



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
441 G STREET NW
WASHINGTON, D.C. 20314-1000

JUN 08 2010

CECW-CO-R

MEMORANDUM FOR RECORD

SUBJECT: Suspension of Nationwide Permit 21, Surface Coal Mining Operations

1. **PURPOSE:** This memorandum for record discusses the administrative process followed by the Corps of Engineers (Corps) and the factors considered by the Corps during the evaluation of the proposed suspension of Nationwide Permit 21 (NWP 21) in the Appalachian Region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

2. **BACKGROUND:** On June 11, 2009, the Department of the Army, the U.S. Department of the Interior (DOI), and the U.S. Environmental Protection Agency (EPA) signed a Memorandum of Understanding (MOU) that addresses actions to strengthen the environmental review of Appalachian surface coal mining. The MOU includes an Interagency Action Plan (IAP) that was developed to reduce the adverse environmental effects of surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, while assuring that future mining remains consistent with the Clean Water Act and the Surface Mining Control and Reclamation Act. One of the short-term action items the Corps agreed to do under the IAP was to issue a Federal Register notice proposing to modify NWP 21 to preclude its use to authorize discharges of fill material into streams for surface coal mining activities in the Appalachian region of these six states and to seek public comment on this proposal. On 15 July 2009, the Corps published a Federal Register notice (74 FR 34311) to solicit public comment on this proposal.

a. The modification of a NWP is a rulemaking activity that requires the preparation of documentation pursuant to the National Environmental Policy Act (NEPA), compliance with the requirements of the Administrative Procedure Act, and review by the Office of Management and Budget. This is a long-term activity that is currently underway and a decision concerning modification of NWP 21 will be made prior to expiration of the NWPs in 2012.

b. Because rulemaking and subsequent modification of a NWP is a lengthy process, in order to provide more immediate environmental protection while the comments received in response to the proposal to modify NWP 21 are fully evaluated, the Corps also proposed in the Federal Register notice referenced above to suspend NWP 21 in the Appalachian region of these six states. Suspension is a short-term measure for quickly halting the use of a NWP in response to identified concerns about impacts to waters of the United States or other public interest review factors, while the Corps continues to evaluate whether modification of a NWP is appropriate. If NWP 21 is suspended to prohibit its use in the Appalachian region of these six states, 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. Using the Individual Permit process may provide more information for the Corps to consider when making permit decisions because of additional evaluation required pursuant to NEPA and opportunities for public involvement. Should the Corps suspend NWP 21, the suspension would temporarily prohibit the use of NWP 21 to authorize discharges of dredged or fill material into waters of the United States for surface coal mining operations in the Appalachia region of six states until a final decision is made on the

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modification of NWP 21, the suspension is lifted, or NWP 21 expires. Provided below is information concerning the applicable statutory authority under which this action is taken, the text of NWP 21, its historical use in the Corps Regulatory Program, and the administrative process followed by the Corps to reach a decision on the proposed suspension action.

c. Applicable Statutory Authorities: 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 (see 33 CFR 322.5 and 323.6(a), respectively). The implementing regulations for the Nationwide Permit Program are at 33 CFR Part 330, which provide 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 (see 33 CFR 330.5(b)). Pursuant to a memorandum dated 22 February 2010, the Chief of Engineers has authorized the Deputy Chief of Engineers (DCG), the Deputy Commanding General for Civil and Emergency Operations (DCG-CEO), and Director of Civil Works (DCW) to share with the Chief of Engineers full authority to sign any documents relating to the issuance, re-issuance, suspension, modification, or revocation of any or all of the nationwide permits. Therefore, the Chief of Engineers, the DCG, the DCG-CEO or the DCW may make the final decision with respect to the proposed suspension of NWP 21. In addition to the decision making authority described above, the division and district engineers can also modify, suspend or revoke NWPs on a regional and case-by-case basis, respectively.

d. NWP 21 authorizes:

"Surface Coal Mining Operations. 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. Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 404 and 10)"

This NWP is subject to 28 general conditions.

