

## 1996 Biological Opinion - SMCRA ESA Coordination and Elevation Process

**The following outlines the procedures regarding issuance of SMCRA permits by the State Regulatory Authority where the proposed action may affect proposed or listed threatened or endangered species or designated critical habitat under the Endangered Species Act (ESA).**

The governing 1983 Title V regulations include several requirements to address potential effects on ESA-listed species. The prohibition against take of a listed species under section 9 of the ESA does not apply when the RA demonstrates that a proposed surface coal mining and reclamation operation will be conducted in compliance with the Terms and Conditions in the Incidental Take Statement (ITS) accompanying the 1996 programmatic Biological Opinion and Conference Report (1996 BiOp). The following procedures are set out to clarify how to comply with the Terms and Conditions of the 1996 BiOp and with our current regulations:

1. The State Regulatory Authority (RA) must provide notice of an administratively complete application for a new permit, significant revision of a permit, or renewal of a permit to the United State Fish and Wildlife Service (Service). *See* 30 C.F.R. § 773.6(a)(3).

The RA must submit the fish and wildlife resource information in the permit application, as well as the fish and wildlife protection and enhancement plan (PEP) in the permit application, to the Service within 10 days of receipt of request from the Service. *See* 30 C.F.R. §§ 780.16(c) and 784.21(c).

RAs should approach the Service as early as possible in the permit application development process to provide sufficient time for the coordination and permit review and revision process as it relates to threatened or endangered species or designated critical habitat.

2. The scope and level of detail for fish and wildlife resource information must be determined in coordination with state and federal agencies with responsibilities for fish and wildlife, and must be sufficient to design the PEP. *See* 30 C.F.R. §§ 780.16 and 784.21. To conduct a timely and efficient review of the permit application and to ensure consideration of the best available science including updated species lists for each project location, the Service needs at a minimum the following information:
  - a. a detailed description of the action being considered. The detailed description must identify the areas to be disturbed by mining activities, including, but not limited to, vegetation removal, road construction, and surface excavations.
  - b. a description of the specific area that may be affected by the action, which would include both the proposed permit area and the adjacent area;
  - c. a description of any listed or proposed species or designated critical habitat that may be affected by the action, including the official species lists obtained through the Service's ECOS-IPaC system at: [ecos.fws.gov/ipac](https://ecos.fws.gov/ipac);

- d. a description of the manner in which the action may affect any listed or proposed species or designated critical habitat;
- e. a description of how the applicant proposes to avoid or minimize adverse impacts on listed or proposed species and designated critical habitat;
- f. a description of how the applicant proposes to enhance fish, wildlife and related environmental values, where practicable (*see* 30 CFR 780.16(b));
- g. relevant reports, including any environmental impact statements, environmental assessments, biological assessments or other analyses prepared on the proposal; and any other relevant studies or other information available on the action, the affected listed species, or designated critical habitat.

### 3. Service Review

Upon receipt of the resource information specified above from an RA, the Service will conduct a review of the materials to determine if any of the required information is missing or in need of clarification in order for the Service to evaluate the permit application. The Service will provide the RA with a detailed description of what, if any, additional information is required.

Once the necessary information is submitted to the Service, the Service will determine whether there is a need for additional species specific protective measures (SSPMs), including reporting and monitoring.

If no additional SSPMs are required, the Service will provide the RA with written confirmation that the technical assistance process has been successfully completed.

If the Service suggests additional SSPMs or provides any other comments related to species or critical habitats listed under the ESA, and the RA accepts the Service recommendations, no further coordination is needed.

If the RA does not accept the additional Service measures, the RA must respond to the Service, explaining its rationale for not implementing all the suggested protective measures. After receiving this explanation, the Service will provide a written response to the RA either confirming its agreement with the RA's decision or notifying the RA that the Service does not agree with the RA's decision.

- 4. The RA must issue a written notification to the Service of its decision to approve or deny an application for a permit if the Service filed comments or objections to the permit application. 30 C.F.R. § 773.19(b)(1). Before approving any permit application that may affect proposed or ESA-listed species or designated critical habitat, the RA must make a finding that "[t]he operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the [ESA]. *See* 30 C.F.R. § 773.15(j).

### **Summary of Interagency Elevation Process**

At any point in this process, if it becomes clear that agreement cannot be reached, either party may elect to elevate through the chain of command of the regulatory authority, the Service, and (to the extent appropriate) OSM or the Department for resolution. See ITS accompanying 1996 Biological Opinion and Conference Report.