



west virginia department of environmental protection

Justification and Background for Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards, 47 C.S.R. 2 §§ 3.2.e and 3.2.i

PURPOSE

The West Virginia Department of Environmental Protection ("DEP") adopts this Justification and Background for its "Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards" (the "Guidance"). The Guidance is intended to facilitate compliance with applicable statutory and regulatory requirements and to provide reasonable means of effectuating the intent of the narrative criteria, as well as to enforce the mandate of the Clean Water Act ("CWA") that every permit contain effluent limitations that reflect the practicable pollution reduction a state can achieve.¹

The Guidance was developed in accordance with the West Virginia Water Pollution Control Act ("WVWPCA"), which states that "the public policy of the State of West Virginia to maintain reasonable standards of purity and quality of the water of the State consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development."²

As it must, the Guidance also recognizes the intent of the West Virginia Legislature, which has formally resolved as follows:

- That any interpretation and implementation of West Virginia's narrative water quality standards is the responsibility of the West Virginia Department of Environmental Protection;
- That the requirements of the narrative criteria are met when a stream (a) supports a balanced aquatic community that is diverse in species composition; and (b) contains appropriate trophic levels of fish (in streams with sufficient flows to support fish populations); and (c) the aquatic community is not composed only of pollution tolerant species or

¹ *American Paper Institute, Inc. v. United States Environmental Protection Agency*, 996 F.2d 346, 349 (D.C. Cir., 1993)

² W. Va. Code § 22-11-2(a).

Promoting a healthy environment.



the aquatic community is composed of benthic invertebrate assemblages sufficient to perform the biological functions necessary to support fish communities within the assessed reach (or, if the assessed reach has insufficient flows to support a fish community, in those downstream reaches where fish are present); and

- That interpretation of West Virginia's narrative water quality standards must faithfully balance the protection of the environment with the need to maintain and expand opportunities for employment, agriculture, and industry as set forth in the Legislature's statement of public policy as contained in the West Virginia Water Pollution Control Act.³

BACKGROUND

West Virginia has had primacy of the NPDES program since 1982 and has narrative water quality standards that predate its NPDES primacy. These criteria are found in West Virginia's *Code of State Rules*, which states, in pertinent part, "No significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed."⁴

In light of its goals to advance, wherever attainable, water quality that provides for recreation and the protection and propagation of fish, shellfish, and wildlife,⁵ and to assure that surface mining operations are conducted so as to protect the environment,⁶ DEP reviewed its NPDES permitting and compliance assessment protocols vis-à-vis West Virginia's narrative water quality standards and solicited public comment regarding these issues. As a result, DEP adopts the Guidance, which describes the procedures DEP will implement in the development of NPDES permits for the coal mining industry. These new procedures shall take effect immediately. In light of the changing nature of the policy concerns addressed herein, this document is intended to be dynamic and will likely be modified in the future as technology and best management practices develop and improve.

While DEP appreciates EPA's recent effort to assist the states in interpreting their various narrative water quality standards, DEP finds that the Guidance is the more appropriate approach for West Virginia for several reasons. First, it involves subject matter uniquely within DEP's expertise and special knowledge. Further, while this document specifically addresses concerns related to the mining industry, it is designed to be adapted in the future to address all discharges to water bodies that will cause, or that have the reasonable potential to cause or contribute to, excursions from water quality standards. Finally, it does not use an overbroad, generic criterion (i.e. conductivity) to set unattainable limits, but instead identifies specific pollutants that can be managed through the inclusion of appropriate whole effluent toxicity ("WET") monitoring and/or limits and best management practices ("BMPs") in NPDES permits, where there is reasonable potential to cause or contribute to excursions from water quality criteria. If the

³ H.C.R. 111 (2010 Regular Session).

⁴ 47 C.S.R. 2 § 3.2.i

⁵ See 33 U.S.C. § 1251(a)(2)

⁶ See 30 U.S.C. § 1202(d)

applicant cannot demonstrate, by means of its chemical and biological monitoring and the control measures outlined in the plans it will submit with its application, that it does not have reasonable potential ("RP") to cause or contribute to an excursion above the narrative criteria, the permit writer should treat new or expanded discharges as if they have RP and include WET limits in the permit, in accordance with 40 C.F.R. § 122.44(d)(1)(v). Alternatively, if the operator identifies toxic pollutants that can be regulated through the use of numeric limits, DEP will put a regulatory control number for those pollutants in the operator's permit.

PROTECTION OF THE AQUATIC ECOSYSTEM

As stated above, the narrative water quality criteria set out in 47 C.S.R. 2 § 3.2.i prohibits the introduction of wastes that cause significant adverse impact to the chemical, physical, hydrologic or biological components of aquatic ecosystems. These criteria are valid components of West Virginia water quality standards that have been properly promulgated by the West Virginia Legislature and approved by the EPA. The phrase "significant adverse impact" is not defined in the CWA or the WVPWA, the regulations promulgated thereunder or in any literature or guidance published by the EPA. DEP has determined that "significant adverse impact" is more than a change in the numbers or makeup of the benthic macroinvertebrate community in a segment of a water body downstream from a point source discharge. It is, instead, a material decline in the overall health of an aquatic ecosystem.⁷ A goal of the CWA and the WVPWA is to protect the aquatic ecosystem as a whole; it is a holistic standard that requires a holistic approach to ecosystem assessment. In contrast to numeric water quality criteria, which can be applied by analysis of samples of water taken at any discharge or monitoring point in a stream, compliance with a standard that protects the aquatic ecosystem must be assessed in the broader area comprising the ecosystem. An ecosystem does not exist at a single point and, accordingly, its health cannot be assessed at a single point.

The Pond-Passmore Study, upon which EPA relied in the development of its guidance on this subject, concludes that West Virginia's narrative standard is violated by surface coal mining operations based on the Study's application of two biologic assessment tools, the West Virginia Stream Condition Index ("WVSCI") and the draft Genus Level Index of Most Probable Stream Status ("GLIMPSS"), to samples of benthic macroinvertebrate life taken from these streams. This conclusion is flawed for two reasons. First, West Virginia does not use the draft GLIMPSS in its assessment of the biologic health of State streams. Second, these tools are just that – tools. They are not stand-alone determinants of compliance with the narrative standard. Any application of these assessment tools in determining compliance with the narrative standard must faithfully apply the language of the standard itself, which prohibits significant adverse impacts on the chemical, physical, hydrologic or biological components of the aquatic ecosystem. Thus, DEP's Guidance follows long-standing EPA guidance, which indicates that biosurveys cannot fully characterize an entire aquatic community and its many attributes, and accordingly suggests that "State standards should contain biological criteria that consider various components (e.g.

⁷ An aquatic ecosystem is a dynamic complex of plant, animal, and microorganism communities and their non-living environment interacting as a functional unit within water. See, Coweeta Long Term Ecological Research "Glossary of Terms."

algae, invertebrates, fish) and attributes (measures of structure and/or function) of the larger aquatic community.”⁸

Through implementation of the Guidance, DEP continues its existing practice of using WVSCI in addition to consideration of other factors affecting the aquatic ecosystem to enforce its narrative water quality standards. By way of background, WVSCI was developed for EPA by national experts to assess biological integrity in West Virginia’s waterways through “careful measurement of the natural aquatic ecosystem and its constituent biological communities,”⁹ including the evaluation of benthic macroinvertebrate communities. It was specifically designed for assessment of the biological component of the 47 C.S.R. 2 § 3.2.i narrative criteria and has been used as a tool in developing the Impaired Streams List (“303(d) List”) and the TMDLs resulting therefrom for almost a decade.¹⁰ WVSCI acknowledges that “[i]t is the responsibility of West Virginia’s [Department] of Environmental Protection to maintain and protect the ecosystem health of the state’s waters[,]” and “[i]n keeping with the Clean Water Act and technical guidance from USEPA, DEP developed water quality standards for the protection of ecosystem health.”¹¹

DEP’s Guidance is the appropriate methodology for implementing West Virginia’s narrative water quality standards, because it is consistent with the Federal Regulations regarding establishing limitations, standards, and other permit conditions for NPDES programs, and it incorporates a holistic approach to ecosystem assessment and protection. The CWA’s implementing regulations require WET testing and limits when the State finds that a discharge has RP to cause or contribute to excursions from water quality standards.

[W]hen the permitting authority determines . . . that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit . . . that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.¹²

WET testing allows flexibility where appropriate (e.g. allowing time to collect additional data for RP determination to supplement limited data sets) and is consistent with DEP’s policy that

⁸ EPA’s *Policy on the Use of Biological Assessments and Criteria in the Water Quality Program* (May 1991) (“1991 Policy”).

⁹ *A Stream Condition Index for West Virginia Wadeable Streams*, March 28, 2000 (Rev. July 21, 2000) (“Stream Condition Index”).

¹⁰ However, a stand-alone WVSCI score has never been the sole determinant of compliance or non-compliance with the narrative standard. This is because WVSCI scores are influenced by many factors (e.g. habitat, geology, and pH).

¹¹ Stream Condition Index

¹² 40 C.F.R. § 122.44(d)(1)(v)

permittees develop robust monitoring plans with the intention of identifying any causative pollutants and adjusting their methods of operation so that those problems may be remedied before the aquatic community suffers a significant breakdown.

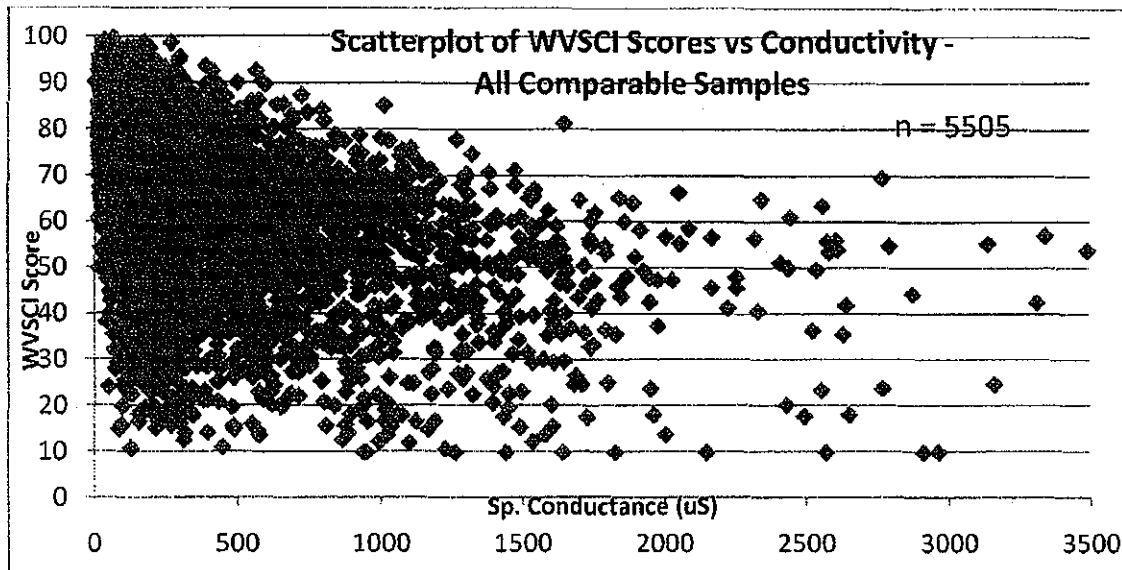
WVSCI considers various components (e.g. algae, invertebrates, fish) and attributes (measures of structure and/or function) of the larger aquatic community. "Because biological integrity is a strong indicator of overall ecological integrity, it can serve as both a meaningful goal and a useful measure of environmental status. . . ."¹³ Based on the 5th percentile of reference values, the current WVSCI score that indicates the integrity of a benthic macroinvertebrate community in West Virginia's wadeable streams is 68.0. The threshold for inclusion on the 303(d) List has historically been 60.6. That value subtracts a precision estimate from the 5th percentile of reference values, and its historical use was intended to take into account sampling error and to aid DEP in allocating its resources so as to avoid misclassifying non-impaired waters as impaired. WVSCI and its application in the 303(d) listing process are consistent with methodologies implemented to assess protection of aquatic ecosystems by all of West Virginia's neighboring states.

CAUSATIVE POLLUTANTS / PROTECTIVE THRESHOLDS

EPA has recently set a numeric limit on conductivity at 500 $\mu\text{S}/\text{cm}$, finding that conductivity levels below 300 $\mu\text{S}/\text{cm}$ generally will not cause a water quality standard violation and that in-stream conductivity levels above 500 $\mu\text{S}/\text{cm}$ are likely to be associated with adverse impacts that may rise to the level of exceedances of narrative state water quality standards.¹⁴ However, DEP's data shows that more than a simple conductivity measurement is necessary to determine the health of a stream. As proof that a number for specific conductance is an inappropriate gauge, FIGURE 1 below illustrates that a stream can have a low level of specific conductance and a WVSCI score firmly within the range for impairment; conversely, a stream can have a high level of specific conductance and a WVSCI score that indicates the stream is above the threshold for impairment. WVSCI scores are affected by many factors: habitat, other uses of the stream and the surrounding land, other pollutants unrelated to conductivity (e.g. fecal coliform), *inter alia*. Certain stream reaches simply cannot attain a "good" WVSCI score because of those factors.