This NWP is scheduled to expire on 18 March 2012.

e. History of NWP 21: NWP 21 was first issued in 1982 to authorize structures, work, and discharges of fill within waters of the United States associated with surface coal mining activities. Each time the NWPs were reissued in 1987, 1992, 1997, 2002 and 2007, NWP 21 was also reissued. Three minor modifications were made to this NWP to address comments received in response to the NWP reissuance proposals. A controversial element of the reissuance process for the 2007 NWP 21 among both agencies and the public involved: limits that may be established for this permit in the Appalachian region,

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compensatory mitigation required to offset unavoidable impacts to waters, and the use of regional conditions to ensure minimal effects. After much coordination, the agencies removed their objections to NWP 21 and this permit was reissued by the Corps without acreage limits or linear foot limits for stream impacts, or specific compensatory mitigation requirements.

f. The current NWP 21 was published in the 12 March 2007, edition of the Federal Register (72 FR 11092) after going through public notice and comment and interagency review. NWP 21 does not have impact limits. NWP 21 requires pre-construction notification to the Corps and requires that applicants cannot begin work in waters of the United States until they receive written verification from the Corps that the activity is authorized by NWP 21 with any project-specific special conditions to ensure that the authorized activity results in minimal individual and cumulative adverse environmental effects. To ensure that proposed activities result in no more than minimal individual and cumulative adverse effects to the environment, districts evaluate each pre-construction notification submitted for individual projects. To ensure minimal effects, special conditions requiring compensatory mitigation to offset unavoidable impacts to aquatic resources, and other actions to minimize adverse environmental effects, are required for the majority of NWP 21 verifications.

g. Pursuant to 33 CFR 330.5, anyone may, at any time, suggest to the Chief of Engineers changes to existing NWPs, which the person believes to be appropriate for consideration. Such a suggestion has been provided in the June 2009 MOU signed by Army, DOI and EPA. In response to the MOU, the Corps issued a proposal to suspend NWP 21 in the six state Appalachian region, specifically within the Appalachian counties of these states as identified by the Appalachian Regional Commission, to address concerns about the adverse individual and cumulative effects of surface coal mining activities on the aquatic environment and other factors of the public interest.

h. 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 Appalachia. 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 the construction of sediment ponds, roads, and slurry impoundments. Activities authorized by NWP 21 have impacted thousands of linear feet of ephemeral, intermittent and some perennial streams at numerous mine sites across the region and compensatory mitigation has been required to ensure NWP 21 activities result in only minimal individual and cumulative adverse environmental effects. This mitigation must be successfully implemented to adequately offset the unavoidable impacts to waters authorized by NWP 21. Stream mitigation is a challenging and evolving science. Because of the nature and magnitude of coal mine sites (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 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.

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i. Based on a search of the Regulatory Program's database, ORM2, five Corps districts (Huntington, Louisville, Norfolk, Pittsburgh and Nashville) in these six Appalachian states have issued 1,204 NWP 21 verifications since 1997 (Table 1).^{*} Seventeen other Corps districts issued 269 NWP 21 verifications during that time period in other areas of the country. Sixteen districts across the country have not authorized any activities under NWP 21. Based on these data, over 80% of the total NWP 21 verifications issued since 1997 have occurred in the states affected by the proposed suspension of NWP 21.

Huntington District	770	Sacramento District	11
Louisville District	149	Omaha District	11
Norfolk District	106	Fort Worth District	11
Pittsburgh District	99	Albuquerque District	10
Nashville District	80	Alaska District	9
Mobile District	53	Los Angeles District	5
Tulsa District	70	Vicksburg District	4
Rock Island District	23	Little Rock District	4
Kansas City District	22	Seattle District	2
St. Louis District	17	Portland District	1
Baltimore District	15	Savannah District	1
TOTAL			1,473

*NWP 21 was first issued in 1982. We are unable to estimate use of NWP 21 from 1982 to 1997 because the Corps' Regulatory Program did not begin collecting NWP-specific data at a consistent national level until May 1997. In addition, the Regulatory Program began to transition from the previous database, RAMS, to ORM around 2003. This transition occurred in different districts at different times and therefore resulted in some inconsistencies in data entry and reporting across the country.

