

Memorandum of Understanding
United States Fish and Wildlife Service
and
Office of Surface Mining Reclamation and Enforcement
Regarding Improved ESA Coordination on
Surface Coal Mining and Reclamation Operations

Introduction and Purpose

The purpose of this Memorandum of Understanding (MOU) between the Office of Surface Mining Reclamation and Enforcement (OSMRE) and the U.S. Fish and Wildlife Service (Service)¹ is to improve interagency coordination and cooperation under the Service’s programmatic Biological and Conference Opinion (referred to herein as the “2016 programmatic Biological Opinion”) to ensure that proposed, threatened, and endangered species and proposed and designated critical habitat are adequately protected for all surface coal mining and reclamation operations and coal exploration conducted under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), including initial permit issuance, permit renewals, and significant permit revisions.

This MOU reflects the combined experiences of OSMRE and the Service in protecting proposed, threatened, and endangered species and proposed and designated critical habitat under the Endangered Species Act of 1973 (ESA) in connection with surface coal mining and reclamation operations and coal exploration regulated under SMCRA.

This MOU provides guidance on appropriate procedures for OSMRE, state and tribal regulatory authorities (RAs), and the Service to follow in connection with agency decisions on proposed, threatened, and endangered species and proposed and designated critical habitat; establishes protocols for elevating disputes between OSMRE, the Service, and RAs; creates local and regional teams to promote cooperation on various activities related to SMCRA and the ESA; and establishes a National Surface Mining Liaison at the Service to facilitate fulfillment of this MOU and to assist interested parties in contacting agency personnel. The MOU will make our work together more productive and timely and benefit ESA-protected species, as well as the regulated community.

The technical assistance process outlined below provides guidance for demonstrating compliance with the terms and conditions of the 2016 programmatic Biological Opinion and, if followed, will ensure that any take resulting from surface coal mining and reclamation operations and coal exploration conducted under SMCRA will comply with the terms and conditions in the Incidental Take Statement (ITS) provided

¹ Under section 7 of the Endangered Species Act (ESA), Federal agencies must consult on any action that “may affect” a listed species with either the Service or the National Marine Fisheries Service (NMFS), depending upon the species in question. 16 U.S.C. § 1536(a)(2). Generally speaking, NMFS handles marine and anadromous species and the Service handles terrestrial and freshwater species.

with the 2016 programmatic Biological Opinion.² States and tribes with approved regulatory programs may choose to comply with the terms and conditions of the 2016 programmatic Biological Opinion's ITS to obtain an exemption from the prohibition against take of a listed species. Alternatively, where a proposed operation may affect a listed species, compliance with the ESA could also be demonstrated by documenting, as appropriate, that interagency consultation under section 7 of the ESA has been completed for the proposed operation or by documenting that the proposed operation is covered under a permit issued pursuant to section 10 of the ESA.

When the RA chooses to demonstrate that a proposed operation will be conducted in compliance with the 2016 programmatic Biological Opinion and this MOU, the RA must comply with the terms and conditions of the ITS associated with the 2016 programmatic Biological Opinion to be exempted from the prohibition against take of a listed species under section 9 the ESA.

The following terms and conditions are non-discretionary for any permit applicant that chooses to achieve compliance with the ESA through the process outlined in the 2016 programmatic Biological Opinion:

1. OSMRE will ensure that any RA choosing to comply with these Terms and Conditions to demonstrate ESA compliance will notify the Service whenever the RA determines that a proposed operation may affect a proposed, threatened, or endangered species or proposed or designated critical habitat. The RA must submit the permit application's fish and wildlife resource information, as well as the fish and wildlife protection and enhancement plan, to the Service.
2. OSMRE will encourage RAs to coordinate with the Service early in the permitting process to provide sufficient time for the coordination and permit review and revision process.
3. OSMRE will ensure RAs provide the Service with all pertinent information to perform a thorough review of the proposed operation under the ESA.
4. In the event that a State or Tribal RA and the Service cannot agree on information requirements, protective measures, or other matters related to proposed, threatened, or endangered species or proposed or designated critical habitat, or if either party fails to respond within timeframes outlined in the 2016 MOU, the issue must be elevated through the chain of command of the RA, the Service, and OSMRE as outlined in the 2016 MOU.

² The consultation resulting in the 2016 programmatic Biological Opinion supersedes the 1996 Biological Opinion for all future permitting actions that wish to obtain an exemption from the prohibition against take of a listed species under OSMRE's programmatic consultation. While the incidental take statement accompanying the 1996 Biological Opinion will remain valid for all existing permits for surface coal mining and reclamation operations that complied with the terms and conditions of the 1996 Biological Opinion to obtain incidental take coverage prior to the signing of the 2016 programmatic Biological Opinion, any new permits, or revisions to previously approved permits where a revision would change the manner or extent of effects on species, must either complete the technical assistance process identified in the 2016 programmatic Biological Opinion and this MOU, a separate section 7 consultation, or a habitat conservation plan under section 10 of the ESA, in order to demonstrate ESA compliance.

