United States Environmental Protection Agency
Office of Water
Washington, D.C. 20460

United States Army Corps of Engineers
Washington, D.C. 20314

US ARMY CORPS OF ENGINEERS

MEMORANDUM FOR THE FIELD

To: U.S. Army Corps of Engineers District Commanders
Huntington, Louisville, and Pittsburgh

U.S. Environmental Protection Agency Regional Administrators
Regions III, IV, and V

Subject: Meeting the Requirements of the CWA Section 404 Permit Program

Among our highest priorities in the joint implementation of the Clean Water Act Section 404 regulatory program is to ensure effective protection for human health and the environment through fair and consistent application of the permitting requirements established under this program. An important aspect of obtaining compliance with these requirements is providing the public with the information necessary to understand what the law requires of them and to provide contact information where questions regarding the applicability of the regulatory program to proposed activities in waters of the United States can be answered.

In this regard, we are becoming increasingly aware of circumstances in Kentucky, West Virginia, and Ohio involving coal mining operations that may be discharging dredged or fill material in waters of the United States without current CWA authorization or a permit application to the Corps of Engineers. If this information is correct, we need to work quickly to address this situation and ensure compliance with the requirements of CWA Section 404 while avoiding disruptions to legitimate mining activities. As a first step, it is critical to address any questions that may exist regarding the application of CWA Section 404 to the various mining related activities that occur in waters of the U.S., including construction of valley fills and coal waste impoundments, road crossings, in-stream mining, placement of sediment ponds, and similar mining discharges. The Corps has previously worked to clarify, for example, the need for coal operators to apply for reauthorization under the recently issued Nationwide permit #21 for their ongoing mining related discharges previously approved under permits that expired in February, 2003.

We believe it is necessary to provide information as soon as possible to the coal mining industry that reiterates CWA Section 404 permitting requirements and prompts those that may be discharging in waters to apply immediately to the Corps for a CWA Section 404 permit. To help you in your efforts to assist coal operators in ensuring that their activities comply fully with the requirements of CWA Section 404, we are attaching a fact sheet that answers some frequently asked questions regarding the regulatory program and encourages anyone with questions to

contact the Corps or EPA for additional clarification. Using the Corps Public Notice procedures and other methods available to you that ensures broad distribution within the coal mining industry, we request that you coordinate quickly to provide this fact sheet to mining companies within your Districts and Regions reiterating their obligation to comply with the requirements of the CWA.

We appreciate your immediate and personal attention to this very important matter. If you or your staff have any questions regarding this memorandum, please contact Mr. Mark Sudol, Chief of the Regulatory Branch, Corps Headquarters at (202) 761- 4750 or Mr. Gregory Peck, Deputy Director of EPA's Wetlands Division at (202) 566-1359.

G. Tracy Mehan, III
Assistant Administrator for Water
U.S. Environmental Protection Agency

Robert H. Griffin
Major General, USA
Director of Civil Works

Attachment

EPA

US Army Corps of Engineers

Clean Water Act § 404 Permit Program & Surface Coal Mining Activities

Overview of Clean Water Act

Section 301(a) of the Clean Water Act (CWA or "Act") generally prohibits a "discharge of a pollutant" unless you have obtained, and comply with, a permit issued under the Act. You generally are subject to the requirement to obtain a CWA permit whenever your activity results in the addition of a pollutant from a point source to waters of the United States. Some examples of the materials included in the Act's definition of pollutants are: dredged spoil, solid waste, chemical wastes, rock, sand, cellar dirt, and industrial waste. Point sources subject to the Act's permitting requirements include not only pipelines, outfalls, and ditches, but also equipment such as bulldozers, backhoes, clamshells, and draglines. The CWA applies to a wide range of waterbodies such as lakes and streams as well as wetlands.

The Act creates two types of permits, one issued under § 404 of the Act, which applies to discharges of dredged or fill material, and the other under § 402, which applies to all other types of pollutants (for example, wastewater and industrial effluents). This fact sheet focuses on § 404 permitting, and provides a series of questions and answers to help explain that program's applicability.

Questions and Answers on § 404 Permit Program

Why would I need a § 404 permit?

