

October 7, 1996

Memorandum

To: Assistant Directors, Coordinating Centers

From: Assistant Director, Program Support /sgd/ Mary Josie Blanchard

Subject: Formal Section 7 Biological Opinion and Conference Report

Attached is a biological opinion and conference report from the U.S. Fish and Wildlife Service (Service) to OSM which completes our section 7 (Endangered Species Act) consultation concerning the continuation and approval of surface coal mining and reclamation operations under State and Federal regulatory programs. The consultation was needed because—

- The initial section 7 “no jeopardy” opinions on the various State regulatory programs in the early 1980s, issued by the Service as part of the Secretary of the Interior’s approval of State programs, addressed only species listed at the time those opinions were rendered.
- The concept of "incidental take" did not exist at the time of the initial “no jeopardy” opinions.

The biological opinion/conference report authorizes the incidental take of all existing and future listed species, provided the following terms and conditions are met:

1. The regulatory authority, acting in accordance with the applicable SMCRA regulatory program, must implement and require compliance with any species-specific protective measures developed by the Service field office and the regulatory authority (with the involvement, as appropriate, of the permittee and OSM).
2. Whenever possible, the regulatory authority must quantify the take resulting from activities carried out under this program. Whenever a dead or impaired individual of a listed species is found, the local Service office must be notified within one working day of the discovery.
3. Whenever the regulatory authority decides not to implement one or more of the species-specific measures recommended by the Service, it must provide a written explanation to the Service. If the Service does not concur, the issue must be elevated through the chain of command of the regulatory authority, the Service, and (to the extent appropriate) OSM for resolution.

A surface coal mining and reclamation operation in existence when a species is listed or critical habitat is designated may continue operation (provided it adheres to all requirements of the approved SMCRA regulatory program) until species-specific standards and protective measures are developed and approved by the Service and the regulatory authority.

Once such measures are developed and approved, existing surface coal mining and reclamation operations may continue without interruption pending submission and approval of a permit revision provided they adhere to these measures.

We think the completion of the section 7 consultation is a significant accomplishment. It incorporates the incidental take provisions; allows for continued surface coal mining and reclamation operations under certain conditions when a species is listed or critical habitat designated; provides for the regulatory authority to work with the Service to determine if site-specific measures are necessary and, if so, develop the measures in consultation with the Service; and provides for OSM involvement to the extent necessary and appropriate.

Please assure distribution of the biological opinion/conference report to Field Offices and the States. If you or your staff have any questions, please communicate with Art Abbs at (202) 208-2651.

Attachment