¹³ 1991 Policy

¹⁴ EPA's *Detailed Guidance: Improving EPA's Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order* (April 1, 2010) ("April 1 Memo")



The Pond-Passmore Study found a shift in the benthic macroinvertebrate community downstream from mining activity, but did not otherwise correlate this finding with any significant or adverse impairment of the ecosystem. Where the only impacts to this component of the ecosystem are diminished numbers of certain genera of mayflies, without evidence that this has had any adverse impact of any significance on the rest of the ecosystem, the State cannot say that there has been a violation of its narrative standard. Various scientific studies and evaluations performed by DEP indicate that lowered biological condition is associated with increased ionic strength, but scientists remain less than certain about the specific causative pollutant(s) and the concentration(s) responsible for impairment. Additional uncertainty is present in correlative studies, because the effects of increased ionic strength cannot be completely distinguished from the effects of other stressors that often co-occur (e.g. organic enrichment, sedimentation). In fact, most available information attempts to relate biological condition to a surrogate parameter, such as specific conductance.

Because conductivity represents the combined concentrations of all different dissolved ions, each with potential varying toxic effects, regulation solely via an indicator such as specific conductance is not the best way to protect against excursions from narrative standards. For example, the elevated dissolved pollutants most commonly associated with mining discharges are sulfate and bicarbonate alkalinity. EPA has not published national recommended aquatic life protection criteria for those pollutants. Similarly, chloride, for which West Virginia has adopted EPA's recommended numeric aquatic life protection water quality criteria, may also be present in some cases. But because chloride seldom exists in the absence of sulfates or alkalinity, singular control of chloride cannot be expected to resolve all ionic stress.

DEP has performed a correlative evaluation of benthic condition and specific conductance. This evaluation suggests that native aquatic life is protected at various values and ranges of specific conductance. This finding supports the basic scientific principle that correlation is not cause and effect. Even though the DEP evaluation applied various filters to the

evaluated dataset to address complicating factors listed above, the biological condition of a stream may be different from the condition predicted by specific conductance. In situations such as these, where DEP has determined that it is infeasible to calculate a numeric effluent limit to implement a narrative water quality standard, DEP will include in the permit appropriate WET limits and BMPs to control or abate the discharge of pollutants, in accordance with 40 C.F.R. § 122.44(k)(3).

DEP routinely identifies biological stressors when developing TMDLs for biologically impaired waters. Stressor identification employs a strength-of-evidence approach that considers multiple information sources. Researchers evaluate water quality monitoring data, physical habitat data, field notes, and the composition of the biological assemblage concurrently to identify significant stressors. DEP's most recent stressor identification protocols, as used in the EPA-approved TMDL process, include the guidelines shown in FIGURE 2 below for evaluating water chemistry to determine if ionic strength is a significant stressor:

Candidate Cause	Parameter	Elimination (Rule out stressors at these thresholds)	Strength of Evidence (Evidence for each Candidate Cause as stressor)
		Elimination Threshold	Candidate Stressor Thresholds
4. Ionic strength	Conductivity	< 326.9 umhos	Consider as independent stressor in non-acidic, non-AMD streams, when conductivity values met threshold ranges and sulfates and chloride violate conditions listed as follows. >1533 Definite Stressor 1075-1532.9 Likely stressor 767-1074.9 Possible stressor 517-766.9 Weak stressor 327-516.9 Equivocal or No Trend
	Sulfates	< 56.9 mg/l	>417 Definite Stressor 290-416.9 Likely stressor 202-289.9 Possible stressor 120-201.9 Weak stressor 57-119.9 Equivocal or No Trend
	Chloride	< 60 mg/l	>230.0 Definite Stressor 160.1-229.9 Likely stressor 125.1-160 Possible stressor 80.1-125.0 Weak stressor 60.1-80.0 Equivocal or No Trend

Based on FIGURE 2, it is clear the EPA limits of 300 – 500 μ S/cm established in the April 1 Memo are far more stringent than what it has long approved for West Virginia's TMDL process. As shown above, conductivity in the 300 – 500 μ S/cm range is "Equivocal or No Trend" as a stressor. Conductivity does not even become a "Likely Stressor" of a stream under this EPA-approved approach until it reaches three to five times these limits: 1075-1532.9 μ S/cm. This is additional support for the State's conclusion that reliance on the single surrogate of specific conductance to implement and/or enforce the State's narrative water quality standards is improper. It also demonstrates that EPA's proposed limits are too narrowly focused on a single parameter and single aquatic species to determine the health of the impacted watershed.

Only the West Virginia Legislature can adopt a numeric water quality standard for conductivity (or any other pollutant); DEP has no authority to immediately or unilaterally

implement numeric standards. Through adoption of H.C.R. 111, the West Virginia Legislature has given DEP direction as to how it should implement its narrative water quality standards. Even if the Legislature does adopt a numeric standard for conductivity, DEP cannot implement it until after it is approved by the EPA. Based on the loose and questionable causal relationship between conductivity and stream impairment, it remains unclear whether EPA would approve such a numeric limit. EPA's duly promulgated regulation endorses establishment of WET limits where, as here, a state is unable to use a limit for a surrogate parameter. DEP can implement new permitting controls based on the agency's best professional judgment of actions necessary to protect the State's waters using its narrative criteria, with follow-up monitoring and contingencies for unsatisfactory outcomes. Thus, DEP is protecting against excursions from its narrative water quality standards by establishing WET limits and verifying impacts to a stream (or lack thereof) by requiring an extensive, comprehensive monitoring plan for the entire watershed.

Memorandum of Agreement
Between The
Division of Water Resources
Of The
Department of Natural Resources
Of The
State of West Virginia
And The
Regional Administrator, Region III
U. S. Environmental Protection Agency
Regarding The Administration and Enforcement
Of The National Pollutant Discharge Elimination System (NPDES)





STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
CHARLESTON 25306

JOHN D. ROCKEFELLER IV
Governor

July 2, 1981

DAVID C. CALLAGHAN
Director
WILLIS H. HERTIG, JR.
Deputy Director

Mr. Jack J. Schramm
Regional Administrator
U. S. Environmental Protection Agency
Region III
Sixth and Walnut Streets
Philadelphia, Pennsylvania 19106

Dear Mr. Schramm:

Please find enclosed the division's final submittal under the NPDES program development outlined in the State/EPA Agreement.

Enclosed is a Memorandum of Agreement which describes how the State intends to carry out its responsibilities under 40 CFR Part 123 and the Attorney General's statement regarding the State's legal authority for the State's proposed Pretreatment Program and identifying the State laws which provide authority to carry out the NPDES Program at the State level, along with copies of State statutes and regulations for implementing the Program.

Your expeditious comments on the previously submitted Pretreatment Program and any documented comments on the April 1 submission regarding compliance tracking and enforcement are necessary to keep on schedule with the targeted October 1, 1981 date for State delegation of the NPDES Program. Also, your prompt action on the review of the enclosures, and in particular the MOA, in accordance with 40 CFR 123.3 and 123.77 is necessary to enable preparations for the timely assumption by the State of the NPDES Program.

The Governor's letter requesting approval of the State Program is in process and will be forwarded separately.

Very truly yours,

WATER RESOURCES DIVISION

David W. Robinson
David W. Robinson
Chief

DWR:jrc
cc: James Burke, W. Va. Program Officer, EPA
Jeff Bass, Chief, W. Va. Section, PEB, EPA

Enclosures

Table of Contents

I. Introduction	1
II. Permit Review and Issuance	4
A. General	4
B. Waiver of EPA Review of State-Issued NPDES Permits	4
C. Transmission of Information to Division of Water Resources Upon Program Transfer	6
D. Transmission of Information to EPA	9
E. Processing of NPDES Applications	12
F. Formulation of Draft Permits	18
G. Public Notice	20
H. Permit Issuance	21
I. EPA Review of Permit Modifications	22
J. Variance Requests	22
III. Pretreatment	24
A. General	24
B. State Program	25
C. NPS Categorical Standards	26
D. Categorical NPS Credit Removal	26
E. POTW Pretreatment Program Approvals	26
F. Variances from Categorical Pretreatment Standards for Fundamentally Different Factors	27
IV. Compliance Monitoring and Inspection	28
A. Compliance Sampling Inspection	28
B. Compliance Evaluation Inspection	28
C. Performance Audit Inspection	28
D. Routine Periodic Facility Inspections	28
E. Bioassays	28

Table of Contents
(continued)

V. Enforcement	29
A. General	29
B. State Enforcement Action	29
C. EPA Notification to the Division of Water Resources	29
D. EPA Enforcement Action	30
E. Endangerment to Health	30
F. Laboratory Assistance	30
VI. Confidentiality of Information	31
VII. Term of Agreement	32

I. Introduction

In recognition of the Clean Water Act (CWA) with amendments through 1978, the Consolidated Permit Regulations of 1980 (40 CFR Parts 122-125), the promulgated pretreatment regulations (40 CFR Part 403) and that the State of West Virginia is requesting approval of a State program for National Pollutant Discharge Elimination System (NPDES) delegation, it is necessary to execute a Memorandum of Agreement (MOA) between the Chief and the EPA Regional Administrator.

This MOA is the mechanism for specifying the details of the EPA overview role of the State NPDES program, which is provided for in the above referenced regulations.

The State shall administer the NPDES Program consistent with this MOA, the CWA, applicable federal regulations, promulgated effluent guidelines and State law and regulations issued pursuant thereto.

Each of the parties has responsibilities to assure that the requirements of the National Pollutant Discharge Elimination System are met. The parties agree to maintain a high level of cooperation and coordination between State and EPA staffs in a partnership to assure successful and effective administration of the NPDES Program. In this partnership, the EPA shall provide to the Division of Water Resources, technical and legal assistance as herein provided and in accordance with the State/EPA agreement.

It is the goal of both the Division of Water Resources and EPA to minimize the flow of documents. To this end, both parties further agree to cooperate in the development of an automatic data processing (ADP) system and other systems which will allow for efficient and effective implementation by the State of the NPDES Program.

The EPA shall provide, on a continuing basis and in a timely fashion to the Division of Water Resources, information relative to proposed, revised, new, promulgated, remanded or withdrawn or suspended regulations and to further advise the State of results of cases pertaining to the NPDES program in general, which could impact the implementation of the program at the State level.

The Division of Water Resources is responsible for the issuance, modification, reissuance, compliance monitoring and enforcement of all NPDES permits issued by the State and those issued by the EPA and subsequently accepted and transferred to the Division of Water Resources. The annual State Section 106 Program Plan shall be the document which establishes strategies, and priorities of the specific implementation of compliance monitoring, enforcement and pretreatment.

All Evidentiary Hearings properly filed for by permittees in accordance with 40 CFR Part 124.74 shall be retained by EPA. EPA shall be responsible for resolving issues by these Hearings and the Division of Water Resources shall retain its rights under Section 401 of the CWA to certify or not, to any change in issued NPDES permits which result from resolution of Adjudicatory Hearings subject to this section.

If requested by either party, meetings will be scheduled between the Division of Water Resources and EPA to review specific operating procedures, resolve problems or discuss mutual concerns involving the administration of the NPDES Permit Program.

The EPA shall assess the Division of Water Resources' administration of the NPDES Program, from time to time, for consistency with the CWA, this MOA and all applicable Federal regulations. This assessment shall be accomplished through the review of permits, reports and enforcement actions

submitted by the Division of Water Resources to EPA, in accordance with this MOA. The Regional Administrator may consider as a part of this assessment, comments concerning the Division of Water Resources' administration of the NPDES Permit Program documented and received by permittees, the public, and appropriately involved Federal and local agencies. Copies of any such comments received by the Regional Administrator shall be forwarded to the Chief. When these assessments are made, the EPA shall submit a written report to the Chief advising the particulars of the assessment and whether or not the State is satisfactorily administering the NPDES Program.

This MOA shall be reviewed jointly at least annually by the Division of Water Resources and the Regional Administrator during the preparation and evaluation of the annual program plan.

Either party may initiate action to modify this MOA.

Following two (2) years of administration by the Division of Water Resources with satisfactory assessment of such State administration, the EPA agrees to renegotiate this MOA to reflect and provide for a significant lesser oversight role of the State and to significantly reduce, where possible, the categories of dischargers subject to EPA review.

As a part of future annual State Section 106 Program Plans, EPA and the Division of Water Resources shall agree upon a list of industrial and municipal facilities to be designated major dischargers during the succeeding fiscal year for the purposes of establishing priorities for permit issuance, compliance inspection frequency and transmission of information to EPA. Until such future designation is made, the current list of major dischargers identifying 121 facilities will be used.

II. Permit Review and Issuance

A. General

It is recognized by the Division of Water Resources and the EPA that the CWA and regulations adopted pursuant thereto provide that upon approval of a state program for NPDES, NPDES permits subject to such program will be issued by the Division of Water Resources and not EPA. Further, EPA maintains an overview role and may object to conditions of NPDES permits. Therefore, it is in the interest of the EPA and the Division of Water Resources to reach an agreement which specifies the details of the EPA overview of NPDES permits to be issued by the State.

