

**Standard Operating Procedure
Public Participation Coordination of Coal Mine Permitting Actions
in Tennessee under the Clean Water Act
and Surface Mining Control and Reclamation Act**

Purpose

The purpose of this document is to establish an interagency Standard Operating Procedure (SOP) to enhance agency coordination regarding public participation required under the various State and Federal regulations involving coal mine permitting actions in the State of Tennessee. This SOP is developed in support of a Local Interagency Working Agreement among those agencies that have jurisdiction by law under the Clean Water Act (CWA), Surface Mining Control and Reclamation Act (SMCRA) and/or the Tennessee Water Quality Control Act regulatory programs. These agencies include the Tennessee Department of Environment and Conservation (TDEC), the U.S. Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), the United States Fish and Wildlife Service (USFWS), and the Office of Surface Mining Reclamation and Enforcement (OSM).

Scope

This SOP applies to those decisions related to proposed coal mine permitting actions in Tennessee in which State and/or Federal regulatory authority is involved. This shall include but is not limited to new permit applications and significant revisions to existing permits.

Introduction

This SOP describes the public participation processes for the issuance of CWA (§401 certifications and §402 / §404 permits) and SMCRA permits for coal mining in Tennessee. This SOP also clarifies the implementation of each agency's responsibilities in coordinating their respective regulatory functions.

Background - 401 Certification, 402 Permit, 404 Permit, and SMRCA Permit

It is the responsibility of TDEC to review and approve or deny CWA §401 certification applications. To accomplish this, TDEC generally requires applicants (1) to have applied to the USACE for a CWA §404 permit, and (2) to submit an Aquatic Resource Alteration Permit (ARAP) application to TDEC for §401 water quality certification. TDEC has also been delegated the CWA §402 National Pollutant Discharge Elimination System (NPDES) regulatory authority. As the §402 regulatory program is delegated to TDEC, USEPA has oversight responsibilities for §402 compliance. Under the CWA, USEPA also has, on a permit specific basis, veto authority for projects proposed under §402 and 404.

Once certified by TDEC under §401, it is the USACE's responsibility to review and approve or deny §404 permit applications. It is OSM's responsibility to review and approve or deny

SMCRA permit applications. The USFWS cooperates with the Federal agencies by providing advice and guidance through the consultation process as to whether an action complies with the substantive requirements of Section 7 of the Endangered Species Act.

As regulatory agencies in Tennessee, TDEC, USACE, and OSM have a responsibility under various statutory authorities to provide public notification of decisions and opportunities for public participation in the decision making process. The public notification and participation process of the three agencies are outlined in Appendices 1, 2 and 3.

Coordinated Multi-Agency Public Hearing / Informal Conference Process

This SOP establishes the following procedures for conducting a coordinated multi-agency public hearing / informal conference (PH/IC) for proposed coal mine permitting actions:

- TDEC will hold a PH/IC for each new mining activity.
- OSM and USACE may hold a PH/IC based on public input or requests.
- TDEC, OSM, and USACE will coordinate and establish a mutually agreeable date, time, and location for the PH/IC.
- All comments received will be shared among the agencies.
- Prior to commencement of the formal PH/IC, the participating agencies will provide subject matter experts for the purpose of open dialog "question/answer" session to better inform the public of the proposed actions under consideration.
- At the conclusion of the "question/answer" session, the formal PH/IC will commence and the official record will be opened for public comments.

Agency	Signatory	Date
TDEC	<i>[Signature]</i>	12/20/11
OSM	<i>[Signature]</i>	12/20/10
USEPA	<i>[Signature]</i>	12/20/2010
USACE	<i>Ronald E. Batten</i>	12/20/2010
USFWS	<i>Mary E. Jennings</i>	12/20/2010

As described in the Local Interagency Working Agreement (LIWA), this SOP does not create any rights, either substantive or enforceable by any party. This document does not and is not intended to impose any legally binding requirements on state or federal agencies, the regulated community or public, and does not restrict the authorities of signatory agencies to exercise their discretion in each case to make a regulatory decision based on their judgment about specific facts and application of relevant statutes and regulations. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the involved agencies or relieve these parties of their obligations under federal and state law. Nothing in this document will be construed as indicating a financial commitment by the agencies to expend funds.

