Document Log Item

Release

Addressing

From	To
Ann Campbell/DC/USEPA/US	Martha Segall/DC/USEPA/US@EPA Elaine Suriano/DC/USEPA/US@EPA
CC	**BCC**
Brian Frazer/DC/USEPA/US	

Description

Form Used: Memo

Subject	Date/Time	
Fw: *Confidential: Fw: Final interagency MTM documents (DO NOT CIRCULATE OR RELEASE)	06/11/2009 11:58 AM	

# of Attachments	Total Bytes	NPM	Contributor
3	4,192,220		Brian Frazer

Processing

Comments

Clear Category

Non-responsive

Release

Printed

Clear MARKER

Round01 NA

Round02

Body

Document Body

----- Forwarded by Ann Campbell/DC/USEPA/US on 06/11/2009 11:57 AM -----

From: David Evans/DC/USEPA/US
To: Linda Boornazian/DC/USEPA/US@EPA, Marcus Zobrist/DC/USEPA/US@EPA, Robert Hargrove/DC/USEPA/US@EPA
Cc: Ann Campbell/DC/USEPA/US@EPA
Date: 06/11/2009 09:46 AM
Subject: Fw: *Confidential: Fw: Final interagency MTM documents (DO NOT CIRCULATE OR RELEASE)

Wanted to be sure you all have the final signed documents related to today's announcements on Surface Coal Mining. We are calling Regions at 10:30 this morning, you and any interested staff are welcome to participate.

Dave

David Evans, Director
Wetlands Division
Office of Wetlands, Oceans and Watersheds
(202) 566-0535
----- Forwarded by David Evans/DC/USEPA/US on 06/11/2009 09:42 AM -----

From:	Suzanne Schwartz/DC/USEPA/US
To:	Robert Wood/DC/USEPA/US@EPA, David Evans/DC/USEPA/US@EPA, Brian Frazer/DC/USEPA/US@EPA, Ann Campbell/DC/USEPA/US@EPA, Christopher Hunter/DC/USEPA/US@EPA, Tanya Code/DC/USEPA/US@EPA
Date:	06/11/2009 08:27 AM
Subject:	*Confidential: Fw: Final interagency MTM documents (DO NOT CIRCULATE OR RELEASE)

Finals. DO NOT SHARE OUTSIDE THE AGENCY.
****
Acting Director,
Office of Wetlands, Oceans, and Watersheds
phone: 202-566-1146; fax: 202-566-1147
street address: 1301 Constitution Ave., N.W.
room 7130E

----- Forwarded by Suzanne Schwartz/DC/USEPA/US on 06/11/2009 08:24 AM -----

From:	Gregory Peck/DC/USEPA/US
To:	"Suzanne Schwartz" <Schwartz.Suzanne@epamail.epa.gov>, "Mike Shapiro" <Shapiro.Mike@epamail.epa.gov>
Date:	06/10/2009 07:21 PM
Subject:	Fw: Final interagency MTM documents (DO NOT CIRCULATE OR RELEASE)

Gregory E. Peck
Chief of Staff
Office of Water
U.S. E.P.A.

From: "Boots, Michael J." [[redacted]]
Sent: 06/10/2009 06:43 PM AST
To: <Laura_Davis@ios.doi.gov>; <Rock.Salt@us.army.mil>; Bob Sussman; Adora Andy; <betsy_Hildebrandt@ios.doi.gov>; <matt_lee-ashley@ios.doi.gov>; Allyn Brooks-LaSure; <candice.s.walters@usace.army.mil>; <Eugene.A.Pawlik@usace.army.mil>; <Sarah_Bittleman@ios.doi.gov>; <Meghan_Conklin@ios.doi.gov>; <Jennifer.A.Greer@usace.army.mil>; <William.L.James@usace.army.mil>; Arvin Ganesan
Cc: Gregory Peck; <Kat_Pustay@ios.doi.gov>; "Klasen, Matthew N." <[redacted]>; "Carson, Jonathan K." [redacted]>; "Glunz, Christine M." <[redacted]>; "Maher, Jessica A." <[redacted]>; <craig.schmauder@us.army.mil>; "Salzman, Amelia S." <[redacted]>; "Buffa, Nicole" <[redacted]>
Subject: Final interagency MTM documents (DO NOT CIRCULATE OR RELEASE)

Hello everyone,

Please find attached the three final documents on mountaintop mining for your information. **DO NOT CIRCULATE OR RELEASE**.

