



**US Army Corps
of Engineers**
Huntington District

Public Notice

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INDIVIDUAL PERMIT REQUIREMENTS FOR SURFACE COAL MINING ACTIVITIES IN THE SOUTHERN DISTRICT OF WEST VIRGINIA

Surface coal mining activities that propose to place fill or dredged material within the waters of the United States require, in addition to the permits required pursuant to the Surface Coal Mining and Reclamation Act (SCMRA), a Clean Water Act (CWA) Section 404 permit from the Army Corps of Engineers (Corps).

On July 8, 2004, the United States District Court for the Southern District of West Virginia at Huntington issued a Memorandum Opinion and Injunctive Order in the case of Ohio Valley Environmental Coalition, et al. v. William Bulen, Colonel, District Engineer, U.S. Army Corps of Engineers, Huntington District, et al. (Civil Action No. 3:03-2281). In this Order, the Court enjoined the Corps from issuing authorizations pursuant to Nationwide Permit 21 in the Southern District of West Virginia. The Southern District comprises the counties of Boone, Cabell, Clay, Fayette, Greenbrier, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mercer, Mingo, Monroe, Nicholas, Putnam, Raleigh, Roane, Summers, Wayne, Wirt, Wood, and Wyoming. Nothing in the Court's opinion precludes any party from seeking an individual permit under Section 404(a) of the CWA.

An Department of the Army (DA) individual permit (IP) requires a public comment period and a full public interest review pursuant to National Environmental Policy Act (NEPA). This is a more lengthy process. In order to issue a Section 404 IP, the Corps must conclude the project is consistent with the Section 404(b)(1) Guidelines (Guidelines) and the project is not contrary to the public interest. Our desire is to work with applicants early in the State's review process to insure impacts to waters of the United States are avoided and minimized and appropriate mitigation is offered for unavoidable impacts to aquatic resources. We will continue to work with State agencies to complement this process.

The information contained within this public notice is intended to assist applicants in determining what information, beyond that already required in SMCRA and other state permits, must be submitted with a IP request. The information required by SMCRA and other state permits may be sufficient to address some of the requirements. The required information provides the factual basis for the Corps to make the aforementioned conclusions to facilitate final IP decisions.

The Clean Water Act and the 404(b)(1) Guidelines (Guidelines) set forth a goal of restoring and maintaining existing aquatic resources. All waters of the U.S. are accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation.

In accordance with the “Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act 404(b)(1) Guidelines,” the mitigation sequencing of a project must take place in the following order. First, all avoidable impacts to waters of the United States must be determined by choosing the least damaging practicable alternative for the project. Secondly, during the mitigation process, appropriate and practicable steps must be proposed to minimize impacts to waters affected during placement of proposed fill material. Applicants are to provide all measures that would be utilized during construction to minimize impacts to waters of the United States that cannot be avoided during project construction. Subpart H of the Guidelines describes several (but not all) means of minimizing impacts of proposed projects. Lastly, appropriate and practicable compensation is required for unavoidable adverse impacts to waters of the United States which remain after all appropriate and practicable minimization has been required.

In determining “appropriate and practicable” measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology and logistics in light of overall project purposes. Pursuant to the Guidelines, the determination of appropriate mitigation is based on the functions and values of the aquatic resources proposed to be impacted and an objective of the Guidelines is to offset unavoidable impacts to those aquatic resources in the proposed project area.

Required compensatory mitigation plans must be submitted before the Corps can render a final permit decision on a proposed project. The compensatory mitigation plan must be developed in accordance with the Corps’ Regulatory Guidance Letter dated December 24, 2002 (attached). The following is a brief description of the required information to be submitted in the compensatory mitigation plan:

- a. Baseline Information
- b. Goals and Objectives
- c. Site Selection
- d. Mitigation Work Plan
- e. Performance Standards
- f. Project Success
- g. Site Protection
- h. Contingency Plan
- i. Monitoring and Long-term Management
- j. Financial Assurances.