Appendix 1

Public Notification and Participation under the SMCRA Regulatory Program in TN

In accordance with National Environmental Policy Act (NEPA) regulations at 40 CFR §1500.5(g) and National Historic Preservation Act (NHPA) regulations at 36CFR §800.8, OSM has integrated the SMCRA, NHPA, and NEPA processes in TN to the extent practicable. This is most obvious in the area of public participation. Once a SMCRA permit application is determined to be administratively complete (i.e. the applicant has provided responses to all the items in the application), the public notification and participation process begins. This process is briefly outlined as follows:

- Notice of proposed permitting action placed in local newspaper(s) once a week for 4 consecutive weeks providing public comment period,
- Written notification of proposed permitting action and comment period to local, State, and Federal agencies with jurisdiction by law or who may otherwise have an interest as well as to organizations or individuals who have asked to be notified of such actions,
- Informal Conference (IC) may be requested during public comment period. Before IC (i.e. public hearing) is held, notice must be placed in local newspaper(s) advising public of IC. Requestor of IC may ask for site visit to gather information relevant to IC. Written and/or oral comments accepted at the IC and become part of public record,
- The permit application and any changes made to it must be made available for public review both at OSM office and at a local public office, typically the county courthouse.
- Public notice of proposed blasting activities is required. Coal operator must publish blasting schedule in the local newspaper(s) and distribute copies of schedule to local governments, public utilities, and anyone living within ½ mile of proposed blasting site. Anyone owning a dwelling or other structure within ½ mile of the permit area must be notified in writing of their right to request a pre-blast survey. If requested, coal operator must promptly conduct survey and provide signed copies of survey to both property owner and OSM. Property owner may submit any objections to findings and conclusions of the survey to both the operator and OSM for resolution
- As application review process nears conclusion, OSM develops a number of "decision documents" to inform and support the decision-making process. In limited circumstances, one of the decision documents (the NEPA document) is made available for public review. If so, availability of this draft NEPA document is advertised in local newspaper(s). Comments received during 30 day review period are considered. With the decision to approve or deny the proposed permitting action, OSM mails notice of

decision and availability of decision documents to everyone on above referenced notification lists as well as to anyone who has commented on the proposed action. OSM also places notice in local newspaper(s) making public aware of availability of decision documents.

Appendix 2

Public Notification and Participation under the USACE Regulatory Program

(1) Within 15 days of receipt of an application, the USACE will either determine that the application is complete and issue a public notice, or that it is incomplete and notify the applicant of the information necessary for a complete application. The comment period on the public notice should be for a reasonable period of time within which interested parties may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice.

(2) Public Notice Requirements

The public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impact on the public interest. The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include the following items of information:

- a. Applicable statutory authority or authorities;
- b. The name and address of the applicant;
- c. The name or title, address and telephone number of the USACE employee from whom additional information concerning the application may be obtained;
- d. The location of the proposed activity;
- e. A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments;
- f. A plan and elevation drawing showing the general and specific site location and character of all proposed activities;
- g. A list of other government authorizations obtained or requested by the applicant, including required certifications relative to water quality, coastal zone management, or marine sanctuaries;
- h. A statement of the USACE's current knowledge on historic properties;
- i. A statement of the USACE's current knowledge on endangered species
- j. Any other available information which may assist interested parties in evaluating the likely impact of the proposed activity, if any, on factors affecting the public interest;
- k. A statement that any person may request, in writing, within the comment period specified in the notice, that a public hearing be held to consider the application. Requests for public hearings shall state, with particularity, the reasons for holding a public hearing;

- (3) Public notices will be distributed for posting in post offices or other appropriate public places in the vicinity of the site of the proposed work and will be sent to the applicant, to appropriate city and county officials, to adjoining property owners, to appropriate state agencies, to appropriate Indian Tribes or tribal representatives, to concerned Federal agencies, to local, regional and national shipping and other concerned business and conservation organizations, to appropriate River Basin Commissions, to appropriate state and area wide clearing houses, to local news media and to any other interested party. Copies of public notices will be sent to all parties who have specifically requested copies of public notices, to the U.S. Senators and Representatives for the area where the work is to be performed, the field representative of the Secretary of the Interior, the Regional Director of the Fish and Wildlife Service, the Regional Director of the National Park Service, the Regional Administrator of the USEPA, the Regional Director of the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration, the head of the state agency responsible for fish and wildlife resources, the State Historic Preservation Officer, and the District Commander, U.S. Coast Guard.
- (4) The USACE will consider all comments received in response to the public notice. Receipt of the comments will be acknowledged, if appropriate, and they will be made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the USACE may seek the advice of that agency.
- (5) A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. The applicant will be given a reasonable time, not to exceed 30 days, to respond to the objections. The USACE will inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the USACE will either grant the time, make a final decision, or consider the application as withdrawn. USACE alone is responsible for reaching a decision on the merits of the Department of the Army application.
- (6) The USACE will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation required by the NEPA. A decision on a permit application will require either an environmental assessment or an environmental impact statement.
- (7) The USACE will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR part 327. A public hearing will be held in connection with the consideration of a Department of the Army (DA) permit application whenever a public hearing is needed for making a decision. Unless the public notice specifies that a public hearing will be held, any person may request, in writing, within the comment period specified in the public notice on a DA permit application. Upon receipt of any such request, stating with particularity the reasons for holding a public hearing, the USACE may expeditiously attempt to resolve the issues informally. Otherwise, the USACE shall promptly set a time and place for the public hearing, and give due notice thereof. Requests for a public hearing shall

