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## UTAH OGM COAL PROGRAM MEETING NOTES

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**Date sent to file:** October 3, 2006

**Meeting Date:** September 12, 2006 (Conference Call)

**To:** Internal File, Section 7 consultation for mining plan modification

**From:** Coal Regulatory Program

**Note taker:** Pamela Grubaugh-Littig

**Attendees:** Diana Whittington, USFWS  
Pete Rutledge, OSM  
Ranvir Singh, OSM  
Bob Block, OSM  
Jerriann Ernstsens, DOGM  
Joe Helfrich, DOGM  
Wayne Hedberg, DOGM  
Pamela Grubaugh-Littig, DOGM

**Purpose:** To Determine Documentation Requirements for "No Effect" Section 7 Consultations for Mining Plan Modification Decision Document Packages

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### MEETING SUMMARY

OSM, USFWS, and DOGM decided that documentation of "No Effect" determination, Informal Section 7 Consultations can be done by documenting phone conversations between the USFWS and DOGM, then emailing meeting notes of the phone conversation to OSM and to DOGM's internal files.

OSM agreed that emails of the meeting notes of phone conversations between DOGM and USFWS would be adequate to include in the OSM Decision Document that goes to the Secretary of Interior. OSM also agreed that these meeting notes would be adequate to include in the State Decision Package that is forwarded to OSM, WRO. The meeting notes of phone conversations between DOGM and USFWS must include the following: date, time, agency representatives, and discussion summary.

The agencies also discussed the January 27, 2006 letter to interested parties from Henry Maddux, Utah Field Supervisor of USFWS as well as the September 24, 2006 Formal Section 7 Biological Opinion and Conference Report on Surface Coal Mining and Reclamation Operations Under the Surface Mining Control and Reclamation Act of 1977 (attached).

During agency review of these meeting notes for the September 12, 2006 meeting, Ranvir Singh of OSM added that DOGM must also prepare a decision memo for "No Effect" determinations. Jerriann Ernstsens (DOGM) recommends that rather than emailing correspondence to OSM, that DOGM send hard copies of DOGM's decision memo and meeting notes of phone conversations between the USFWS and DOGM. DOGM will send these two documents with the State

Decision Package. By not emailing the meeting notes, this will save OSM from receiving two copies (hard- and e-versions) of the same documentation.

Also, during the agency review, Ranvir Singh responded and accepted to Jerriann's recommendation. The DOGM will send hard copies of phone notes along with DOGM's decision memo to OSM. Emails of this information would be redundant and are not requested.

During the meeting, USFWS also clarified that for "may affect, is not likely to adversely affect" determinations that DOGM will initiate Informal Section 7 Consultations, which USFWS will respond with official letters to DOGM.

Jerriann clarified that for "may affect, is likely to adversely affect" determinations (e.g., Colorado River endangered fish), that DOGM will draft and send decision memos to OSM. OSM will review DOGM's documents and initiate Formal Section 7 Consultations between OSM and USFWS. USFWS will respond with official letters to OSM and cc DOGM.

DOGM drafted a diagram of the formal and informal consultation wording and correlating process for clarification purposes.

Enc:

1996 Biological Opinion

January 27, 2006 – FWS Guidance for Informal Consultation

Determination of Consultation

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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

SEP 24, 1996

In Reply Refer To:  
FWS/AES/TE

Memorandum

To: Acting Director, Office of Surface Mining Reclamation and Enforcement

From: Assistant Director - Ecological Services

Subject: Formal Section 7 Biological Opinion and Conference Report on Surface Coal Mining and Reclamation Operations Under the Surface Mining Control and Reclamation Act of 1977

The U.S. Fish and Wildlife Service has reviewed your March 21, 1995, request for formal section 7 Endangered Species Act consultation regarding the continuation and approval of surface coal mining and reclamation operations under State and Federal regulatory programs adopted pursuant to the Surface Mining Control and Reclamation Act of 1977, as amended, and its implementing regulations. Details of the proposed action are included in the attached document.

The Service and the Office of Surface Mining Reclamation and Enforcement began informal discussions in September 1994 to develop procedures to fulfill OSM's need to consult on the potential for the proposed action to adversely affect species listed as threatened or endangered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.). Appropriate Service Regional and Field Offices were contacted for comments.

