



## NATIONWIDE PERMIT NUMBER 21 SUSPENSION DECISION QUESTIONS AND ANSWERS

### **1. What is NWP 21 and what does it authorize?**

Nationwide permit 21 (NWP 21) was first issued in 1982 to authorize surface coal mining activities in waters of the United States that have minimal individual and cumulative effects on the aquatic environment and other public interest review factors. Specifically, it authorizes the discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of the Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The prospective permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. This NWP is subject to 28 general conditions. The current NWP 21 is scheduled to expire on March 18, 2012.

### **2. Why did the Corps make the decision to suspend NWP 21 in the Appalachian region of six states?**

We have determined, after thorough consideration of agency and public comments, that surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia are more appropriately evaluated through an individual permit process that allows greater opportunity for public comment and examination of environmental effects on aquatic resources consistent with the Corps regulations and Section 404 Clean Water Act requirements.

Pursuant to our regulations, activities resulting in more than minimal individual and cumulative impacts to the aquatic environment cannot be authorized by general permits, and can only be authorized by individual permits. We have determined suspension of this permit in the Appalachian region of these six states will ensure the Corps appropriately evaluates these complex activities through an individual permit process. Individual permits will continue to be issued for mining activities, if they are determined to be in compliance with the implementing regulations of Section 404 of the Clean Water Act, including the 404(b)(1) Guidelines, and are not contrary to the public interest.

### **3. How did you define the Appalachian region?**

In June 2009, a Memorandum of Understanding (MOU) was signed by Army, Department of the Interior (DOI) and the United States Environmental Protection Agency (EPA) to implement an interagency action plan designed to reduce the harmful environmental impacts of surface coal mining, specifically surface coal mining involving mountain top removal and valley fills. This

MOU identified the area of concern as the Appalachian region within the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia. When the Federal Register announcing proposed suspension of NWP 21 was published on July 15, 2009, the agencies agreed to use the Appalachian Regional Commission's list of counties in Appalachia to clarify the geographic area proposed to be affected by the suspension action.

#### **4. How often has NWP 21 been used, nationally and in Appalachia?**

Since 1997, 1,473 NWP 21 verifications have been issued by 22 Corps districts. Approximately 1,204 (~80%) of these verifications have been issued in the Appalachian region of the six states affected by this suspension action. Seventeen other Corps districts issued the remaining 269 (~20%) NWP 21 verifications in this same time period in areas of the country outside of the six state Appalachian region.

#### **5. What is the effect of today's decision to suspend NWP 21 in six states in Appalachia? When will the suspension take effect and how long will it last?**

This announcement was published in the Federal Register on June 18, 2010, and became effective on that date. The suspension will remain in effect until a final determination is made on the modification of NWP 21, or until NWP 21 expires on March 18, 2012.

Nationwide Permit Number 21 will no longer be available in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia and West Virginia. While the suspension is in effect, individuals who seek authorization for discharges of dredged or fill material into waters of the United States for surface coal mining projects in the affected region will have to obtain Department of the Army authorization under the Clean Water Act, through the individual permit process. Some coal mine activities may continue to be authorized by either NWP 49 for re-mining activities, or NWP 50 for underground mining activities, if appropriate.

Currently five (5) NWP 21 applications are pending in the Appalachian Region that are affected by this decision. Processing of these NWP 21 PCNs cannot continue since NWP 21 has been suspended. Therefore, these PCNs will be withdrawn and applicants will be advised that individual permits will be required and the districts will advise the applicants on how to submit individual permit applications. If the applicants wish to apply for individual permits, the Corps districts will work to prioritize the evaluation of these five projects, and issue public notices immediately. After the public notice comment period, the Corps will continue to work with the applicant and other interested parties to resolve any concerns and make final permit decisions.

#### **6. Are existing NWP 21 verifications that were issued before this suspension action still valid?**

Activities that were verified by the districts prior to the effective date of the suspension will continue to be authorized by NWP 21, unless district engineer(s) take action to modify, suspend, or revoke a particular NWP verification on a case-by-case basis. Verified work in waters at many of these sites has been completed under the terms and conditions of those NWP 21 verifications. This completed work in waters will continue to be authorized by NWP 21. For

work that has not been completed in waters of the United States, permittees will have until March 18, 2012 to complete authorized work.