be granted, unless the USACE determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing. The USACE will make such a determination in writing, and communicate reasons therefore to all requesting parties. The procedures to be followed in developing and implementing a joint multi-agency public hearing / informal conference process are described in Section H of this document.

- (8) After all above actions have been completed, the USACE will determine in accordance with the record and applicable regulations whether or not the permit should be issued.

Appendix 3

Public Notification and Participation under the TDEC Regulatory Program

OSM, USACE, and TDEC will coordinate in review of coal permit applications. When the interagency review team reaches consensus that an application exhibits a level of administrative completeness and technical information sufficient for public review, TDEC will proceed with the Public Notification and Participation process. This process may include both the NPDES and ARAP / 401C permits. TDEC and the applicant must meet regulatory requirements as established in Rule 1200-4-5 and 1200-4-7.

1. Upon receipt of an NPDES or ARAP permit application, TDEC has thirty days to determine if the application is complete or provide notification of incompleteness.
2. Once TDEC's review of the NPDES permit application has determined completeness, then appropriate draft effluent limitations may be established. When the applicant has complied with all the public participation requirements pursuant to 1200-4-5-.06 and 1200-4-7, TDEC will coordinate with OSM and USACE and will provide draft permit conditions. Upon concurrence of permit conditions, TDEC will notice the draft NPDES permit and set a public hearing date. The ARAP may be noticed but does not require a draft permit.
3. These specific regulations provide detailed informational requirements for TDEC for both NPDES permit and ARAP. The NPDES permit must include the Rationale and Public Notice. TDEC will not proceed with the permit process until the applicant's notification requirements are clearly satisfied and include the following:
 - a. Newspaper advertisement
 - b. Sign posting
4. The NPDES and/or ARAP Public Notice(s) will extend for 30 days and comments will be accepted as specified in 1200-4-5-.06(11, 12). TDEC has 10 days to respond to comments received during the notice period and at the Public Hearing.
5. TDEC will issue a Notice of Determination when no new information is forthcoming.
6. Upon issuance of the SMCRA permit, TDEC may issue or deny the final NPDES permit or ARAP to applicant.
7. If TDEC determines to deny the NPDES and/or ARAP permit then the denial process must be followed.

Standard Operating Procedure Revision Coordination for SMCRA Permit Review

Purpose:

The purpose of this document is to establish an interagency Standard Operating Procedure (SOP) to coordinate the revision processes among the Federal and State agencies involved in coal mine permitting actions in the State of Tennessee. This SOP was developed in support of a Local Interagency Working Agreement (LIWA) among those agencies who have jurisdiction by law under the Clean Water Act (CWA), Surface Mining Control and Reclamation Act (SMCRA) and/or the Tennessee Water Quality Control Act regulatory programs. These agencies include the Tennessee Department of Environment and Conservation (TDEC), the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency Region 4 (USEPA), the United States Fish and Wildlife Service (USFWS), and the Office of Surface Mining Reclamation and Enforcement (OSM).

Scope:

The OSM Knoxville Field Office has primary authority for reviewing and issuing the SMCRA permit; TDEC for the 401 certifications and 402 permits; and the USACE for the 404 permit. OSM, TDEC, and USACE staff will consult with USEPA and the USFWS to address specific items in the respective permitting documents.

Introduction/Background:

This SOP will act as the primary procedure for the coordination of the revision of 401 certifications, 402 permits, 404 permits, and SMCRA mining permits. This SOP clarifies the implementation of each of the listed agencies' responsibilities in coordinating respective regulatory functions for revision to both the SMCRA and CWA permits.