5. OSMRE will ensure that RAs document, and provide to the appropriate Service Field Office, the disposition of all comments from the Service during the technical assistance process.
6. OSMRE will ensure that species-specific protective measures agreed upon by both the Service and RA during the technical assistance process are incorporated as a necessary condition into the SMCRA permit.
7. OSMRE will ensure that species-specific protective measures incorporated into SMCRA permits as enforceable conditions are followed.
8. OSMRE will ensure that RAs reinitiate technical assistance coordination, and order that SMCRA permits be revised if necessary, for any surface coal mining and reclamation operation for which any of the following occur:
 - (1) The amount or extent of incidental take estimated during the site-specific technical assistance process is exceeded;
 - (2) New information reveals effects of the operation that may affect species or critical habitat in a manner or to an extent not considered during the technical assistance process;
 - (3) The operation is subsequently modified in a manner that causes an effect to species or critical habitat not considered in the technical assistance process; or
 - (4) A new species is listed or critical habitat is designated that may be affected by the operation.
9. In the event the species- and site-specific analyses performed during a technical assistance coordination review indicates that proposed permitting action on a surface coal mining and reclamation operation would result in jeopardy of a proposed or listed species or adverse modification of designated or proposed critical habitat, and a reasonable and prudent alternative cannot be negotiated between the RA and Service, OSMRE will intervene to achieve a resolution.
10. Should a SMCRA permit be issued that would result in un-exempted take, jeopardy of a listed or proposed species, or adverse modification of designated or proposed critical habitat, OSMRE will use its authority to ensure that surface coal mining operations are not initiated under the permit until the permit is modified in an acceptable manner.
11. OSMRE will conduct an annual review of the technical assistance process to ensure that OSMRE and State and Tribal RAs are following applicable SMCRA regulations, state regulations, and the technical assistance process as outlined in the 2016 MOU and this programmatic Opinion. OSMRE and the Service will meet annually to review the effectiveness of the technical assistance process.
12. OSMRE will adhere to the 2016 Memorandum of Understanding Regarding Improved ESA Coordination on Surface Coal Mining and Reclamation Operations between OSMRE and the Service. Dissolution of the 2016 MOU will trigger reinitiation of this programmatic consultation.

13. If the Stream Protection Rule is not fully implemented nationwide, including in all State or Tribal SMCRA regulatory programs, by 2020, OSMRE will reinstate consultation.

This MOU addresses implementation of the 2016 programmatic Biological Opinion only for those operations for which a state or tribe has primacy; i.e., for which a state or tribe has the primary governmental responsibility for the regulation of coal exploration and surface coal mining and reclamation operations, as demonstrated by the approval of a state or tribal regulatory program by the Secretary of the Interior. This MOU applies both before and after states or tribes amend their approved SMCRA regulatory programs to be no less effective than the Stream Protection Rule (SPR). Where OSMRE is the RA, it will conduct a separate section 7 consultation whenever a proposed action may affect proposed or listed species or proposed or designated critical habitat.

Correct implementation of the 2016 programmatic Biological Opinion will ensure that OSMRE's implementation of its oversight requirements and state and tribal RAs' implementation of their regulations pertaining to the permitting and conduct of surface coal mining and reclamation operations and coal exploration will comply with the requirements of the ESA. Alternatively, as mentioned above, proposed operations that may affect a listed species could also demonstrate compliance with the ESA by documenting, as appropriate, that interagency consultation under section 7 of the ESA has been completed for the proposed operation or by documenting that the proposed operation is covered under a permit issued pursuant to section 10 of the ESA.

OSMRE ESA Consultation Background

1996 Biological Opinion

The 1996 Biological Opinion issued to OSMRE on September 24, 1996, addressed the "approval and conduct of surface coal mining and reclamation operations under State and Federal regulatory programs adopted pursuant to [Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA)] where such operations 'may adversely affect' species listed as threatened or endangered or designated critical habitat under the Endangered Species Act (ESA)." In the 1996 Biological Opinion, the Service concluded that surface coal mining and reclamation operations conducted in accordance with properly implemented regulatory programs under SMCRA are not likely to jeopardize the continued existence of listed or proposed species and are not likely to result in the destruction or adverse modification of designated or proposed critical habitats.

The Incidental Take Statement in the 1996 Biological Opinion set forth the following three mandatory terms and conditions for the RA:

1. The RA, acting in accordance with the applicable SMCRA regulatory program, must implement and require compliance with any species-specific protective measures developed by the Service F[ield] O[ffice] and the RA (with the involvement, as appropriate, of the permittee and OSM[RE]).
2. Whenever possible, the RA 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 (1) working day of the discovery.

