

## Qs and As on the “Fill” Rule

Q: Are the Corps and EPA proceeding with a rule change that would allow new dumping of mining wastes in the Nation's waters?

A: The rule does not change current practice with regard to the regulation of materials placed in the Nation's waters, including those generated by mining— if it wasn't allowed before, it won't be allowed now.

\* No discharge could take place without a permit that meets Clean Water Act standards. The rule itself does not authorize any discharges.

\* This rule was proposed in 2000 by the Clinton Administration. It provides for the Corps to adopt EPA's 25-year old approach in the definition of “fill material,” and therefore improve the regulation of discharges under the Clean Water Act.

Q: If this rule isn't being done to allow the dumping of mining wastes in the Nation's waters, then why is it being done?

A: The rule is a clarification of Clean Water Act definitions that would harmonize the Corps and EPA regulations and would reflect current practice. The rule also provides environmental benefits beyond clarification of the definitions.

\* For example, the rule would clarify in regulation that the discharge of trash or garbage will not be permitted in the Nation's waters. The rule would ensure that any proposal to site a landfill in wetlands would be subject to Clean Water Act review.

\* Although the rule will not stop mountaintop coal mining, in the course of completing this rule we are undertaking complementary actions to further protect the environment. In particular, the Army Corps of Engineers will apply stricter standards for its permit program throughout Appalachia that are currently only in place in one state (West Virginia). In addition, the Office of Surface Mining will revisit its rules to minimize impacts around streams.

\* Limitations have already been adopted to reduce the size, number, and cumulative impacts of these mining discharges, as well as to mitigate more effectively for these impacts, to ensure that mining activities are conducted in an environmentally sound way.

\* The federal agencies maintain their commitment to no net loss of the Nation's wetlands. In particular, the agencies are completing work on a comprehensive action plan to ensure that any authorized losses of waters are fully and effectively mitigated, by replacing their lost functions and values.

Q: What about the allegations that this rule merely makes legal what the agencies have been authorizing illegally over the last decades?

A: Notwithstanding the allegation that the Corps has been illegally approving valley fills, there is no court decision holding that Corps regulation of valley fills is illegal.

\* Permits issued by the State of West Virginia and the Corps of Engineers authorizing a mountaintop coal mine in West Virginia were challenged in Federal court in 1998. The claims against the Corps were settled, including agreement that the Corps would continue to regulate valley fills. The subsequent decision against the State finding that certain state regulation was

illegal was overturned on appeal in the Federal 4<sup>th</sup> circuit.

Q: Why aren't the Corps and EPA waiting until the completion of the ongoing Mountaintop mining environmental impact study (EIS) before moving forward with this rule?

A: The decision to proceed with the EIS was predicated on the continued application of the regulatory approach affirmed in the final rule.

\* In 1998, in a lawsuit involving coal mining discharges, environmental plaintiffs settled the case against the Federal agencies in an agreement that specified that we would continue to apply the regulatory scheme provided for in this rule.

\* The Federal agencies are preparing a comprehensive draft Environmental Impact Statement to evaluate the environmental affects of mountaintop mining in Appalachia and to propose changes to Federal programs that would further improve the regulation of these activities. The draft EIS is expected to be made available for public comment this summer. The agencies expect to use the results of this evaluation to continue to make improvements to the way coal mining activities are regulated to ensure that all Federal decisions are consistent with the law and provide effective protection for human health and the environment.

Q: Is the rule different from the Clinton Administration proposal?

A: The draft final rule differs in two minor ways:

\* in response to environmental organization and other comments, the draft final rule takes a concept discussed in the preamble to the proposal— that some materials are “unsuitable fill”— and incorporates it into regulation itself; and

\* the preamble clarifies that end-of-pipe discharge limits (effluent guidelines) will continue to apply to the pollutants they cover; (Although the effluent guideline provision in the proposed regulatory language was removed, because commenters found it confusing, the approach that would be followed with respect to effluent guidelines would remain the same as in the proposal.)

Q: How can the rule distinguish between mining discharges, which would be allowed, and garbage or trash, which would not?

A: Again, this rule retains EPA's longstanding definition of “fill,” and is consistent with the Corps' longstanding practice of reviewing and authorizing certain mining discharges. These discharges have been regulated under the current framework for 25 years, when done in compliance with State water laws, surface mining reclamation laws, and the Clean Water Act. In drafting the rule, the agencies took advantage of the opportunity, informed by public comment, to define in regulation certain garbage and trash discharges as inconsistent with this approach.

Q: How can the rule sanction discharge of toilets into waterbodies?

A: The rule prohibits the discharge of trash or garbage in the Nation's waters. However, the preamble to the rule notes that sometimes certain materials that people might otherwise throw away can actually be clean up and used for a beneficial purpose. Used, but clean, porcelain toilets and sinks are given as an example of material that has been used to create environmentally beneficial artificial reefs in coastal areas, which serve as habitat for fish and other aquatic species.