 2025 BiOp litigation have argued that the case should be dismissed as moot in light of the exemption. The court is likely to receive briefing on that issue in the coming months.

Considerations for Congress

The ESA exemption process has rarely been used in the nearly 50 years since it was added to the ESA. Before March 31, the last time the Committee convened was in 1992. Most federal agency actions do not require formal consultations, and BiOps generally result in either nonjeopardy findings or RPAs. In either case, so long as the federal agency agrees that any identified RPA is viable, it may move forward with the action. As such, federal agencies have rarely had reason to pursue an exemption. The March 31 decision marks the first time an exemption has been approved due to national security reasons. As a result, there is no judicial precedent about how the national security exemption should work in practice. The ongoing litigation may change that if the court reaches a decision on the merits.

With respect to the March 31 exemption specifically, Congress may choose to pass legislation to rescind or affirm the decision or to otherwise alter how the ESA requirements apply to oil and gas activities in the Gulf. More broadly, in light of the recent use of the exemption, Congress may consider whether to revisit the exemption provisions to determine whether they align with current congressional intent. With respect to the national security provision in particular, Congress may consider whether the discretion afforded the Secretary of Defense is consistent with national security goals or whether to specify procedural or substantive requirements for use of the provision, for example by defining "reasons of national security" or delineating the basis or form of the Secretary's "find[ings]." Congress may also seek to clarify points of contention at issue in the ongoing litigation, such as whether the public must be allowed in-person access to Committee votes or whether federal agencies must follow the application process in Section 7(g) when the national security provision is invoked.

Alternatively, Congress could specify that no additional process is required or otherwise streamline the use of the national security provision. Congress may also choose to glean further insight from the litigation into how a court might interpret these provisions before determining whether to pursue any legislative actions. Congress also could opt not to act legislatively. Either way, Congress could consider conducting oversight to determine which other actions may be considered for Section 7 exemptions, whether for national security reasons or otherwise.

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