Attachments include:
-Interagency MOU (signed by Jackson, Salazar, and Salt)
-Permit coordination procedures (signed by Jackson and Salt)
-Letter from Jackson to Salt with pending CWA permit considerations (signed by Jackson)

PLEASE NOTE: Please do not circulate these. These documents will not be released until after our conference call tomorrow at noon.

Please be in touch with me, Christine, or Jess with any questions over the next couple days.

All the Best,

Mike

Michael Boots
Associate Director for Land and Water Ecosystems
White House Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20530
Main Line: 202-456-6224
Direct: 202-456-[redacted]

Final MTM MOU.pdf Final EPA MTM letter to Army.pdf EPA-Corps MTM Permit Coordination Procedures.pdf

To: William C. Early, Acting Regional Administrator, EPA Region III
A. Stanley Meiburg, Acting Regional Administrator, EPA Region IV
Bharat Mathur, Acting Regional Administrator, EPA Region V
COL Dionysios Anninos, District Commander, USACE Norfolk District
COL Dana R. Hurst, District Commander, USACE Huntington District
COL Michael P. Crall, District Commander, USACE Pittsburg District
COL Keith A. Landry, District Commander, USACE Louisville District
LTC Bernard R. Lindstrom, District Commander, USACE Nashville District

From: Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency

Terrence "Rock" Salt,
Acting Assistant Secretary (Civil Works)
Department of the Army

Re: Enhanced Surface Coal Mining Pending Permit Coordination Procedures

The Environmental Protection Agency (EPA) and the Department of the Army have developed enhanced coordination procedures to respond to the unique challenge before us in reviewing pending surface coal mine permit applications in Appalachia. The purpose of this enhanced coordination process is to provide for timely resolution of issues for those permits about which the agencies have substantial environmental concerns, ensure effective coordination among the agencies and consistent compliance with the requirements of the Clean Water Act (CWA), its regulations and relevant policy, and to expedite review and final decisions regarding pending permits for surface coal mining operations in Appalachian states (OH, PA, WV, VA, TN, and KY). It is also important that we provide additional transparency to the public during the enhanced coordination process. The attached Enhanced Coordination Procedures should be implemented immediately.

In accordance with the attached procedures, this process will apply to those permits for which the Corps of Engineers (Corps) has issued a public notice or coordinated with EPA through the Nationwide Permit coordination process by March 31, 2009. 108 CWA section 404 permit applications for surface coal mining activities in Appalachia will be subject to review in accordance with these procedures. (List attached) The timeframes established in the procedures will ensure timely coordination among the agencies and applicants as we make decisions under the CWA and our regulations.

We understand and appreciate the significant work already undertaken by you and your staff to coordinate in the review of pending CWA permits in Appalachia. We look forward to supporting your efforts as the Enhanced Coordination Procedures are implemented. Your staff should contact Mr. Brian Frazer, EPA Regulatory Branch Chief, or Meg Smith, Corps Regulatory Community of Practice, Chief, with any questions about these procedures.