3. Whenever the RA 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 [Field Office] concurs with the RA's action, it will provide a concurrence letter as soon as possible. However, if the Service does not concur, the issue must be elevated through the chain of command of the RA, the Service (and to the extent appropriate) OSM[RE] for resolution.

OSMRE and the Service completed formal Section 7 consultation on the continuation of existing permits and the approval and conduct of future surface coal mining and reclamation operations under both state and federal regulatory programs adopted pursuant to SMCRA, as modified by the SPR, on December 16, 2016. OSMRE and the Service agree that the 2016 programmatic Biological Opinion supersedes the 1996 Biological Opinion for all future permitting actions because of the broad scope of this rulemaking and consultation and because the action under consultation sufficiently modifies the OSMRE regulations consulted on under the 1996 Biological Opinion. The incidental take statement accompanying the 1996 Biological Opinion will remain valid for all existing permits that comply with the terms and conditions of the 1996 Biological Opinion. However, all new permits, as well as all revisions to previously approved permits where a revision would change the manner or extent of effects to species, must complete the technical assistance process identified in the 2016 programmatic Biological Opinion and this MOU, or a section 7 consultation or habitat conservation plan under section 10 of the ESA, to demonstrate ESA compliance.

As noted in the 2016 programmatic Biological Opinion, significant new information has become available that reveals that surface coal mining operations affect listed and proposed species and proposed and designated critical habitats in a manner and to an extent not considered in the 1996 Biological Opinion, independently triggering reinitiation of ESA section 7 consultation on the activities covered by the 1996 Biological Opinion. Therefore, even without the SPR, OSMRE would have been required to reinitiate consultation on activities covered by the 1996 Biological Opinion.

2016 Stream Protection Rule

The SPR updates OSMRE's regulations to improve the balance between environmental protection and the Nation's need for coal as a source of energy and is based on, among other things, advances in science. The SPR updates OSMRE's regulations to better protect streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations. It also provides mine operators with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment.

The SPR will take effect 30 days after publication in federal program states and on Indian lands. Adoption of the SPR will not have any immediate effect on approved state or tribal regulatory programs. Each state or tribe with an approved regulatory program must propose and adopt counterpart revisions to its regulations and other state program provisions and submit them for review by OSMRE and the public as a program amendment under 30 C.F.R. § 732.17. Under 30 C.F.R. § 732.17(g)(9), no change to state law or regulations making up the approved program may take effect for purposes of a state program until that change is approved by OSMRE as a program amendment. It could take several years for all states to update their programs to be no less effective than the SPR and for all program amendments to be approved by OSMRE.

How to use this MOU

This MOU provides guidance for coordinating SMCRA permitting activities by States or Tribes with approved regulatory programs and the Service under the 2016 programmatic Biological Opinion. This MOU addresses implementation of the 2016 programmatic Biological Opinion as of the signature date of the 2016 programmatic Biological Opinion and this MOU, regardless of whether or not OSMRE has approved a State's or Tribe's program under the SPR. The incidental take statement accompanying the 1996 Biological Opinion will remain valid for all existing surface coal mining and reclamation permits that complied with the terms and conditions of the 1996 Biological Opinion to obtain incidental take coverage prior to the effective date of the SPR. Any new permit, or revisions to a previously approved permit where a revision would change the manner or extent of effects to species, would need to complete the technical assistance process identified in the 2016 programmatic Biological Opinion and this MOU or a habitat conservation plan under Section 10 of the ESA in order to demonstrate ESA compliance.

SMCRA Permitting Program Technical Assistance Process

a) Technical Assistance procedures regarding issuance of SMCRA permits where the proposed action may affect proposed or listed threatened or endangered species or critical habitat

OSMRE has authority and responsibility to evaluate approved state and tribal SMCRA regulatory programs to ensure that the state or tribe is effectively implementing, maintaining, administering and enforcing the approved program. See 30 C.F.R. § 733.12. OSMRE's oversight authority includes:

1. Conducting such inspections as are necessary to evaluate the administration of state programs, 30 C.F.R. § 842.11(a)(1);
2. Conducting inspections where a state, after notification from OSMRE of "any information" of a violation, fails to respond appropriately within ten days, 30 C.F.R. § 842.11(b);
3. Issuance of a cessation order when an OSMRE inspector finds a situation that presents an imminent danger to public health or safety or imminent danger of significant environmental harm, 30 C.F.R. § 843.11(a)(1); and
4. Substitution of federal enforcement of a state program when a state is not effectively implementing, administering, or enforcing its approved program, 30 C.F.R. Part 733.

Relevant to this MOU, OSMRE will, as appropriate, determine whether the RA is reviewing permit applications and issuing permits in a manner that adequately ensures that all surface and underground coal mining and reclamation operations minimize disturbances and adverse impacts on fish, wildlife, and related environmental values, and achieves enhancement of those resources where practicable, as required under sections 515(b)(24) and 516(b)(11) of SMCRA, 30 U.S.C. §§ 1265(b)(24) and 1266(b)(11). This would include addressing the concerns of the Service about impacts to and protection of proposed, threatened, or endangered species and their proposed and designated critical habitat.