3. ACTIONS AND ANALYSIS:

a. Public Notice and Comment Process: On 15 July 2009, the Corps published a Federal Register notice (74 FR 34311) to solicit public comment on its proposal to modify NWP 21 and also to suspend NWP 21 in the interim while the Corps evaluates the longer term action of modifying NWP 21. Suspension is an immediate action that would halt the use of NWP 21 in response to concerns about impacts to the aquatic environment and other public interest review factors, until the Corps makes its decision on whether to modify NWP 21 to address those concerns.

b. To clarify the geographic area subject to the proposed suspension, the Corps used the Appalachian Regional Commission's list of counties in Appalachia. This geographic area was identified and described in the Federal Register notice published on 15 July 2009 (74 FR 34311). The counties proposed to be affected in the six states include:

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- Kentucky: Adair, Bath, Bell, Boyd, Breathitt, Carter, Casey, Clark, Clay, Clinton, Cumberland, Edmonson, Elliott, Estill, Fleming, Floyd, Garrard, Green, Greenup, Harlan, Hart, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Menifee, Metcalfe, Monroe, Montgomery, Morgan, Nicholas, Owsley, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Russell, Wayne, Whitley, and Wolfe.
- Ohio: Adams, Ashtabula, Athens, Belmont, Brown, Carroll, Clermont, Columbiana, Coshocton, Gallia, Guernsey, Harrison, Highland, Hocking, Holmes, Jackson, Jefferson, Lawrence, Mahoning, Meigs, Monroe, Morgan, Muskingum, Noble, Perry, Pike, Ross, Scioto, Trumbull, Tuscarawas, Vinton, and Washington.
- Pennsylvania: Allegheny, Armstrong, Beaver, Bedford, Blair, Bradford, Butler, Cambria, Cameron, Carbon, Centre, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lackawanna, Lawrence, Luzerne, Lycoming, McKean, Mercer, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Schuylkill, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Washington, Wayne, Westmoreland, and Wyoming.
- Tennessee: Anderson, Bledsoe, Blount, Bradley, Campbell, Cannon, Carter, Claiborne, Clay, Coker, Coffee, Cumberland, De Kalb, Fentress, Franklin, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, Jackson, Jefferson, Johnson, Knox, Lawrence, Lewis, Loudon, McMinn, Macon, Marion, Meigs, Monroe, Morgan, Overton, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Smith, Sullivan, Unicoi, Union, Van Buren, Warren, Washington, and White.
- Virginia: Alleghany, Bath, Bland, Botetourt, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Henry, Highland, Lee, Montgomery, Patrick, Pulaski, Rockbridge, Russell, Scott, Smyth, Tazewell, Washington, Wise/Norton, and Wythe.
- West Virginia: All counties.

c. The 15 July 2009 Federal Register notice began the public comment period, and all Corps districts also issued local public notices to solicit public comment. The 15 July 2009 Federal Register notice also provided an opportunity for interested parties to request public hearings. The Corps received many requests to extend the public comment period and also to conduct hearings in the six states proposed to be affected. On 13 August 2009, the Corps extended the comment period to 14 September 2009 (74 FR 40815). Further, in the 10 September 2009, issue of the Federal Register (74 FR 46582), the Corps announced that six public hearings would be held. These hearings were conducted on 13 October 2009, in Pikeville, Kentucky; Charleston, West Virginia; and Knoxville, Tennessee and on 15 October 2009, in Cambridge, Ohio; Pittsburgh, Pennsylvania; and Big Stone Gap, Virginia. Comments to supplement the hearing record were accepted until 26 October 2009. Overall, the comment period lasted 104 days because of extensions to the comment period and because the comment period remained open until 10 days after the public hearings were conducted.

