



Via Electronic and Certified Mail

July 30, 2025

The Honorable Lee Zeldin
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Mail Code: 1101A
Washington, DC 20460

Re: Notice of Intent to Sue for Violations of the Endangered Species Act with Respect to EPA's Clean Water Act Tribal and State Assumption Program Rulemaking

Dear Administrator Zeldin,

This letter serves as formal notice by the Center for Biological Diversity (Center) of violations of Section 7 of the Endangered Species Act (ESA)¹ by the U.S. Environmental Protection Agency (EPA) in connection with the agency's rulemaking establishing a process that "streamlines" and "facilitates" the ability for states, territories, and authorized Tribes to assume and administer Section 404 permitting programs for discharges of dredge and fill materials under the Clean Water Act (CWA) (hereinafter "the Assumption Rule").²

The Assumption Rule, which is nationwide in scope, constitutes EPA's "first comprehensive revisions to the regulations governing [CWA] section 404 Tribal and State programs since 1988."³ As detailed below, in taking this action the EPA has violated the ESA by failing to engage in consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively "the Services") under Section 7 of the Act on the effects to federally-listed threatened and endangered species, including migratory species including sturgeon, salmon and steelhead and their designated critical habitats.

Rather than engaging in Section 7 consultation prior to finalization of this rulemaking, EPA claimed that consultation is not required prior to rule finalization and that any commitment by EPA to engage in any future consultation activities in its anticipated future piecemeal approval of Tribal or State CWA Section 404 programs is "beyond the scope of this rulemaking."⁴ This interpretation violates the ESA's procedural and substantive mandate, which requires that an action agency consult "at the earliest possible time."⁵

¹ 16 U.S.C. § 1536.

² EPA, *Clean Water Act Section 404(g) Tribal and State Assumption Program; Final Rule*, 89 Fed. Reg. 103454 (Dec. 18, 2024).

³ *Id.*

⁴ *Id.* at 103462.

⁵ 50 C.F.R. § 402.14

EPA's failure to assess direct, indirect, and cumulative adverse effects to endangered species and their habitats across the United States will have adverse effects on threatened and endangered species. For example, individual pallid sturgeons may traverse multiple states across their 80-year lifespans, and while a hypothetical federal wetland protection program in South Dakota could still consider species-specific impacts from 404 permits, it would be unable to address impacts from a deficient, state-assumed 404 program in North Dakota or Louisiana.

The Endangered Species Act and its implementing regulations clearly require that EPA consult with the Services on any agency action "authorized, funded, or carried out by such agency" that "may affect" listed species. Agency "action" is broadly defined in the ESA's implementing regulations to include "(a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."⁶

In 2015, the Services established specific regulations to govern programmatic consultations, defining two discrete categories of federal agency actions that require consultations: "framework programmatic actions" and "mixed programmatic actions."⁷ Of particular relevance here is the framework programmatic action, which is defined as "for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation."⁸ The Services established these specific types of consultations because of the inherent difficulties of quantifying the incidental take of listed species at the programmatic scale, and "in recognition that subsequent site-specific actions authorized, funded, or carried out under the programmatic action will be subject to subsequent section 7 consultation and incidental take statements, as appropriate."⁹ In other words, while the Services recognized the inherent challenge of quantifying incidental take, the solution to this challenge was not for action agencies to disregard the Endangered Species Act altogether, but rather to thoughtfully address the one aspect of consultation that was most problematic.

EPA's own characterization and description of the Assumption Rule makes clear that EPA has completed a "framework programmatic action" and this action clearly will result in "indirect" "modifications to the land, water, or air." Accordingly, EPA was required to enter into a programmatic consultation with the Services to insure that this action will not jeopardize any listed species, and equally importantly, that the framework the EPA establishes "minimizes" take to listed species in all of its applications. This very straightforward application of EPA's nationwide consultation obligation evidences a clear violation by EPA of the Endangered Species Act with regards to this rulemaking.