B. Waiver of EPA Review of State-Issued NPDES Permits

1. Except as hereinafter expressly provided, EPA waives the right to review, object to, or comment upon State-issued permits under 402(d),(3), (e) or (f) of the CWA for all categories of discharges except:
 - a. Discharges which may affect the waters of another State.
 - b. Discharges proposed to be regulated by general permits.
 - c. Discharges from POTWs with a daily average discharge exceeding 1 million gallons per day.
 - d. Discharges of uncontaminated cooling water with a daily average discharge exceeding 500 million gallons per day.
 - e. Discharges from any major discharger or from any discharger within any of the industrial categories listed in Appendix A to 40 CFR Part 122, dated May 19, 1980.
 - f. Discharges from other sources with a daily average discharge exceeding 0.5 million gallons per day.

2. The Regional Administrator retains the right to terminate the foregoing waiver as to future permit actions, in whole or in part, by sending the Chief written notice of termination at least sixty (60) days before such termination shall be effective, except where EPA cannot practically give this much advance notice.

C. Transmission of Information to Division of Water Resources Upon Program Transfer

1. The Regional Administrator shall transfer all NPDES files to the Chief at the time of program approval except those for which EPA maintains jurisdiction, as delineated below or those documents involved in litigation that have not yet been filed in court.

2. All files transferred to the Chief shall be on microfiche, except for pending permit applications and support files for permit issuance, which consist of all relevant information collected before approval of the State Program and not already in the possession of the Chief, and including the record of any proceedings, enforcement action, compliance reports, etc. Pending permit application files shall be transferred to the Chief, subject to the following:

a. Commencing immediately, the Regional Administrator shall begin preparation for transferral to the Division of Water Resources, a list of all pending NPDES permit applications received by EPA. The list will include the name of each discharger, SIC Code, and specifically designate whether the application is:

- (1) administratively complete;
- (2) administratively incomplete or otherwise deficient; or
- (3) of undetermined status.

b. Upon receipt of the above list, the Division of Water Resources shall identify the priority order to be used by EPA to transfer application files to the Division of Water Resources.

c. To the extent practicable, the Regional Administrator shall, within one hundred eighty (180) days of EPA's approval of West Virginia's NPDES Program, complete the transferral of all NPDES permit application files (including those for Federal installations),

and any other relevant data collected by the Regional Administrator prior to approval of West Virginia's Program.

- d. Subsequent to EPA's approval of West Virginia's Program, the Regional Administrator shall forward all appropriate information received thereafter relating to the NPDES permit applications to the Division of Water Resources, no later than fifteen (15) days after the receipt of such information, for those installations.
 - e. All NPDES permit applications in Category (1) above shall be transferred without further actions by the Regional Administrator.
 - f. All NPDES permit applications in Category (2) above shall be transferred with a document prepared by the EPA which specifies the information needed to make the application administratively complete or identify other deficiencies.
 - g. All NPDES permit applications in Category (3) above shall have completeness determinations made by the Regional Administrator prior to transfer of the file to the Division of Water Resources and a document prepared by the EPA and submitted to the Division of Water Resources which specifies if the application is complete or not and if not complete, such document shall specify the information needed to make the application administratively complete or identify other deficiencies.
3. Where the Chief has not adopted and accepted NPDES permits issued by EPA under Section 3.03 of Chapter 2 of the W. Va. Administrative Regulations, EPA shall maintain jurisdiction over those permits.
4. The retention of EPA jurisdiction over any permits shall include the processing of any permit appeals, modification requests or variance requests; the performance of inspections, and the receipt and review of self-monitoring reports. If any permit appeal, modification request

B.

or variance request is not finally resolved when the Federally issued permit expires, EPA will retain jurisdiction until the matter is resolved, unless the Division of Water Resources and the Regional Administrator make some other arrangement.

5. The Division of Water Resources shall become the sole permit issuing authority and the Administrator shall suspend the issuance of permits upon approval of the State Program.
6. If an NPDES applicant or permittee contacts the Regional Administrator concerning either an application or a permit, except for those covered in 3. and 4., above, the Regional Administrator shall inform the applicant of the Division of Water Resources' role and refer all inquiries concerning the specific NPDES application or permit to the Division of Water Resources.
7. The Division of Water Resources shall not issue a permit on the basis of any application received from EPA resulting from this transfer, which the Regional Administrator identifies as incomplete or otherwise deficient until the Chief receives information from the applicant sufficient to complete the application or correct the deficiency.
8. The Regional Administrator will forward to the Chief copies of all inspections performed by EPA and provide in writing to the Chief documentation advising of any enforcement action the EPA pursues against a violator.
9. Following EPA audit or any other review of the State NPDES Program, the Regional Administrator will forward a draft report of any such audit or review to the Chief for his review and comment in advance of release of any final report.

D. Transmission of Information to EPA

1. The Division of Water Resources shall transmit to the Regional Administrator:

- a. Copies of permit program forms as developed or significantly modified.
- b. Copies of all complete NPDES permit applications received by the Chief except those for which permit review has been waived.
- c. Whenever requested by EPA, copies of permit applications for which permit review has been waived.
- d. Notice of every action taken by the Division of Water Resources related to the consideration of any permit application or general permit, including a copy of each draft permit and any conditions, requirements or documents which are related to the draft permit, except for those for which permit review by EPA has been waived.
- e. Whenever requested by EPA, copies of notices for which permit review has been waived.
- f. A copy of every State-issued NPDES permit, along with any and all terms, conditions, requirements, or documents which are related to or affect the authorization of the permit.

2. The Division of Water Resources shall transmit a copy of each draft general permit, except those for separate storm sewers, to the EPA Director, Office of Water Enforcement and Permits at the same time such draft is transmitted to the Regional Administrator.

3. The Chief shall transmit to the EPA:

- a. Upon request of the Regional Administrator, notices from publicly-owned treatment works for actions in accordance with 40 CFR Part 122.61(b) and 40 CFR Part 403.

- b. A copy of any significant comments presented in writing pursuant to the public notice of a draft permit and a summary of any significant comments presented at any hearing on any draft permit, except those for which permit review has been waived by EPA and for which EPA has not otherwise requested receipt, if:
- (1) The Regional Administrator requests the information; or
 - (2) The proposed permit contains requirements significantly different from those contained in the tentative determination and draft permit; or
 - (3) Significant comments objecting to the tentative determination and draft permit have been presented at the public hearing or in writing pursuant to the public notice.
- c. The Division of Water Resources shall keep such records as the Regional Administrator may reasonably require to ascertain whether the State program complies with the requirements of the CWA or 40 CFR Part 123.
4. The Division of Water Resources will forward to EPA copies of compliance inspection reports on major dischargers and copies of correspondence to major dischargers regarding non-compliance.
5. Upon program approval, the Chief shall prepare quarterly and annual noncompliance reports on NPDES permittees and submit to the Regional Administrator.
- a. The Chief shall submit quarterly narrative reports for major facilities, as elsewhere defined and agreed upon through this document. The report shall:
- (1) Be subcategorized as non-POTWs, POTWs and Federal permittees.
 - (2) Be alphabetized by permittee name. When two or more permittees have the same name, the permittee with the lowest permit number shall be listed first.

(3) For each entry, include in the following order the following

information:

- (a) Name, location and permit number of the noncomplying permittee.
 - (b) Brief description of noncompliance for that permittee.
 - (c) Date(s) and brief description(s) of action(s) taken by Chief to insure compliance.
 - (d) Status of resolution of the noncompliance.
 - (e) Any details which tend to explain or mitigate the instance(s) of noncompliance, provided that such reports be kept confidential by EPA if the State is contemplating or is taking enforcement action against a particular facility for which these details are submitted.
- b. These quarterly noncompliance reports (QNCRs) shall be submitted in accordance with the schedule required by EPA regulations effective at the time. Currently, this is prescribed by 40 CFR Part 122.18(e).
 - c. Statistical reports shall be submitted on an annual basis by the Chief on minor NPDES permittees indicating the total number reviewed, the number of noncomplying minor permittees, the number of enforcement actions and number of permit modifications extending compliance deadlines. The statistical information shall be organized to follow the types of noncompliance listed in 40 CFR Part 122.18(a)(2).
 - d. A separate list of minor discharges which are one or more years behind in construction phases of the compliance schedule shall be submitted and alphabetized by permittee name and permit number.
 - e. These annual reports shall be prepared for a calendar year basis and completed within 60 days after the end of the calendar year.

E. Processing of NPDES Applications

1. In accordance with Section D., copies of complete NPDES permit applications shall be forwarded to the Regional Administrator immediately following the Division of Water Resources' determination that the application is complete. The draft permit for facilities for which the Regional Administrator has not waived review shall be submitted to the Regional Administrator concurrently with the complete application.
2. The Regional Administrator has up to thirty (30) days after receipt of the copy of the draft permit to make general comments upon, objections to or recommendations with respect to the draft permit. If the Regional Administrator requires additional time to supply specific grounds for objection, the Regional Administrator shall notify the Chief in writing during the thirty (30) day period of need for a time extension, and specify the length of the requested extension, but in no case shall it exceed ninety (90) days from the time he receives the draft permit. Such written notification shall provide information on the general objection of EPA to the draft permit.
3. In the event the Regional Administrator fails to provide the general objection or notify the Division of Water Resources of the request for an extension within such thirty (30) day period, the application shall be deemed complete with respect to EPA.
4. In the case of draft general permits, EPA shall have 90 days from the date of receipt of the draft general permit to comment upon, object to or make recommendations with respect to the draft general permit.

5. The written notification by the Regional Administrator, or the Director, Office of Water Enforcement and Permits, as appropriate, shall include:
 - a. A statement of reasons for the objection (including the section of the CWA or regulation thereunder that supports the objection), and
 - b. The actions that must be taken by the Chief to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator).
6. The Regional Administrator or Director, Office of Water Enforcement and Permits objection to the issuance of a draft permit must be based upon one or more of the following grounds:
 - a. The permit fails to apply, or to insure compliance with any applicable requirement of 40 CFR Part 123;
 - b. In the case of a draft permit for which notification to the Administrator is required under section 402(b)(5) of the CWA, the written recommendations of an affected State have not been accepted by the permitting State and the Regional Administrator finds the reasons for rejecting the recommendations are inadequate;
 - c. The procedures followed in connection with formulation of the draft permit failed in a material respect to comply with procedures required by the CWA or by regulations thereunder or by the MOA;
 - d. Any finding made by the Chief in connection with the draft permit misinterprets the CWA or any guidelines or regulations under the CWA, or misapplies them to the facts;

- e. Any provision of the draft permit relating to the maintenance of records, reporting, monitoring, sampling or provision of any other information by the permittee are inadequate, in the judgement of the Regional Administrator to assure compliance with permit conditions, including effluent standards and limitations required by the CWA, by the guidelines and regulations issued under the CWA, or by the draft permit;
 - f. In the case any draft permit with respect to which applicable effluent standards or limitations under sections 301, 302, 306, 307, 318, 403 and 405 of CWA have not yet been promulgated by the Agency, the draft permit, in the judgement of the Regional Administrator, fails to carry out the provisions of the CWA or any regulations issued under the CWA; the provisions of this subparagraph apply to determinations made pursuant to 40 CFR Part 125.3(c)(2) in the absence of applicable guidelines and best management practices under section 304(e) of CWA, which must be incorporated into permits as requirements under sections 301, 306, 307, 318, 403, or 405, as the case may be; The objection by the Regional Administrator shall take into consideration the draft permit terms and conditions provided in accordance with Section II, F.8. this MOA.
 - g. Issuance of any draft permit would in any other respect be outside the requirements of the CWA, or regulations issued under the CWA.
7. Upon receipt of EPA's general objection, the Division of Water Resources shall promptly notify the applicant and advise that the time provided by the regulations for the Chief to act on the application may be extended, due to EPA's general objection to the permit.

8. Upon receipt of EPA's specific objection, the Division of Water Resources shall promptly notify the applicant that the EPA has objected to the issuance of the permit and the time provided by the regulations for the Chief to act on the application will be extended. This notification will include all comments, recommendations and objections made by EPA on the draft permit and will request the applicant to provide the information necessary to comply with the recommendations or to remove the cause for EPA objection. If the cause for EPA objection was based on procedural aspects or judgment by the Division of Water Resources varying from that of the Regional Administrator, rather than due to any cause by the applicant, the Chief shall advise the Regional Administrator of the reasoning, as the situation demands.
9. Prior to notifying the Chief on an objection based upon any of the grounds set forth above, the Regional Administrator:
 - a. Shall consider all data transmitted to the EPA by the Division of Water Resources.
 - b. May, if the information provided is inadequate to determine whether the draft permit meets the guidelines and requirements of the CWA, request the Chief to transmit to the Regional Administrator the complete record of the permit proceedings before the Division of Water Resources, or any portions of the record that the Regional Administrator determines are necessary for review. If this request is made within thirty (30) days of receipt of the Division of Water Resources submittal, it shall constitute an interim objection to the issuance of the permit and the full period of time specified (90 days) shall

be allowed, provided the Regional Administrator's request for information on the specific inadequacies of the draft permit is submitted with the request for the complete record.