### **7. Can existing NWP 21 verifications be modified?**

No. District engineers may not modify previously issued NWP 21 verifications to authorize additional discharges of dredged or fill material into waters of the United States; such discharges must be applied for and evaluated under the individual permit process.

### **8. Why are you suspending this permit in six states only?**

There has been an increase in the concern regarding impacts to waters of the United States in association with the direct and indirect effects to waters caused by surface coal mining activities in the Appalachian region of these states. Activities in waters of the United States that typically occur in association with surface coal mining activities include valley fill construction activities (e.g., the placement of rock and soil into headwaters streams and their valleys), and construction of sediment ponds, roads, and slurry impoundments. Activities authorized by NWP 21 in the Appalachian region of these six states have impacted thousands of linear feet of ephemeral, intermittent and some perennial streams at numerous mine sites across the region.

Compensatory mitigation has been relied upon to ensure NWP 21 activities result in no more than minimal individual and cumulative adverse environmental effects. Compensatory mitigation must be successfully implemented to adequately offset the unavoidable impacts to streams. Stream mitigation is a challenging and evolving science. Because of the nature and magnitude of coal mine sites (they are typically very large sites involving coal extraction and associated reclamation activities completed in phases over a period of several years), follow-up monitoring to demonstrate whether compensatory mitigation is ecologically successful may not take place until several years after authorization of the activity.

Since 2002, the Corps has been able to collect information with respect to the challenges associated with on-site mitigation required for surface coal mine permits issued in Appalachia. Based on this information and based on the 2008 mitigation rule, which emphasizes the importance of selecting mitigation sites based on their likelihood to be ecologically successful, we are beginning to better understand how site selection and project design criteria could be improved to increase the likelihood that stream mitigation will provide ecologically successful compensation to offset any unavoidable losses of waters associated with surface coal mining projects.

While many comments submitted in response to the July 2009 Federal Register notice suggested that NWP 21 should be suspended in other areas of the country, we would need to publish another Federal Register and provide opportunity for public comment before considering an action that would affect other areas outside the six state Appalachian region. This process would delay the protection of aquatic resources in the Appalachian region. The specific activity of valley fill construction is limited to this region of Appalachia and there has been increasing concern regarding adverse effects of valley fill construction during the past few years. During the process for issuing the 2012 NWPs, the Corps will consider what action is most appropriate

for the future of NWP 21, both in Appalachia and in other areas of the country. Options that will likely be considered include: allowing NWP 21 to expire, reissuing NWP 21, or modifying it either regionally or nationally to include limits or other conditions to ensure impacts do not exceed minimal.

**9. Why did the Corps propose to suspend and modify NWP 21 when less than 3 years ago you determined this permit to be valid? (i.e. What has changed since 2007?)**

As a general matter, the Corps is continually self-evaluating its performance and how the Regulatory Program is doing in terms of meeting the goals of the Clean Water Act. Over the past few years, enough new information came to light, much of it compiled by the Corps and interested parties, that indicated there may be concerns regarding mining techniques, direct, indirect and cumulative impacts to aquatic resources, and the ecological success of compensatory mitigation projects. Based on this information the Corps believed the proposal to evaluate suspension of NWP 21, and now our decision to suspend NWP 21 in the Appalachian region of six states, is appropriate.

**10. Why is the Corps only suspending this permit and not modifying it now?**

Modification is a long-term activity that requires rulemaking and compliance with the Administrative Procedure Act. Since the Corps has concerns with the potential for more than minimal individual and cumulative adverse environmental effects that may result from the use of NWP 21 in the Appalachian region of six states, our current decision to suspend NWP 21 is necessary to provide us with time to collect information regarding these issues and inform our future decision regarding NWP 21 in 2012.

The procedure to reissue and modify all of the Corps NWPs (there are 49 total) is a two-year process that the Corps began in March 2010. This reissuance and modification process must occur before March 18, 2012, the current scheduled expiration date for all NWPs. If modification of NWP 21 is evaluated separately from the rest of the NWPs, this process would follow a different timeline than the reauthorization effort for the remaining NWPs, resulting in confusion for both the regulatory agencies and the regulated public. Aligning the schedule for modification of NWP 21 with the other NWP decisions would reduce this confusion and continue to retain all NWPs on the same 5 year evaluation timeline/schedule.

