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Legal Sidebar

ESA Section 7 Consultation and Cooperative Federalism

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Section 7 of the Endangered Species Act (ESA) requires federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) (together, "the Services") in advance of agency activities with the potential to impact endangered or threatened species (*listed species*) or their critical habitat. The Services' goal in conducting that consultation is to determine whether the agency activity is likely to jeopardize listed species or adversely modify or destroy their critical habitat and, if so, whether there are reasonable and prudent alternatives (RPAs) that would avoid those outcomes.

Courts in two recent cases have grappled with the application of the ESA's consultation requirement to so-called "cooperative federalism" regimes, in which states assume regulatory authority within a federal statutory framework. These cases reveal a potential tension between the principles of cooperative federalism and the requirements of ESA Section 7. The cooperative federalism model anticipates states assuming federal regulatory authority in certain contexts, but state action—on its own—is not subject to the ESA consultation requirement that applies to federal agency action. In effect, this means that delegation of regulatory authority from federal agencies to states changes how the ESA applies to certain actions, such as permitting decisions, that would be subject to ESA consultation if taken by federal agencies. Therefore, while a federal agency's decision to delegate regulatory authority to a state may trigger the consultation requirement, the nature of the delegation deprives the federal agency of direct control over downstream impacts to listed species and critical habitat and makes it difficult to analyze what those impacts might be. This Legal Sidebar provides background on ESA Section 7 consultation and cooperative federalism, reviews two recent judicial opinions addressing these issues, and provides considerations for Congress surrounding the potential tension between the mandates of cooperative federalism and the inquiry required under ESA Section 7.

ESA 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. Federal agencies fulfill this requirement "in consultation with and with the assistance of" the Services. In general, FWS administers the act for terrestrial and freshwater species, and NMFS

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administers the act for marine species. Federal agencies proposing to undertake, authorize, or fund an action (referred to as *action 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 an action agency or the Services conclude that a proposed action is likely to adversely affect listed species or critical habitat, the action agency generally is required to initiate a formal consultation process to assess the effects of the action. The consultation process can relate to a single agency action, or it can take the form of a "programmatic consultation" covering "an agency's multiple actions on a program, region, or other basis." Programmatic consultation can streamline consultation where multiple similar agency actions would raise many of the same considerations.

The formal consultation process culminates in the consulting Service issuing a *biological opinion* (BiOp). In a BiOp, the Service determines whether the action is likely to jeopardize listed species or adversely modify critical habitat. Per regulation, this determination involves several steps. Among those requirements are that the Service must review all available relevant information, evaluate the current status and "environmental baseline" of listed species or critical habitat, evaluate the effects of the proposed action (both direct and cumulative, meaning effects of related state or private activities reasonably certain to occur) on the listed species or critical habitat, and then "add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize" listed species or adversely modify their critical habitat. If so, the Service is required to identify any RPAs that the action agency can take to avoid jeopardy.

If the Service either finds no jeopardy or identifies an RPA, the Service issues the BiOp with an *incidental take statement* (ITS) that prescribes terms and conditions for mitigating the effects of the action on listed species. ESA Section 9 generally prohibits *take* of endangered species (and certain threatened species per regulation), where "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." However, if an action agency proceeds with a proposed action or an RPA, as applicable, and complies with the terms and conditions of the ITS, any *incidental take* of the species—meaning take that occurs in the course of an otherwise lawful action—does not violate the act when undertaken by the action agency or related nonfederal actors. If the amount of incidental take exceeds that authorized by the ITS, the action agency "must reinitiate consultation immediately."

Unlike federal agency actions, state and private entity actions not authorized or funded by a federal agency are not governed by ESA Section 7. Nonfederal entities seeking authorization to take listed species in the course of otherwise legal, wholly nonfederal actions must obtain an incidental take permit by a different process under ESA Section 10.

Cooperative Federalism and the ESA

Various federal laws employ a cooperative federalism model allowing states to exercise regulatory authority within a federal law framework. As discussed in another CRS product, there are various reasons that Congress may wish to employ a cooperative federalism model. The approach is particularly prevalent in laws related to the environment and natural resources.