Attachments

EPA/Corps of Engineers

Enhanced Coordination Process

for

Pending Clean Water Act Permits Involving Appalachian Surface Coal Mining[1]

Issue:

The Corps of Engineers (Corps) has determined there are 108 CWA section 404 permit applications under review for surface coal mining activities proposing to discharge fill material into the waters of the U.S. These applications are being reviewed in 5 Corps Districts covering 6 states (OH, PA, WV, VA, TN, and KY) in Appalachia where the mining is proposed. Many of these permits have been pending for over a year as a result of ongoing litigation and other issues. The review and evaluation of these pending permits poses a unique challenge for EPA and the Corps requiring an enhanced coordination process.

To deal with this unique challenge, EPA and the Corps hereby establish a process for enhanced coordination that:

1. expedites review and final decisions regarding all pending permits,
2. provides for timely resolution of issues for those permits about which EPA has raised substantial environmental concerns,
3. ensures effective coordination among the agencies and consistent compliance with applicable provisions of the Clean Water Act, its regulations and relevant policy, and
4. provides additional transparency to the public during the enhanced coordination period.

The procedures below will apply to applications for individual and Nationwide general permits for which the Corps has issued a public notice or coordinated with EPA through the NWP coordination process by March 31, 2009. These procedures will apply to EPA Regions 3 (Philadelphia), 4 (Atlanta), and 5 (Chicago), and Corps Districts Pittsburgh, Huntington, Louisville, Nashville, and Norfolk. The agencies will continue to rely on existing coordination and review procedures for permit applications public noticed or coordinated after March 31, 2009.

General Review and Coordination Procedures:

- In early March 2009, the Corps districts noted above prepared a list of pending permit applications where the districts anticipated reaching a final permit decision within 60 days. Of this list of 48 permit applications, EPA identified 6 permit applications for which they had substantial environmental concerns. Additional review and coordination was undertaken for these 6 permits. EPA notified the Corps that it did not have concerns about the remaining 42 permit applications. Normal processing of these applications is continuing and permits for several of these 42 have been issued.
- There are 108 permits (List Attached) for which public notices or pre-construction notifications were issued prior to March 31, 2009 that are being reviewed by EPA Regions 3, 4, and 5 in coordination with EPA HQ. Corps Districts will provide EPA Regions with additional available information, including additional information requested from permit applicants, as necessary, regarding these

[1] "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

applications in response to EPA's written request. Within 45 days[2] of receipt of the additional data requested by EPA for these of permit applications, EPA Regions 3, 4, and 5, after review by EPA headquarters, will propose an initial list of permit applications about which the Regions have concerns and permit applications with which the Corps may proceed without further action by EPA. This initial list will identify the nature of environmental concerns EPA has identified, any steps recommended to be consistent with the Section 404(b)(1) guidelines, and actions EPA is recommending to respond to its concerns. EPA's evaluation of these permit applications will be based on the factual considerations shared previously with the Corps and EPA's views concerning compliance with existing statutory, regulatory, and policy provisions.

- The initial list developed by EPA will be transmitted to the Corps and made available to the public on the Websites of the EPA Region involved. Within 14 days after the proposed list is posted on the EPA Website, each EPA Region will identify to EPA headquarters those permit applications raising concern and applications that may proceed without further action by EPA. EPA HQ will then promptly submit to Corps HQ a consolidated EPA list of these permit applications. Permit applications raising concern will be subject to additional coordination and review following the procedures and timeframes identified below. Permit applications not subject to additional review and coordination may be acted on by the Corps without further coordination with EPA.

Enhanced EPA/Corps Coordination Procedures for Permit Applications of Substantial Concern:

- In order to facilitate timely resolution, each Corps District and EPA Region is encouraged to begin discussions immediately (i.e., before the 60 day clock is triggered below) on those permit applications requiring additional review and coordination. This coordination may include phone conversations, field visits, exchange of new information, and other steps that help to reduce the total time necessary to reach agreement on each permit.
- When a permit application is ready for enhanced coordination consistent with the procedures below, each Corps District will provide written notice to the EPA Region. This Corps determination will be based on workload considerations, completeness of information available on each application, and other factors to ensure that the following 60 day coordination process will be as effective as possible. Corps' determinations that particular permits are ready for coordination will be promptly posted on the relevant EPA Regional website.
- Upon receipt of notification from the Corps, each District and Region will begin immediately to coordinate to discuss permit applications EPA has identified as having remaining concerns in an effort to reach timely resolution. Other relevant parties including state agencies, permit applicants, and involved consultants shall be encouraged to participate to facilitate resolution. Each Corps District and EPA Region will have 60 days to coordinate and resolve each permit application of concern. The 60 days begins on the date EPA receives the Corps' written notice described above. Meetings may include face to face discussions or teleconferences. The agencies will coordinate to ensure that a sufficient number of meetings are held to provide an effective opportunity for resolution. Meetings should include all relevant parties including mining companies and their consultants, other state or federal agencies, and agency HQs. EPA and the Corps will strive to adhere to the 60 day timeframe for interagency coordination; however, when workload dictates or issue resolution warrants, EPA or the Corps may seek a 15 day time extension.
- Should the Corps choose to issue a permit after the conclusion of the coordination period and where there are unresolved issues, the Corps will provide, within 10 days after the close of the 60 day period,

[2] If any timeframes in this memo fall on a weekend or Federal holiday, that timeframe is automatically extended to the next business day.

their Regional counterpart a written notice of decision to issue a permit which details how the District is responding to concerns raised by EPA. Such responses may include, for example, revisions to approved discharges, special conditions, or mitigation requirements. The Corps is encouraged to provide EPA with a draft of the permit and decision documents during this period.

- Within 10 days after receipt of the written notice of decision, the EPA Region will either (1) advise the Corps District that it does not intend to pursue further action and the Corps, therefore, is free to make a permit decision or (2) initiate action under CWA Section 404(c)

Considerations:

- These procedures and timeframes are intended to facilitate effective and timely coordination and the agencies will work to adhere to them to the maximum practical extent, recognizing that flexibility may be needed under particular circumstances. The timeframes may be shortened or extended by mutual agreement among the agencies.
- Full and open sharing of information among the agencies is necessary for efficient review of proposed projects.
- This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.
- The policy and procedures contained within this document are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This document does not constitute final agency action on any issue, and any actions contemplated by this document will be carried out in an appropriate administrative process by the agencies in accordance with all applicable laws and regulations.

Effective Date: June 11, 2009

Attachment: List of 108 Permits

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Huntington	200300065	S-5027-99	Hobet Mining	Hewett
Huntington	200400336	898-0715	Bear Fork	Bear Fork
Huntington	200400624	S-5025-97	Independence Coal Company	Constitution Surface Mine
Huntington	200400867	S-45014-04	Central Appal Mining	Remining No. 3
Huntington	200401152	10296	Buckingham Coal	Buckingham Wash Plant
Huntington	200401155	S-2001-05	Brooks Run Mining	Brandy St & Cove Mtn
Huntington	200401451	S-5001-02	Independence Coal Company	Glory Surface Mine
Huntington	200500167	U-3004-06	Catenary Coal Co.	Tenmile Fork Deep Mine
Huntington	200500217	S-4014-01	Bluestone	Contour Auger 1
Huntington	200500421	D-2295	Oxford	Peabody 3
Huntington	200500753	D-2290-1	Oxford Mining	Long Sears Adjacent
Huntington	200500934	898-5694 Am5	Premier Elkhorn	U/T Old Beefhide
Huntington	200501115	O-10-83IBR9	Green Valley Coal Company	Blue Branch Refuse
Huntington	200501198	S-5008-02 S-5021-01	Marrowbone Development	Taywood W & Marrowbone
Huntington	200501211	S-5020-99 AM3	Premium Energy, Inc.	Premium Mills Surface Mine
Huntington	200501275	10397	Oxford	Mizer
Huntington	200501385	10400	Oxford	Halls Knob