To ensure a common understanding, this MOU restates the requirements of the applicable Federal SMCRA regulations and the 2016 programmatic Biological Opinion. OSMRE will encourage RAs to develop specific technical assistance procedures with the appropriate Service offices to supplement these procedures and expedite the permitting process while protecting proposed, threatened, and endangered species and their proposed or designated critical habitats.

The prohibition against take of a listed species under section 9 of the ESA will not apply when the RA demonstrates that a proposed operation will be conducted in compliance with the ITS Terms and Conditions accompanying the 2016 programmatic Biological Opinion and this MOU, provided that the RA adheres to the technical assistance procedures below:

1. The 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 Service. *See* 30 C.F.R. § 773.6(a)(3).
 - OSMRE will continue to exercise its oversight authority to ensure that the state or tribe provides this notice to the Service.
 - The Service will encourage all Service field offices to submit a letter to the appropriate RA that will serve as a standing information request.

2. Whenever the RA determines that a proposed operation may affect a proposed, threatened, or endangered species or proposed or designated critical habitat, 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 in the permit application, to the Service.³
 - OSMRE will encourage RAs and permit applicants to 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 proposed, threatened or endangered species or designated or proposed critical habitat. For example, depending on the species present in an action area, monitoring and survey data may be necessary for the development of appropriate species-specific protective measures (SSPMs). Continued collaboration and dialog, especially during the design phase of a proposed mining permit, can help facilitate an expedited review of the final permit application.
 - OSMRE will encourage RAs to obtain official species lists through the Service's ECOS-IPaC system (ecos.fws.gov/ipac). However, if the RA is unable to obtain an official species list through the Service's ECOS-IPaC system, the Service will provide the RA with information on federally proposed or listed species and any proposed or designated critical habitat in the states or on tribal lands within 30 days of request.

3. The scope and level of detail for fish and wildlife resource information must be determined in

³ *See* 30 C.F.R. §§ 780.16(e) and 784.16(e). For over thirty years, OSMRE's previous regulations at 30 C.F.R. §§ 780.16 and 784.21 required that the RA work with State and Federal agencies with responsibilities for fish and wildlife, including the Service, to ensure that a permit application include sufficient information about listed or proposed endangered or threatened species and their critical habitats to design a protection and enhancement plan that would be in compliance with the ESA. Prior 30 C.F.R. §§ 780.16(c) and 784.21(c) required that the RA provide the fish and wildlife resource information and the fish and wildlife protection and enhancement plan in the permit application to the FWS upon request. As mentioned above, the Service encourages all Service field offices to submit a letter to the appropriate RA that will serve as a standing information request.

coordination with state and federal agencies with responsibilities for fish and wildlife.⁴ For proposed or listed species under the ESA, or proposed or designated critical habitats, the Service is the appropriate agency for coordination.

- To conduct a timely review of the permit application, the Service needs the following information, at a minimum:
 - 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.
 - 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;
 - A description of any listed or proposed species or designated or proposed 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;
 - A description of the manner in which the action may affect any listed or proposed species or designated or proposed critical habitat;
 - An analysis of any future state or private activities that are reasonably certain to occur within the proposed permit area and the adjacent areas that might also affect listed or proposed species or designated or proposed critical habitat;
 - A description of how the applicant proposes to avoid or minimize adverse impacts on proposed or listed species and proposed or designated critical habitat;
 - A description of how the applicant proposes to enhance fish, wildlife and related environmental values, where practicable; and
 - Relevant reports, including any environmental impact statements, environmental assessments, biological assessment or other analyses prepared on the proposal; and any other relevant studies or other information available on the action, the affected listed species, or critical habitat;
- OSMRE will encourage the RA to closely coordinate with the Service to ensure that the scope and level of detail provided by the permit applicant is sufficient to design a protection and enhancement plan (PEP) in accordance with SMCRA regulations.⁵

⁴ Resource information must be provided for the proposed permit and adjacent areas, as those areas are defined in 30 C.F.R. § 701.5.

⁵ See 30 C.F.R. §§ 780.16 and 784.16. Prior to the Stream Protection Rule, the underground regulation was found at 30 C.F.R. § 784.21(b).

