404 Permitting Program/Assumption Rule: Center for Biological Diversity Notice of Intent to Sue U.S. EPA Alleging Violations of the Endangered Species Act



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The Center for Biological Diversity ("CBD") sent a July 30th document to the United States Environmental Protection Agency ("EPA") styled:

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 ("NOI").

The NOI alleges that EPA has violated Section 7 of the Endangered Species Act ("ESA") in connection with the "Assumption Rule".

On December 18, 2024, EPA had promulgated a rule that it stated was intended to streamline and facilitate the ability of states, territories, and authorized tribes to assume and administer Clean Water Act ("CWA") Section 404 permitting programs for discharges of dredged or fill materials. See 89 Fed. Reg. 103454.

CBD alleges that in promulgating this rule EPA violated the ESA by failing to engage in consultation with United States Fish and Wildlife Service and National Marine Fisheries Service (collectively "the Services") under Section 7 of that statute on the effects to federally-listed threatened and endangered species.

EPA is stated to have indicated the consultation was not required prior to rule finalization and that any commitment by the agency 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.

CBD argues in response that EPA's interpretation violates the ESA's procedural and substantive mandate, which requires that an action agency consult at the earliest possible time. The organization also argues that EPA's characterization and description of the Assumption Rule make clear that the federal agency completed a framework programmatic action which will result in indirect modifications to the land, water, or air. Therefore, EPA is argued to have been required to enter into a programmatic consultation with the Services to ensure that the action will not jeopardize any listed species, and equally importantly, and that the framework minimizes take to listed species in all of its applications.

The Assumption Rule is argued by CBD to:

- Increase the pace of wetland destruction.

- Create a patchwork as states assume authority with differing levels of funding, staffing, and protection for listed species.
- Create cumulative impacts for wetland-dependent species relying on the integrity of interstate and downstream waters and wetlands.

CBS states that pursuant to the Citizen Suit Section of the Clean Water Act, if EPA does not act within 60 days to correct the alleged violations it will pursue litigation.

A copy of the NOI can be downloaded here.