

Addendum to OSMRE's 2020 Biological Assessment

Dispute Resolution Process Relevant to Regulatory Authorities Coordinating SMCRA Permitting with the USFWS

This document has been created to accompany the Addendum to OSMRE's Biological Assessment entitled, "SMCRA/ESA Coordination Process as Outlined in 30 C.F.R. §§ 780.16 and 784.21 and Based on OSMRE's Oversight Process" (referenced herein as the "Coordination Addendum").

As discussed more fully in the Coordination Addendum, State regulatory authorities (SRAs) are required to notify and provide fish and wildlife resource information to the local U.S. Fish and Wildlife Service (USFWS) of all SMCRA permit applications where a proposed species, or species listed as threatened or endangered or proposed or designated critical habitat may be affected by a proposed SMCRA surface coal mining and reclamation operation. 30 C.F.R. §§ 780.16 and 784.21. The term "may be affected" is a broad term and should be interpreted and applied broadly to the affected area as defined by 30 C.F.R. § 701.5.

As established in 30 C.F.R. §§ 780.16(a)(1) and 784.21(a)(1), the SRA is required to send the USFWS all requisite material, as specifically defined in the Coordination Addendum, and as reflected in the approved State program or memorandum of understanding between the SRA and the USFWS, for SMCRA permitting actions that may affect proposed species or species listed as, threatened or endangered species, or proposed designated critical habitat or designated critical habitat.

The USFWS should review the relevant permitting material in a timely manner and in coordination with the SRA and applicant (that at a minimum is as detailed in 30 C.F.R. §§ 780.16 and 784.21) assist in developing measures to minimize disturbances and adverse impacts to proposed or listed as threatened or endangered species or proposed or designated critical habitat, consistent with all applicable laws and regulations including SMCRA, to help the SRA ensure that the permitting action is not likely to jeopardize the continued existence of any proposed species or species listed as endangered or threatened or result in the destruction or adverse modification of proposed or designated critical habitat of applicable species. To ensure timely permit processing, this should occur within 30 days of receipt of the fish and wildlife resource information provided by an SRA regarding an administratively complete permit application.

If the SRA and the USFWS cannot agree on the measures recommended by the USFWS or if the USFWS does not provide recommendations within the 30-day period described above, the following elevation process is available. The goal of the elevation process is to promptly and efficiently resolve disagreements that arise at the permitting level. The elevation process must not be used as a mechanism to delay the processing of permits. Therefore, to ensure issues are promptly and efficiently resolved, it is necessary to ensure the elevation process is only utilized in the rare circumstance when a true impasse is present, and the resolution is achieved at the lowest level of management possible. Thus, because resolution is to be achieved at the lowest level of management possible, the disagreement will, to the fullest extent practicable, be resolved at the initial level of review, as defined below.

Level 1: OSMRE Field Office

If an SRA and the USFWS do not agree on acceptable measures to minimize disturbances and adverse impacts on proposed or listed as threatened or endangered species or proposed or designated critical habitat, the SRA will initiate elevation procedures by notifying the OSMRE Field Office Director (FOD) or equivalent of the respective state of the disagreement. The FOD will review the situation, consult experts as needed including the USFWS and the applicant, and offer a reasonable resolution on the issue. The FOD should produce the proposed resolution within 14 days of the SRA's request. Once a proposed resolution is issued, the SRA can either require implementation of the proposed resolution if one is issued and request agreement of the USFWS, to which the USFWS will respond within 14 days, reject the proposed result and request elevation to Level 2, or reject the proposed resolution and approve the permit.

Level 2: Regional OSMRE and USFWS Offices

If the issue is not resolved at Level 1, the SRA may request review by the OSMRE Regional Office or the USFWS Regional Office. This will activate Level 2 review. When Level 2 review is activated, the appropriate OSMRE or USFWS Regional Director (RD) or their designees will contact the reciprocal office and mutually establish an evaluation team. The evaluation team will be comprised of experts deemed essential to derive a satisfactory solution to the issue. The RDs of OSMRE and the USFWS will mutually serve as the officials to assist in resolving the issue. Resolution should occur within 14 days of receipt of the review request. Once a proposed resolution is issued, the SRA can either require implementation of the proposed resolution and request agreement of the USFWS, to which the USFWS will respond within 14 days, reject the proposed resolution and request elevation to Level 3, or reject the proposed resolution and approve the permit.

Level 3: OSMRE and the USFWS Headquarters

If the issue is not resolved at Level 2 the SRA may request review by the Director of OSMRE or the USFWS. When an issue is elevated to Level 3, the contacted Director or their designees will contact the Director of the reciprocal office and begin a coordinating and review process. The Directors may choose personnel they believe will help promptly resolve the issue to assist them, including experts or members of the SRA. The Directors will reach a consensus and offer a resolution to the parties within 14 days of review request. Once a proposed resolution is issued, the SRA can either require implementation of the proposed resolution and request agreement of the USFWS, to which the USFWS will respond within 14 days, reject the proposed resolution and request elevation to Level 4, or reject the proposed resolution and approve the permit.¹

Level 4: U.S. Secretary of the Interior

If the issue is not resolved at Level 3, the SRA may request review by the U.S. Secretary of the Interior, or his or her designee (Secretary). After careful consideration, the Secretary will offer a proposed resolution within 21 days. Once a proposed resolution is issued, the SRA can either require implementation of the proposed resolution or reject the proposed resolution and approve the permit. Further elevations will not be available.

¹ OSMRE acknowledges that SRAs are required to implement and comply with species-specific protective measures developed by the USFWS field office and the State regulatory authority as defined in terms and conditions between SRAs and the local USFWS after input, as appropriate, of the permittee and OSMRE. It is fully expected that SRAs will comply with species-specific protective measures.