Revision of 401 Certification, 402 permits, 404 permits and SMRCA permits:

A revision to a SMCRA permit is used to reflect the changes in mining conditions. Revisions to SMCRA permits may necessitate modification of the 401 certification, 402 permits, and/or the 404 permit. SMCRA revisions may be proposed by the permittee, result from an order by TDEC, USACE, or OSM due to inconsistencies between the operation and the approved permit or as a result of an enforcement action. The OSM classifies SMCRA revisions into two categories. The first is a minor revision which requires no changes to the original NEPA findings or CHIA.

The second is a significant revision to the mining or reclamation plan and will be subject to the SMCRA permit application information requirements and procedures which includes a public notice, public participation, and notice of decision requirements under 30 CFR §773.6, 773.19(b)(1) and (3), and 778.21, prior to approval and implementation. The OSM will consider any proposed revision to be significant if it:

- (1) Will result in adverse impacts beyond those previously considered, affecting cultural resources listed on, or eligible to be listed on, the National Register of Historic Places;
- (2) Involves changes to the blasting plan that will be likely to cause adverse impacts beyond those previously considered, to persons or property outside of the permit area;
- (3) Will result in adverse impacts beyond those previously considered, affecting a water supply to which the requirements of 30 CFR 816.41(h) apply;
- (4) Will cause a new or updated probable hydrologic consequences determination or cumulative hydrologic impact analysis to be required under 30 CFR 780.21(f)(4) or 780.21(g)(2) as a result of an increase in impacts;
- (5) Requires a change in the identification, disturbance, or handling of toxic- or acid-forming materials different from those previously considered, where the changes have the potential for causing additional impacts not previously considered;
- (6) Will result in adverse impacts on fish, wildlife and related environmental values beyond those previously considered;
- (7) Includes the proposed addition of a coal processing facility, or any permanent support facility, where the addition of the facility will cause impacts not previously considered, except that the addition of a temporary coal processing facility used exclusively for crushing and screening need not be considered a significant revision; or
- (8) Involves a change in the post mining land use to a residential, industrial/commercial, recreation or developed water resources land use, as defined in 30 CFR 701.5; except that a change to a developed water resource not meeting the size criteria of §77.216(a) may not be considered a significant revision.

Procedures:

OSM will notify the TDEC and the USACE of any proposed revisions to the SMCRA permit that would necessitate a change to 401 certifications, 402 permits or 404 permits. This notification will include any modifications to ephemeral streams within the permit boundary. In return, TDEC and the USACE will notify OSM, in writing, of any changes to CWA certifications or permits that may impact the SMCRA permit. Any changes to CWA permits may necessitate revisions in the SMCRA permit. If the applicant does not submit a revision to the SMCRA permit, the OSM may request, as appropriate, revisions to the existing permit by ordered revision. OSM, TDEC, and USACE will copy both the USEPA and the USFWS for any ordered revision requests. If either agency has comments they may provide them at this time.

The Technical Group supervisor will review all permit applications and ensure all pertinent sections are sent to the USACE, TDEC, and USFWS. Response timeframes will be included in all correspondence.

Agency	Signatory	Date
TDEC	<i>[Signature]</i>	12/20/2010
OSM	<i>[Signature]</i>	12/20/10
USEPA	<i>[Signature]</i>	12/20/2010
USACE	Ronald E. <i>[Signature]</i>	12/20/2010
USFWS	<i>[Signature]</i>	12/20/2010

As described in the Local Interagency Working Agreement (LIWA), this SOP does not create any rights, either substantive or enforceable by any party. This document does not and is not intended to impose any legally binding requirements on state or federal agencies, the regulated community or public, and does not restrict the authorities of signatory agencies to exercise their discretion in each case to make a regulatory decision based on their judgment about specific facts and application of relevant statutes and regulations. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the involved agencies or relieve these parties of their obligations under federal and state law. Nothing in this document will be construed as indicating a financial commitment by the agencies to expend funds.

Attachments:

OSM Draft Application for Permit Revision



DRAFT

APPLICATION FOR PERMIT REVISION
UNDER THE
FEDERAL PROGRAM FOR TENNESSEE

DRAFT
APPLICATION FOR PERMIT REVISION
UNDER THE
FEDERAL PROGRAM FOR TENNESSEE

Revision applications consist of an original plus 3 copies (4 total) of --

- a) An "Application for Revision"; and
- b) Each individual page, map, cross section and plan needed to replace those portions of the approved permit application to be changed.