The attached document represents the Service's biological opinion and conference report on the effects of the action, as proposed, on listed and proposed species and designated and proposed critical habitats in accordance with section 7 of the ESA. They are based on information provided at numerous meetings of the staffs of OSM and the Service throughout 1994 and 1995, information in our files, and other sources of information. A complete administrative record of this consultation is on file in this office.

The Service has concluded that the proposed action is not likely to jeopardize the continued existence of any threatened, endangered, or proposed species or result in adverse modification of designated or proposed critical habitats.

This concludes formal consultation and conference on the proposed action. The biological opinion and conference report does not absolve OSM from following appropriate conference/consultation procedures at any implementation level that may affect proposed or listed species or their proposed or designated critical habitats in a manner not considered in this consultation/conference.

Thank you for your consideration of endangered species. Should you need any additional information or have any questions concerning this issue, please contact E. LaVerne Smith, Chief, Division of Endangered Species at 703/358-2171.

/sgd/ Jamie R. Clark

Attachments

**ENDANGERED SPECIES ACT--SECTION 7 CONSULTATION****BIOLOGICAL OPINION and CONFERENCE REPORT**

**AGENCY:** U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement (OSM)

**ACTIVITY:** Surface Coal Mining Regulatory Programs Under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (SMCRA or the Act)

Consultation conducted by: U.S. Department of Interior, U.S. Fish and Wildlife Service (the Service)

Date Issued: \_\_\_\_\_

**BIOLOGICAL OPINION/CONFERENCE REPORT****Description of Proposed Action**

The proposed action is the approval and conduct of surface coal mining and reclamation operations under State and Federal regulatory programs adopted pursuant to SMCRA where such operations may adversely affect threatened or endangered species. At present, 24 States (Alabama, Alaska, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, and Wyoming) have approved State regulatory programs (primacy) under SMCRA for non-Federal, non-Indian lands within their borders. OSM administers Federal regulatory programs for 13 States (Arizona, California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington), although only Tennessee and Washington have active coal mines at the present time. OSM directly regulates all surface coal mining and reclamation operations on Indian lands, which at present consist of operations on the Navajo, Hopi, and the Ute Mountain Ute reservations. On the Crow Ceded Area in Montana, OSM and the Montana Department of State Lands administer applicable surface mining requirements. OSM also directly regulates surface coal mining and reclamation operations on Federal lands in primacy States (most significantly Kentucky) that have not entered into cooperative agreements with the Secretary of the Interior to assume this responsibility.

As of June 1, 1996, a total of 308 species listed as threatened or endangered occur within States with primacy, and 337 listed species occur within States with Federal regulatory programs. Surface coal mining and reclamation operations would potentially impact only a subset of these species.

## **Background**

### ***Surface Mining Regulation Under SMCRA***

In fashioning SMCRA, Congress recognized the need to protect society and the environment from the adverse effects of surface coal mining operations while fulfilling the nation's need for coal. Signed into law on August 3, 1977, SMCRA was the first Federal statute specifically directed toward regulation of the environmental impacts associated with surface coal mining. The Act created two major programs:

- A reclamation program for abandoned mine lands, funded by fees that operators pay on each ton of coal mined; funds are used to reclaim land and water resources adversely affected by pre-1977 coal mining; and
- An environmental protection program to establish standards and procedures for permitting and inspecting surface and underground coal mining and reclamation operations. This program has five major components:
  - (1) Criteria and procedures for designation of areas as unsuitable for mining;
  - (2) Performance standards governing the conduct of mining and reclamation operations;
  - (3) A detailed permitting process to ensure that mining and reclamation operations are designed to achieve the performance standards and other requirements of SMCRA and its regulations;
  - (4) A performance bond to provide a financial guarantee for completion of the reclamation plan if the permittee defaults on reclamation obligations; and
  - (5) Inspection and enforcement to monitor and secure compliance.