**11. Districts have the authority to assert discretionary authority on pending NWP 21 applications now and require IP review. Why are you suspending this permit across the region when discretionary authority could be exercised on a case-by-case basis and projects could be reviewed as IPs? Can't you simply add thresholds or impact limits?**

Many factors are considered by the districts when evaluating whether or not a project complies with NWP 21 or whether discretionary authority should be exercised. Consideration is given to such factors including, but not limited to, baseline conditions of the site (e.g., quality of the waters, whether the site has been adversely affected in the past), number of proposed fills, length of stream impacts, minimization efforts, and the applicant's proposed mitigation. Unlike most NWPs, NWP 21 does not have acreage or linear foot limits for losses of waters of the United

States. That lack of clear limits requires districts to make case-specific minimal effects determinations for these complicated projects. The Corps has concerns that the discharges of fill material into jurisdictional waters of the United States in association with surface coal mining projects may be more than minimal, and these affects are best evaluated under the individual permit process. This will provide greater consistency for review of these activities and predictability for the public, and will provide information that will help us make better permit decisions.

## **12. Who gives the Corps the authority to make this decision?**

Section 404(e) of the Clean Water Act authorizes the Secretary of the Army to issue, after notice and opportunity for public hearing, “general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” The authority for issuing Section 10 and 404 permits, including nationwide general permits, has been delegated from the Secretary of the Army to the U.S. Army Corps of Engineers. The implementing regulations for the Nationwide Permit Program are at 33 CFR Part 330, which provides procedures for issuing, modifying, suspending, or revoking nationwide permits. The Chief of Engineers is the decision making authority for the issuance of new nationwide permits, and for the modification, suspension, revocation, or re-issuance of nationwide permits, and he shares this authority with the Deputy Commanding General, the Deputy Commanding General for Civil and Emergency Operations, and the Director of Civil Works.

## **13. There seems to be a moratorium on coal mining permits. Why is the Corps not issuing any permits?**

There is not a moratorium on Section 404 coal mining permits. In accordance with our regulations, the Corps is neither an opponent nor a proponent for a project. We will issue a Section 404 permit if we determine the proposal is not contrary to the public interest, it is in compliance with the 404(b)(1) guidelines, and it can be demonstrated to be in compliance with all applicable regulations pursuant to our authorities. The Corps has authorized approximately 60 coal mining projects in Appalachia since the MOU was signed in June 2009. Because the Corps is the decision maker for permits under Section 404 of the Clean Water Act, each of the permit decisions we have made have been based on our independent review of the activity’s compliance with Section 404 of the Clean Water Act and applicable regulations. During these evaluations, the Corps fully considered and evaluated the concerns and comments expressed during coordination with state and federal agencies. We have made and will continue to make responsible permit decisions that allow continued extraction of coal to support our nation’s energy needs, provided all appropriate methods are employed to ensure the activities comply with all applicable implementing regulations for Section 404 of the Clean Water Act. The Corps has also increased our efforts to work with the states and the Office of Surface Mining to incorporate information gathered through their SMCRA process to inform our decisions.

**14. What actions do you plan to take to manage the increased workload that will result from this decision?**

Since NWP 21 will not be available in the Appalachian region of six states, it is expected that approximately 65 additional individual permit applications for surface coal mine projects would be received each year in the five affected districts. Greater interagency/applicant coordination is expected in comparison to coordination that occurred prior to implementation of the June 2009 interagency MOU. Evaluation of permit applications has resulted in increased travel to meetings and extensive deliberation between applicants, the Corps, EPA, FWS, and state agencies. During the past year, districts have reprioritized work assignments and realigned personnel to accommodate this increase in workload. Districts are also working with their interagency teams to better align processes and improve collaboration, the result of which should be a more effective evaluation process.

**15. How many comments did you receive and from whom?**

The Corps received approximately 23,400 comments and testimony, the majority of which were form letters. Approximately 1,750 substantive comments were received, with nearly the same number expressing support for the proposal as the number who stated opposition to the proposal. Agencies in support of the proposal included EPA, DOI and Ohio EPA. Non-governmental organizations expressing support included Sierra Club, Natural Resources Defense Council, and National Wildlife Federation and Ohio Valley Environmental Coalition. Agencies and groups opposing the proposal included PA Department of Environmental Protection, the National Mining Association, several state mining associations, numerous coal companies, other members of the industry, and several townships and counties.