PLEASE COMPLETE THE FOLLOWING

- 1. Permit Number _____
- 2. Expiration Date _____
- 3. Circle which revision this is: 1st, 2nd, 3rd, other _____
- 4. Permittee Name _____
Address _____
Contact Person _____ Phone _____
- 5. Mine Name _____
- 6. County _____
- 7. Consulting Firm _____
Address _____
Contact Person _____ Phone _____

8. a. Is this revision the result of an enforcement action by a regulatory authority?
Yes [] No []

If yes, provide name of the RA, inspector's name and abatement date if applicable.

If no, explain why this revision is needed.

- b. Is this revision being submitted pursuant to
30 CFR 942.785.25 - Lands Eligible for Remining?

Yes [] No []

If yes, complete attachment A.

9. Has application been made or will it be made within 60 days for Phase I, II, or III bond release?

Yes [] No []

Is this revision for postmining land use changes, retention of haulroads, or pond status changes needed to achieve final reclamation or facilitate bond release?

Yes [] No []

10. What is the net change in permit acreage?

_____ acre increase
_____ acre decrease
_____ no change

11. Would this revision change the results of the previously submitted PHC (Determination of probable hydrologic consequences)?

Yes [] No []

12. a. Has the permittee added a new partner, officer, member, director, or person performing a function similar to a director, person who owns 10 to 50 percent of the applicant or a person who owns or controls the applicant different than those listed in the approved permit application, pursuant to 30 CFR 942.778.11?

Yes [] No []

- b. If yes, is the appropriate new information attached?

Yes [] No []

13. Complete and attach each individual page, map, cross section and plan to replace those portions of the approved permit application proposed to be changed.

14. Submit an original and 3 copies of this application and all supporting documentation, maps, and plans to:

Office of Surface Mining
Technical Group
710 Locust Street, Second Floor
Knoxville, Tennessee 37902

15. Verification:

I certify under penalty of the Act (Public Law 95-87) that I am a responsible official for this operation, that I have personally examined and am familiar with the information submitted in this revision application and all attachments, and that, based on my inquiry of those persons immediately responsible for obtaining the information contained in this application, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment.

Signature of Responsible Official _____

Title _____ Date _____

Subscribed and sworn to before me by _____

This _____ day of _____, 20 _____

Notary Public _____

My Commission Expires _____

AFFIX SEAL:

ATTACHMENT A

LANDS ELIGIBLE FOR REMINING

A. Eligibility Criteria

OSM is required to make a written finding pursuant to 30 CFR 942.773.15(m)(i)-(iii) regarding the eligibility of lands within the permitted area for expenditure of AML funds under Sections 402 (g)(4) or 404 of SMCRA. For OSM to make the written finding, the applicant is required to check one of the three statements below that applies to the area that the applicant believes may be eligible for re-mining and provide supporting documentation. For OSM to determine that the previously disturbed site is eligible under one of the three statements, the supporting documentation shall conclusively show that both conditions of the checked statement have been met.

- The area proposed for re-mining eligibility was mined between August 4, 1977 and August 10, 1982 AND funds for reclamation or abatement which are available pursuant to a bond or other form of financial guarantee or from any other source are not sufficient to provide for adequate reclamation or abatement at the site.
- The area proposed for re-mining eligibility was mined between August 4, 1977 and November 5, 1990 AND the surety for the mining operator became insolvent during such period and as of November 5, 1990 funds immediately available from proceedings relating to such insolvency, or from any financial guarantee or other source are not sufficient to provide for adequate reclamation or abatement at the site.
- The area proposed for re-mining eligibility was mined for coal or affected by such mining, wastebanks, coal processing, or other coal mining processes and abandoned or left in an inadequate reclamation status prior to August 3, 1977, AND for which there is no continuing reclamation responsibility under State or other Federal laws.

Documentation to support the determination for lands eligible for re-mining may include, but is not limited to, information available from OSM, Mine Safety and Health Administration (MSHA), Tennessee Valley Authority (TVA), Divisions of Land Reclamation and Water Pollution Control within the Tennessee Department of Environment and Conservation, and the Natural Resources Conservation Service (NRCS). Aerial photographs may also be submitted.