d. The Corps received approximately 23,000 comments and oral testimony from approximately 400 individuals as a result of the Federal Register notices and public hearings, respectively. Of the 23,400 comments and testimonies received, approximately 1,750 consist of individual non-form letters and

testimony, and the remainder consist of form letters and petitions. Of the total 23,400 comments, approximately 16,900 commenters expressed support for immediate suspension and approximately 6,500 commenters opposed the suspension of NWP 21. In non-form letters and testimony, approximately 750 expressed opposition to suspension and 1,000 expressed support for suspension. Agencies and groups that expressed support for suspension include EPA, DOI, the Ohio EPA, the National Wildlife Federation, the Natural Resources Defense Council, the Sierra Club and numerous other non-governmental organizations. Agencies and groups that expressed opposition to suspension include the Pennsylvania Department of Environmental Protection, the National Mining Association, several state mining associations, multiple coal companies, other members of industry and numerous towns and counties. The majority of comments against suspension were provided by individuals who reside in the region proposed to be affected; while comments in support of suspension were provided by individuals from across the country, including the region proposed to be affected.

e. Summary of comments and testimony: A summary of comments in response to the Federal Register published on 15 July 2009 is provided below. The Federal Register notice proposed two actions: the long-term action of modification of NWP 21 in Appalachia and immediate suspension of NWP 21 in Appalachia. As stated above, the decision for modification of NWP 21 will be made prior to the expiration of the NWPs in 2012. Therefore, a brief discussion of comments related to the modification will follow the summary of comments related to the suspension action, but evaluation of modification alternatives are not addressed in this memorandum.

e.1. Suspension: Comments received that *opposed* regional suspension of NWP 21 in Appalachia:

- The Corps has not considered negative effects this proposal would have on the following public interest review factors:
 - Economics (Impacts to primary jobs associated directly with the coal mining industry as well as secondary, indirect jobs that support the coal industry. In addition, impacts to severance taxes that support such services in the communities as education and emergency services.)
 - Energy needs and mineral needs (i.e. the effect this proposal may have on coal extraction, prices of electricity, and dependence on foreign sources of energy.)
 - Land use (i.e. use of land after mining to provide flat areas for development such as hospitals, housing, recreational areas, etc.)
 - Property ownership.
- The same scrutiny currently being applied to surface coal mining projects in Appalachia has not been applied to discharges of fill material in waters of the United States in association with other types of projects, including road construction activities, subdivisions, recreational uses, hospitals, and commercial facilities.
- If NWP 21 is suspended, commenters are concerned the Corps will not be able to evaluate any applications for coal mining activities and therefore no permits could be issued and coal mining would cease in this six state region.
- This proposal discriminates against one industry in one region of the country. If NWP 21 is modified/suspended in Appalachia, the same action should occur nationwide.
- The Corps has provided no scientific basis for proposed suspension of NWP 21 in Appalachia.
- The Corps currently has the option to exercise discretionary authority and require individual permit review for any application that is submitted requesting authorization to discharge fill material into waters in association with surface coal mining activities. Commenters request

discretionary authority be exercised when appropriate and the NWP 21 remain available for use when appropriate.

- The NWP 21 was issued in 2007 as a valid permit after going through public comment and a full evaluation by the Corps pursuant to NEPA. Why in 2009 was it proposed to be suspended?
- Waters being regulated by the Corps and subject to permitting requirements under either NWP 21 or Individual Permit procedures in the Appalachian region are not jurisdictional waters of the United States, either because they are swales and only carry water after storm events or because they lack a significant nexus pursuant to the Rapanos-Carabell guidance. Therefore, the proposed suspension of NWP 21 is unnecessary.
- Pending permit applications currently being processed by Corps districts should continue to be evaluated pursuant to the conditions of NWP 21 even if a suspension decision is made.

e.2. Suspension: Comments received that *supported* regional suspension of NWP 21 in Appalachia:

- If the Corps does not require Individual Permit review for all surface coal mining projects, a thorough evaluation of the proposed mining impacts on relevant public interest review factors, including the cumulative effects thereof, is not conducted. The effects of mining activities on public interest review factors should include an evaluation of the activity's impacts on factors including conservation, aesthetics, general environmental concerns, wetlands, fish and wildlife values, economics, flood hazards, floodplain values, land use, recreation, water supply and conservation, water quality (due to elevated levels of lead, and arsenic, increased sediment load, selenium, sulfate, total dissolved solids, magnesium, manganese, acidity, conductivity, nitrate/nitrite), safety, food and fiber production, consideration of property ownership, and needs and welfare of the people.
- Activities permitted under NWP 21 result in significant degradation of waters.
- Impacts verified under NWP 21 are more than minimal on an individual and cumulative basis.
- Required compensatory mitigation in association with authorized losses is not successful and therefore minimal impact determinations based on mitigation is not appropriate.
- No work in waters under the existing NWP 21 should be allowed to continue if NWP 21 is suspended (i.e. no grandfathering of any permitted actions, all NWP 21s should be invalidated).

e.3. Suspension: Comments received that *supported* suspension of NWP 21 *beyond Appalachia/Nationwide*:

- NWP 21 should be suspended in other areas of the country. Commenters specifically expressed concern that Alabama and Illinois should be included in this proposal and NWP 21 should be suspended to preclude the use of this permit to authorize discharges of fill material into waters of the United States in these states.

e.4. Modification: Comments received that *supported* or *opposed* modification of NWP 21 in Appalachia or Nationwide:

- Many commenters did not distinguish between the proposed suspension and modification of NWP 21 and instead either expressed general support for NWP 21 or opposition to NWP 21. Some commenters did distinguish between the two actions. If commenters expressed support for suspension in Appalachia, they also expressed support for modification in Appalachia. If commenters were opposed to suspension in Appalachia, they were also opposed to modification in Appalachia. Further, some comments were received stating that modification of NWP 21 should occur nationwide, rather than only in the specified region of Appalachia. Because modification is a long-term activity requiring rulemaking, this action is not addressed in this document. However, modification of NWP 21 will be thoroughly evaluated both in Appalachia and other regions of the country before expiration of the NWPs in 2012.

f. Agency Coordination: As described above, EPA, DOI (including U.S. FWS and OSM), and Army signed an interagency MOU, wherein the Corps agreed to propose to modify NWP 21 in the Appalachian Region of six states to preclude its use to authorize the discharge of fill material into waters of the United States in association with surface coal mining activities.

f.1. By letter dated 7 August 2009, EPA stated it strongly supports both the suspension and modification of NWP 21 in the Appalachian region. They state that consideration of proposed mining actions under an Individual Permit, rather than a NWP, would offer significant improvements because this evaluation would allow for further review of potential adverse cumulative environmental impacts and enhanced opportunity for public participation. The EPA cited technical data that they indicate provides evidence that surface coal mining operations result in long-term impairments to aquatic biota, and that such operations potentially violate water quality standards.

f.2. By letter dated 26 October 2009, DOI stated they support the proposal to modify NWP 21 to prohibit its use in the Appalachian region of six states, and to suspend the use of this permit in six states of the Appalachian region while the longer term modification process is considered. They stated that numerous downstream units of the National Park System are being adversely affected by impacts associated with historic and ongoing surface coal mining operations, and that it is very difficult to assess the sources of upstream contributions of sedimentation and other waterborne pollutants resulting from surface coal mining operations permitted under the current NWP 21. They stated that the suspension and evaluation of modification to NWP 21 should result in individual analysis of surface coal mining proposals that will help determine each operation's potential contribution to downstream sedimentation or pollutants that may adversely affect managed resources. They encourage the Corps to ensure that the revised permitting process contains a requirement for a cumulative impacts analysis. They urged the Corps to ensure that any preamble statements regarding changes in surface coal mining practices since 1982 be based upon and supported by accurate historical data. They stated OSM's Appalachian Regional Office is willing to work with the Corps on this matter.