4. Timing of Service Review

- Upon receipt of the resource information and PEP from an RA, the Service will conduct a review of the materials to determine if they are sufficient for the Service to evaluate the permit application. Within 30 days of receipt of the resource information and PEP, the Service will notify the RA if additional information is necessary. This notification will include a detailed description of what additional information is required.
- Once the additional information is submitted to the Service, the Service will conduct a review of the materials and determine within 15 days if there is sufficient information for the Service to evaluate the permit application. This process will continue until the Service determines the information is sufficient to evaluate the permit application.
- Once the necessary information is submitted to the Service, the Service will determine whether there is a need for additional SSPMs, including monitoring and reporting, within 30 days.⁶
 - 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 does not respond within 30 days identifying concerns with the SSPMs, the RA may elevate the dispute through the appropriate chains of command of the RA, the Service, and OSMRE for resolution. Elevation is appropriate because the RA must obtain documentation that any take of any proposed or listed ESA species or critical habitats is covered by the Incidental Take Statement accompanying the 2016 programmatic Biological Opinion. Without written confirmation, the RA will not be able to demonstrate compliance with the 2016 programmatic Biological Opinion or regulations and in the event that take occurs, it will not be exempted through the 2016 programmatic Biological Opinion.
 - If the Service suggests additional SSPMs or provides any other comments related to species or critical habitats listed or proposed for listing under the ESA, the 2016 programmatic Biological Opinion requires the RA to provide documentation to the Service of the ultimate disposition of any comments from the Service.
 - If the RA does not accept the additional Service measures, the RA must respond to the Service, within 30 days, explaining its rationale for not implementing all the suggested protective measures.
 - After receiving this explanation, the Service will provide a response to the RA within 15 days. In its response, the Service will either confirm its approval of the RA's decision or notify the RA that the Service does not agree with the RA's decision.
 - If the Service agrees with the RA, the Service will provide written documentation of this fact.
 - If the Service does not respond within 15 days, or if the Service does not agree, the RA, the Service, or both, may elevate the dispute through the appropriate chains of command of the RA, the Service, and OSMRE for resolution.
- At any point in this process, if it becomes clear that agreement cannot be reached or timelines

⁶ The Service will use the "best scientific and commercial data available" when determining whether additional SSPMs are required. 50 C.F.R. § 402.14(d). Where data is limited, Service biologists may use their best professional judgment. The Service should clearly articulate the chain of logic and all assumptions on which their determinations were based.

are not being followed, either party may elect to elevate in accordance with the procedures outlined in section (c) below. Alternatively, the Service and the RA may mutually agree to adjust timelines as necessary.

5. Section 773.19(b) requires that the RA issue a written notification to the Service of its decision to approve or deny an application for a permit to the Service if the Service filed comments or objections to the permit application. 30 C.F.R. § 773.19(b)(1). OSMRE will exercise its oversight authority, as appropriate, to ensure that this requirement is met.

6. Before approving any permit application that may affect proposed or ESA-listed species or proposed or designated critical habitat, the RA must make a finding that the proposed surface coal mining and reclamation operations will be conducted in compliance with the ESA. The RA may demonstrate compliance with the ESA through:

- The Technical Assistance process outlined in the 2016 programmatic Biological Opinion and this MOU,
- A section 7 consultation, if applicable, or
- A habitat conservation plan under section 10 of the ESA.⁷

b) Procedures Subsequent to Permit Issuance

i. Reporting Dead or Impaired Listed Species

Where a dead or impaired individual of a proposed or listed species is discovered within the permit or adjacent areas, the permittee must promptly notify the RA, and the RA must promptly notify the appropriate Service office. After notifying the appropriate Service office, the RA must determine if corrective action is necessary to avoid a recurrence of the circumstances that resulted in the inadvertent take unless the take was exempted through the earlier technical assistance process (i.e., a species previously considered or the amount or extent of take was previously authorized).

ii. Species Listed, Species Discovered, or Critical Habitat Designated Subsequent to Permit Issuance

Whenever the permittee becomes aware of a newly-listed threatened or endangered species or newly-proposed species, new proposed or designated critical habitat, or the presence of a threatened or endangered species or critical habitat within the permit area or adjacent area that was not considered at the time of permit issuance, the permittee must promptly report that information to the RA. This requirement applies regardless of whether the species was listed (or critical habitat was proposed or designated) before or after permit issuance. Once the newly listed or newly discovered species or critical

⁷ See 30 C.F.R. § 773.15(j). For over thirty years, OSMRE's previous regulation required that the RA 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]." This regulation did not specify the exact method that an RA should use to make such a demonstration. Under the current regulations as amended by the SPR, the RA may demonstrate compliance with the ESA by following the terms and conditions of OSMRE's programmatic consultation (in this case, the 2016 programmatic Biological Opinion), by completing a habitat conservation plan under section 10 of the ESA, or by completing a separate section 7 consultation under the ESA.

habitat has been reported to the RA, the RA must contact and coordinate with the appropriate state and federal fish and wildlife agencies. The RA, in coordination with the appropriate state and federal fish and wildlife agencies, will identify whether, and under what conditions, the operation may proceed. If necessary to ensure compliance with the ESA, the RA must issue an order under 30 C.F.R. § 774.10(b) requiring that the permittee revise the permit.