Under many cooperative federalism frameworks, the relevant federal statute specifies the conditions a state must meet before assuming federal regulatory authority, and the federal agency tasked with implementing the statute determines whether those conditions are met. A federal agency's action to approve a state's exercise of regulatory authority under federal law may trigger the ESA Section 7 consultation requirement.

Because environment and natural resources law involves regulating activities—such as waste disposal, land use, or resource extraction—with some likelihood of impacting listed species, permittees undertaking otherwise lawful regulated activities often require some form of authorization for resultant incidental take of listed species. Federal agencies have at times sought to provide such authorization in blanket fashion for activities permitted by states under cooperative federalism regimes through programmatic Section 7 consultations at the time of delegation. In two cases discussed below, the Services issued BiOps, including ITSs intended to cover all activities permitted by states exercising delegated authority, in connection with cooperative federalism delegations under the Clean Water Act (CWA) and the Surface Mining Control and Reclamation Act (SMCRA).

CWA Section 404 Permitting: *Center for Biological Diversity v. Zeldin*

Under CWA Section 404, states may assume responsibility for issuing permits to discharge dredged and fill materials to certain waters; absent such assumption, the U.S. Army Corps of Engineers (the Corps) issues Section 404 permits pursuant to certain regulatory guidelines, referred to as *404(b)(1) Guidelines*, developed in conjunction with the U.S. Environmental Protection Agency (EPA). In *Center for Biological Diversity v. Zeldin*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) considered claims from a coalition of environmental groups that a delegation of permitting authority from EPA and the Corps to the State of Florida under Section 404 of the CWA violated the ESA.

CWA Section 404 and EPA's implementing regulations impose a number of requirements for state permitting programs. State programs must be authorized under state law, must be at least as protective as the federal regime, and must not issue permits except in compliance with the 404(b)(1) Guidelines. Under those guidelines, states may not issue permits where the discharge would jeopardize the continued existence of listed species or likely destroy or adversely modify critical habitat. States can apply to EPA to assume CWA Section 404 permitting authority, and EPA evaluates those applications with input from other agencies and the public. Currently, two states—Michigan and New Jersey—have assumed Section 404 permitting authority as to some waters within their boundaries; the Corps retains permitting authority as to other waters, including waters in Michigan and New Jersey that are presently used or susceptible to use in interstate or foreign transportation of commerce.

Florida applied to assume CWA Section 404 permitting authority in August 2020. EPA engaged in a formal programmatic consultation with FWS regarding EPA approval of Florida's CWA Section 404 assumption application, and FWS issued a BiOp in November 2020 concluding that the transfer of Section 404 permitting authority to Florida was not likely to jeopardize listed species. FWS arrived at this conclusion partially in reliance on a planned "technical assistance process" by which FWS could choose to participate in reviewing permit applications. Under the technical assistance process, FWS would have the option to review permit applications and assist Florida with identifying and mitigating the risks to species posed by each individual permit application; if FWS determined a project would cause adverse effects to a species, the applicant would need to incorporate additional protective measures or Florida would reject the permit application. The BiOp concluded the proposed coordination process was "as protective as the section 7 interagency consultation processes" that would occur if a federal agency processed a given permit application, and therefore that the program "built in a sufficiently structured process to insure that the State's administration of section 404 of the CWA" would not jeopardize listed species or critical habitat.

The BiOp included an ITS, which stated that the "inability to anticipate the locations of future State 404 permit applications did not allow the Service to conduct site- and species-specific analyses to estimate the number of individuals that might be affected by the permitted activities." Instead, the ITS granted an incidental take exemption with the understanding that "the amount or extent of incidental take of listed species will be quantified during the technical assistance process" in connection with each permit application. Florida, the ITS provided, would reopen the permit and "coordinate" with FWS if new information showed impacts to listed species that were greater than or different from what was anticipated. The BiOp did not provide for reinitiation of Section 7 consultation for the CWA 404 delegation on the basis of excess incidental take.