If you are engaged in an activity involving the discharge of dredged or fill material to waters of the United States, then you need to get a permit under CWA § 404, which authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for such material.

Under the regulations "dredged material" subject to § 404 permitting is defined as material dredged or excavated from waters of the United States. 33 C.F.R. 323.2(c). In addition to dredged material, § 404 also applies to "fill material," which the

regulations define as material that changes the bottom elevation of waters of the United States or converts waters of the United States to dry land. 33 C.F.R. 323.2(e)(1). The regulations provide some examples of fill material, specifically including overburden from mining or other excavation activities as well as materials used to create any structure or infrastructure in waters of the United States such as an embankment for a sediment pond or slurry impoundment. 33 C.F.R. 323.2(e)(2).

What are some examples of mining related activities that may require a CWA permit?

Mining related activities conducted in streams or wetlands typically will result in the addition of dredged or fill material and thus need a CWA permit. For example, placement of excess spoil in valley fills, construction of slurry impoundments, mine face-ups, dams for sediment ponds, road crossings, in-stream mining that includes discharges, and similar activities that involve the placement of materials in a stream or wetland require a CWA § 404 permit. If you have any question whether or not your activity involves a discharge that requires a § 404 permit, you should contact the Corps of Engineers.

Many of the streams affected by mining activities do not have water in them all the time; some only when it rains. Is a CWA permit required when my mining activities are in these small streams?

It is best to contact the Corps of Engineers before you conduct any mining activity in a stream, even if the stream only flows after rain events or snowmelt. The Corps will be able to advise you whether or not the stream in which you are proposing to conduct your mining related activity (e.g., build a valley fill) is subject to the CWA.

What kinds of § 404 permits are there?

There are two basic types of permits available under § 404: individual permits and general permits. Individual permits are generally required for potentially significant impacts and involve a project-specific review of potential impacts and alternatives. General permits are available for categories of activities that are similar in nature and will cause only minimal adverse individual or cumulative effects. General permits may be issued on a nationwide, regional, or statewide basis and provide an expedited means for permitting the covered categories of activities. The Corps of Engineers recently re-issued and revised its nationwide general permits on January 15, 2002, including NationWide Permit (NWP) 21, which applies to the category of surface coal mining activities authorized by the Surface Mining Control and Reclamation Act.

I already have a mining permit under the Surface Mining Control and Reclamation Act, Do I still need a § 404 permit for any associated discharges of dredged or fill material?

Yes. Permits issued under the Surface Mining Control and Reclamation Act (SMCRA) do not substitute for a CWA § 404 permit. However, as discussed above, CWA § 404 authorization may be available for a SMCRA permitted mining activity through the use of a general permit, Nationwide Permit 21, instead of a more information intensive individual § 404 permit.

I applied for and received § 404 authorization in the past under NationWide Permit 21, do I need to do anything more?

NationWide (NWP) 21 was revised and re-issued on January 15, 2002 (67 Fed. Reg. 2020).The CWA limits the duration of NWPs to a period of no more than five years, 33 U.S.C. § 1344 (e)(2). As a result, old NWP 21 expired on February 11, 2002. If the work covered by old NWP 21 was under construction, or under contract for construction, by February 11, 2002, however, the Corps provided a limited grandfathering period under which you had until February 11, 2003 to complete the activity authorized by old NWP 21. 67 Fed. Reg. 2020. If the previously authorized activity continued (or is continuing) after that date, then re-authorization under new NWP21 is required, and you will need to contact the Corps to seek authorization under new NWP 21. The reauthorization may require additional information and may include additional mitigation requirements to meet the revised conditions contained in the new NWP 21 general permit. The information needed and steps to do this are explained in the January 15, 2002, NWP permit reissuance package, which is available on the Corps Web Site at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/nationwide_permits.htm.

I'm still confused about whether I need a § 404 permit or how I should apply for one; what should I do?

You should contact the regulatory program in the Corps District for the area in which you are located. A complete list of such contacts is available on the Corps' Webpage at: http://www.usace.army.mil/inet/functions/cw/cecwo/reg/district.htm.