Surface coal mining and reclamation operations and coal exploration will not be exempted under the 2016 programmatic Biological Opinion ITS unless those operations are conducted in accordance with the Terms and Conditions of the 2016 programmatic Biological Opinion ITS and any SSPMs developed by the Service and incorporated into the permit by the RA during the permit-specific technical assistance process.

iii. Reinitiation of the Technical Assistance Process

Reinitiation of technical assistance coordination between the Service, permittees, and RAs will be required if:

1. The amount or extent of incidental take authorized during the site-specific technical assistance process is exceeded;
2. New information reveals effects of the operation that may affect listed species or critical habitat in a manner or to an extent not considered during the technical assistance process;
3. The operation is subsequently modified in a manner that causes an effect to listed or proposed species or designated or proposed critical habitat not considered in the technical assistance process; or
4. A new species is listed or proposed or critical habitat designated or proposed that may be affected by the permitted operation.

c) Interagency Elevation Process

To be exempt from the prohibitions of section 9 the ESA, SMCRA RAs must comply with the ITS's Terms and Conditions accompanying the 2016 programmatic Biological Opinion or demonstrate compliance with the ESA in some other manner.⁸ Specifically, if the RA and the Service cannot agree on information requirements, protective measures, or other matters related to proposed, threatened, or endangered species or proposed or designated critical habitat, or if either party fails to respond within designated timeframes, the issue must be elevated through the chain of command of the RA, the Service, and OSMRE.⁹ The following procedures have been developed by OSMRE and the Service to ensure that all disputes are resolved prior to permit issuance or revision. In the event that there is a disagreement between a state or tribal RA and the Service and the RA chooses not to follow the elevation procedures outlined in this section, the incidental take coverage from the 2016 programmatic Biological Opinion will not apply to any incidental take resulting from the permitted action. Instead, the RA or permit applicant

⁸ 30 C.F.R. § 773.15(j).

⁹ All elevation processes should include OSMRE because OSMRE is the action agency in the 2016 programmatic Biological Opinion.

should pursue ESA compliance by documenting, as appropriate, that interagency consultation under section 7 of the ESA has been completed for the proposed operation or by documenting that the proposed operation is covered under a permit issued pursuant to section 10 of the ESA.

These elevation procedures do not impair the ultimate authority of the RA, OSMRE, or the Service to issue decisions or render determinations that are within each agency's authority under SMCRA and the ESA. OSMRE, the Service, or the state or tribal RA may initiate the elevation process.

Elevation should be initiated so that all applicable deadlines may be met, taking into account subsequent levels of review. In any elevation, the agencies will, wherever possible, jointly prepare an elevation document that will contain a joint statement of facts and succinctly state each agency's position and recommendations for resolution. If the agencies enter into the elevation process, the RA should defer taking final action (e.g., issuing a permit), where consistent with applicable legal deadlines, to allow the issue to be resolved through the elevation process. Failure to resolve a disagreement between the RA and the Service on the use of SSPMs requested by the Service will negate the exemption from the prohibitions of section 9 of the ESA as provided through the 2016 programmatic Biological Opinion's ITS.

The times specified below are intended to facilitate expeditious resolution of the issues. These times can be adjusted when necessary to meet applicable legal deadlines. The times begin on the date that the elevating agency or agencies notify the relevant agencies in the next level of the elevation process. All prescribed time frames in the elevation process may be waived by mutual consent of the participants at any level when the participants believe that progress is being made and that resolution at that level is still possible.

If disputes cannot be resolved at the Field Office level the issue will be raised with the Regional Review Team (defined below) as soon as possible. To begin the process, elevation materials produced pursuant to the regulations and coordination process should be provided to all relevant parties, including as appropriate, the applicant, the Field and Regional review teams and the Service's National Surface Mining Liaison.¹⁰

National Surface Mining Liaison: The Service will maintain a National Surface Mining Liaison. The liaison will be familiar with the 1996 Biological Opinion, the 2016 programmatic Biological Opinion, and this MOU. The liaison's primary role will be to educate all interested parties on the requirements of the Opinions and the implementation of the technical assistance process as outlined in the Opinions and this MOU. The liaison will also assist interested parties in contacting appropriate agency personnel and will provide guidance when appropriate and requested. At the time of MOU finalization, the liaison position has been assigned to the Service's national section 7 coordinator. If the individual assigned to the liaison position changes, the new appointment will be announced to OSMRE. OSMRE will then notify state and tribal RAs.

Regional Review: The Regional Review Team consists of the relevant regional executives from the State or Tribe, OSMRE, and the Service, or their designees. The Regional Review Team will attempt to resolve any elevated disputes within 21 days of notification of elevation by Field Review Teams, or sooner as

¹⁰ Please see Appendix A for a chart outlining the appropriate point of contact for each elevation level.

necessary to meet mandatory deadlines. If issues cannot be resolved by the Regional Review Team, the issue will be elevated for Headquarters review.

