

Reclamation Advisory Memorandum

RAM # 171

Kentucky Energy and Environment Cabinet Department for Natural Resources

From: Gordon Slone, Commissioner

Date: July 1, 2024

Subject: Fish and Wildlife Review

Beginning on July 1, 2024, this Reclamation Advisory Memorandum (RAM) revises procedures for Fish and Wildlife review for proposed and listed species and designated critical habitat in accordance with the *Final Programmatic Biological Opinion and Conference Opinion on the United States Department of the Interior Title V Regulatory Program herein after referred to as the 2020 Biological Opinion or the 2020 BiOp*.

Permitting Actions

1. Permit applications, including new permits, amendments, major revisions, renewals and any permit revision where additional acreage is added to the existing permit area will be required, at the time of the application, and again upon reclassification of species or designation of critical habitat under the Endangered Species Act (ESA), to include a copy of the Official Species List generated by the US Fish and Wildlife Service's (USFWS) Information for Planning and Consultation tool (IPaC) in the permit application. The IPaC is located on USFWS's web site: [USFWS IPaC Tool](#).
2. Each application must include fish & wildlife resource information for the permit and adjacent area, including all site-specific resource information on all listed or proposed threatened and endangered species and their designated critical habitat identified on the Official Species List. The information must be sufficient to design a protection & enhancement plan (PEP) that describes how, to the greatest extent possible using the best available technology, the operator will minimize disturbances and adverse impacts on fish & wildlife related environmental values, including compliance with the ESA, during surface coal mining and reclamation operations, and how enhancement of these resources will be achieved where practicable.
3. As outlined in Appendix A of the 2020 Biological Opinion, each application should include, 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: [USFWS IPaC Tool](#).
 - 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)).
4. As indicated in subsection 3 (c) above, in order to ensure that the fish & wildlife information is complete, the applicant/permittee must enter the permit area and adjacent area into the USFWS IPaC tool to produce an Official Species List before an application for a new permit, amendment, permit renewal, major revision, or any minor revision that proposes added acreage.
- a. The location must encompass the permit and adjacent areas. Any area included within the definition of "action area" under the ESA must be considered part of the permit or adjacent area under SMCRA.
 - b. IPaC species lists marked "not for consultation" will not be accepted.
 - c. IPaC documentation is valid for 90 days, provided that the scope of the action remains unchanged.
 - d. For efficiency purposes, the permittee should add the Division of Mine Permits (DMP) as a "project member" within the IPaC entry by adding DMP personnel (DMPFWSReview@ky.gov) as a consulting party to the official IPaC submittal. As a project member in IPaC, DMP can better fulfill step 5 below, and make direct adjustments to the IPaC entry, including reverification of the Official Species List in the event 90 days pass during review.
5. The DMP will evaluate the accuracy and completeness of the applicant's or permittee's IPaC entry, including the location and project description. The project description must include the type of permitting action pending, the type of mine permit, the method of mining, the status of the mine, the current acreage of disturbance, the anticipated

acreage of future disturbance, and other relevant factors. If DMP determines that the applicant's or permittee's IPaC entry is not accurate and complete, DMP will require the applicant/permittee to correct the entry and resubmit the updated Official Species List for re-evaluation.

6. The Official Species List generated by the IPaC tool must be included in the application as an attachment to Item 14.1. Administrative completeness (AAA) of the application cannot occur until the species list is included.
7. When the Official Species List indicates a proposed or listed species/designated critical habitat may be present within the permit or adjacent areas, DMP will likely not make a "No Effect" determination. Instead, DMP, based on the best available information, will likely make an initial determination of "May Effect, Not Likely to Adversely Affect" or "May Effect, Likely to Adversely Affect" for each species and critical habitat. Following this initial determination, DMP will coordinate with USFWS through the coordination process in Appendix A of the 2020 BiOp. If DMP makes a "No Effect" determination, DMP must document its determination, rationale, and any supporting material to the permitting file. Similarly, upon conclusion of the coordination process in Appendix A of the 2020 BiOp, DMP must document its determination, rationale, and supporting materials, including USFWS correspondence, in the permit file. DMP will make an effects determination for all of the species listed on the Official Species List. The Official Species List and information as required by the 2020 Biological Opinion will be forwarded by the Division of Mine Permits to the USFWS Frankfort Field Office for review and concurrence.
8. During/after the SMCRA/ESA coordination process with USFWS, DMP will notify the applicant or permittee of the findings, including any additional Species-Specific Protective Measures (SSPMs) recommended by USFWS, effects determination(s), and quantification of incidental take, if applicable. Correspondence from USFWS will be sent to the permittee. The SMCRA/ESA coordination process may result in one or more of the following scenarios:
 - a. If there is a "No Effect" or "May Affect, Not Likely to Adversely Affect" determination, the DMP will notify the permittee of any additional SSPMs required and to include the correspondence from the Division and the USFWS in the application, documenting the completion of the SMCRA/ESA coordination process.
 - b. If there is a "May Affect, Likely to Adversely Affect" determination, the DMP will notify the permittee of any additional SSPMs required, and USFWS will provide a quantification of incidental take, concluding the SMCRA/ESA coordination process. DMP will notify the permittee to include the correspondence from the Division and the USFWS in the application, documenting the completion of the SMCRA/ESA coordination process.

