

Addendum to OSMRE's 2020 Biological Assessment

SMCRA/ESA Coordination Process as Outlined in 30 C.F.R. §§ 780.16 and 784.21 and Based on OSMRE's Oversight Process

The following procedures outline issuance of SMCRA permits by the State regulatory authority where the proposed action may affect proposed or listed threatened or endangered species or proposed or designated critical habitat under the Endangered Species Act (ESA).

As mandated by SMCRA, the governing Title V regulations include numerous requirements to minimize potential effects on ESA-listed species. *See, e.g.* 30 U.S.C. § 1265(b)(24). The following procedures are set out to clarify those provisions in OSMRE's regulations:

1. State regulatory authorities 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 or proposed critical habitat.

The State regulatory authority 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 States Fish and Wildlife Service (Service). *See* 30 C.F.R. § 773.6(a)(3)(ii).

The State regulatory authority 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).

2. The scope and level of detail for fish and wildlife resource information, for the permit area and adjacent area, must be determined by the State regulatory authority 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(a)(1) and 784.21(a)(1). 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, in most instances, but based upon the discretion of the State regulatory authority in coordination with the Service, the Service should receive from the State regulatory authority, at a minimum the following information:
 - a. a description of the action under consideration. The 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 Information for Planning and Consultation system found at: <https://ecos.fws.gov/ipac/>
- d. a description of how the operator will minimize disturbance and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act during the surface coal mining and reclamation operations;
- e. a description of how the applicant proposes to avoid or minimize adverse impacts on listed or proposed species and designated critical habitat; and
- f. a description of how the applicant proposes to enhance fish, wildlife and related environmental values, where practicable (*see* 30 C.F.R. §§780.16(b) and 784.21(b)).

3. Service Review

Upon receipt of the resource information, as specified above, from the State regulatory authority, 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 State regulatory authority with a detailed description of what, if any, additional information is required.

Once the requested information is submitted to the Service, the Service will review the effects of the action and cumulative effects on the listed species or designated critical habitat and the State regulatory authority's written findings that the exploration, mining, and reclamation activities will not jeopardize the continued existence of an endangered or threatened species and make a determination on the likelihood of the proposed operation to jeopardize the continued existence of listed species, or destroying or adversely modifying of designated critical habitats.

If, in close coordination with the regulatory authority, the Service and the State regulatory authority determine there is a need for additional species-specific protective measures (SSPMs), including reporting and monitoring, the Service and the State regulatory authority must develop SSPM to minimize anticipated incidental take.

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

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

If the State regulatory authority does not accept the unilaterally suggested additional Service measures, the State regulatory authority must provide a written explanation to

the Service for concurrence. If the Service does not concur, the State regulatory authority or the Service may elevate the issue as outlined in the accompanying elevation process document.

4. Ultimately, the State regulatory authority 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 State regulatory authority 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].” 30 C.F.R. § 773.15(j).