

# RECENT CHANGES TO THE ILLINOIS SMCRA THREATENED AND ENDANGERED SPECIES (T&E) REQUIREMENTS

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# ILLINOIS SMCRA T&E HISTORY

- 1983 – 2009 Fairly static issue
- 2009 – present Rapidly changing dynamic issue
  - Resulting in questions by the Illinois Coal Industry
    - Why are these changes being made?
    - Why do we need to look at so many species?
    - Why do I need a “take” permit for Indiana bats
    - When can we clear our trees?
      - Seasonal considerations
      - Permit Issuance considerations

# ILLINOIS SMCRA T&E HISTORY

- Driving Legislation
  - SMCRA (including promulgated regulations)
  - Federal Endangered Species Act (ESA)
  - Illinois Endangered Species Protection Act
  
- 1983 Illinois was Granted Primacy (Indiana bat was issue)

# ILLINOIS SMCRA T&E PROVISIONS

- The Endangered Species Finding
  - The 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 Endangered Species Act of 1973 (16 USC 1531 et seq.).
  - Applies only to Federally listed species (Indiana bat, Decurrent false aster, bald eagle [formerly], fat pocketbook mussel)
  - Historically in Illinois, an Indiana bat issue
- Provides for consultation with State (OREP) and Federal (USFWS) wildlife agencies on T&E issues.

# ILLINOIS SMCRA T&E HISTORY

- 1987 Federal rules expand jurisdiction and require protection of State listed species (IL updated 1992)
- 1996 - OSM Biological Opinion
- 2002 - 96 Biological Opinion Interpretation and Implementation Agreement made OSM/USFWS/RA's
- 2008 – Sierra Club vs. Kempthorne decision guides tree clearing jurisdiction
- 2009 – Indiana bat guidelines OSM/USFWS/IMCC (updated 2013)
- 2009 – Banner decision; loss of IL SMCRA permit due to T&E issues



# 1987 T&E Jurisdictional Expansion in OSM Regulations 780.16 (IL 1780.16)

1982 (IL 1983)

XXXX

(b) A statement explaining how the applicant will utilize impact control measures, management techniques, and monitoring methods to protect or enhance the following, if they are to be affected by the proposed activities:

(1) Threatened or endangered species of plants or animals listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and their critical habitats;

(2) Species such as eagles, migratory birds or other animals protected by State or Federal law, and their habi

1987 (IL 1992)

THIS SECTION:

(2) Site-specific resource information necessary to address the respective species or habitats shall be required when the permit area or adjacent area is likely to include:

(i) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), or those species or habitats protected by similar State statutes;

(ii) Habitats of unusually high value for fish and wildlife such as important streams, wetlands, riparian areas, cliffs supporting raptors, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or

(iii) Other species or habitats identified



# SITE SPECIFIC RESOURCE INFORMATION

## Section 1780.16(a)(2) 1784.21(a)(2)

- 2) **Site-specific resource information** necessary to address the respective species or habitats shall be required when the permit area or **adjacent area** is **likely to include**:
- A) Listed or proposed endangered or threatened species of plants or animals or their critical habitats listed by the Secretary under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) or those species or habitats protected by the Illinois Endangered Species Protection Act, Ill. Rev. Stat. 1989, ch. 8, par. 331 et seq.;
  - B) Habitats of unusually high value for fish and wildlife such as **important streams, wetlands, riparian areas**, ~~cliffs supporting raptors~~, areas offering special shelter or protection, migration routes, or reproduction and wintering areas; or
  - C) Other species or habitats identified through **agency consultation** as requiring special protection under State or Federal law.

# SITE SPECIFIC RESOURCE INFORMATION

- Historically OMM had considered the permit application to include site specific resource information as habitat characterization including:
  - Pre mining land use map and descriptions
  - Pre mining vegetation documentation
  - Wetland data sheets
  - Groundwater and surface water data documenting hydrology which drives wetland ecosystems on site resulting in T&E habitat
  - Other components of the application which **characterize habitats** including geology, soils, and topographic information and aerial photography.



# BANNER PROCEEDING

- Numerous T&E species brought up above and beyond those identified from agency consultations or public comments.
- Criticism that an engineer, rather than a biologist, drafted protection and enhancement plans
- Criticism that lack of “wildlife studies” did not meet “site specific resource information” requirements.