4. DECISION CRITERIA: Two decision criteria were established to evaluate each alternative that was considered by the Corps in association with the proposal for NWP 21. The first criterion deals with the Corps authority under Section 404(e) to verify only those activities under a NWP that result in no more than minimal adverse environmental effects when considered individually and cumulatively. To determine whether an alternative meets this criterion, the following question was asked: "Would this alternative better ensure compliance with Section 404(e) of the Clean Water Act?" The second criterion deals with specific regulations the Corps must follow before existing rules or policies are modified. In this case, a final agency action such as modification of a NWP must go through the rulemaking procedures, while an interim action of suspension is available immediately following opportunity for

public comment on the proposed action. To determine whether an alternative meets this criterion, the following question was asked: "Can this alternative be implemented immediately?"

5. ALTERNATIVES: The following is a discussion of alternatives considered by the Corps based on the Federal Register notice and based on public comment. For a summary of whether each alternative met decision criteria, see Table 2.

a. **Alternative 1: No Action Alternative (Do not suspend NWP 21 in Appalachia):** The no action alternative would allow the current NWP 21 permitting framework to continue. Districts would continue to process NWP 21 pre-construction notifications and would have the opportunity to exercise discretionary authority and require Individual Permit evaluation if they find that proposed surface coal mining activities would result in more than minimal individual and cumulative adverse effects on the aquatic environment and other public interest review factors. While this alternative is available immediately, continued verification of activities under NWP 21 will continue to raise concerns about whether using NWP 21 to authorize surface coal mining activities in this area of Appalachia results in impacts to aquatic resources that are greater than minimal. Therefore this alternative brings into question the compliance of NWP 21 with Section 404(e) of the Clean Water Act.

b. **Alternative 2: Suspend NWP 21 in the six state region in Appalachia:** This alternative would result in the suspension of NWP 21 in the Appalachian region, as an interim action while modification of this permit is considered. This alternative would allow the Corps additional time to determine whether NWP 21 should be modified in the six state Appalachian region and to complete the necessary steps in the rulemaking process. If NWP 21 is suspended in the Appalachian region of six states, individuals who propose surface coal mining projects in the affected region that involve discharges of dredged or fill material into waters of the United States will have to obtain authorization through the individual permit process. Using the Individual Permit process would provide more information for the Corps to consider when making decisions on these permit applications because of increased public involvement, including the opportunity to comment on public notices for individual surface coal mining activities in Appalachia. This additional information could augment the Corps analysis of impacts that proposed discharges of fill material could have on the aquatic environment and on any public interest review factors within the Corps scope of analysis (i.e., within the Corps Federal control and responsibility). Suspending NWP 21 in this region could help address concerns about compliance with Section 404(e) of the Clean Water Act. This alternative does not need to comply with rulemaking provisions because suspension does not constitute rulemaking, as it is an interim decision and not a final agency action. Therefore, this alternative is immediately available.

c. **Alternative 3: Suspend NWP 21 Nationwide:** During the public comment period for this proposal, many comments were received stating that suspension of NWP 21 should occur nationwide, rather than only in the specified region. In accordance with Corps regulations, we may only suspend a permit after opportunity for public comment and opportunity for a public hearing has been provided. Therefore, at this time, this review is limited to the six state region described in the 15 July 2009 Federal Register notice and we would need to publish another Federal Register notice and provide opportunity for public comment before considering suspension of NWP 21 in areas outside the six state Appalachian region. This process would delay the steps we are taking to address concerns about 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. For these reasons, immediate suspension of NWP 21 in other areas outside of the six state Appalachian region is not warranted at this time. During the process for

issuing the 2012 NWP, 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.

Table 2. Summary of alternatives evaluated in association with proposed NWP 21 suspension.