### ***State Regulatory Programs***

Section 101(f) of SMCRA specifies that because of the diversity in terrain, climate, and other physical conditions under which mining operations occur, the primary governmental responsibility for regulating surface coal mining and reclamation operations should rest with the States. To achieve primary regulatory responsibility (often referred to as primacy), a State must develop and obtain OSM approval of a program which demonstrates the State's capability to carry out applicable provisions of SMCRA. Specifically, State programs must include:

- Laws which regulate surface coal mining and reclamation operations;
- Sanctions for violations of State laws, regulations, or permit conditions;



- Plans for implementation, maintenance, and enforcement of an effective permit system;
- A process for the designation of areas as unsuitable for surface coal mining operations;
- A process for coordinating the review and issuance of surface coal mining permits with any other Federal or State permitting requirements applicable to the proposed operations;
- Rules and regulations consistent with regulations issued by the Secretary of the Interior (the Secretary); and
- Sufficient administrative and technical personnel and funding to operate a regulatory program.

Through OSM, the Secretary reviews the proposed State program to determine its consistency with SMCRA and the implementing regulations adopted by the Secretary. Each State program is also reviewed by the public, industry, and other Federal agencies. After soliciting and publicly disclosing the views of the Environmental Protection Agency, the Secretary of Agriculture, and heads of other Federal agencies, the Secretary either approves or disapproves the proposed State program. Upon program approval, the State becomes the primary regulatory authority for surface coal mining and reclamation operations within its borders. As of the date of this document, 24 States have primacy. These States are responsible for 98 per cent of the nation's surface coal mining and reclamation operations.

### ***Oversight of State Regulatory Programs***

Following approval of a State program, OSM assumes a monitoring role and provides funding and technical assistance. Section 517(f) of SMCRA requires that OSM evaluate the administration of approved State programs. In this role, OSM conducts oversight inspections of selected minesites and undertakes oversight reviews of selected topics in States with primacy.

### ***Federal Regulatory Programs***

As required by section 504 of SMCRA, OSM directly regulates surface coal mining and reclamation operations in a State if the State does not submit and receive approval of its own program pursuant to section 503 of SMCRA. As of the date of this document, OSM operates Federal regulatory programs in 13 States, although only Tennessee and Washington have active mines.

### ***Federal and Indian Lands***

Section 523(a) of SMCRA requires the Secretary to establish and implement a Federal regulatory program applicable to all surface coal mining and reclamation operations taking place on Federal lands. Through cooperative agreements, the Secretary has delegated most regulatory responsibilities under this provision to States with approved regulatory programs. The Secretary has entered into cooperative agreements with Alabama, Colorado, Illinois, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Utah, Virginia, West Virginia, and Wyoming. Among States without cooperative agreements, only Kentucky has significant mining activity on Federal lands.

Pursuant to section 710 of SMCRA, OSM directly regulates all surface coal mining and reclamation operations on Indian lands, which, at present, consist of operations on the Navajo, Hopi, and Ute Mountain Ute reservations. On the Crow Ceded Area in Montana, OSM and the Montana Department of State Lands administer applicable requirements.

### **Status of the Species**

This biological opinion and conference report addresses all present and future Federally listed and proposed species and designated or proposed critical habitats that may be affected by the implementation and administration of surface coal mining regulatory programs under SMCRA. The Service's field offices will maintain and update a list of protected species and habitats and the specific measures needed to ensure the protection of these species and habitats. The Service will routinely distribute this list and any updates to OSM and State regulatory authorities.

A complete list of endangered and threatened wildlife and plants and critical habitats appears at 50 CFR 17.11 and 17.12. The preambles to the proposed and final listing rules contain detailed status information for each species. Individual species recovery plans, reports, and other documents contain additional information.

### **Effect of Proposed Action**

The effect of surface coal mining and reclamation operations on plant and animal communities depends on the nature of the affected plant, animal, or critical habitat, the type of mining and its intensity, reclamation techniques and timing, the seral history of the site, and postmining land use. Generally, these activities can result in impacts such as changes in pH (acidification or alkalization of waters and/or soils); siltation of bodies of water such as lakes, ponds, rivers, streams and creeks; increased turbidity of water bodies, thus reducing primary productivity; deposition of metals in water bodies; and synergistic effects of mining wastes with other pollutants (Mason 1978). In some cases, surface coal mining and reclamation activities may have contributed to the endangerment of species.