**16. How has the Corps considered the negative effect this decision could have on the economy and energy needs?**

Suspending the use of NWP 21 in the Appalachian region of six states does not mean the Corps will not issue permits for surface coal mining in this region. Suspending the use of this permit means applications will be processed in accordance with individual permit procedures. Using the individual permit process may provide more information for the Corps to consider when making decisions on these permit applications because of increased public involvement provided through our public notice process. Before the Corps may make a final individual permit decision on any surface coal mine activities, we will weigh all beneficial and detrimental impacts the project is expected to have on all relevant public interest review factors, including economics, energy needs, water quality, fish and wildlife values, etc. We will issue permits when the impacts are not found to be contrary to the public interest and determined to be in compliance with all applicable Section 404 Clean Water Act requirements.

Our decision to suspend NWP 21 in the Appalachian region of six states, thereby requiring individual permit evaluation for these activities, will ensure the necessary balance between economic growth and our nation's energy needs is maintained while also ensuring environmental protection pursuant to Clean Water Act requirements.

**17. In the journal *Science*, an article was recently published that discussed the detrimental impacts that MTM has on human health and the environment. Did the information from their article affect your decision?**

The article published in *Science* provided information on the environmental effects of surface coal mining in Appalachia, with particular emphasis on the effects of mining activities in uplands. The Corps evaluation of an activity under the terms and conditions of NWP 21 focuses on whether the proposed activity would result in minimal impacts to the aquatic environment, when considered individually and cumulatively. Our focus is on the effects that the activity would have on relevant factors within our scope of federal control and responsibility. We do not have the authority to evaluate effects of mining activities that occur in uplands, as these impacts are regulated under the Surface Mining Control and Reclamation Act. Therefore our decision was based on a careful evaluation of the 23,400 comments and supporting information provided in response to the 15 July 2009 Federal Register notice and the six public hearings.

**18. What has the Corps accomplished under the MOU?**

In addition to the NWP 21 proposed suspension action, the Corps is working in collaboration with EPA, United States Fish and Wildlife Service (FWS), and OSM to prepare guidance to strengthen the review of projects under the 404(b)(1) Guidelines and improve collaboration between state and federal agencies with authority to regulate surface coal mining activities. In the field, districts are conducting interagency coordination meetings with other agencies to better understand how our permitting processes can be collaborative and how we can collect and share information that will better inform permit decisions. The Corps has also collected information to support the guidance we have committed to prepare in cooperation with EPA and FWS to improve the ecological success of stream mitigation. It is also our goal to be more transparent, consistent and predictable with the regulated community so they understand what to expect during the permitting process. Districts continue to conduct meetings with applicants, as well as state and federal agencies, on pending projects to resolve remaining issues and work toward final permit decisions that are in compliance with the Clean Water Act and SMCRA. We are also working with DOI on their stream protection rulemaking initiative.

**19. What is the practical CWA impact of the Interagency Action Plan in the MOU?**

The Corps has taken and continues to take significant steps within our existing statutory authorities to evaluate and minimize the adverse effects of surface coal mining activities on waters of the United States and other public interest review factors related to those impacts in jurisdictional waters. The short-term actions being completed by the agencies in accordance with commitments in the June 2009 MOU will strengthen the environmental review of these complex activities and will further empower the Corps and other agencies to effectively analyze impacts within each agency's purview.

**20. Does this decision affect Nationwide Permits 49 or 50?**

No. Nationwide Permit 49, Coal Remining Activities, and NWP 50, Underground Coal Mining Activities, are not impacted by this decision. Companies that propose to discharge dredged or

fill material into waters of the United States for remining or underground mining activities may still submit a pre construction notification to the district engineer under the appropriate NWP. The district engineer will review the proposed work, and, if it is determined that the individual or cumulative adverse environmental impacts would not be more than minimal or contrary to the public interest, the district engineer will verify that the work is authorized under the terms and conditions of the appropriate NWP.

**21. Some of the streams the Corps is regulating appear to be swales that only carry water after storm events. Why are you regulating these?**

Pursuant to the Carabell-Rapanos Supreme Court decision, all relatively permanent streams are jurisdictional waters of the United States subject to regulation under Section 404 of the Clean Water Act. Relatively permanent streams in Appalachia include all perennial streams and most intermittent streams. Based on the Carabell-Rapanos Supreme Court decision, all non-relatively permanent waters (non-RPWs) are considered jurisdictional waters of the United States if the Corps determines that the streams have a significant nexus (SN) to a traditional navigable water (TNW). Non-RPWs in Appalachia typically include ephemeral streams that flow only in response to precipitation.