B. Potential Environmental and Safety Problems

OSM is required to make written findings pursuant to 30 CFR 942.773.15(m)(ii) and (iii) regarding the: (1) identification of potential environmental and safety problems that could reasonably be anticipated to occur on those lands eligible for remining and (2) mitigation plans contained in the revision application that demonstrate that the required reclamation can be accomplished. For OSM to make the written findings, the applicant is required to address the following:

1. Are there any potential environmental and safety problem(s) related to prior mining activity which could be reasonably anticipated to occur at the site?

Yes [] No []

Provide a detailed narrative describing the nature of the investigation to identify potential problems which shall include visual observations at the site, a record review of past mining at the site, and environmental sampling tailored to current site conditions.

2. If yes, identify the **type and degree** of the potential problems and provide a mitigation plan to sufficiently address these problems so that reclamation as required by 30 CFR 942, Tennessee Federal Program, can be accomplished.

C. Outstanding Violations

1. Are there any unabated violations that occurred after October 24, 1992, related to lands eligible for remining which arose from unanticipated events or conditions?

Yes [] No []

If yes, provide the following information for each outstanding violation:

- a. NOV/CO/Violation Number: _____
- b. Date the Violation Occurred: _____
- c. A detailed narrative with supporting documentation demonstrating that the violation resulted from an unanticipated event or condition arising from surface coal mining and reclamation operations on lands eligible for remining.

D. Map Requirements

Delineate on the Mining Operations Map those areas within the permitted area that have been previously disturbed or affected by surface coal mining operations and are believed to be lands eligible for remining.

**Standard Operating Procedure
National Historic Preservation Act Coordination of Coal Mine Permitting
Actions in Tennessee Under the Clean Water Act
and Surface Mining Control and Reclamation Act**

Purpose

The purpose of this document is to establish an interagency Standard Operating Procedure (SOP) to enhance coordination under the National Historic Preservation Act (NHPA) among the Federal agencies involved in coal mine permitting actions in the State of Tennessee. This SOP is developed in support of a Local Interagency Working Agreement among those agencies that have jurisdiction by law under the Clean Water Act (CWA) and/or Surface Mining Control and Reclamation Act (SMCRA) regulatory programs. These agencies include the Tennessee Department of Environment and Conservation (TDEC), the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), the United States Fish and Wildlife Service (USFWS) and the Office of Surface Mining Reclamation and Enforcement (OSM).

Scope

This SOP applies to proposed coal mine permitting actions in Tennessee in which Federal authority is involved. This shall include but is not limited to new permit applications and revisions to existing permits for which the potential impacts of the proposed revision relevant to archeological / historical sites were not adequately identified when the permit was issued. It should be noted that as a State agency with no Federal authority requiring NHPA compliance under the CWA or SMCRA, TDEC has no legal obligations under NHPA to coordinate with the State Historic Preservation Officer (SHPO) prior to making a permitting decision. TDEC is identified in this SOP only to extent that actions they may take under State counterparts to the CWA may assist and facilitate the Federal agencies compliance with NHPA.

As Federal decision making agencies in Tennessee, both the USACE and OSM have a responsibility to comply with NHPA. For any coal mining related permitting action in Tennessee that is within the statutory jurisdiction of these agencies and for which the potential impacts to archaeological or historic sites were not adequately identified in previous documents, then appropriate NHPA documents must be developed. OSM will be the lead agency on coordination with the SHPO in which Federal authority is concerned.

NHPA Compliance under the SMCRA Regulatory Program in TN

OSM has integrated compliance with the NHPA into the SMCRA process. Public notification and participation are integral to the NHPA / SMCRA regulatory process. To that end, notice is placed in the local newspaper(s) once a week for four consecutive weeks making the public

aware of the proposed undertaking. OSM also sends out written notification to local, State, and Federal agencies with jurisdiction by law or who may otherwise have an interest in the proposed undertaking as well as to organizations or individuals, including Native American tribes, who have asked to be notified of proposed coal mine permitting actions. This notification specifically invites participation as a "consulting party" under the NHPA.

Any comments or concerns received by OSM during the SMCRA / NHPA public participation process are part of the public record and are considered during the technical review process. During technical review, OSM must determine if historic or archaeological properties are present in the area of potential effect (APE) and if present, determine whether these properties would, after applying the "criteria of adverse affect" as set forth in NHPA regulations at 36 CFR §800.5(a), be adversely impacted by the proposed undertaking. OSM can, as necessary and in accordance with the jurisdictional authorities of SMCRA, require that the applicant incorporate measures into the proposed permit / revision application to prevent, reduce, and or monitor the potential impacts of the proposed undertaking on identified historic / cultural resources.