10. Within ninety (90) days of receipt by the Chief of an objection by the Regional Administrator, the State or interstate agency may request that a public hearing be held by the Regional Administrator on the objection. The public hearing, in accordance with the procedures of 40 CFR Part 124.12(c) and (d) shall be held, and public notice provided in accordance with 40 CFR Part 124.10, whenever requested by the State or interstate agency.
11. A public hearing held in accordance with the above provisions shall be conducted by the Regional Administrator within sixty (60) days of the request by the State or interstate agency.
12. Following the public hearing, the Regional Administrator shall reaffirm the original objection, modify the terms of the objection, or withdraw the objection, and shall notify the State of this decision.
13. If no public hearing is held and the State does not resubmit a permit revised to eliminate the objection of the Regional Administrator within ninety (90) days of receipt of the objection, the Regional Administrator may issue the permit in accordance with 40 CFR Parts 121, 122 and 124 and any other guidelines and requirements of the CWA. The EPA shall maintain jurisdiction over any permit it issues, accordingly.
14. If a public hearing is held and the Regional Administrator does not withdraw the objection, and the State does not resubmit a permit revised to eliminate the objection or modified objection within thirty (30) days of the date of the receipt of the Regional Administrator's notification aforementioned, the Regional Administrator

may issue the permit in accordance with 40 CFR Parts 121, 122 and 124 and any other guidelines and requirements of the CWA. The EPA shall maintain jurisdiction over any permit it issues, accordingly.

{NOTE: In the case of draft general permits for discharges other than separate storm sewers, the Director, Office of Water Enforcement and Permits should be substituted for Regional Administrator whenever it appears above.}

F. Formulation of Draft Permits

18

1. Concurrent with the staff of the Division of Water Resources determining an NPDES permit application is complete, a draft permit shall be prepared and subjected to public notice with copies of the complete permit application and draft permit for all categories of discharges, except those for which EPA has waived review, forwarded to EPA.
2. On NPDES permits for POTWs, where construction is required to obtain compliance with Section 301(b)(1) of the CWA, a compliance schedule for the construction of facilities shall be included, in accordance with the provisions of Chapter 20-5A-7(b).
3. In acquiring permit information for privately-owned treatment works, pursuant to Chapter 2, Section 4.04(b)(3) of the W. Va. Administrative Regulations, the Chief will require all users to be identified, except for residential users discharging only domestic waste.
4. All permits will contain conditions required by 40 CFR Part 122.60(a)(2), (c)(2) and (d).
5. All NPDES permits issued to major dischargers shall require copies of DMRs and non-compliance reports be submitted to EPA.
6. The types of samples required by 40 CFR Part 122.53(d)(7) will be required by NPDES permit applicants.
7. The Division of Water Resources and EPA acknowledge that during the period of application review and formulation of the draft permit, effective cooperation is essential. Therefore, EPA agrees to provide, when requested and to the extent possible, appropriate staff to advise and assist the staff of the Division of Water Resources.

8. On NPDES permits up for reissuance for categories of dischargers where BAT guidelines are not finalized, EPA agrees to make the necessary EPA staff available, on specifically requested applications, with the expertise to assist in development of permit terms and conditions which should be in the permit, and further, agrees to provide personnel to defend the terms and conditions of the permit in such cases where the permittee appeals the permit to the State Water Resources Board.
9. EPA agrees to assist the Division of Water Resources in the determination of fundamentally different factors, in accordance with Sections 301(b), 304, and 307(b) of the CWA and any regulations promulgated pursuant thereto, where the applicant claims such, when submitting the permit application to the Division of Water Resources.

G. Public Notice

1. The Division of Water Resources shall issue a permit only after public notice and opportunity for a public hearing.
2. The Division of Water Resources, upon its determination that an application is complete, shall concurrently prepare a draft permit and provide public notice and opportunity for a public hearing. Concurrent with the public notice, copies of the public notice, any required fact sheet and the draft permit, shall be forwarded to the applicant and EPA, except for those categories of dischargers where EPA has waived review.
3. The Division of Water Resources shall consider all comments received pursuant to the public notice in preparing the final permit.

H. Permit Issuance

1. After the public notice period and, if required, a public hearing, the final permit shall be issued, unless the Division of Water Resources proposes to issue a final permit which differs significantly from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment on the draft permit.
2. If any of the situations arise as delineated above, a proposed permit shall be forwarded to EPA for review and the procedures of Section II.E. shall be followed.
3. Within thirty (30) days after the EPA receives the proposed permit from the Division of Water Resources, the Regional Administrator shall provide in writing to the Chief, any comments or objections to the issuance of the proposed permit.
4. If no comments or objections are provided by the Regional Administrator during the thirty (30) day period, the Chief shall issue the permit.
5. If comments or objections, based on the proposed permit, are received from the Regional Administrator within the thirty (30) day period, the Chief shall promptly notify the applicant and follow the procedures outlined in Section II.E., just as for a draft permit on which EPA has documented objections.
6. The Division of Water Resources shall not issue an NPDES permit when the Regional Administrator has objected in writing.
7. All NPDES permits issued shall include an expiration date not to exceed five (5) years from the date of issuance.

I. EPA Review of Permit Modifications

1. When the Division of Water Resources proposes to modify a permit, not subject to the waiver provisions of Section II.B., the draft permit shall be submitted to EPA, put to public notice and issued in accordance with the outlined procedures of Section II.E., F., G., and H.

J. Variance Requests

1. When the Chief receives a completed request for a variance in accordance with Section 4.04(d), (e), and (f) of the State regulations, he shall process the variance request in accordance with Sections 10.02 of the regulations.
2. If the Chief grants a variance request in accordance with Section 10.02(a), the variance shall be included in a draft permit and the procedures of Part II. E., F., G., H., and I. of this Memorandum followed.
3. If the Chief sends to EPA with a written concurrent or sends to EPA without recommendation a completed variance request in accordance with Section 10.02(b) of the regulations, EPA shall have 90 days from receipt to approve or deny the request and to notify the Division, unless the Regional Administrator finds it necessary to obtain the review and assistance of EPA headquarters, in which case EPA shall have 150 days to make a decision.
4. If EPA denies a variance request under Section 10.02(b) of the regulations, the Chief shall so notify the requestor. If EPA approves such a variance request, the State may prepare a draft permit. The procedures of Sections II. E., F., G., H., and I. of this Memorandum shall be followed.

5. Any notice of EPA's denial of a variance request, and any public notice of a draft permit resulting from a variance request approved by EPA, shall identify the procedures for appealing the variance decision contained at 40 CFR Part 124.64.

III. Pretreatment

A. General

The EPA and the Division of Water Resources recognizes that it is necessary to control pollutants from indirect dischargers which pass through or interfere with the treatment processes in POTWs or which may contaminate sewage sludge. In recognition of this, the EPA promulgated General Pretreatment Regulations for Existing and New Sources of Pollution, 40 CFR Part 403. In this Part, a state must develop a requisite pretreatment program before making application for NPDES authority. The State initially prepared such a program and submitted to the Regional Administrator in August, 1979. Subsequently, revisions requested by EPA were made and the document was resubmitted for approval on December 29, 1980. Following receipt of EPA consultant comments, a second revised version of the document was submitted on October 21, 1981.

This section of the MOA is to delineate the Division of Water Resources' and EPA's responsibilities in carrying out the establishment and enforcement of National Pretreatment Standards (NPS) for new and existing sources pursuant to Section 307(b) and (c) of the CWA and 40 CFR Part 403.

Nothing in this section is intended to affect any pretreatment requirement, including any standards or prohibitions established by State law, as long as the State requirements are not less stringent than (1) any set forth in the NPS, or (2) other requirements or prohibitions established under the CWA or applicable regulations.

B. State Program

1. The Division of Water Resources has primary responsibility for:
 - a. Enforcement against discharges prohibited by 40 CFR Part 403.5;
 - b. Application and enforcement of any NPS established by the Administrator in accordance with Section 307(b) and (c) of the CWA;
 - c. Review, approval, and oversight of Publicly-Owned Treatment Works (POTW) Pretreatment Programs to insure that NPS are enforced in accordance with the procedures outlined in 40 CFR Part 403.11;
 - d. A POTW Pretreatment Program incorporated in permits issued to POTWs as required in 40 CFR Part 403.8 and as provided in Section 402(b)(8) of the CWA;
 - e. Review and approval of modifications of categorical NPS to reflect removal of pollutants by a POTW and enforcement of related conditions in the POTW permit.
2. The Division of Water Resources shall carry out inspection, surveillance, and monitoring procedures which will determine (independent of information supplied by the POTW) compliance or noncompliance by the POTW with pretreatment conditions incorporated into its permit.

The Division of Water Resources will also carry out inspection, surveillance, and monitoring procedures which will determine (independent of information supplied by the industrial discharger) if the industrial discharger is in compliance with the NPS. The number of inspections to determine compliance shall be agreed upon as part of the annual Section 106 program plan process and shall be consistent with State resources.

C. NPS Categorical Standards

The Division of Water Resources shall review requests from industrial dischargers or POTWs for industrial subcategory determinations received after the effective date of a NPS. The Division of Water Resources shall make a written determination as to whether the industrial discharger does or does not fall within that particular subcategory, in accordance with 40 CFR Part 403.6.

The EPA Enforcement Division Director waives the right to review the Chief's determinations.

D. Categorical NPS Credit Removal

The Division of Water Resources shall review POTW applications for removal credit and either approve or disapprove, in accordance with 40 CFR Part 403.7. The Regional Administrator waives the right to review and object to POTW submissions requesting removal credit.

E. POTW Pretreatment Program Approvals

Following determination by the Division of Water Resources that the submission of a request for a local POTW Pretreatment Program meets all appropriate requirements of 40 CFR Parts 403.9 and 403.11, the Chief shall provide a thirty (30) day public notice of the submission and opportunity for a public hearing. If written comments received are insufficient to warrant a public hearing, the Division of Water Resources shall approve the submission.

F. Variances from Categorical Pretreatment Standards for Fundamentally Different Factors

The Division of Water Resources shall conduct an initial review of all categorical pretreatment standards fundamentally different factors variance requests from indirect dischargers and either deny the request and notify the indirect discharger or send the request to the EPA Enforcement Division Director with a recommendation for approval, in accordance with 40 CFR 403.13. EPA shall notify the State whether it denies or approves the variance request and the Division of Water Resources shall advise the indirect discharger making the request. If the EPA does not notify the Division of Water Resources of a determination within forty-five (45) days after its receipt, the Division of Water Resources shall consider the variance request denied and so notify the requester.

IV. Compliance Monitoring and Inspection

The State will expand its compliance monitoring capability to cover the entire State. The State will conduct a number of inspections to administer the program.

Inspections shall be of the following types:

- A. Compliance Sampling Inspection (CSI) - The Compliance Monitoring Section conducts these. Reports are to be sent to EPA for review.
- B. Compliance Evaluation Inspection (CEI) - The field inspection force is to be used for this function. This is a new responsibility for them and training will be required.
- C. Performance Audit Inspection (PAI) - The Division currently has a QA Officer whose projected responsibility will include PAIs.
- D. Routine Periodic Facility Inspections - conducted by Field Operations Inspections.
- E. Bioassays - conducted by the Biology Section for NPDES Compliance work and general effluent categorization.

Joint inspections (EPA and DWR) and/or independent EPA inspections shall be coordinated with DWR's Monitoring Section. Requests by EPA for specific site monitoring will be processed as they are now, however, the Division will have the program and our needs will take precedence. Copies of inspections conducted by EPA independent of DWR shall be forwarded to DWR for inclusion in State files in a timely manner.

The Division shall inspect every major at least once a year utilizing either a CSI, CEI or PAI. The number and type of other inspections will be determined by the Division, depending upon the need to assess permit compliance.

V. Enforcement

A. General

It is recognized by the Division of Water Resources and the EPA that an effective and aggressive enforcement program is necessary to obtain compliance with the requirements of the NPDES program. It is therefore necessary that these agencies coordinate any enforcement activities. A wide range of criminal, administrative and judicial actions may be brought by Federal and State laws to insure compliance. However, with the exceptions covered in II.C.3. and 4., the State will have the primary responsibility for taking appropriate enforcement actions against persons in violation of NPDES requirements, detected by either the State or EPA.

B. State Enforcement Action

The Division of Water Resources shall insure that all appropriate enforcement proceedings are initiated within thirty (30) days after notification by the Regional Administrator of an alleged violation. The Regional Administrator shall be advised, from time to time, on the progress of any such ensuing enforcement proceedings. The Regional Administrator may participate in any enforcement proceedings and/or shall provide staff assistance upon request by the Chief.

Any civil penalty sought or agreed upon by the Chief shall be appropriate to the violation.

C. EPA Notification to the Division of Water Resources

This MOA shall not be construed to limit the authority of the EPA to take action pursuant to Section 309 of the CWA, but, to provide the required enforcement activities, and for the coordination of enforcement activities, the EPA shall notify the Division of Water Resources of an alleged violation concurrently with the alleged violator.

D. EPA Enforcement Action

In the event the EPA pursues enforcement action against an NPDES violator, the EPA shall notify the Division of Water Resources. This notification shall be made regardless of the existence or extent of previous communication between EPA and the Division of Water Resources on the matter.

E. Endangerment to Health

The Division of Water Resources will insure that any pollution source or combination of sources which is presenting an imminent and substantial endangerment to the health or welfare of persons, is immediately subjected to appropriate enforcement proceedings, including, but not limited to, a request for injunctive relief.

F. Laboratory Assistance

The EPA will provide, through the Wheeling Field Office, laboratory assistance for DWR field inspectors in the Northern Panhandle area. This will include sample analysis and support that may later be needed.