The plaintiffs in *Zeldin* sued, arguing that the BiOp and associated ITS both violated the requirements of the ESA and attendant regulations. The U.S. District Court for the District of Columbia agreed. On March 27, 2026, a divided D.C. Circuit panel affirmed the district court's decision, concluding in relevant part that the BiOp and ITS were deficient and that EPA violated the ESA by relying on them. The court unanimously held that the ITS was inadequate for failing to (1) quantify an acceptable amount of incidental take, (2) "identify specific 'reasonable and prudent measures' to minimize the impact of incidental take," and (3) require reinitiation of Section 7 consultation in the event of excess take. The panel was also unanimous in concluding that EPA had erred by failing to consult with NMFS.

Members of the panel varied in their reasoning with respect to the faults of the BiOp. Judge Florence Pan wrote the opinion for the court, which the other two members of the panel joined in part. In a portion of the opinion in which no other judge joined, Judge Pan wrote that an agency could properly decline to conduct a site- and species-specific effects analysis in a programmatic BiOp only if such analysis were deferred to subsequent Section 7 consultation. She found the BiOp's no-jeopardy finding was based on an incorrect assumption that the technical assistance process would be as protective as further Section 7 consultation with respect to individual permit applications and that the BiOp was therefore invalid. Judge Robert Wilkins agreed that the BiOp included a faulty ITS, would have vacated the BiOp solely for that reason, and saw no reason to evaluate the BiOp on any other basis. Judge Karen Henderson, in partial dissent, wrote that given the programmatic nature of the BiOp, its no-jeopardy finding in reliance on the proposed technical assistance process was reasonable. She would have followed the reasoning of *Cooling Water Intake Structure Coalition v. EPA*, in which the U.S. Court of Appeals for the Second Circuit upheld a programmatic BiOp with a similar technical assistance process underlying its no-jeopardy finding and no site-specific effects analysis. Judges Pan and Wilkins found *Cooling Water* to be unpersuasive.

Following the court's ruling affirming the vacatur of EPA's program approval, the district court denied Florida's request to stay the order pending appeal, and CWA Section 404 permitting authority reverted to the Corps. The defendants have requested rehearing by the D.C. Circuit sitting en banc.

Federal Oversight of "Primacy States" under SMCRA: *Center for Biological Diversity v. OSMRE*

Title V of SMCRA established a "comprehensive regulatory scheme" for coal mining operations. One of the stated purposes of the statute is to "assist the States in developing and implementing a program to achieve the purposes" of the law. SMCRA employs a cooperative approach in which states can assume regulatory responsibility with federal oversight; such states are referred to as "primacy states." SMCRA charges the Office of Surface Mining Reclamation and Enforcement (OSMRE) within the U.S. Department of the Interior with implementing the regulatory framework for SMCRA, including oversight of primacy states. Regulations detail OSMRE's oversight program, the development of which has been the subject of several ESA Section 7 consultations.

In *Center for Biological Diversity v. OSMRE*, environmental nongovernmental organizations challenged OSMRE's most recent ESA Section 7 consultation with FWS on OSMRE oversight of state programs. As described in a 2020 BiOp, that consultation involved development of a "coordination process" that would govern the respective roles of state regulatory authorities and FWS in evaluating future mining permit applications with potential implications for listed species.

In essence, the coordination process involved state authorities notifying FWS of permit applications and providing fish and wildlife resource information for FWS to use in evaluating permit applications, after which FWS would review the materials, ask for any further information needed, and evaluate state authorities' determinations regarding whether the permitted mining activity would jeopardize listed species. States and FWS would develop species-specific protective measures where necessary to minimize anticipated take. In the event FWS recommended such measures and the state rejected the recommendation, FWS and the state would attempt to resolve the disagreement through a dispute resolution process by which the disagreement could be elevated to the Secretary of the Interior. Ultimately, while FWS would have the opportunity to object to a permit issuance, the state could issue the permit upon its own finding that the operation would not jeopardize listed species or critical habitat for ESA purposes.