Direct effects of surface coal mining and reclamation operations on threatened,

endangered, or proposed species or critical habitats consist primarily of habitat alteration by land clearing and earthmoving operations. While some of these effects are temporary, unique habitat features in such microenvironments as cliffs, caves, rock outcroppings, seeps, and old-growth forests are difficult and sometimes impossible to replace (Thornburg 1982). Aquatic and wetland-dependent species also may be directly affected by adverse impacts on water availability and quality (e.g., increased levels of metals, sulfates and dissolved or suspended solids), increased variations in streamflow and thermal gradients, and changes in groundwater levels and spring flows (USDA 1982). If the species of concern lacks individual mobility, land clearing and excavation activities may result in a direct take. Direct effects are often readily identifiable, but the magnitude of incidental take resulting from both direct and indirect impacts is difficult to ascertain and not well-documented.

Surface coal mining and reclamation operations may indirectly affect threatened, endangered, or proposed species or proposed or designated critical habitats by increasing human access to species and/or their habitats and by causing or contributing to long-term changes in land use and the local ecology. Improved access can result in increased site disturbance, poaching, and invasion of species incompatible with the species of concern. Mining can interrupt migration corridors and habitat continuity (Mason 1978), thus isolating populations and threatening their long-term viability by increasing their susceptibility to genetic decline and catastrophic events. Forest fragmentation resulting from mining-related activities and subsequent changes in land use may cause increased predation and habitat degradation on adjacent, physically undisturbed sites and may threaten the ecological integrity of those lands with respect to species requiring extensive continuous forest cover. Even if the land is restored to its premining use, the species composition and age structure will likely differ; this may have an adverse impact on species of concern. Hence, surface coal mining and reclamation operations may result in an indirect take of a protected species or significant disturbance and/or destruction of protected habitats.

As summarized below, SMCRA and its implementing regulations set forth programmatic standards and procedures designed to minimize mining-related impacts on fish and wildlife in general and threatened and endangered species in particular. OSM, State regulatory authorities under SMCRA, State fish and game or conservation agencies, and local Service offices must develop additional species-specific or site-specific standards and procedures if needed to protect listed and proposed species, their habitats, and designated or proposed critical habitats.

### ***Regulatory Requirements Under SMCRA***

Section 501 of SMCRA requires the Secretary to promulgate regulations for surface coal mining and reclamation operations based on and conforming to Title V of SMCRA. These regulations are codified in Title 30, Chapter VII of the Code of Federal Regulations. The specific regulations pertinent to protection of fish and wildlife and related environmental values are summarized below:

*§ 772.12 Permit requirements for exploration removing more than 250 tons of coal, or occurring on lands designated unsuitable for surface coal mining operations.*

Paragraph (b)(9) requires a description of any endangered or threatened species listed pursuant to the Endangered Species Act of 1973 and identified within the proposed exploration area.

Paragraph (d)(2)(ii) requires that the regulatory authority (State or OSM) find in writing that the exploration and reclamation activities described in the application will not jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat of those species.

*§ 815.15 Performance standards for coal exploration.*

Prohibits disturbance of habitats of unique or unusually high value for fish, wildlife, and other related environmental values and critical habitats of threatened or endangered species during coal exploration.

*§ 773.12 Regulatory coordination with requirements under other laws.*

To avoid duplication, requires that each regulatory program provide for the coordination of review and issuance of permits with applicable requirements of the Endangered Species Act, the Fish and Wildlife Coordination Act, the Migratory Bird Treaty Act, and the Bald Eagle Protection Act.

*§§ 780.16 and 784.21 Fish and wildlife information.*

Paragraph (a) requires that each permit application include fish and wildlife resource information for the permit and adjacent area, including site-specific information when the permit or adjacent area is likely to include listed or proposed endangered or threatened species. The scope and level of detail for the information must be determined by the regulatory authority in consultation with the State and Federal agencies with responsibilities for fish and wildlife.

Paragraph (b) requires that each permit application include a description of how the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act. The application also must include a plan for enhancement of these resources where practicable.

Paragraph (c) provides that upon request by the Service, the regulatory authority must supply the information required under paragraphs (a) and (b) to the Service for review.

*Shelton*