⁶ *Id.* § 402.02 (emphasis added); see also *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994); *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988); *National Wildlife Fed'n v. FEMA*, 345 F. Supp. 3d 1151, 1169 (W.D. Wash. 2004).

⁷ *Incidental Take Statements*, 80 Fed. Reg. 26832 (May 11, 2015).

⁸ 50 C.F.R. 402.02

⁹ *Incidental Take Statements*, 80 Fed. Reg. 26832 (May 11, 2015).

The “may effect” threshold is a low bar to ensure that “actions that have *any chance* of affecting listed species or critical habitat — even if it is later determined that the actions are ‘not likely’ to do so — require at least some consultation under the Endangered Species Act.”¹⁰ This analysis includes an examination of both the direct effects of the action as well as its indirect effects, which are defined as “those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.”¹¹ An action agency must consult except when its actions will have “no effect” on listed species.

Here, the Assumption Rule will increase the pace of wetland destruction, but it will also create a patchwork of wetland protections as states assume authority with differing levels of funding, staffing, and protection for listed species, creating cumulative impacts for wetland-dependent species relying on the integrity of interstate and downstream waters and wetlands.¹²

For example, the pallid sturgeon — a long-lived, threatened species with an average lifespan of up to 80 years — migrate through extensive stretches of the Missouri and Mississippi River systems, crossing multiple state boundaries throughout its life.¹³ As a result, the species is particularly vulnerable to cumulative and interconnected impacts that occur across jurisdictions. Consultation under the Endangered Species Act is specifically meant to prevent these situations and put forth guardrails to ensure no harm to the pallid sturgeon and hundreds of other downstream species.

Indeed, it is impossible to envision a situation where EPA’s actions do not result in an increase in wetland habitat loss, especially for states that may seek to assume 404 authority without proper Endangered Species Act compliance and for the express purpose of streamlining permitting, referring to lax state-standards achieved through assumption as “the holy grail for developers.”¹⁴ In fact, many species are impacted by the EPA’s failure to consult before promulgating this rule, with a subset of 77 listed below:

Alabama Moccasinshell	Cumberland Elktoe	Loggerhead Sea Turtle
Arkansas River Shiner	Fat Three Ridge	Narrow Pigtoe
Atlantic Pigtoe	Finelined Pocketbook	Neosho Mucket
Choctaw Bean	Fluted Kidneyshell	Orangeacre Mucket
Coosa Moccasinshell	Georgia Pigtoe	Oval Pigtoe
Colorado Pikeminnow	Gulf Moccasinshell	Ovate Clubshell
Cumberlandian Combshell	Gulf Sturgeon	Oyster Mussel
Cumberland Darter	Interrupted Rocksnail	Purple Bean

¹⁰ *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (emphasis added); see also U.S. Fish & Wildlife Serv. and Nat’l Marine Fisheries Serv., Endangered Species Consultation Handbook at xvi (Mar. 1998) (emphasis in original) (the low “may affect” threshold, which is met whenever “a proposed action may pose any effects on listed species or designated critical habitat”).

¹¹ 50 C.F.R. § 402.02

¹² *Id.* (emphasis added)

¹³ U.S. FWS, Revised Recovery Plan for the Pallid Sturgeon (*Scaphirhynchus albus*) (Jan. 2014) https://ecos.fws.gov/docs/recovery_plan/Pallid%20Sturgeon%20Recovery%20Plan%20First%20Revision%20signed%20version%20012914_3.pdf

¹⁴ Craig Pittman, *Gov. Rick Scott’s DEP Wants to Take Over Issuing Federal Wetland Permits*, Tampa Bay Times, (Jan. 29, 2018) http://www.tampabay.com/news/environment/Gov-Rick-Scott-s-DEP-wants-to-take-over-issuing-federal-wetland-permits_164779154.