Headquarters Review: This review consists of the head of the state or tribal RA and the Directors of OSMRE and the Service, or their designees. These officials will attempt to issue a decision resolving the issue within 21 days after elevation. If they are unable to resolve the dispute, OSMRE and the Service reserve the discretion to elevate the dispute as appropriate. Where determined to be appropriate (e.g., where the results of the elevation would provide useful guidance to agency staff), the written documentation of the agreement should be circulated among OSMRE and Service staff.

Resolution: The Service will provide written documentation of the agreement as soon as possible after the state or tribal RA, OSMRE, and the Service agree on the appropriate SSPMs. This written documentation should explain how any initial concerns that triggered the elevation procedures have been resolved.

d) Enforcement Procedures

OSMRE is responsible for ensuring that SMCRA and the regulations pertaining to the protection of fish and wildlife and related environmental values are being enforced directly in Federal situation in which OSMRE is the regulatory authority. OSMRE is also responsible for conducting such evaluations as are necessary to ensure that RAs are enforcing the state or tribal counterparts to the Federal regulations. Whenever OSMRE has reason to believe that a violation of SMCRA, the applicable regulatory program, or a permit condition exists, OSMRE must either issue a ten-day notice to the state or tribe, if the state or tribe has primacy, or conduct a federal inspection.

If the Service becomes aware of a permit that does not adequately protect proposed, threatened or endangered species or designated or proposed critical habitat, or a permittee that is not complying with permit requirements, the Service will notify OSMRE and/or the state or tribal RA. When necessary, the Service will provide its scientific expertise to assist OSMRE and/or the RA in supporting permitting and enforcement actions.

e) Local/Regional Coordinating Teams

The regional offices of OSMRE and the Service may establish coordinating teams, as appropriate. These teams will be comprised of OSMRE and Service staff. In addition, representatives from other appropriate entities, including, but not limited to, state and tribal RAs, State natural resource agencies, other Federal agencies such as the U.S. Army Corps of Engineers, the Forest Service, the Environmental Protection Agency, and other Federal or non-Federal stakeholders whose actions and interests may impact, or be impacted by, the SMCRA/ESA issues may be invited to participate, as appropriate. The local/regional coordinating teams are intended to foster early and recurring cooperation on various activities related to the SMCRA and the ESA. Such activities may include, but are not limited to:

- (a) Identifying upcoming actions of mutual interest to both agencies, such as development of general conservation measures for wide-ranging species, using recovery plans to help achieve conservation, potential State or Tribal program oversight studies, proposed listings, or proposed habitat conservation planning efforts;
- (b) Identifying high priority issues of concern and opportunities for cooperation;

- (c) Identifying the available information for evaluating effects of surface and underground coal mining operations on species;
- (d) Identifying research needs;
- (e) Identifying training needs;
- (f) SMCRA oversight reviews; and
- (g) Identifying ways to reduce the impacts of proposed agency actions on proposed and listed endangered and threatened species and proposed and designated critical habitat and to help achieve conservation of listed species and their habitats.

Nature of Agreement

It is Mutually Agreed and Understood that:

- This MOU does not alter either party's obligations or responsibilities or any other statute or other legal authority.
- This MOU is intended only to improve the internal management of OSMRE and the Service. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States; its agencies or instrumentalities, its officers or employees, or any other person.
- OSMRE and the Service will comply with all other relevant Federal laws, including the Federal Advisory Committee Act, 5 U.S.C. Appendix 2, and the Freedom of Information Act, 5 U.S.C. § 552, to the extent they apply.
- Nothing in this MOU is intended to create or establish a binding statement of policy or law, nor is any such provision intended to deviate from the requirements established by statute or regulation.
- This MOU in no way restricts either party from participating in similar agreements with other RAs, public or private agencies, governments, organizations, or individuals.
- This MOU is neither a fiscal nor a funds obligation document. It does not provide authority for obligations of that nature. Any endeavor involving reimbursement, contribution of funds, or transfer of anything of value between the parties will be handled in accordance with applicable laws, regulations, and procedures, including those for government procurement and printing. Such endeavors will be outlined in separate agreements that will be made in writing by representatives of the parties and will be independently authorized by appropriate statutory authority. Specifically, this MOU does not establish authority for noncompetitive award of any contract or other agreement. Any contract or agreement for training or other service must fully comply with all applicable requirements for competition.