VI. Confidentiality of Information

- A. Any information obtained or used in the administration of the NPDES program shall be available to EPA upon request without restriction.
- B. If the information has been submitted to the State under a claim of confidentiality, the State will submit that claim to EPA when providing information under this section. The claim of confidentiality shall be treated in accordance with the requirements of 40 CFR Part 2.
- C. The Chief shall deny any claim of confidentiality related to effluent data, application forms, or permits under the NPDES program.
- D. EPA shall furnish to the State the information in its files not submitted under a claim of confidentiality which the State needs to implement its program. EPA shall furnish to the State information submitted to EPA under a claim of confidentiality, which the State needs to implement its program, subject to the conditions in 40 CFR Part 2.

VII. Term of Agreement

This Memorandum of Agreement will take effect upon program approval by the Administrator of the EPA, pursuant to Section 402(b) of the CWA and will remain in effect until revised or terminated in writing, by the parties involved.

The State Water Resources Board is proposing amendments to the West Virginia NPDES regulations. The proposed amendments shall be filed in the Secretary of State's Office and publicly noticed on February 1, 1982 (see Appendix A for proposed amendments). DWR and EPA agree that the State's NPDES program cannot be approved until after these regulations have been adopted, and are fully effective.

Dated _____ by David W. Robinson
David W. Robinson, Chief
Division of Water Resources

Dated _____ by _____
Peter Bibko, Regional Administrator
Environmental Protection Agency

Dated _____ approved by _____
Anne M. Gorsuch, Administrator
Environmental Protection Agency

EPA Acts to Reduce Harmful Impacts from Coal Mining

Release date: 03/24/2009

Contact Information: Enesta Jones, 202-564-4355 / 7873 / jones.enesta@epa.gov

(Washington, D.C. – March 24, 2009) The United States Environmental Protection Agency has sent two letters to the U.S. Army Corps of Engineers expressing serious concerns about the need to reduce the potential harmful impacts on water quality caused by certain types of coal mining practices, such as mountaintop mining. The letters specifically addressed two new surface coal mining operations in West Virginia and Kentucky. EPA also intends to review other requests for mining permits.

"The two letters reflect EPA's considerable concern regarding the environmental impact these projects would have on fragile habitats and streams," said Administrator Lisa P. Jackson. "I have directed the agency to review other mining permit requests. EPA will use the best science and follow the letter of the law in ensuring we are protecting our environment."

EPA's letters, sent to the Corps office in Huntington, W.Va., stated that the coal mines would likely cause water quality problems in streams below the mines, would cause significant degradation to streams buried by mining activities, and that proposed steps to offset these impacts are inadequate. EPA has recommended specific actions be taken to further avoid and reduce these harmful impacts and to improve mitigation.

The letters were sent to the Corps by EPA senior officials in the agency's Atlanta and Philadelphia offices. Permit applications for such projects are required by the Clean Water Act.


EPA also requested the opportunity to meet with the Corps and the mining companies seeking the new permits to discuss alternatives that would better protect streams, wetlands and rivers.

The Corps is responsible for issuing Clean Water Act permits for proposed surface coal mining operations that impact streams, wetlands, and other waters. EPA is required by the act to review proposed permits and provides comments to the Corps where necessary to ensure that proposed permits fully protect water quality.

Because of active litigation in the 4th Circuit challenging the issuance of Corps permits for coal mining, the Corps has been issuing far fewer permits in West Virginia since the litigation began in 2007. As a result, there is a significant backlog of permits under review by the Corps. EPA expects to be actively involved in the review of these permits following issuance of the 4th Circuit decision last month.

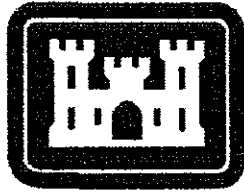
EPA is coordinating its action with the White House Council on Environmental Quality and with other agencies including the Corps.

More information on wetlands and the letters: <http://www.epa.gov/owow/wetlands/>

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MEMORANDUM OF UNDERSTANDING AMONG THE
U.S. DEPARTMENT OF THE ARMY,
U.S. DEPARTMENT OF THE INTERIOR,
AND U.S. ENVIRONMENTAL PROTECTION AGENCY

IMPLEMENTING THE INTERAGENCY ACTION PLAN ON APPALACHIAN
SURFACE COAL MINING¹

JUNE 11, 2009

PREAMBLE

The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities. These mountains also contain some of the nation's richest deposits of coal, which have been mined by generations of Americans to provide heat and electricity to millions in the U.S. and around the world. After generations of mining, however, the region's most readily available coal resources have diminished, and the remaining coal seams are less accessible to non-surface mining methods.

In response, a surface mining technique commonly referred to as "mountaintop mining"² has become increasingly prevalent in the Appalachian region. Although its scale and efficiency has enabled the mining of once-inaccessible coal seams, this mining practice often stresses the natural environment and impacts the health and welfare of surrounding human communities. Streams once used for swimming, fishing, and drinking water have been adversely impacted, and groundwater resources used for drinking water have been contaminated. Some forest lands that sustain water quality and habitat and contribute to the Appalachian way of life have been fragmented or lost. These negative impacts are likely to further increase as mines transition to less accessible coal resources within already affected watersheds and communities.

With this Memorandum of Understanding (MOU), the Department of the Interior (DOI), U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps)

¹ For purposes of this MOU, "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

² The term "mountaintop mining" may also be referred to as "mountaintop removal" or "valley fill mining."



are announcing this Interagency Action Plan (IAP) designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law. This IAP includes a set of short-term actions to be implemented in 2009 to existing policy and guidance, and a longer term process for gathering public input, assessing the effectiveness of current policy, and developing regulatory actions.

The Federal government has made a commitment to move America toward a 21st-century clean energy economy based on the recognition that a sustainable economy and environment must work hand in hand. Federal Agencies will work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities. This interagency effort will have a special focus on stimulating clean enterprise and green jobs development, encouraging better coordination among existing federal efforts, and supporting innovative new ideas and initiatives.

Interagency Action Plan

I. COORDINATION ON REGULATORY PROGRAMS

This MOU formalizes the agencies' IAP for coordinating the regulation of Appalachian surface coal mining. The elements of the plan are:

- A series of interim actions under existing authorities to minimize the adverse environmental consequences of Appalachian surface coal mining;
- A commitment by the agencies to investigate and, if appropriate, undertake longer term regulatory actions related to Appalachian surface coal mining;
- Coordinated environmental reviews of pending permit applications under the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act (SMCRA); and
- A commitment to engage in robust public participation, through public comment mechanisms and Appalachian public outreach events, helping to inform Federal, State, and local decisions.

In addition to the steps taken above, the Federal government will help diversify and strengthen the Appalachian regional economy. This effort will include the agencies to this MOU, and other Federal agencies, as appropriate, and will work to focus clean energy investments and create green jobs in Appalachia.

Coordination of interagency policy discussions and assessment of policy effectiveness will be achieved in consultation with the Council on Environmental Quality.

II. SHORT-TERM ACTIONS TO MINIMIZE ENVIRONMENTAL HARM

The signatory agencies will take the following short-term actions under existing laws, regulations, and other authorities to reduce the harmful environmental consequences of Appalachian surface coal mining.

Before the end of 2009, the Corps and EPA will take the following steps:

- Within 30 days of the date of this MOU, the Corps will issue a public notice pursuant to 33 C.F.R. § 330.5 proposing to modify Nationwide Permit (NWP) 21 to preclude its use to authorize the discharge of fill material into streams for surface coal mining activities in the Appalachian region, and will seek public comment on the proposed action.
- EPA and the Corps, in coordination with DOI's Fish and Wildlife Service (FWS), will jointly develop guidance to strengthen the environmental review of proposed surface coal mining projects in Appalachia under the CWA Section 404(b)(1) Guidelines.
- Recognizing that the regulation of surface coal mining extends beyond CWA Section 404, EPA will improve and strengthen oversight and review of water pollution permits for discharges from valley fills under CWA Section 402, and of state water quality certifications under CWA Section 401, by taking appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting of surface mining operations under these programs.
- The Corps and EPA, in coordination with FWS and consistent with the agencies' regulations governing compensatory mitigation, will jointly issue guidance clarifying how impacts to streams should be evaluated and how to evaluate proposed mitigation projects to improve the ecological performance of such mitigation implemented to compensate for losses of waters of the United States authorized by Section 404 permits.
- EPA, in coordination with the Corps, will clarify the applicability of the CWA waste treatment exemption for treatment facilities constructed in waters of the United States in order to minimize the temporary impacts of mining operations on streams.

Before the end of 2009, DOI will take the following steps:

- If the 2008 Stream Buffer Zone Rule is vacated by the U.S. District Court for the District of Columbia in *Coal River Mountain Watch et al v. Kempthorne*, 1:08-cv-02212-HHK C, as requested by the Secretary of the Interior on April 27, 2009, the Office of Surface Mining Reclamation and Enforcement (OSM) will issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts.
- OSM will reevaluate and determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA.
- OSM will remove impediments to its ability to require correction of permit defects in SMCRA primacy states.

III. DEVELOPMENT OF LONGER TERM REGULATORY ACTIONS TO BETTER MANAGE APPALACHIAN SURFACE COAL MINING

A. OBJECTIVES

The signatory agencies will review their existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining. At a minimum, the agencies will consider:

- Revisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone Rule and Approximate Original Contour (AOC) requirements;
- Eliminating use of Nationwide Permit 21 in connection with surface coal mining in the Appalachian region when the Nationwide Permit Program is reauthorized in 2012; and
- Revisions to how surface coal mining activities are evaluated, authorized, and regulated under the CWA.

B. PROCESS

The signatory agencies will create an interagency working group to coordinate the development of short-term actions, longer term regulatory actions, and coordination procedures for Appalachian surface coal mining. The group will ensure robust public involvement in the development of any proposed actions or regulatory reforms.

For any proposed regulatory revision or other action under this MOU that is a major federal action significantly affecting the quality of the human environment (and is an action subject to NEPA), an Environmental Impact Statement (EIS) will be prepared to inform the decision-making process. At an early stage in the interagency coordination process, the working group will determine whether coordinating these NEPA processes programmatically would more effectively guide regulatory development and decision-making. The interagency group will coordinate with CEQ regarding the implementation of the National Environmental Policy Act (NEPA) in the development of regulatory reforms.

IV. INTERIM INTERAGENCY COORDINATION PROCEDURES

A. Clean Water Act

EPA and the Corps will begin immediately to implement enhanced coordination procedures applicable to the Clean Water Act review of Section 404 permit applications for Appalachian surface coal mining activities that have been submitted prior to execution of this MOU. The goal of these procedures is to ensure more timely, consistent, transparent, and environmentally effective review of permit applications under existing law and regulations. The agencies are issuing these

enhanced joint procedures concurrently with this MOU. Also concurrently, EPA is clarifying the factual considerations it is using to evaluate pending CWA permit applications under the 404(b)(1) Guidelines.

Pending Clean Water Act Section 404 permit applications for Appalachian surface coal mining activities will continue to be evaluated by the Corps and EPA on a case-by-case basis. The agencies will focus their reviews of Appalachian surface coal mining permit applications based on likely environmental impacts with the goal of avoiding, minimizing, and mitigating such impacts to the extent practicable under the CWA Section 404(b)(1) Guidelines and consistent with NEPA. This approach will enable the continued permitting of environmentally responsible projects.

B. Surface Mining Control and Reclamation Act

During 2009, OSM will issue guidance concerning appropriate application of the Stream Buffer Zone rule and other related rules and will ensure that states are implementing their counterpart provisions and SMCRA regulatory programs consistent with the guidance.

V. PUBLIC INVOLVEMENT

This IAP will be accompanied by robust public comment on its short- and longer term actions. The agencies will hold public meetings in Appalachia during 2009 to gather on-the-ground input and encourage ongoing local engagement in the environmental assessment and decision-making process. Additional public participation will occur as agency actions move forward.

VI. GENERAL

A. The policy and procedures contained within this MOU are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This MOU does not constitute final agency action on any issue, and any actions contemplated by this MOU will be carried out in an appropriate administrative process by the action agency in accordance with all applicable laws and regulations.

B. This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.

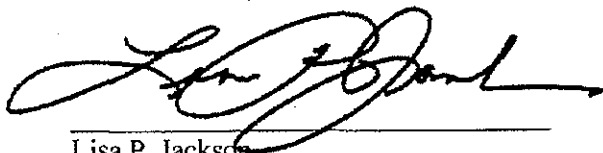
C. Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. All formal guidance interpreting this

MOU and background materials upon which this MOU is based will be issued jointly by the appropriate agencies.

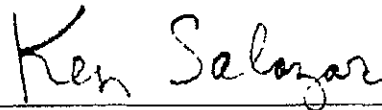
D. Nothing in this MOU will be construed as indicating a financial commitment by DOI, the Corps, EPA, or any cooperating State agency for the expenditure of funds except as authorized in specific appropriations.

E. This MOU will take effect on the date shown above and will continue in effect until permanent procedures are established, or unless earlier modified or revoked by agreement of all signatory agencies. Modifications to this MOU may be made by mutual agreement of all the signatory agencies. Modifications to the MOU must be made in writing.