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Photo courtesy IL DNR



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Photo credit Carol Foil

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Photo credit Winnu, carolinabirds.com

# BANNER DECISION

- Permit revoked due primarily to insufficient “site specific resource information”.
- Why was decision made?
  - Lack of information?
  - Presentation problem
    - Lawyers (including hearing officer) had a hard time with the idea that the site specific resource information was scattered throughout the application and not in a stand-alone document.

# CHANGES RESULTING FROM BANNER

- T&E Finding Support Document (pursuant to the “Bragg” decisions) made part of the permit finding document (Appendix E) rather than a file document. (simplified the “administrative record” issue)
- Determination of “likely to occur” requires biologist expert opinion. All 484 T&E species must be addressed.
- Site specific resource information, as well as PEP’s, required in a separate stand-alone document.
- Views OREP and USFWS consultation differently.
  - T&E species must be addressed even if not addressed in consultations.
  - Recommendations of species specific surveys taken more seriously.
    - Surveys vs. assumed presence

# LIKELY TO OCCUR DETERMINATION

- First Tier (484 species)
  - OMM agrees that any species not known to occur in the affected county or a bordering county is unlikely to occur in the permit area or adjacent area.
- Second Tier (long list – typically 50-150 species)
  - T&E species known to occur in affected county or a bordering county.
- Third Tier (short list – typically 10-20 species)
  - Second tier species not eliminated by
    - long distance to known populations
    - watershed separations for aquatic species

# LIKELY TO OCCUR DETERMINATION CONTINUED

- First Tier (484 species)
- Second Tier (long list – typically 50-150 species)
- Third Tier (short list – typically 10-20 species)
- Fourth Tier
  - Species from third tier list for which habitat exists and distance to existing known populations makes presence likely.
    - Example: The habitat exists for a plant species but they are only known from the assessment area from a bordering county at a location 45 miles away. NOT LIKELY
    - Example: The habitat exists for a bird and they are known to occur 5 miles away. LIKELY



# PROTECTION AND ENHANCEMENT PLAN (PEP)

## Section 1780.16(b)

Each application shall include a description of how, to the extent possible using the best technology currently available, the operator will minimize disturbances 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 and how enhancement of these resources will be achieved where practicable.



# PROTECTION AND ENHANCEMENT PLAN (PEP)

## A) Protective measures

Used during the active mining phase of operation. Such measures may include the establishment of buffer zones, the selective location and special design of haul roads and powerlines, and the monitoring of surface water quality and quantity

## B) Enhancement measures

Used during the reclamation and postmining phase of operation to develop aquatic and terrestrial habitat. Such measures may include restoration of streams and other wetlands, retention of ponds and impoundments, establishment of vegetation for wildlife food and cover, and the replacement of perches and nest boxes. Where the plan does not include enhancement measures, a statement shall be given explaining why enhancement is not practicable.

# BARN OWL PEP OUTLINE



## I. INTRODUCTION

- I. Project Description
- II. Species Description

## II. SITE SPECIFIC RESOURCE INFORMATION

## III. PROTECTION AND ENHANCEMENT MEASURES

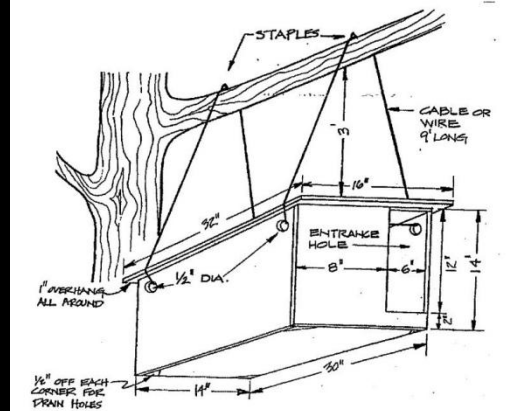
### I. Objective 1 – Protection Measures

- I. Avoid habitat impacts
- II. Incremental advancement
- III. Contemporaneous reclamation
- IV. Controlled blasting

### II. Objective 2 – Enhancement Measures

- I. Post mining land use
- II. Specialized Habitat Features

### BARN OWL NEST BOX Plans



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# Range-wide Indiana Bat Protection and Enhancement Plan Guidelines for Surface Coal-Mining Operations