Appendix A: OSMRE and Service Offices for the purpose of elevation procedures

| State | OSMRE POC | | Service POC ¹¹ | |
|----------------|---------------------------|----------------------|---|-----------------|
| | Field Office | Regional Office | Field Office | Regional Office |
| Georgia | Knoxville Field Office | Appalachian Region | Georgia Ecological Services Field Office Supervisor | Region 4 |
| Kentucky | Lexington Field Office | Appalachian Region | Kentucky Ecological Services Field Office Supervisor | Region 4 |
| Maryland | Pittsburgh Field Division | Appalachian Region | Chesapeake Bay Ecological Services Field Office Supervisor | Region 5 |
| Massachusetts | Pittsburgh Field Division | Appalachian Region | New England Field Office Supervisor | Region 5 |
| Michigan | Pittsburgh Field Division | Appalachian Region | East Lansing Ecological Services Field Office Supervisor | Region 3 |
| North Carolina | Knoxville Field Office | Appalachian Region | Asheville Ecological Services Field Office Supervisor | Region 4 |
| Ohio | Pittsburgh Field Division | Appalachian Region | Columbus Ohio Field Office Supervisor | Region 3 |
| Pennsylvania | Pittsburgh Field Division | Appalachian Region | Pennsylvania Ecological Services Field Office Supervisor | Region 5 |
| Rhode Island | Pittsburgh Field Division | Appalachian Region | New England Field Office Supervisor | Region 5 |
| Tennessee | Knoxville Field Office | Appalachian Region | Tennessee Ecological Services Field Office Supervisor | Region 4 |
| Virginia | Big Stone Gap Area Office | Appalachian Region | Virginia Ecological Services Field Office Supervisor | Region 5 |
| West Virginia | Charleston Field Office | Appalachian Region | West Virginia Ecological Services Field Office Supervisor | Region 5 |
| Alabama | Birmingham Field Office | Mid-Continent Region | Alabama Ecological Services Field Office Supervisor | Region 4 |
| Arkansas | Tulsa Field Office | Mid-Continent Region | Arkansas Ecological Services Field Office Supervisor | Region 4 |
| Illinois | Alton Field Division | Mid-Continent Region | Chicago Ecological Service Field Office Supervisor Marion Ecological Services Sub-Office Supervisor Rock Island Ecological Services Field Office Supervisor | Region 3 |
| Indiana | Alton Field Division | Mid-Continent Region | Bloomington Ecological Services Field Office Supervisor Northern Indiana Ecological Services Sub-Office Supervisor | Region 3 |
| Iowa | Alton Field Division | Mid-Continent Region | Rock Island Ecological Services Field Office Supervisor | Region 3 |
| Kansas | Tulsa Field Office | Mid-Continent Region | Kansas Ecological Services Field Office Supervisor | Region 6 |
| Louisiana | Birmingham Field Office | Mid-Continent Region | Louisiana Ecological Services Field Office Supervisor | Region 4 |
| Mississippi | Birmingham Field Office | Mid-Continent Region | Mississippi Ecological Services Field Office Supervisor | Region 4 |
| Missouri | Alton Field | Mid-Continent | Columbia Ecological Services Field Office | Region 3 |

¹¹ Please include Service's National Surface Mining Liaison in all correspondence.

| | OSMRE POC | | Service POC ¹¹ | |
|---------------|--------------------------|----------------------|--|----------|
| | Division | Region | | |
| Oklahoma | Tulsa Field Office | Mid-Continent Region | Oklahoma Ecological Services Field Office Supervisor | Region 2 |
| Texas | Tulsa Field Office | Mid-Continent Region | Arlington Ecological Services Field Office Supervisor Austin Ecological Services Field Office Supervisor Texas Coastal Ecological Services Field Office Supervisor | Region 2 |
| Alaska | Program Support Division | Western Region | Anchorage Fish And Wildlife Field Office Supervisor Fairbanks Fish And Wildlife Field Office Supervisor Kenai Fish And Wildlife Field Office Supervisor | Region 7 |
| Colorado | Denver Field Division | Western Region | Colorado Ecological Services Field Office Supervisor | Region 6 |
| Montana | Denver Field Division | Western Region | Kalispell Ecological Services Office Supervisor Montana Ecological Services Field Office Supervisor | Region 6 |
| New Mexico | Program Support Division | Western Region | New Mexico Ecological Services Field Office Supervisor | Region 2 |
| North Dakota | Denver Field Division | Western Region | North Dakota Ecological Services Field Office Supervisor | Region 6 |
| Utah | Denver Field Division | Western Region | Utah Ecological Services Field Office Supervisor | Region 6 |
| Washington | Program Support Division | Western Region | Washington Fish And Wildlife Office Supervisor | Region 1 |
| Wyoming | Denver Field Division | Western Region | Wyoming Ecological Services Field Office Supervisor | Region 6 |
| Crow Tribe | Denver Field Division | Western Region | Montana Ecological Services Field Office Supervisor | Region 6 |
| Hopi Tribe | Program Support Division | Western Region | Arizona Ecological Services Field Office Supervisor | Region 2 |
| Navajo Nation | Program Support Division | Western Region | New Mexico Ecological Services Field Office Supervisor | Region 2 |