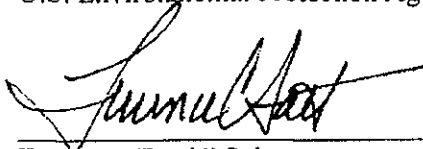
Signed,



Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency



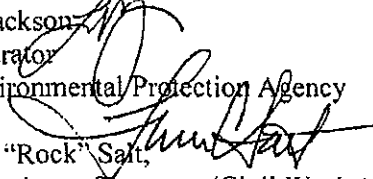
Ken Salazar
Secretary
U.S. Department of the Interior



Terrence "Rock" Salt
Acting Assistant Secretary
of the Army (Civil Works)
U.S. Department of the Army



To: William C. Early, Acting Regional Administrator, EPA Region III
A. Stanley Meiburg, Acting Regional Administrator, EPA Region IV
Bharat Mathur, Acting Regional Administrator, EPA Region V
COL Dionysios Anninos, District Commander, USACE Norfolk District
COL Dana R. Hurst, District Commander, USACE Huntington District
COL Michael P. Crall, District Commander, USACE Pittsburg District
COL Keith A. Landry, District Commander, USACE Louisville District
LTC Bernard R. Lindstrom, District Commander, USACE Nashville District

From: Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency

Terrence "Rock" Salt,
Acting Assistant Secretary (Civil Works)
Department of the Army

JUN 11 2009

Re: Enhanced Surface Coal Mining Pending Permit Coordination Procedures

The Environmental Protection Agency (EPA) and the Department of the Army have developed enhanced coordination procedures to respond to the unique challenge before us in reviewing pending surface coal mine permit applications in Appalachia. The purpose of this enhanced coordination process is to provide for timely resolution of issues for those permits about which the agencies have substantial environmental concerns, ensure effective coordination among the agencies and consistent compliance with the requirements of the Clean Water Act (CWA), its regulations and relevant policy, and to expedite review and final decisions regarding pending permits for surface coal mining operations in Appalachian states (OH, PA, WV, VA, TN, and KY). It is also important that we provide additional transparency to the public during the enhanced coordination process. The attached Enhanced Coordination Procedures should be implemented immediately.

In accordance with the attached procedures, this process will apply to those permits for which the Corps of Engineers (Corps) has issued a public notice or coordinated with EPA through the Nationwide Permit coordination process by March 31, 2009. 108 CWA section 404 permit applications for surface coal mining activities in Appalachia will be subject to review in accordance with these procedures. (List attached) The timeframes established in the procedures will ensure timely coordination among the agencies and applicants as we make decisions under the CWA and our regulations.



We understand and appreciate the significant work already undertaken by you and your staff to coordinate in the review of pending CWA permits in Appalachia. We look forward to supporting your efforts as the Enhanced Coordination Procedures are implemented. Your staff should contact Mr. Brian Frazer, EPA Regulatory Branch Chief, or Meg Smith, Corps Regulatory Community of Practice, Chief, with any questions about these procedures.

Attachments

EPA/Corps of Engineers
Enhanced Coordination Process
for
Pending Clean Water Act Permits Involving Appalachian Surface Coal Mining¹

Issue:

The Corps of Engineers (Corps) has determined there are 108 CWA section 404 permit applications under review for surface coal mining activities proposing to discharge fill material into the waters of the U.S. These applications are being reviewed in 5 Corps Districts covering 6 states (OH, PA, WV, VA, TN, and KY) in Appalachia where the mining is proposed. Many of these permits have been pending for over a year as a result of ongoing litigation and other issues. The review and evaluation of these pending permits poses a unique challenge for EPA and the Corps requiring an enhanced coordination process.

To deal with this unique challenge, EPA and the Corps hereby establish a process for enhanced coordination that:

1. expedites review and final decisions regarding all pending permits,
2. provides for timely resolution of issues for those permits about which EPA has raised substantial environmental concerns,
3. ensures effective coordination among the agencies and consistent compliance with applicable provisions of the Clean Water Act, its regulations and relevant policy, and
4. provides additional transparency to the public during the enhanced coordination period.

The procedures below will apply to applications for individual and Nationwide general permits for which the Corps has issued a public notice or coordinated with EPA through the NWP coordination process by March 31, 2009. These procedures will apply to EPA Regions 3 (Philadelphia), 4 (Atlanta), and 5 (Chicago), and Corps Districts Pittsburgh, Huntington, Louisville, Nashville, and Norfolk. The agencies will continue to rely on existing coordination and review procedures for permit applications public noticed or coordinated after March 31, 2009.

General Review and Coordination Procedures:

- In early March 2009, the Corps districts noted above prepared a list of pending permit applications where the districts anticipated reaching a final permit decision within 60 days. Of this list of 48 permit applications, EPA identified 6 permit applications for which they had substantial environmental concerns. Additional review and coordination was undertaken for these 6 permits. EPA notified the Corps that it did not have concerns about the remaining 42 permit applications. Normal processing of these applications is continuing and permits for several of these 42 have been issued.
- There are 108 permits (List Attached) for which public notices or pre-construction notifications were issued prior to March 31, 2009 that are being reviewed by EPA Regions 3, 4, and 5 in coordination with EPA HQ. Corps Districts will provide EPA Regions with additional available information, including additional information requested from permit applicants, as necessary, regarding these

¹ "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

applications in response to EPA's written request. Within 45 days² of receipt of the additional data requested by EPA for these of permit applications, EPA Regions 3, 4, and 5, after review by EPA headquarters, will propose an initial list of permit applications about which the Regions have concerns and permit applications with which the Corps may proceed without further action by EPA. This initial list will identify the nature of environmental concerns EPA has identified, any steps recommended to be consistent with the Section 404(b)(1) guidelines, and actions EPA is recommending to respond to its concerns. EPA's evaluation of these permit applications will be based on the factual considerations shared previously with the Corps and EPA's views concerning compliance with existing statutory, regulatory, and policy provisions.

- The initial list developed by EPA will be transmitted to the Corps and made available to the public on the Websites of the EPA Region involved. Within 14 days after the proposed list is posted on the EPA Website, each EPA Region will identify to EPA headquarters those permit applications raising concern and applications that may proceed without further action by EPA. EPA HQ will then promptly submit to Corps HQ a consolidated EPA list of these permit applications. Permit applications raising concern will be subject to additional coordination and review following the procedures and timeframes identified below. Permit applications not subject to additional review and coordination may be acted on by the Corps without further coordination with EPA.

Enhanced EPA/Corps Coordination Procedures for Permit Applications of Substantial Concern:

- In order to facilitate timely resolution, each Corps District and EPA Region is encouraged to begin discussions immediately (i.e., before the 60 day clock is triggered below) on those permit applications requiring additional review and coordination. This coordination may include phone conversations, field visits, exchange of new information, and other steps that help to reduce the total time necessary to reach agreement on each permit.
- When a permit application is ready for enhanced coordination consistent with the procedures below, each Corps District will provide written notice to the EPA Region. This Corps determination will be based on workload considerations, completeness of information available on each application, and other factors to ensure that the following 60 day coordination process will be as effective as possible. Corps' determinations that particular permits are ready for coordination will be promptly posted on the relevant EPA Regional website.
- Upon receipt of notification from the Corps, each District and Region will begin immediately to coordinate to discuss permit applications EPA has identified as having remaining concerns in an effort to reach timely resolution. Other relevant parties including state agencies, permit applicants, and involved consultants shall be encouraged to participate to facilitate resolution. Each Corps District and EPA Region will have 60 days to coordinate and resolve each permit application of concern. The 60 days begins on the date EPA receives the Corps' written notice described above. Meetings may include face to face discussions or teleconferences. The agencies will coordinate to ensure that a sufficient number of meetings are held to provide an effective opportunity for resolution. Meetings should include all relevant parties including mining companies and their consultants, other state or federal agencies, and agency HQs. EPA and the Corps will strive to adhere to the 60 day timeframe for interagency coordination; however, when workload dictates or issue resolution warrants, EPA or the Corps may seek a 15 day time extension.
- Should the Corps choose to issue a permit after the conclusion of the coordination period and where there are unresolved issues, the Corps will provide, within 10 days after the close of the 60 day period,

² If any timeframes in this memo fall on a weekend or Federal holiday, that timeframe is automatically extended to the next business day.

their Regional counterpart a written notice of decision to issue a permit which details how the District is responding to concerns raised by EPA. Such responses may include, for example, revisions to approved discharges, special conditions, or mitigation requirements. The Corps is encouraged to provide EPA with a draft of the permit and decision documents during this period.

- Within 10 days after receipt of the written notice of decision, the EPA Region will either (1) advise the Corps District that it does not intend to pursue further action and the Corps, therefore, is free to make a permit decision or (2) initiate action under CWA Section 404(c)

Considerations:

- These procedures and timeframes are intended to facilitate effective and timely coordination and the agencies will work to adhere to them to the maximum practical extent, recognizing that flexibility may be needed under particular circumstances. The timeframes may be shortened or extended by mutual agreement among the agencies.
- Full and open sharing of information among the agencies is necessary for efficient review of proposed projects.
- This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.
- The policy and procedures contained within this document are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This document does not constitute final agency action on any issue, and any actions contemplated by this document will be carried out in an appropriate administrative process by the agencies in accordance with all applicable laws and regulations.

Effective Date: June 11, 2009

Attachment: List of 108 Permits

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Huntington	200300065	S-5027-99	Hobet Mining	Hewett
Huntington	200400336	898-0715	Bear Fork	Bear Fork
Huntington	200400624	S-5025-97	Independence Coal Company	Constitution Surface Mine
Huntington	200400867	S-45014-04	Central Appal Mining	Remining No. 3
Huntington	200401152	10296	Buckingham Coal	Buckingham Wash Plant
Huntington	200401155	S-2001-05	Brooks Run Mining	Brandy St & Cove Mtn
Huntington	200401451	S-5001-02	Independence Coal Company	Glory Surface Mine
Huntington	200500167	U-3004-06	Calenary Coal Co.	Tenmile Fork Deep Mine
Huntington	200500217	S-4014-01	Bluestone	Contour Auger 1
Huntington	200500421	D-2295	Oxford	Peabody 3
Huntington	200500753	D-2290-1	Oxford Mining	Long Sears Adjacent
Huntington	200500934	898-5694 Am5	Premier Elkhorn	U/T Old Beehide
Huntington	200501115	O-10-831BR9	Green Valley Coal Company	Blue Branch Refuse
Huntington	200501198	S-5008-02 S-5021-01	Marrowbone Development	Taywood W & Marrowbone
Huntington	200501211	S-5020-99 AM3	Premium Energy, Inc.	Premium Mills Surface Mine
Huntington	200501275	10397	Oxford	Mizer
Huntington	200501385	10400	Oxford	Halls Knob

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Huntington	200600100	S-5009-00	ICG Eastern, LLC	Jenny Creek Surface Mine
Huntington	200600126	860-0390 Am4	Consol of KY	Area 80
Huntington	200600127	860-5260 Am1	Consol of KY	Stone Br Mine
Huntington	200600821	U-3001-98 IBR5	Catenary Coal Co.	Laurel Fork
Huntington	200602033	S-3016-06	Wildcat	No. 2 Surface
Huntington	200602256	10379	Oxford Mining	Horn
Huntington	200602290	S-7-81	Colony Bay Coal Co.	Colony Bay Surface Mine
Huntington	200700182	S-3011-07	Alex Energy, Inc.	Federal Surface Mine
Huntington	200700282	U-4012-06	Pioneer Fuel	Little Eagle
Huntington	200700285	S-3009-07	Alex Energy, Inc.	Lonestar Surface Mine
Huntington	200700286	S-3010-06	Pioneer Fuel	MT5B
Huntington	200700499	10372	Oxford Mining	Page
Huntington	200700708	10391	Surface Mining Inc	Young Property
Huntington	200701021	10405	Oxford Mining	Kaiser Mathias
Huntington	200800114	U-3016-95	Performance Coal Company	Upper Big Branch Deep Mine
Huntington	200800491	S-5002-07	CONSOL of Energy	Buffalo Mt. Surface Mine
Huntington	200800562	S-4004-07	Eastern Associated Coals	Huff Creek Surface Mine

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Huntington	200800791	S-5002-07	Hobet Mining	Surface Mine No. 45
Huntington	200800805	S-3001-08	Coyote Coal Company	Joes Creek Surface Mine
Huntington	200800830	S-5006-07	CoalMac, Inc.	Pine Creek Surface Mine
Huntington	200800935	U-5010-08	Hampden Coal	Harrys Br
Huntington	200801098	S-5018-08	Frasure Creek Mining	Spring Fork Surface Mine No. 2
Huntington	200802160	10403	B&N Coal	Whigville III
Huntington	200900427	U-5023-92	Argus Energy WV, LLC	Devils Trace No. 2 Punchout
Huntington	200900428	U-5031-08	Consol of Kentucky	Spring Branch No. 3 Deep Mine
Louisville	200301276	897-0430 A1	Candle Ridge Mining	Candle Ridge Mining
Louisville	200500851	867-0440	Cheyenne Resources	Cheyenne Resources
Louisville	200501893	895-0171	Sturgeon Mining	Sturgeon Mining
Louisville	200600756	897-0457 A2	ICG Hazard	ICG Hazard
Louisville	200601124	836-5488, 836-0317	Mat/Co	Mat/Co
Louisville	200601290	877-0167, 877-0168	Licking River Resources	Licking River Resources
Louisville	200601296	898-4150 A1	Clintwood Elkhorn	Clintwood Elkhorn
Louisville	200700069	898-0803	CAM Mining	Cane Branch
Louisville	200700193	898-0400	Premier Elkhorn Coal	Premier Elkhorn Coal