The Corps must conclude the proposed project is consistent with the Guidelines and is not contrary to the public interest in order to issue a Section 404 DA IP. The Section 404 IP permit, in turn, triggers the requirement of an assessment under the National Environmental Policy Act (NEPA). A NEPA document may be an Environmental Impact Statement (EIS) or an Environmental Assessment (EA). The EA provides the factual basis for the Corps to make the aforementioned conclusions to facilitate permit decisions, which are summarized in a Statement of Findings. The EA is used to identify impacts associated with alternatives and to allow the responsible federal official to determine whether to prepare a finding of no significant impact (FONSI) or require an EIS.

An alternative analysis must be submitted pursuant to the Guidelines and NEPA. Section 230.10(a) of the Guidelines requires no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. Under the Guidelines, the least environmentally damaging practicable alternative must be chosen.

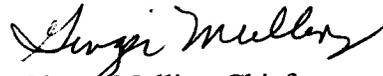
Alternative analysis identifies a no action alternative, the proposed action, and other reasonable alternatives. The alternatives analysis compares the practicability and environmental impacts of the identified alternatives with the ultimate goal of identifying the least environmentally damaging, practicable alternative. For example, practicable alternatives for disposal of excess spoil in uplands are explored and documented, including backstacking spoil on the upper reaches of the planned valley fills to higher elevations and hauling spoil to adjacent reclaimed areas of mines owned or operated by your company or the parent company, or subsidiaries. Documentation of the practicability of each of alternative should be included in the alternative analysis. All practicable alternatives that are available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes must be examined [40 CFR 230.3(q)].

A description of the affected environment is necessary to help understand the environmental impacts of proposed projects and no action alternative. The affected environment is considered to be the existing conditions. Applicants should identify the environmental trends that currently exist and the areas of concern that may be impacted by the action or alternatives, as well as provide an inventory of resources. This description emphasizes only those resource areas that may be impacted by the action and only to the extent necessary to get an understanding of the extent of anticipated impacts. A brief discussion of critical environmental areas or issues, such as environmental justice, historic properties, and threatened and endangered species, is necessary to show they have been considered even if there are no impacts. Both the beneficial and adverse impacts should be presented. The description includes a discussion of short- and long-term impacts, primary and secondary impacts, irreversible and irretrievable resource commitments, and residual or net (those remaining after all mitigation measures are implemented) impacts.

The Corps must consider the cumulative effects associated with proposed projects on the aquatic environment in order to evaluate it under the NEPA and the Guidelines. The Council on Environmental Quality (CEQ) regulations implementing the NEPA require Federal agencies analyze the cumulative effects of federal actions on the environment. Cumulative effects on the human environment are defined by CEQ regulations as “impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions” (40 CFR 1508.7). Applicants are to submit information concerning other land disturbance activities and watershed improvement projects within the same watersheds as the proposed activity on water quality and aquatic habitat.

Even though the Corps has ultimate responsibility for compliance with NEPA, the burden of providing the Corps with basic information about a project and its environmental effects falls on the permit applicant. The Corps recommended permit applicants to begin the environmental review process by preparing an Environmental Information Document (EID). The required alternative analysis as well as the other information requested above may be incorporated into the EID. To assist applicants in preparing EID, attached is a NEPA guidance document. This document is intended to assist applicants in determining what information, beyond that already required in SCMRA and other State permits, must be collected to comply with NEPA and how that information should be analyzed to determine the nature, extent, and duration of impacts to the human environment. This document also describes information necessary for the Corps to determine all aspects of its public interest factors and Section 404(b)(1) Guidelines compliance decisions. We hope this guidance will assist you in developing your EID. We will appreciate any comments which may serve to make this a more effective tool.

If you have any questions concerning the above, please contact Mrs. Teresa Spagna of the South Regulatory Section at 304-399-5710.


Ginger Mullins, Chief
Regulatory Branch

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