Alternatives	Could alternative better ensure compliance with Section 404(e) of the Clean Water Act?	Can alternative be implemented immediately?
(1) No Action	NO	YES
(2) Appalachian Suspension	YES	YES
(3) Nationwide Suspension	YES	NO

6. RECOMMENDATION: Alternative 2 is the preferred alternative. The Corps has concerns that continued use of this permit in Appalachia may result in more than minimal adverse effects to aquatic resources. Activities resulting in more than minimal individual or cumulative impacts to the environment may not be verified under a NWP and instead must be evaluated in accordance with Individual Permit procedures. Suspension of this permit in the Appalachian region will ensure the Corps appropriately evaluates these complex activities through Individual Permit procedures. Suspending NWP 21 in the Appalachian region will help to better ensure compliance with Section 404(e) of the Clean Water Act while the Corps continues to evaluate whether NWP 21 should be modified or allowed to expire in 2012.

7. IMPACTS OF DECISION:

a. Impacts of the proposed suspension of NWP 21 on the regulated public: Since the Federal Register notice was published in July 2009, potential applicants were notified that they may wish to submit Individual Permit applications in lieu of NWP 21 pre-construction notifications (PCNs), since NWP 21 could be suspended before a Corps district makes decisions on those NWP 21 PCNs. Applicants with pending NWP 21 PCNs at the time the July 2009 Federal Register notice was published were notified of the option to work with the appropriate Corps district to withdraw that NWP 21 PCN and apply for an Individual Permit, or if appropriate, submit a PCN for a different NWP that could authorize those proposed activities (e.g., NWP 49 for remaining activities or NWP 50 for underground mining activities).

b. At the time of this decision, it is estimated that there are approximately six pending NWP 21 PCNs being processed in the Corps districts that would be affected by suspension of NWP 21 in this region. If NWP 21 is suspended, the Corps districts will work with these applicants to discuss the process for submitting applications for evaluation of these activities as Individual Permits. If the applicants submit Individual Permit applications, the Corps districts will immediately advertise the proposals on Public Notice and prioritize the evaluation of these projects. Public notices will afford resource agencies and the public with an opportunity to comment on the proposals. After the public notice comment period closes, the Corps will continue to work with the applicants and other interested parties to resolve any concerns as expeditiously as possible and make final permit decisions.

c. Activities that were verified under NWP 21 by district engineers prior to the effective date of the suspension will continue to be authorized by that NWP, unless the district engineer takes action to modify, suspend or revoke a particular NWP authorization on a case-by-case basis in accordance with the procedures at 33 CFR §330.5(d). Verified work in waters of the United States at many of these sites has

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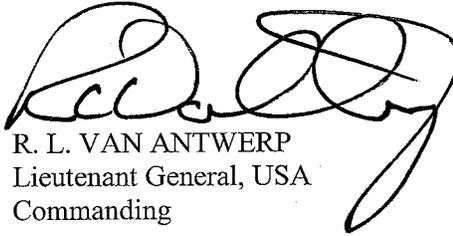
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been completed already under the terms and conditions of the NWP 21 verifications. This completed work in waters continues to be authorized by NWP 21. For discharges of dredged or fill material into waters of the United States that have not been completed, applicants will have until 18 March 2012 to complete authorized work. Further, under the grandfathering provision, permittees will have until 18 March 2013 to complete the authorized work if they have commenced work or are under contract to complete the activities prior to that date.

d. 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 in the affected region; such discharges must be applied for and evaluated under the individual permit process.

8. CONCLUSION: I have reviewed and evaluated the information gathered through public comments on this proposal to suspend NWP 21 in the Appalachian region of six states. I have fully considered the public and agency comments received in response to the proposal to suspend NWP 21, as well as the alternatives discussed above. I have determined that suspending NWP 21 in this region is necessary to more appropriately evaluate surface coal mining impacts in the six state region of Appalachia through an Individual Permit process.

The Corps will publish this decision to suspend NWP 21 in the Federal Register and the suspension will be effective on the date of publication in the Federal Register. This suspension will remain in effect until NWP 21 is modified or expires. Corps districts will also publish local public notices announcing the suspension of NWP 21 in the Appalachian region of the six affected states. Once this suspension goes into effect, pending and future requests for Section 404 Clean Water Act permits for discharges of dredged or fill material that could have previously been evaluated under the terms and conditions of NWP 21 in the Appalachian counties of the six affected states will be processed through the Individual Permit procedures.



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