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Louisville	200700217	897-0480	Leeco, Inc.	Stacy Branch Surface Mine
Louisville	200700335	898-0607	Apex Energy	Apex Energy
Louisville	200700393	867-0456	Consol of KY	Razorblade Surface Mine
Louisville	200700400	895-0177	Candle Ridge Mining	Candle Ridge Mining
Louisville	200700400	864-0195	Argus Energy	Argus Energy
Louisville	200700594	898-0800	Premier Elkhorn Coal	Premier Elkhorn Coal
Louisville	200700595	860-0455	Leeco, Inc.	Elk Lick
Louisville	200700669	836-0338	Miller Bros. Coal	Miller Bros. Coal
Louisville	200700706	858-0206	Johnson Floyd Coal	Johnson Floyd Coal
Louisville	200700733	880-5071	Martin County Coal	Martin County Coal
Louisville	200700815	877-0176	Licking River Resources	Licking River Resources
Louisville	200700867	898-0779	CAM Mining	CAM Mining
Louisville	200701026	836-0341 A1	Frasure Creek Mining	Frasure Creek Mining
Louisville	200701044	898-0712	Apex Energy	Apex Energy
Louisville	200701104	836-0292 A1	The Raven Co.	The Raven Co.
Louisville	200701131	836-0335 A2	Miller Bros. Coal	Miller Bros. Coal
Louisville	200701132	836-0349	Miller Bros. Coal	Frasure Branch Mine

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Louisville	200701190	897-0355 A3	Pine Branch Coal	Pine Branch Coal
Louisville	200701205	836-0307	Matt/Co	Matt/Co
Louisville	200701206	877-0782	Frasure Creek Mining	Frasure Creek Mining
Louisville	200701224	860-5304	Miller Bros. Coal	Miller Bros. Coal
Louisville	200701230	860-8012	ICG Knott Co.	ICG Knott Co.
Louisville	200701301	836-0335	CAM Mining	Tom's Branch Surface Mine
Louisville	200701397	836-0350	FCDC	FCDC
Louisville	200701406	860-0462	ICG Hazard	Bearville North
Louisville	200701445	836-0339	FCDC	FCDC
Louisville	200701504	898-0783 A3	CAM Mining	CAM Mining
Louisville	200701515	897-0456 A10	ICG Hazard	ICG Hazard
Louisville	200701518	898-0799	Clintwood Elkhorn	Clintwood Elkhorn
Louisville	200701582	813-0319	Miller Bros. Coal	Miller Bros. Coal
Louisville	200701644	877-0166	Consol of KY	Consol of KY
Louisville	200701660	880-0066	Martin County Coal	Findlay Branch Mine
Louisville	200800095	898-0817	Premier Elkhorn Coal	Premier Elkhorn Coal
Louisville	200800114	897-0445 A1	BDCC Holdings	Cherries Branch

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Louisville	200800115	836-0356	Wolverine Resources	Jake Fork and Stoney Branch Surface Mine
Louisville	200800138	807-0352	Chas Coal	Chas Coal
Louisville	200800139	898-0646 A1	Apex Energy	Apex Energy
Louisville	200800226	880-8002 A4	Czar Coal	Czar Coal
Louisville	200800239	813-0328	Frasure Creek Mining	Frasure Creek Mining
Louisville	200800408	880-0156	Czar Coal	Czar Coal
Louisville	200800525	877-0191	Middle Fork	Middle Fork
Louisville	200800654	860-0464	Enterprise Mining	Enterprise Mining
Louisville	200800727	813-0310 A1	Miller Bros. Coal	Miller Bros. Coal
Louisville	200800777	897-0455 A3	ICG Hazard	ICG Hazard
Louisville	200800781	836-0348	Wolverine Resources	Wolverine Resources
Louisville	200801368	919-0067	North Fork Collieries	Gilmore Surface Mine
Nashville	200201435	3064	Premium Coal	Refuse Area No.3
Nashville	200400062	3143	Premium Coal	Area 19
Nashville	200400609	3112	Appolo Fuels	Jellico Strip
Nashville	200401108	918-0392	Ikerd Coal	Ikerd Coal
Nashville	200401391	861-0467	CH Development	CH Development

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Nashville	200501691	3191	Appolo Fuels	Buckeye Springs Mine No. 2
Nashville	200601647	807-0342	Nally & Hamilton	Nally & Hamilton
Nashville	200700820	807-0355	Nally & Hamilton	Nally & Hamilton
Nashville	200900382	8502	Tennessee Land Reclamation	Cherry Branch Reclamation Project
Pittsburgh	200600660	10395	Ohio American Energy	Red Bird South
Pittsburgh	200701180	10399	Oxford Mining Company LLC	Ellis Area



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 11 2009

THE ADMINISTRATOR

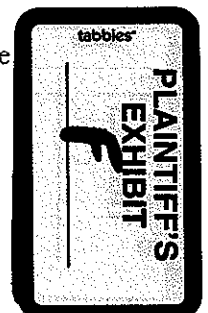
Mr. Terrence Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, D.C. 20310-0108

Dear Acting Assistant Secretary Salt:

As you know, the U.S. Environmental Protection Agency, the U.S. Department of the Interior, and the U.S. Army Corps of Engineers, in coordination with the Council on Environmental Quality, have developed a new Memorandum of Understanding and "Interagency Action Plan" designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining is consistent with federal law. One component of the IAP is the establishment by EPA and the Corps of enhanced coordination procedures to improve the joint review of pending Clean Water Act permit applications. EPA has given thought to how we intend to conduct the review of the approximately 110 pending permit applications subject to these enhanced procedures, and I am writing to provide you with a summary of the regulations and key factual considerations that will form the basis for our identification of pending permit applications that will require further coordination between EPA and the Corps.

The Section 404(b)(1) Guidelines promulgated by EPA in conjunction with the Secretary of the Army establish the substantive environmental standards applied in the review of projects proposing to discharge dredged or fill material in waters of the United States. The Guidelines establish a "sequence" of review requiring: (1) an evaluation of all practicable alternatives that meet the project's basic purpose to ensure that only the least environmentally damaging alternative is permitted; (2) taking all appropriate and practicable steps to minimize potential adverse impacts; and (3) compensation for all remaining unavoidable impacts to aquatic resources. In addition, the Guidelines require that no discharge may be permitted that would cause or contribute to "significant degradation" of the waters of the United States. The Guidelines, therefore, will guide our review of the pending permit applications, and we have highlighted particularly relevant provisions below:

- Guidelines Section 230.10(a) provides that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have



less adverse impact on the aquatic ecosystem. The Guidelines require consideration of project alternatives to eliminate and/or reduce the number of discharges of dredged or fill material occurring in the waters of the United States. When evaluating permit applications in light of this provision, key factual considerations include: the adequacy of the alternatives analysis submitted; the number of valley fills; the number of streams to be impacted; and the number and location of sediment ponds.

- Guidelines Section 230.10(b) provides that no discharge may be permitted that would cause or contribute to an exceedance of an applicable water quality standard, violate any applicable toxic effluent standard, or jeopardize the existence of threatened or endangered species. When evaluating permit applications in light of this provision, key factual considerations include: the pre-mining water quality and potential for water quality impacts downstream of proposed sediment ponds, including impacts from selenium, conductivity, pH, turbidity, dissolved solids, and manganese; and potential impacts to biotic integrity and to threatened and endangered aquatic species.
- Guidelines Section 230.10(c) provides that no discharge shall be permitted that will cause or contribute to significant degradation of the waters of the United States. When evaluating permit applications in light of this provision, key factual considerations include: the cumulative effects of the proposed mine in consideration of previous and reasonably foreseeable future impacts; a watershed assessment of total length of streams to be impacted and/or total area of valley fills in waters of the United States; the extent of high-value streams to be impacted, including extent of impacts to critical headwater streams and/or perennial reaches; the geographic location of the proposed mine; and an assessment of impacts based on a watershed-scale evaluation of stream quality, water temperature, stream diversity, etc.
- Guidelines Section 230.10(d) provides that no discharge shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse environmental impacts of the discharge on the aquatic ecosystem. When evaluating permit applications in light of this provision, key factual considerations include: the total length of streams to be impacted by the proposal; the total length of instream mining-related discharges; the total length of waters affected between the toe of valley fill and sediment ponds; and the adequacy of proposed mitigation to fully compensate for impacts consistent with the requirements of the recently revised mitigation regulations.

These are factors EPA intends to use to screen and evaluate the pending permit applications to determine which permit applications require further coordination between EPA and the Corps. To expedite this process and assist in making EPA's decisions efficient, consistent, and transparent, we intend to utilize a database containing information on each of the pending permit applications. We will review the database's parameters and data requirements with your staff in the near future.

I hope that our agencies will be able to reach agreement on the pending permit applications. While this letter lays out factual considerations EPA expects to review when evaluating the pending permit applications, any action EPA takes, including, if appropriate, any

exercise of EPA's authority under Section 404(c) of the CWA to restrict or prohibit the use of a site for disposal of dredged or fill material, will be based on the statute and regulations.

I look forward to this enhanced cooperation and coordination between our two agencies.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisa P. Jackson', with a large, stylized initial 'L'.

Lisa P. Jackson

Q: How many permit applications did EPA put on its final list as requiring further coordination?

EPA identified the need for further review of all 79 applications identified in EPA's initial Enhanced Coordination Procedure (ECP) list published September 11, 2009. EPA determined that there are remaining water quality and/or regulatory compliance issues with all of the applications. However, EPA further concluded that some applications are clearly not ready for processing, and that others are likely to be readily resolved upon further discussion with the Corps.

Q: What is the ECP?

The Enhanced Coordination Procedure (ECP) is a coordination process that establishes procedures by which the Corps and EPA will evaluate pending surface coal mine projects that were initially coordinated prior to March 31, 2009. The goal of these procedures, jointly developed by EPA and the U.S. Army Corps of Engineers (Corps), is to strengthen the environmental review and ensure timely, consistent, transparent, and environmentally effective review of permit applications under existing law and regulations.

Q: Why has the Corps' list changed since June 11?

An initial list of 108 pending Clean Water Act permit applications for proposed coal mines was provided by the Corps and published at the same time as the June 11, 2009 MOU. The original group of 108 projects included 13 projects whose permit applications have subsequently been withdrawn by the mining company, 8 projects for which permit issuance was imminent and occurred prior to, or concurrent with, the publication of the list, 3 projects for which an ongoing enforcement action currently precludes a permit decision, 1 permit application not complete, 1 project for which the work does not require a permit, and 5 underground mining projects determined not appropriate for the ECP. Also, 2 additional projects were added to the original list. In summary, 31 projects were removed from the original list of 108, and 2 were added, resulting in a total of 79 projects identified as remaining on the ECP list.

Q: Will EPA stop some projects from being authorized?

EPA's action today does not prohibit any project, nor does it reflect a judgment about the likelihood that a project will or will not be authorized. EPA's action identifies projects that require additional coordination and review in cooperation with the Corps and mining companies before a permit decision can be made. Projects that the Corps determines to be in compliance with Section 404 of the Clean Water Act may be authorized by the Corps.

Q: Does EPA's action today mean that mountaintop mining activities can not be authorized under Section 404 of the Clean Water Act?

No. The recommendations made as part of the ECP do not constitute a determination by EPA under its CWA Section 404(c) authority that surface coal mining can not be permitted under CWA Section 404, nor does it represent a final recommendation from EPA to the Corps on these proposed projects. Instead, EPA's decision will help to ensure that mining



projects approved under the CWA are fully consistent with the requirements of the law and will protect water quality and the environment.

Q: How has EPA addressed surface coal mining since the 4th Circuit Court Appeals decision?

Since the 4th Circuit Court decision, EPA and the Corps worked with Council on Environmental Quality to address 48 mining permits that the Corps identified for immediate issuance. After review, EPA raised environmental concerns with six out of the 48 permits. Following that effort, EPA, Corps and DOI issued a MOU which identified a pending application list of 108 projects (now 79) for screening. EPA continues to work with the Corps on permit applications that have been submitted after March 31, 2009. Where EPA believes the information contained in the public notice raises environmental concerns, we are submitting comments to the Corps explaining these concerns and our recommended actions to resolve the concerns.

Q: Is the screening process too difficult for any mining application to be approved?

The screening process itself does not establish any standard for evaluating mining projects. CWA standards used by the Corps to make permit decisions about proposed mining projects are established in the Clean Water Act's Section 404 (b)(1) Guidelines and the Corps' permit implementing regulations. EPA relies on these standards in our review of mining projects and in making decisions about which projects are consistent with the law.

Q: Does the ECP constitute a policy change for EPA regarding surface coal mining?

No. Proposals subject to the enhanced coordination procedures were evaluated for compliance with existing regulations and policies. In order to receive authorization under the Clean Water Act, proposed projects must comply with all requirements of the Section 404 regulations, regardless of activity type. Nationwide, EPA reviews proposed Clean Water Act permits through public notices and other coordination with Corps Districts and submits comments and recommendations when appropriate. The ECP protocol was designed to strengthen the environmental review of surface coal mining proposals.

Q: How did EPA develop the final list? Were any actions taken during the 14-day availability period?