July 2009

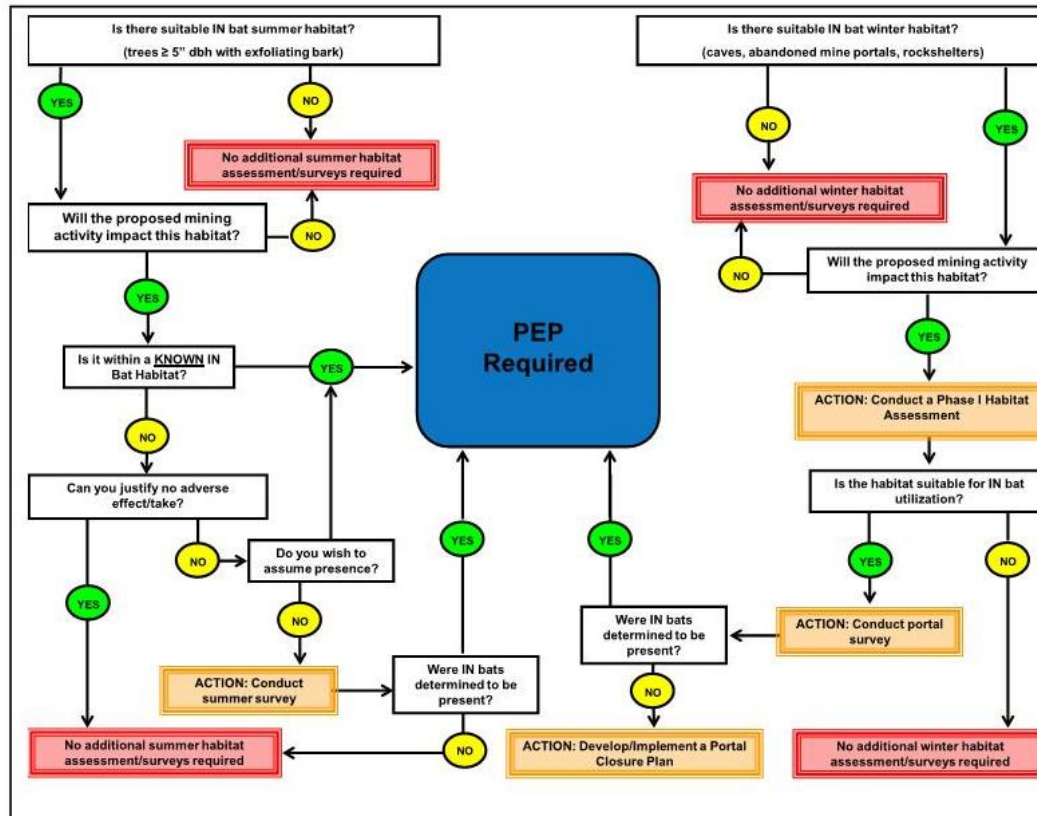
Revised:  
December 2009  
February 2013



- Step 1: Initial Habitat Information (Section 2.1)
- Step 2: Habitat Determination (Section 2.2)
- Step 3: Applicant Alternatives (Section 2.3)
- Step 4: PEP Development and Implementation (Section 2.4)
- Step 5: Agency Responsibilities/Oversight (Section 2.5)

The flowchart in Figure 1 is a graphical representation of the steps described in this guidance.

Figure 1



# TAKE

- Defined differently in different laws
  - IL Wildlife Code
  - IL ESPA (harm, hunt, shoot, pursue, lure, wound, kill, destroy, harass, gig, spear, ensnare, trap, capture, collect, or to attempt to engage in such conduct, regarding plants, to collect, pick, cut, dig up, kill, destroy, bury, crush, harm)
  - ESA (harass, harm, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct)
  - Bald Eagle Act (pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb)
  - Migratory Bird Treaty Act
- Taking an individual vs. taking habitat

# FUTURE ISSUES

- State listed species SSRI & PEP's
  - Barn Owl
  - Northern Harrier
  - Loggerhead Shrike
  - Marsh Rice Rat
- Possible take permits for State-listed Species (taking individuals, habitats)



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