FWS concluded in the 2020 BiOp that OSMRE's oversight of primacy states, as prescribed by regulation, was not likely to jeopardize listed species or adversely modify critical habitat, because the coordination process would provide sufficient guidance to state authorities to minimize potential adverse impacts on species. The BiOp did not include a site- or species-specific effects analysis due to the geographic breadth of SMCRA programs, but rather deferred such effects analysis to the coordination process that would occur on a permit-by-permit basis. The BiOp included an ITS stating that for primacy states, "if it is determined through the SMCRA Coordination Process that take of listed species is reasonably certain to occur, the amount or extent of incidental take will be quantified by the appropriate Service Field Office in coordination with the State regulatory authority." The ITS provided take liability exemption except in cases where states issued permits without FWS concurrence.

In its lawsuit, the Center for Biological Diversity argued, as it had in *Zeldin*, that the BiOp was invalid. In considering the plaintiffs' challenges, the court acknowledged the centrality of *Zeldin* and held it to be controlling, awarding summary judgment to the plaintiffs and concluding the BiOp and ITS violated the ESA. The court found the ITS, like that held unlawful in *Zeldin*, did not provide a quantifiable take limit, which is a key trigger for reinitiation of consultation and without which it would not be possible to comply with the requirement to reinitiate consultation. The court also found that the ITS did not "identify *specific* 'reasonable and prudent measures' to minimize the impact of incidental take." The court further found the BiOp unlawful because it did not include an effects analysis (instead leaving site- and species-specific information to be assessed through the technical assistance process and allowing the state to determine the information to be provided to FWS for each permit) and delegated too much of the consulting agency's responsibility under Section 7 to state authorities. The court concluded that the coordination process, like the technical assistance process in *Zeldin*, was therefore less protective than Section 7 consultation and did not satisfy the requirements of the ESA. Consequently, the court vacated the BiOp and ITS as applied to primacy states (but not as applied to OSMRE's direct regulation of mining activities). The defendants have requested a stay of the court's order pending appeal, which the plaintiffs have opposed.

Considerations for Congress

The cases discussed above illustrate a potential tension between cooperative federalism and ESA Section 7: while the act of delegating a federal agency's regulatory power to state authorities may be a trigger for Section 7 consultation, the nature of the action limits the federal agency's control over, and ability to predict, ensuing nonfederal conduct that could jeopardize listed species or their critical habitat. Action agencies and the Services may therefore encounter challenges in analyzing the potential impacts to listed species that could result from activities that would be permitted by the state, but they also may face resistance from courts when they decline to engage in a more specific analysis. In *Zeldin*, Florida argued that "granular analysis of the species effects of each state permit that might be approved in the future" would be "an impossible task." In Florida's view, "a rigid requirement of upfront, species-specific analysis" would preclude "EPA from approving *any* Section 404 program in a species-rich state like Florida," which in turn would undermine "Congress's promise of cooperative federalism." The environmental coalition argued, on the other side, that "the ESA does not require perfect foresight, only informed projections." Requiring FWS to "do the most informed analysis it can," in their view, would "not infringe on cooperative federalism." As agencies continue to navigate ESA consultations about delegation of federal regulatory power to state authorities in various contexts, courts will likely have more opportunities to weigh these competing viewpoints and evaluate the legality of such consultations on a case-by-case basis.

Should Congress wish to act with respect to the balancing of listed species protection and cooperative federalism, it has multiple options for how to do so. One option is to legislate narrowly in the context of specific consultations. For example, H.R. 9017, the Restore Florida Water Independence Act of 2026, would specifically deem the BiOp and ITS for Florida's assumption of CWA Section 404 permitting authority to have satisfied the ESA's consultation requirement. By contrast, H.R. 1897, the ESA Amendments Act of 2025, would effect a broad slate of amendments to the ESA, including with respect to consultation requirements. The bill would allow the Services to consider, for purposes of a jeopardy determination, only those effects that are "caused by the action itself and are reasonably certain to occur." To the extent this limitation might spare the Services from analyzing potential downstream impacts of hypothetical state-issued permits, it could facilitate programmatic consultation on cooperative federalism delegations. Congress also has the option to amend the ESA in the other direction to specifically require more robust predictive analysis of potential downstream effects of cooperative federalism delegations.

Alternatively, Congress may wish to amend individual statutes employing cooperative federalism schemes to specify whether a federal agency delegating authority to or sharing authority with states is subject to ESA consultation—programmatic or otherwise—and, if so, whether any constraints on or different requirements for the consultation process should apply.

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