If after consultation and public notification, OSM determines no cultural resources are present in the APE or resources are present but possible direct or indirect effects are precluded by the nature of the project/undertaking, OSM incorporates its conclusion of no historic properties affected into the decision documents. OSM mails notices of the decision to issue or deny the proposed permitting action and the availability of the decision documents to everyone on the above referenced notification lists as well as to anyone who has participated in the NHPA process as a consulting party, including SHPO. OSM also places an ad in the local newspaper making the public aware of the availability of the decision documents.

If after appropriate mitigation and treatment measures are applied, it is concluded that the historic / archaeological properties may still be adversely affected as per 36 CFR §800.5(a), OSM must enter into consultation with all identified consulting parties including SHPO. Under these circumstances, SMCRA regulations also require joint approval by both OSM and the agency with jurisdiction over the property. Once the NHPA consultation process has concluded, OSM notifies the public and consulting parties of the decision in the same manner as described above for "no affect" decisions.

Agency	Signatory	Date
TDEC	<i>[Signature]</i>	12/20/10
OSM	<i>[Signature]</i>	12/20/10
USEPA	<i>[Signature]</i>	12/20/2010
USACE	<i>[Signature]</i>	12/20/2010
USFWS	<i>[Signature]</i>	12/20/2010

As described in the Local Interagency Working Agreement (LIWA), this SOP does not create any rights, either substantive or enforceable by any party. This document does not and is not intended to impose any legally binding requirements on state or federal agencies, the regulated community or public, and does not restrict the authorities of signatory agencies to exercise their discretion in each case to make a regulatory decision based on their judgment about specific facts and application of relevant statutes and regulations. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the involved agencies or relieve these parties of their obligations under federal and state law. Nothing in this document will be construed as indicating a financial commitment by the agencies to expend funds.

Standard Operating Procedure Compliance with Endangered Species Act for Mining Projects in Tennessee

Purpose

The purpose of this Standard Operation Procedure (SOP) is to enhance coordination among the federal and state agencies involved in coal mine permitting actions in the State of Tennessee. The SOP is developed in support of a Local Interagency Working Agreement among those agencies that have regulatory authority in areas related to coal mining or responsibilities specified by the Endangered Species Act (ESA). These agencies include the Office of Surface Mining Reclamation and Enforcement (OSM), the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), and the United States Fish and Wildlife Service (USFWS).

The Tennessee Department of Environment and Conservation (TDEC) are included in this SOP because it has regulatory responsibilities associated with the Clean Water Act, the Surface Mining Control and Reclamation Act (SMCRA) and/or the Tennessee Water Quality Control Act. As an agency that is frequently involved in mining permitting decisions, the Tennessee Wildlife Resources Agency (TWRA) is also included in this SOP.

Scope

This SOP applies to those decisions related to proposed coal mine permitting actions in Tennessee in which federal authority is involved. This shall include new permit applications, renewals, and significant revisions to existing permits for which the potential impacts of the proposed revision relevant to ESA-related concerns should be re-assessed.

Statutory/Regulatory Requirements

This SOP is based upon requirements of the Endangered Species Act of 1973 (as amended through the 108th Congress), Public Law 95-87 (the Surface Mining Control and Reclamation Act of 1977), and Sections 401, 402, and 404 of the Clean Water Act.

Introduction/Background

All Federal agencies must comply with the requirements of the ESA. In an effort to help meet their agency's compliance responsibilities, in March 1995, OSM requested that there be formal section 7(a)(2) consultation regarding 'the continuation and approval of surface coal mining and reclamation operations under the State and Federal regulatory programs. . .' In an October 7, 1996, biological opinion (BO), the USFWS concluded that approval and conduct of surface coal mining and reclamation operations under SMCRA are, if conducted in accordance with the provisions of SMCRA and the terms and conditions of the BO, "not likely to jeopardize the continued existence of any threatened, endangered, or proposed species or result in adverse modification of designated critical habitats." In complying with the 1996 BO and the provisions of SMCRA, OSM provides opportunities for all federal agencies to comment on the permit

application with regard to respective expertise. The USFWS provides comment relative to the conservation of common fish and wildlife species, federally listed threatened and endangered (T/E) species, and species that may be listed as threatened or endangered. When T/E species are present, OSM as lead Federal Agency in coordination with USACE, as appropriate, is required to consult with the USFWS on all matters relating to possible adverse impacts to T/E species. This document outlines procedures for the development of protective and enhancement measures for T/E species and those that may be listed.

