



Kentucky  
Department for Surface Mining  
Reclamation and Enforcement

# Reclamation Advisory Memorandum

From: Carl E. Campbell, Commissioner

C.E.C.

Date: March 10, 2000

Subject: Section 404 Permits for Fills

## RAM # 133

Attached for your information is the February 28, 2000 letter I received from Mr. Thomas C. Welborn, Acting Deputy Director of the Water Management Division, U.S. Environmental Protection Agency, Region 4, Atlanta, Georgia.

The letter emphasizes that mining operations discharging dredged or fill material into waters of the United States must obtain permits from the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, and discusses the applicability of Corps Nationwide Permit #21 to such fills. The letter expresses EPA's concern that the coal mining industry in Kentucky is not adhering to these requirements, and describes possible enforcement actions.

We provide the EPA letter as a service to you and as a courtesy to EPA.

As the letter suggests, if you have questions please contact Mr. Thomas Welborn at (404) 562-9354 or Mr. Eric Sommerville at (404) 562-9414.

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FEB 28 2000

Mr. Carl E. Campbell  
Commissioner  
Department for Surface Mining Reclamation and Enforcement  
Frankfort, KY 40201

Dear Mr. Campbell:

As you are aware, the U.S. Environmental Protection Agency (EPA) has participated in a number of interagency meetings with its federal and state partners in the Commonwealth of Kentucky in an attempt to reconcile permitting and regulatory issues pertinent to coal mining in eastern Kentucky. Attention has been brought to these issues in large part due to the Settlement Agreement of the Bragg et al. v. Robertson et al. lawsuit in West Virginia and the ongoing development of the programmatic environmental impact statement.

EPA is concerned that permitting requirements applicable to the federal Clean Water Act (CWA) are not being adhered to by the coal mining industry in Kentucky. Consequently, EPA has initiated an investigation into potential unauthorized discharges of fill material into waters of the United States associated with disposal/storage of soil and rock in valleys adjacent to mining operations in the Appalachian region of Kentucky. Such discharges require prior authorization from the applicable district office of the U.S. Army Corps of Engineers (COE). In order for EPA to fulfill its responsibilities under Sections 309 and 404 of the CWA, the Agency is authorized to gather information pertaining to such matters under Section 308 of the CWA.

Failure to obtain a Section 404 permit from the COE prior to discharging dredged or fill material into waters of the U.S. is a violation of Section 301(a) of the CWA, which specifically prohibits the discharge of dredged or fill material into waters of the U.S. by any person, unless authorized by a permit under Section 404 of the CWA. Both the landowner and the person performing the unauthorized action may be liable for the discharge. Section 309(a) of the CWA gives EPA the authority, upon making a factual finding of violation of Section 301(a), to require cessation of all work, and where appropriate, to remove the fill material and/or restore the site to pre-discharge conditions. Further, Section 309(b) authorizes EPA to commence civil action in U.S. District Court seeking injunctive relief and/or penalties of up to \$27,500 per day per violation for each day that the unauthorized fill material is left in place. In addition, Section 309(g) of the CWA authorizes EPA to assess administrative penalties of up to a maximum of \$137,500 for violations of Section 308 or 404 of the CWA.

On August 27, 1999, the COE, Louisville District, acting in its capacity as the lead Corps District in the Commonwealth of Kentucky, proposed a regional condition for the use of Nationwide Permit (NWP) #21, *Surface Coal Mining Activities*, limiting its applicability in eastern Kentucky to operations with fills affecting watersheds of less than 250 acres. The regional condition will be applicable in watersheds drained by the Kentucky River, Licking

River, Big Sandy River, Little Sandy River, and the Cumberland River. Valley fills in streams draining watersheds of 250 acres or greater will require an individual Section 404 permit from the applicable COE district. NWP #21 will remain applicable for fills affecting watersheds of less than 250 acres, but to qualify for NWP #21, the applicant must provide pre-construction notification to the COE. In addition, when the nationwide permits were reissued in 1997, NWP #21 was revised to include a requirement for a mitigation plan to compensate for the adverse impacts to aquatic resources on the project site. This required plan must be approved by either the U.S. Office of Surface Mining (OSM) or the State and must be submitted to the COE with the applicant's pre-construction notification (61 Fed. Reg. 241).

In November 1999, EPA issued information requests pursuant to Section 308 of the CWA to ten mining companies who received mining permits from DSMRE authorizing valley fills associated with operations in eastern Kentucky pursuant to the Surface Mining Control and Reclamation Act (SMCRA). Responses to these inquiries reveal a common misconception among the industry about its obligations under the CWA. Some operators suggested that no Section 404 permit was required for their operation, because it had been permitted by DSMRE under SMCRA authority, and by the State of Kentucky, Division of Water, under Section 401 of the CWA. Other responses suggest that even those mining companies who are familiar with the 250 acre threshold discussed previously believe that no Section 404 permit is required at all for fills affecting watersheds less than 250 acres. Neither of these positions is accurate and may subject some mining companies to enforcement actions under CWA authority.

EPA encourages potential applicants to begin coordination for Section 404 permits with the COE and EPA prior to issuance of a SMCRA permit. This early coordination will permit all applicable regulatory agencies to review proposed projects, will insure compliance with all applicable state and federal permitting requirements, and will ultimately reduce the applicants' expenditure of time and resources during the permitting process.

EPA will continue to cooperate with our federal and state partners to insure that the mining industry understands and complies with all applicable federal and state regulations and policies. The objective of EPA is not to unduly punish the industry, but rather to insure that oversight and enforcement authorities are implemented in an equitable and consistent manner across industry sectors and throughout the Appalachian region.

EPA appreciates the insight provided by DMSRE's involvement in these negotiations to date, and looks forward to continuing our efforts in the future. If you, your staff, or any mining companies have any questions concerning EPA's position or CWA authorities, please contact me at (404) 562-9354 or Mr. Eric Somerville at (404) 562-9414.

Sincerely,



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