Between the time when the initial ECP list was made public and the announcement of the final list, EPA has been receiving comments from the public on the initial list, coordinating with the Corps and other agencies on the plans for the ECP, and responding to inquiries from stakeholders. EPA has reviewed all comments submitted, updated project-specific information based on comments received, and finalized our review of available information on these pending projects. Following this review, EPA concluded there was no new information which warranted a change in the initial ECP list.

Q: How did EPA decide that all of the permit applications should be on the list for enhanced coordination?

Decisions regarding which applications will be subject to enhanced coordination were made based upon the Clean Water Act and its implementing regulations. Specifically, EPA based its determinations on the Section 404(b)(1) Guidelines. The Section 404(b)(1) Guidelines are a set of regulations developed jointly by EPA and the Corps pursuant to Section 404(b)(1) of the Clean Water Act. They can be found in Title 40, Part 230 of the Code of Federal Regulations (<http://www.epa.gov/owow/wetlands/pdf/40cfrPart230.pdf>). The Section 404(b)(1) Guidelines establish a number of requirements for determining whether to issue a Section 404 permit and what conditions to place in a permit. All of the permits on the list showed the potential to violate one or more of the requirements in the Guidelines.

Q: What comments did EPA receive on the initial list of applications published on September 11, 2009?

Between September 11 and September 28, 2009, EPA received approximately 150 written comments on the initial ECP list. In addition, approximately 1,181 comments were received as identical form letters. Approximately 13 comments were individual submissions which provided specific information on the permits or the environmental condition in an affected area. Two (2) mining companies submitted comments regarding one or more of their projects on the initial ECP list and the Governors of Kentucky and Ohio submitted letters to EPA Administrator Lisa P. Jackson. Overall, 99% of the comments received indicated support for EPA's actions in proposing enhanced coordination for 79 pending applications. 42% of the comments submitted included information indicating that the commenter resides in one of the Appalachian States, as defined in the MOU (KY, OH, PA, TN, VA, WV)

Q: What environmental concerns does EPA have?

The review of pending surface mining applications indicated potential compliance issues with the Guidelines for avoidance and minimization of impacts to aquatic resources, water quality, cumulative effects, and/or mitigation.

- The majority of the proposals recommended for further evaluation may not have adequately demonstrated avoidance and minimization of impacts in accordance with the Guidelines.
- Over 80% of the proposals recommended for further evaluation exhibited the potential for excursions from state narrative water quality standards.
- Over 50% of the proposals recommended for further evaluation raise concerns regarding the potential for significant degradation of the aquatic ecosystem, either individually or cumulatively.
- The scientific literature, EPA field experience, and available project information suggest that the mitigation proposed may not be adequate to offset proposed impacts.

EPA reviewed all proposals in light of available project data, the current science, and with regard to Clean Water Act regulations and has identified opportunities for benefits to the environment, while advancing the Administration's interest in a clean energy economy.

Q: Does EPA have concerns about the approach the Corps is using to comply with NEPA for these pending permits?

The Corps is ultimately responsible for demonstrating compliance with National

Environmental Policy Act (NEPA) for the pending permits. However, as EPA works with the Corps to review the permits in more detail, EPA will evaluate and discuss the Corps' plans for NEPA compliance, as well as the Clean Water Act Section 404 permitting factors.

Q: What happens next?

EPA Regions and Corps Districts should begin discussions immediately in order to resolve EPA's concerns on those applications that will be ready for processing in the near future. When an application is ready for formal coordination under the ECP, the Corps District will notify the appropriate EPA Region in writing, which begins the 60-day review period. During this time, the Region and Corps District will coordinate with applicants, relevant State agencies, and consultants, as necessary, to reach a timely resolution of the environmental concerns identified.

Q: How long will this enhanced coordination take?

The environmental, technical and procedural circumstances associated with each of these 79 applications vary. As such, the time needed to commence and complete review will also vary. It is expected that for some applications, the environmental concerns will be resolved in less than 60 days. In some instances, EPA and the Corps have already begun discussions on the proposals to identify methods for resolution of environmental concerns. Based on these discussions with the Corps, EPA has also come to understand that some proposals may not be at the stage of evaluation where they are ready for coordination.

Q: Will EPA meet with the individual companies involved to try to resolve concerns with these permit applications?

EPA, together with the Corps, expects to meet with some of the applicants. The enhanced application review process envisions these meetings and EPA believes they can be valuable in effectively addressing environmental concerns. In order to ensure only the least environmentally damaging practicable alternative will be authorized, EPA and the Corps may need to confirm project-specific information on mine design and minimization of impacts to aquatic resources. In some cases, EPA has already initiated communication with project applicants and consultants in order to verify data and project status. We appreciate the willingness these applicants have demonstrated to work with EPA under the ECP.

Q: Does the ECP usurp the Corps' authority?

No, the Corps makes final permit decisions. The Corps has not made any decisions on the proposals subject to the enhanced coordination procedures, and the MOU is not intended to alter the Corps' decision authority for Clean Water Act Section 404 permits. Corps permitting regulations provide for coordination with other Federal agencies in order to seek a better understanding of that agency's concerns. According to Corps regulations, "If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency" (33 CFR 325.2(a)(3)).

Q: How does EPA plan to deal with the magnitude of these impacts?

EPA will coordinate with the Corps to make sure that the applications comply with the 404(b)(1) Guidelines. During the 60-day individual application review period called for in the MOU, EPA will discuss the basis for environmental concerns, recommend methods to resolve those concerns, and work with the Corps Districts and project applicants to improve environmental protection consistent with the Clean Water Act. The Clean Water Act does not prohibit all environmental impacts in order to comply with the requirements of the 404(b)(1) Guidelines, but generally requires the applicant for a proposed activity to first avoid impacts to aquatic resources, minimize any unavoidable impacts, and then evaluate the need to compensate for any remaining impacts.

Q: How is EPA dealing with surface coal mining applications outside the ECP list?

Clean Water Act permit applications submitted to the Corps after the March 31, 2009, cutoff for the ECP are being processed according to the Corps' permitting process, which includes coordination with the EPA via either a Public Notice or a Pre-Construction Notification. This means that public notices are being published for proposed standard permits and EPA is continuing to review these public notices as usual, and pre-construction notifications are being provided to the EPA by the Corps for any projects being considered under a Nationwide Permit. Where EPA believes the information contained in the public notice raises environmental concerns, we are submitting comments to the Corps explaining these concerns and our recommended actions to resolve the concerns. A list of comment letters regarding proposed coal mine projects that EPA has submitted to the Corps Districts since March 31, 2009 can be found on the EPA headquarters website (<http://www.epa.gov/owow/wetlands/guidance/mining-letters.html>).

Q: What was EPA's process for identifying environmental concerns in applications?

EPA reviewed all available data regarding the proposed mine, the existing environmental condition in the watershed where the mine is proposed, and the nature of environmental impacts predicted to result from construction and operation. This review is in keeping with the requirements of the 404(b)(1) Guidelines, which contain evaluations of a proposed activity's direct impacts, as well as the potential for significant degradation of the broader aquatic ecosystem, either individually or through cumulative effects.

Q: Where did you get the data to conduct this review?

The majority of information on the proposed mines was extracted from the Corps' permit applications and from SMCRA permits. In order to ensure consistent and up-to-date information, mine applicants and/or consultants were contacted in order to verify available data. We appreciate the companies' willingness to work with EPA, their timely responses, and the updated information provided. Data on watershed condition was provided by EPA programs and State reporting data (water quality sampling data, impaired waters, etc.). The U.S. Fish and Wildlife Service and U.S. Geological Survey provided data on the presence of federally listed threatened and endangered species, critical habitat, land use and land cover.

Q: How was the data used to develop the list?

Gathering basic mine and watershed data from the sources discussed above allowed EPA

staff to perform an analysis of the potential direct, secondary, and cumulative effects of the proposed mine, without subjecting all the applications to a full case-specific review, which would have increased the time needed to develop the initial list. EPA Regional experts reviewed all available data on an individual and watershed basis in order to identify potential environmental concerns with water quality, cumulative impacts, fill minimization, and significant degradation of the aquatic ecosystem.

Q: I've heard that EPA used something called "MIRA" to identify the permit applications that would be subject to enhanced coordination. Is that true?

MIRA (Multi-criteria Integrated Resource Assessment) is a data-gathering and analysis approach used by EPA decision makers to help them evaluate the permit applications. MIRA was used by EPA officials to screen the permit applications to help identify which would be subject to enhanced coordination.

Q: What is MIRA?

MIRA is a tool that EPA has developed to assist program managers' consideration of a broad array of scientific and technical information in their program and policy decisions. MIRA assists program managers by organizing and comparing pieces of relevant project data and information. It allows decision makers to compare different decision options based upon one or more common criteria and become more informed regarding the various criteria and how those criteria can be considered. With respect to Appalachian surface coal mining, MIRA was used to process an extensive set of technical data and generate summary information to facilitate program management decisions. In this case, the MIRA approach promoted consistency by allowing decision makers from three EPA regions to review, discuss and reach consistency and consensus using a common set of data for discussion and analysis.

Q: Was MIRA developed specifically for coal mining?

No. MIRA is an existing approach that EPA decision makers have utilized in a variety of contexts, including developing budgets and making certain designations under the Clean Air Act. More information about MIRA can be found on the EPA Region 3 website (<http://www.epa.gov/reg3esd1/data/mira.htm>).

Q: How was MIRA used to decide which permit applications would be subject to enhanced coordination?

MIRA was used by EPA officials to screen available information on the proposed projects and assist them in their decisions about which applications to further evaluate. This process allowed EPA to organize the relevant data for all mines into a central location. Using the data, EPA reviewers were able to better understand the mining impacts, including cumulative impacts. Data that is relevant to evaluation under the Section 404(b)(1) Guidelines was gathered and input into MIRA. MIRA was then used to assist program managers in considering the data in various combinations to identify potential areas of concern, and analyze the proposed mines in the context of the Section 404(b)(1) Guidelines. After reviewing the information provided through the MIRA screening and conducting

additional analysis, EPA decision makers determined which permit applications would be on the initial list.

Q: Did EPA use MIRA to create a new standard for proposed permit review?

No. MIRA does not create a new standard. The data input into MIRA are the same data and criteria that would be considered pursuant to the Section 404(b)(1) Guidelines. In the end, each permit application is subject to review under the Section 404(b)(1) Guidelines. MIRA was not used as a substitute or surrogate for the Section 404(b)(1) Guidelines analysis. The advantage of using MIRA in this particular circumstance is to provide a consistent and timely initial review of all permit applications subject to the enhanced coordination procedures.

Q: How was the use of MIRA appropriate given that MIRA is not designed to make discrete decisions, such as decisions about a permit application?

The MIRA process did not make discrete decisions about particular permit applications. Rather, it facilitated the analysis and supported the discussions regarding the aquatic ecosystem, the proposed applications' effects on that ecosystem, and potential compliance with the Section 404(b)(1) Guidelines.

Q: Do the Section 404(b)(1) Guidelines apply only to coal mining permits?

No. The Section 404(b)(1) Guidelines apply to all applications for permits pursuant to Section 404 of the Clean Water Act, regardless of the project purpose. That includes applications for Section 404 permits for discharges of dredged and/or fill material associated with mining activities.

Q: What kinds of factors are in the Section 404(b)(1) Guidelines?

Because they apply nationally, the Section 404(b)(1) Guidelines are designed to address a wide variety of permit applications and site-specific environmental conditions. Some of the key requirements are:

- The Corps may not authorize a discharge if there is another less environmentally damaging way by which the permit applicant can accomplish the same project purpose (40 CFR § 230.10(a)).
- The Corps must ensure that the proposed project has avoided and minimized to the maximum extent practicable the discharge of fill to waters of the United States (33 CFR 332.1(c); 40 CFR 230.10(a)(1)(i); 40 CFR 230.10(d); 40 CFR 230.70-77).
- The Corps may not issue a permit if the discharge will cause or contribute to a violation of any applicable State water quality standard (40 CFR 230.10(b)(1)).
- The Corps may not issue a permit if the discharge will cause significant degradation to waters of the United States, including significant adverse effects on the aquatic ecosystem. This includes adverse effects on life stages of naturally occurring aquatic organisms, and aquatic ecosystem diversity, productivity and stability (40 CFR 230.10(c); 40 CFR 230.31; 40 CFR 230.61(b)(3); 40 CFR 230.22(b)).
- The Corps must consider both the impacts from the project individually and its impacts

in combination with other known existing or planned activities that will affect the same ecosystem. Although the impact of a particular discharge may be minor, the cumulative effect of numerous discharges can result in a major impact to water resources and the aquatic ecosystem (40 CFR 230.1(c); 40 CFR 230.11(g)).

Q: What evaluation was conducted outside of MIRA?

Throughout the 45-day review period, EPA Regional experts have been evaluating available data on the proposed mines and condition of the watersheds in which they are proposed. This review focused on placing available data on environmental effects in the context of the 404(b)(1) Guidelines and evaluating the reasonable potential for the proposed action to violate one or more of the requirements of the Guidelines. Representatives from EPA Regions 3, 4, and 5 met on multiple occasions to discuss concerns and ensure all permit applications were evaluated in a consistent manner and using consistent criteria. EPA also consulted with representatives of the U.S. Fish and Wildlife Service, U.S. Geologic Service, and the Corps to solicit their professional knowledge and feedback.