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Huntington	200600100	S-5009-00	ICG Eastern, LLC	Jenny Creek Surface Mine
Huntington	200600126	860-0390 Am4	Consol of KY	Area 80
Huntington	200600127	860-5260 Am1	Consol of KY	Slone Br Mine
Huntington	200600821	U-3001-98 IBR5	Catenary Coal Co.	Laurel Fork
Huntington	200602033	S-3016-06	Wildcat	No. 2 Surface
Huntington	200602256	10379	Oxford Mining	Horn
Huntington	200602290	S-7-81	Colony Bay Coal Co.	Colony Bay Surface Mine
Huntington	200700182	S-3011-07	Alex Energy, Inc.	Federal Surface Mine
Huntington	200700282	U-4012-06	Pioneer Fuel	Little Eagle
Huntington	200700285	S-3009-07	Alex Energy, Inc.	Lonestar Surface Mine
Huntington	200700286	S-3010-06	Pioneer Fuel	MT5B
Huntington	200700499	10372	Oxford Mining	Page
Huntington	200700708	10391	Surface Mining Inc	Young Property
Huntington	200701021	10405	Oxford Mining	Kaiser Mathias
Huntington	200800114	U-3016-95	Performance Coal Company	Upper Big Branch Deep Mine
Huntington	200800491	S-5002-07	CONSOL of Energy	Buffalo Mt. Surface Mine
Huntington	200800562	S-4004-07	Eastern Associated Coals	Huff Creek Surface Mine

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Huntington	200800791	S-5002-07	Hobet Mining	Surface Mine No. 45
Huntington	200800805	S-3001-08	Coyote Coal Company	Joes Creek Surface Mine
Huntington	200800830	S-5006-07	CoalMac, Inc.	Pine Creek Surface Mine
Huntington	200800935	U-5010-08	Hampden Coal	Harrys Br
Huntington	200801098	S-5018-08	Frasure Creek Mining	Spring Fork Surface Mine No. 2
Huntington	200802160	10403	B&N Coal	Whigville III
Huntington	200900427	U-5023-92	Argus Energy WV, LLC	Devils Trace No. 2 Punchout
Huntington	200900428	U-5031-08	Consol of Kentucky	Spring Branch No. 3 Deep Mine
Louisville	200301276	897-0430 A1	Candle Ridge Mining	Candle Ridge Mining
Louisville	200500851	867-0440	Cheyenne Resources	Cheyenne Resources
Louisville	200501893	895-0171	Sturgeon Mining	Sturgeon Mining
Louisville	200600756	897-0457 A2	ICG Hazard	ICG Hazard
Louisville	200601124	836-5488, 836-0317	Matt/Co	Matt/Co
Louisville	200601290	877-0167, 877-0168	Licking River Resources	Licking River Resources
Louisville	200601296	898-4150 A1	Clintwood Elkhorn	Clintwood Elkhorn
Louisville	200700069	898-0803	CAM Mining	Cane Branch
Louisville	200700193	898-0400	Premier Elkhorn Coal	Premier Elkhorn Coal

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Louisville	200700217	897-0480	Leeco, Inc.	Stacy Branch Surface Mine
Louisville	200700335	898-0607	Apex Energy	Apex Energy
Louisville	200700393	867-0456	Consol of KY	Razorblade Surface Mine
Louisville	200700400	895-0177	Candle Ridge Mining	Candle Ridge Mining
Louisville	200700400	864-0195	Argus Energy	Argus Engergy
Louisville	200700594	898-0800	Premier Elkhorn Coal	Premier Elkhorn Coal
Louisville	200700595	860-0455	Leeco, Inc.	Elk Lick
Louisville	200700669	836-0338	Miller Bros. Coal	Miller Bros. Coal
Louisville	200700706	858-0206	Johnson Floyd Coal	Johnson Floyd Coal
Louisville	200700733	880-5071	Martin County Coal	Martin County Coal
Louisville	200700815	877-0176	Licking River Resources	Licking River Resources
Louisville	200700867	898-0779	CAM Mining	CAM Mining
Louisville	200701026	836-0341 A1	Frasure Creek Mining	Frasure Creek Mining
Louisville	200701044	898-0712	Apex Energy	Apex Energy
Louisville	200701104	836-0292 A1	The Raven Co.	The Raven Co.
Louisville	200701131	836-0335 A2	Miller Bros. Coal	Miller Bros. Coal
Louisville	200701132	836-0349	Miller Bros. Coal	Frasure Branch Mine