Applicants have the option to request an Approved Jurisdictional Determination (JD), which requires the Corps to perform an evaluation pursuant to Carabell-Rapanos guidance. If this evaluation concludes that non-RPWs have an SN with a TNW, these waters are subject to regulation under Section 404 of the Clean Water Act. If non-RPWs do not have an SN to a TNW, the Corps concludes these streams are not waters of the United States and they are not regulated under Section 404 of the Clean Water Act. Conversely, applicants may request a Preliminary JD, where a formal determination of jurisdiction is waived and the applicant agrees to assume all waters on-site are regulated and subject to applicable mitigation requirements. A preliminary JD is typically requested to move forward expeditiously with permitting.

**22. Why is the Corps applying additional scrutiny to surface coal mining projects in Appalachia and not to other types of projects such as road construction activities, commercial facilities, and other types of developments?**

NWP 21 does not currently have limitations for wetland acreage impacts or linear stream distance impacts. Conversely, most other NWPs have limits on the amount or type of impacts to waters that can occur in order to ensure minimal effects. For example, NWP 14 for linear transportation crossings and NWP 39 for commercial and institutional developments only authorize up to ½ acre of wetland impact and 300 linear feet of stream impact. We will consider whether limitations, such as those that have been deemed necessary for many other NWPs, would be appropriate for NWP 21 to ensure minimal impacts. This determination will occur during this interim suspension period and before expiration of NWP 21 in 2012.

**23. Will applicants be given a one year grace period after NWP 21 expires on March 18, 2012, to complete work in waters?**

In accordance with 330.6(b), activities which have commenced (i.e., are under construction) or are under contract to commence in reliance upon an NWP will remain authorized provided the activity is completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5 (c) or (d). Therefore, activities verified under NWP 21 that commenced or are under contract to commence before March 18, 2012, will have until March 18, 2013, to complete the authorized work in waters.

**24. When must work authorized under NWP 21 be complete? Does the entire stretch of jurisdictional water have to be filled, or could just the pond and the toe of the fill be constructed?**

All authorized discharges of fill material into waters of the United States must be complete before expiration of the permit on March 18, 2012 (or by March 18, 2013, if the activities in waters commenced or were under contract to commence before March 18, 2012). As clarification, any work above the ordinary high water mark of streams is currently beyond the purview of the Corps (for example, the discharge of fill material into a water of the United States for the construction of an under drain must be complete before expiration of the Corps permit, but material can be placed on top of the under drain for construction of the valley fill after expiration of the Corps permit because work outside of waters to construct the valley fill is regulated not under the CWA, but instead under SMCRA.)

**25. Can permittees still mitigate under the expired NWP 21 without additional 404 permitting?**

Mitigation that involves the discharge of fill material into jurisdictional waters of the United States associated with a NWP 21 verification should be completed by March 18, 2012 (or by March 18, 2013, as described above.) If the discharge into waters is not completed by this time, the permittee should notify the appropriate Corps district and that district will evaluate permitting requirements of the mitigation activity on a case-by-case basis. The Corps will work with the permittee to determine the best approach for completing the necessary mitigation, which may result in a modification to the required mitigation or evaluation of the activity by the Corps under the appropriate permitting procedures.

**26. The Federal Register notice states that previously verified NWP 21s may not be modified to authorize additional discharges. May minor modifications (i.e. the construction of a sediment pond in a different location than what was originally authorized) be considered by the Corps?**

No. Because NWP 21 is no longer a valid permit in the Appalachian Region of six states, new or additional discharges of fill material into waters of the United States may not be authorized under NWP 21.

**27. Can existing 21s be modified to reduce impacts and also reduce required mitigation (e.g. if a permittee reduces the size of a valley fill, or eliminates other impacts to waters of the United States that were verified under NWP 21, will they be required to do less mitigation?)**

If a project is modified to reduce impacts to waters, and the permittee does not propose any new or additional discharges into waters that were not previously verified, the permittee may submit this information to the Corps for our review. In these cases, the Corps district may use their discretion to determine whether or not reducing previously required mitigation would adequately offset impacts to waters in association with the activity. The Corps will coordinate these requests with the resource agencies before making final decisions as to whether mitigation requirements may be lessened.

**28. Can an existing NWP 21 verification be transferred to a different company?**

Yes, provided no new or additional discharges of fill material into waters of the United States are proposed.