Purple Bankclimber	Least Tern	Anthony's Riversnail
Rabbitsfoot	Loggerhead Sea Turtle	Fanshell
Razorback Sucker	Ozark Hellbender	Bog Turtle
Round Ebonyshell	Pallid Sturgeon	Oregon Spotted Frog
Southern Clubshell	Dromedary Pearlmussel	Reticulated Flatwoods
Southern Pigtoe	Shiny Pigtoe	Salamander
Shinyrayed Pocketbook	Finerayed Pigtoe	Frosted Flatwoods
Southern Kidneyshell	Cracking Pearlmussel	Salamander
Southern Sandshell	Pink Mucket	Topeka Shiner
Spotfin Chub	Alabama Lampmussel	Gulf Sturgeon
Triangular Kidneyshell	Birdwing Pearlmussel	Atlantic Sturgeon
Trispot Darter	Ring Pink	Chinook Salmon
Piping Plover	White Wartyback	Steelhead
Virgin River Chub	Orangefoot Pimpleback	Sockeye Salmon
Woundfin	Clubshell	Coho Salmon
Green Sea Turtle	Rough Pigtoe	Bull Trout
Hawksbill Sea Turtle	Winged Mapleleaf	

The Endangered Species Act is clear that EPA *must* consult with the Services on any “programs” that “may affect” listed species, including actions that would otherwise affect water quality, aquatic species, aquatic-dependent species, wetland-dependent species, and other listed and endangered species that may be affected as a result of this rulemaking.¹⁵ In fact, the Section 7 “mandate applies to *every discretionary action*.”¹⁶ A nationwide consultation that incorporates the needs of all listed species affected by EPA’s action here is what the Endangered Species Act requires — to give the “benefit of the doubt” to the species.¹⁷

EPA on its own cannot meaningfully address the full harm or cumulative impacts to listed species from a nationwide rulemaking such as the one at issue here. Absent review at the programmatic level, EPA does not take the cumulative loss or contamination of habitat outside an individual state into account and so will not consider the full range of effects of across its action here. Such cumulative impacts—which may jeopardize the continued existence of species—can be analyzed only through consultation on the effects to species and critical habitats of this rulemaking itself.

EPA has completed several biological opinions on aspects of its water program, including a consultation for its 316(b) regulations,¹⁸ a consultation on the NPDES general permit for stormwater,¹⁹ and consultations on the use of organophosphate pesticides.²⁰ In these instances,

¹⁵ 50 C.F.R. § 402.02; 50 C.F.R. § 402.14.

¹⁶ *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 671 (2007) (emphasis added).

¹⁷ *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

¹⁸ *Cooling Water Intake Structure Coalition v. US EPA*, 905 F.3d 49 (2nd Cir. 2018).

¹⁹ EPA, NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM, STORMWATER DISCHARGES FROM INDUSTRIAL ACTIVITIES-THREATENED AND ENDANGERED SPECIES, <https://www.epa.gov/npdes/stormwater-discharges-industrial-activities-threatened-and-endangered-species> (last visited Jan. 30, 2022).

²⁰ NOAA FISHERIES, PESTICIDE CONSULTATIONS WITH THE U.S. ENVIRONMENTAL PROTECTION AGENCY, <https://www.fisheries.noaa.gov/national/consultations/pesticide-consultations> (last visited June. 18, 2025).

even though EPA could not predict the exact specifics of any third party actions, it nonetheless sought the necessary legal approvals for such activities to eventually occur, influencing the actions of numerous third parties, and ultimately impacting the conservation status of numerous endangered species. The same is true and required here.

EPA is, therefore, in violation of Section 7 of the Endangered Species Act for failing to engage in consultation with the Services on the Assumption Rule and failing protecting against jeopardy and the destruction and adverse modification of critical habitat. In failing to comply with the substantive and procedural obligations of the ESA, the EPA has injured and continues to injure the Center and its members. Under the Act and pursuant to this notice, EPA has 60 days to resolve these violations.²¹ If EPA does not act within 60 days to correct the violations described in this letter, we will pursue litigation. If you would like to discuss this matter, please contact us.



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²¹ 16 U.S.C. § 1540(g).