



**COALEX STATE INQUIRY REPORT – 142**  
**July 9, 1990**

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**TOPICS: FISH AND WILDLIFE INFORMATION REQUIREMENTS**

**INQUIRY:** Locate the Federal Register notices which discuss the fish and wildlife information required in permit applications. Are there any references to "minimum standards" in the preambles of those notices?

**SEARCH RESULTS:** Using the public materials available in LEXIS, several relevant Federal Register notices were identified. Copies of the notices are attached.

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**FEDERAL REGISTER NOTICES**

**45 FR 51547 (AUGUST 4, 1980). Notice of suspension.**

As a result of the court's ruling in IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, No 79-1144, Memorandum Opinion (D D C February 26, 1980), OSM suspended 30 CFR 779.20, 780.16, 783.20 and 784.16. See CHRONOLOGY OF EVENTS, below.

[NOTE: The text of this Federal Register notice is not included here.]

**50 FR 7274 (FEBRUARY 21, 1985). Notice of suspension.**

In this "interpretative statement", OSM removed "a previous suspension addressing fish and wildlife information requirements in permit applications, thereby reinstating the fish and wildlife information rules originally promulgated in 1979. OSM is taking these actions chiefly as a result of a District Court decision in Round II of the present litigation on OSM's permanent program regulations."

30 CFR 779.20, 780.16, 783.20 and 784.21 were reinstated.

**51 FR 19498 (MAY 29, 1986). Proposed Rule.**



These regulations proposed to delete 30 CFR 779.20 and 783.20, which provided for permit requirements for fish and wildlife resources information for surface and underground mining, respectively, amend the language and incorporate them into 30 CFR 780.16 and 784.21 as paragraph (a). The protection and enhancement planning requirements for surface and underground mining in these sections would also be amended and renumbered paragraph (b).

"Proposed Section 780.16(a) would go beyond the requirements of existing Section 779.20 by setting specific minimum requirements for resource information that must be included in each application. It would establish a minimum standard in the event that no guidance has been established by fish and wildlife agencies....OSM's revision of the rule is intended to ensure the minimum reporting of resource information on species and habitats with special significance."

### **52 FR 47352 (DECEMBER 11, 1987). Final Rule.**

Regulations regarding "fish and wildlife resource information and planning requirements, and standards applied to the protection of fish and wildlife values" were revised in order "to comply with recent court decisions" and to "clarify" existing rules.

Most commenters who responded to OSM's request, in the preamble of the proposed rules, for comments on "the experiences and events of the four and one-half years when the Federal rules were suspended", indicated that "Federal regulation requiring both premining resource information and protection and enhancement plans are necessary for the protection of fish and wildlife resources." OSM concluded: "Although certain states may be protecting fish and wildlife resources...these rules are needed to define Federal standards regarding the submission of permit information needed to assure minimum standards of protection."

The final rule clarifies the roles of federal and state fish and wildlife agencies: they act "in an advisory capacity to the regulatory authorities. Regulatory authorities retain their responsibility for making decisions on the completeness and adequacy of applications for SMCRA permits."

Regarding one commenter's suggestions on "minimum standards" for "non-critical" species and habitats, OSM responded by adding a requirement to 780.16(a) that "the resource information be sufficient to design the protection and enhancement plan." Because of the "diversity and variability of lands between and within regions", OSM determined that "a more practical and as protective approach" was for the regulatory authority to "make these decisions within the framework of that information needed to assure an appropriate fish and wildlife management plan."

OSM determined that the information and planning requirements could be addressed under one section; therefore, Sections 30 CFR 779.20 and 780.16 were removed as proposed. [See the attached notice for discussion of the specific rule revisions.]

### **CHRONOLOGY OF EVENTS**



As part of their challenge to the 1979 permanent regulations (IN RE: PERMANENT SURFACE MINING LITIGATION, No. 79-1144 (D D C 1980)), industry plaintiffs argued that "there was no statutory authorization in Sections 507, 508, or 515(b)(24) of the Act to require fish and wildlife information in the permit application or the reclamation plan. Since sections 507 and 508 of the Act gave the regulatory authority power to decide on other necessary requirements, plaintiffs contended that the challenged rules usurped the role Congress had delegated to the States by creating a uniform system of permit-data requirements, which left no flexibility for consideration of State-specified conditions." [51 FR 19498 (MAY 29, 1986).]

The District Court "rejected industry's challenge to the Secretary's general authority to promulgate uniform permit processing and bonding requirements". The court stated that "specific listing of these requirements was not necessary" because "the structure of the Act" gave the Secretary authority to require additional information. However, 30 CFR 779.20 and 780.16, which provided permit requirements for fish and wildlife resources information (for surface mining operations), were remanded "on the basis that there was no statutory authority for this specific case. See IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, No 79-1144, slip op. at 39 (D D C February 26, 1980)." OSM suspended 30 CFR 779.20 and 780.16, and the corresponding rules for underground mining, 783.20 and 784.16, on AUGUST 4, 1980 (45 FR 51547). [51 FR 19498 (MAY 29, 1986).]

The coal industry appealed the decision. The Appeals Court "found that the District Court was correct in holding that the Act's explicit listing of information requirements is not exhaustive and does not preclude the Secretary from requiring additional information needed to insure compliance with the Act." See IN RE: PERMANENT SURFACE MINING LITIGATION, 653 F2d 514 (D C Cir 1981), cert. denied, 454 US 822 (1981).

The Appeals Court did not specifically address the fish and wildlife rules. [50 FR 7274 (FEBRUARY 21, 1985).]

During the 1983 regulatory reforms, OSM "revised the performance standards found in Sec. 816.97 for the protection of fish, wildlife and related environmental values. See 48 FR 30312 (JUNE 30, 1983)." The fish and wildlife information requirements were not repromulgated: the suspension of the 1979 rules remained in effect. [50 FR 7274 (FEBRUARY 21, 1985).]

Part of the environmental plaintiffs's challenge to the 1983 regulations included a claim that the rules failed "to require operators to supply information on fish and wildlife resources in permit applications." In his brief, the Secretary agreed with the plaintiffs and asked the District Court to allow OSM to propose new regulations. The District Court held that the 1981 Circuit Court decision had the effect of reinstating the fish and wildlife information rules and ordered that 30 CFR 779.20 and 780.16 be reinstated pending new rulemaking. See IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION II, No. 79-1144, (D D C October 1, 1984). OSM reinstated 30 CFR 779.20, 780.16, 783.20 and 784.16 on FEBRUARY 21, 1985 (50 FR 7274).



The October 1, 1984 decision also remanded portions of 30 CFR 816.97 and 817.97 which OSM had revised in June, 1983. [51 FR 19498 (MAY 29, 1986)]

Revisions to 30 CFR 779.20, 780.16, 783.20, 784.16, 816.97 and 817.97 were proposed on MAY 29, 1986 (51 FR 19498).

The final rules were published in the Federal Register on December 11, 1987 (52 FR 47352).

Fish and wildlife information requirements in 30 CFR 780.16(a) and (b) are currently under litigation as a result of a challenge by the National Wildlife Federation.

## **ATTACHMENTS**

- A. 50 FR 7274 (FEBRUARY 21, 1985). Notice of suspension.
- B. 51 FR 19498 (MAY 29, 1986). Proposed Rule.
- C. 52 FR 47352 (DECEMBER 11, 1987). Final Rule.