Procedure

Several obligations must be fulfilled during section 7(a)(2) ESA consultation regarding T/E species, which takes place between the point at which the OSM receives a permit application and the conclusion of consultation between the USFWS, OSM, and the USACE. The critical steps involved in the consultation process include the following:

- 1) The applicant will provide a description of the proposed mining project to the Inter-agency Group prior to submittal of the SMCRA permit application and after the Jurisdictional Determination is complete. This description includes an overview map of the entire mining operation (including "shadow areas" of deep mines). The Inter-agency Group advises the applicant of a description of potential environmental concerns, involving T/E species and fish and wildlife resources in general. OSM will notify the applicant of any sampling, monitoring, or surveys for T/E species required prior to submittal of the SMCRA application. USFWS will provide technical assistance at any time in the process, at the request of OSM.
- 2) OSM will verify that all listed species concerns have been addressed either through avoidance or by application of minimization measures described in a Protection and Enhancement Plan prior to the SMCRA application being determined administratively complete. OSM will provide a copy of pertinent information to the USFWS and the USFWS will provide comments to OSM regarding necessary measures for protection of species that may be impacted by the proposed mining and reclamation activities. The most recent Tennessee Indiana bat and/or blackside dace protection and enhancement plan guidelines will be used as a guide to these species. These species-specific guidelines provide descriptions of minimum levels of standard protective measures. Additional measures may be requested by the USFWS, OSM, or USACE to further minimize impacts to a protected species or to address potential cumulative impacts to a species as the need arises. If OSM does not require an applicant to include one or more of USFWS's recommended protection measures, they will provide the USFWS with a written reason why. If USFWS agrees with OSM's reasoning, the USFWS will issue a concurrence letter. If USFWS disagrees with OSM's rationale, USFWS must elevate the issue through the chain of command of the Agencies for resolution.
- 3) If adequate measures have not been included in the application, OSM will provide the applicant with permit deficiency letters that will include descriptions of measures necessary to address T/E species needs. Once OSM personnel determine that the permit adequately provides for implementation of species-specific protective measures, they provide the USFWS with a determination of how the mining and reclamation project will affect T/E species. Resolution of concerns is concluded upon provision of a letter of concurrence with this determination by the

USFWS to OSM. In cases when a determination by OSM that a mining project is likely to adversely affect a T/E species or when the FWS does not concur with a "not likely to adversely affect" finding, USFWS will provide to OSM additional species-specific protection measures that will address USFWS concerns. If OSM deems these measures to be impractical or not feasible, OSM and USFWS will enter into reconciliation meetings to resolve the outstanding issues. If these meetings and associated measures fail to produce a satisfactory result to both agencies, procedures for elevation as outlined in the 1996 Biological Opinion will be followed. Note that the USACE can also make an "adverse affect" determination that would lead to reconciliation meetings with OSM, USFWS and USACE as outlined above.

4) Other ESA requirements must also be followed subsequent to authorization of a mining project. When necessary, OSM must exercise its authority to ensure compliance with the T/E species provisions of SMCRA. The USFWS will be notified when situations may result in any noticeable impacts to T/E species. OSM must quantify take of T/E species whenever possible. When a dead or impaired individual of a T/E species is found, OSM must notify the USFWS within one working day. If OSM determines incidental take of a T/E species has occurred in excess of predicted take, then OSM will re-evaluate the mining and reclamation plan to determine if corrective action is necessary.

Agency	Signatory	Date
TDEC	<i>R. D. [Signature]</i>	12/20/10
OSM	<i>[Signature]</i>	12/20/10
USEPA	<i>[Signature]</i>	12/21/10
USACE	<i>Ronald E. Batlin</i>	12/21/2010
USFWS	<i>Mary [Signature]</i>	12/20/2010

As described in the Local Interagency Working Agreement (LIWA), this SOP does not create any rights, either substantive or enforceable by any party. This document does not and is not intended to impose any legally binding requirements on state or federal agencies, the regulated community or public, and does not restrict the authorities of signatory agencies to exercise their discretion in each case to make a regulatory decision based on their judgment about specific facts and application of relevant statutes and regulations. Nothing in this document is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the involved agencies or relieve these parties of their obligations under federal and state law. Nothing in this document will be construed as indicating a financial commitment by the agencies to expend funds.