9. If the SMCRA/ESA coordination process results in a May Affect, Likely to Adversely Affect determination, and, after SMCRA/ESA coordination process with the USFWS, additional SSPMs are recommended, the DMP will notify the permittee of the requirements needed to address listed species. For renewals, if the SMCRA/ESA coordination process results in a May Affect, Likely to Adversely Affect determination, and the species identified requires additional protection & enhancement measures included in the PEP, the DMP will initiate a special mid-term to have the permittee address the issue. The permittee will include the required items in the special mid-term application. DMP staff will review this information and send it to USFWS for review. Once the review is complete, the items will either be approved, or sent back to the applicant for revision. This process will repeat until both DMP and USFWS are satisfied that sufficient SSPMs are included to minimize the effects to the species to the greatest extent possible, prevent jeopardy of the species, and incidental take is quantified, if applicable.
10. All correspondence between DMP and USFWS will be scanned into DocTree under each permit number in a folder marked Critical Resource Review Section (CRRS). DMP will include written documentation reflecting the completion of the coordination procedures and requirements outlined within this RAM, including the Official Species List, any coordination with USFWS, correspondence from USFWS concluding technical assistance conditioned upon incorporation into the permit of any proposed Site Specific Protection Measures (SSPMs) and monitoring requirements, and a written determination that the protective measures and project-specific coordination procedures in the applicable statutory and regulatory requirements, the implementing regulations, the coordination process outlines in Appendix A of the 2020 BiOp, and this policy to ensure that no permit issued under the Title V regulatory program is likely to jeopardize proposed or listed species, or result in the destruction or adverse modification of proposed or designated critical habitat.

New Listings of Species and/or Critical Habitat

Upon receipt of the Federal Register Notice of a new listing of a species and/or critical habitat, the Division of Mine Permits will take the following steps to review existing permits:

1. When reclassification of a species or designation of critical habitat under the ESA requires coordination with USFWS, the Division of Mine Permits will communicate with USFWS to identify which permits are impacted by the listing/designation. As a courtesy, DMP will invite input from USFWS on a prioritized review schedule for the impacted permits and rationale. The prioritization process will account for species needs and sensitivities, as well as mine type, mine status, current disturbance, anticipated disturbance, proximity to designated critical habitat, and other relevant factors.
2. After the courtesy coordination with USFWS on a prioritization process, DMP will compile a list of all permits in the affected counties as listed in the Federal Register. The prioritization process will account for species needs and sensitivities, as well as mine

permit type, mine status, current disturbance, anticipated disturbance, and other relevant factors.

3. Promptly upon publication in the Federal Register of a newly listed species or newly designated critical habitat under the ESA, the applicant/permittee for each mining operation must use IPaC to produce an Official Species List to determine if the new ESA listing may be present in the permit area or adjacent areas. Pending permitting actions at the time of publications, as well as future permitting actions, must address proposed species and habitats. The Division of Mine Permits may, as a courtesy, notify applicants/permittees of the publication in the Federal Register. However, even in the absence of direct notice from DMP, publication in the Federal Register constitutes awareness of the need to determine whether the newly listed species or newly designated critical habitat may be present within the permit area or adjacent areas.
4. Where DMP is responsible for revoked or abandoned permits, DMP must undertake this analysis and SMCRA/ESA coordination process for newly listed or designated ESA resources.
5. The permittee must follow the process and provide the information required in the Permitting Actions section above.
6. DMP will review, as prescribed in the Permitting Actions section above, the permit application and permit package as a whole to verify the information provided by the permittee.
7. Using this information, the Division will make an effects determination for all of the species listed on the Official Species List. Except for species for which DMP makes a “No Effect” determination, all of the information will be sent to the USFWS for review and concurrence.
8. During/after the SMCRA/ESA coordination process with USFWS, DMP will notify the permittee of the findings, including any additional SSPMs recommended by USFWS, effects determination(s), and quantification of incidental take, if applicable. Correspondence from USFWS will be sent to the permittee. The SMCRA/ESA coordination process may result in one or more of the following scenarios:
 - a. If there is a “No Effect” or “May affect, Not Likely to Adversely Affect” determination, the Division will notify the permittee of any additional SSPMs required and to include the correspondence from the Division and the USFWS in the application, documenting the completion of the SMCRA/ESA coordination process.
 - b. If there is a “May Affect, Likely to Adversely Affect” determination, the DMP will notify the permittee of any additional SSPMs required, and USFWS will provide a quantification of incidental take, concluding the SMCRA/ESA coordination

process. DMP will notify the permittee to include the correspondence from the Division and the USFWS in the application, documenting the completion of the SMCRA/ESA coordination process.

- c. The permittee will include the required information in either the existing application or a mid-term application. DMP will review this information and send it to USFWS during the SMCRA/ESA coordination process. Once coordination is complete, the application will either be approved or sent back to the applicant for additional information and revision. This process will repeat until both the Division and USFWS agree on the effects determination(s), that the SSPMs are adequate to ensure that the authorized activities are not likely to jeopardize proposed or listed species or result in the destruction or adverse modification of proposed or designated critical habitat, and incidental take is quantified by USFWS, if applicable.
9. All correspondence between the Division and USFWS will be scanned into DocTree under each permit number in a folder marked USFWS.
 10. Upon approval, the permit face sheet will be modified to include any conditions the permittee will be required to adhere. Until another triggering event, such as a renewal, major modification, etc., the review for this permitting action will be complete.

Revoked or Abandoned Permits

Where DMP is responsible for revoked or abandoned permits, DMP must undertake the analysis and SMCRA/ESA coordination process:

1. For newly listed or designated ESA resources, as outlined in the previous section of this RAM, and
2. For any changes in the scope of the action or action area, including deviations from the reclamation plan presented to USFWS during the previous SMCRA/ESA coordination process.

Questions related to this RAM, BiOp review, and/or coordination should be directed to the Director of the Division on Mine Permits, Wes Jones, at 502-564-2340, or via email at Wes.Jones@ky.gov.

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