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Louisville	200701190	897-0355 A3	Pine Branch Coal	Pine Branch Coal
Louisville	200701205	836-0307	Matt/Co	Matt/Co
Louisville	200701206	877-0782	Frasure Creek Mining	Frasure Creek Mining
Louisville	200701224	860-5304	Miller Bros. Coal	Miller Bros. Coal
Louisville	200701230	860-8012	ICG Knott Co.	ICG Knott Co.
Louisville	200701301	836-0335	CAM Mining	Tom's Branch Surface Mine
Louisville	200701397	836-0350	FCDC	FCDC
Louisville	200701406	860-0462	ICG Hazard	Bearville North
Louisville	200701445	836-0339	FCDC	FCDC
Louisville	200701504	898-0783 A3	CAM Mining	CAM Mining
Louisville	200701515	897-0456 A10	ICG Hazard	ICG Hazard
Louisville	200701518	898-0799	Clintwood Elkhorn	Clintwood Elkhorn
Louisville	200701582	813-0319	Miller Bros. Coal	Miller Bros. Coal
Louisville	200701644	877-0166	Consol of KY	Consol of KY
Louisville	200701660	880-0066	Martin County Coal	Findlay Branch Mine
Louisville	200800095	898-0817	Premier Elkhorn Coal	Premier Elkhorn Coal
Louisville	200800114	897-0445 A1	BDCC Holdings	Cherries Branch

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Louisville	200800115	836-0356	Wolverine Resources	Jake Fork and Stoney Branch Surface Mine
Louisville	200800138	807-0352	Chas Coal	Chas Coal
Louisville	200800139	898-0646 A1	Apex Energy	Apex Energy
Louisville	200800226	880-8002 A4	Czar Coal	Czar Coal
Louisville	200800239	813-0328	Frasure Creek Mining	Frasure Creek Mining
Louisville	200800408	880-0156	Czar Coal	Czar Coal
Louisville	200800525	877-0191	Middle Fork	Middle Fork
Louisville	200800654	860-0464	Enterprise Mining	Enterprise Mining
Louisville	200800727	813-0310 A1	Miller Bros. Coal	Miller Bros. Coal
Louisville	200800777	897-0455 A3	ICG Hazard	ICG Hazard
Louisville	200800781	836-0348	Wolverine Resources	Wolverine Resources
Louisville	200801368	919-0067	North Fork Collieries	Gilmore Surface Mine
Nashville	200201435	3064	Premium Coal	Refuse Area No.3
Nashville	200400062	3143	Premium Coal	Area 19
Nashville	200400609	3112	Appolo Fuels	Jellico Strip
Nashville	200401108	918-0392	Ikerd Coal	Ikerd Coal
Nashville	200401391	861-0467	CH Development	CH Development

LIST OF 108 PENDING 404 PERMIT APPLICATIONS

District	Corps Number	SMCRA Number	Applicant name	Project Name
Nashville	200501691	3191	Appolo Fuels	Buckeye Springs Mine No. 2
Nashville	200601647	807-0342	Nally & Hamilton	Nally & Hamilton
Nashville	200700820	807-0355	Nally & Hamilton	Nally & Hamilton
Nashville	200900382	8502	Tennessee Land Reclamation	Cherry Branch Reclamation Project
Pittsburgh	200600660	10395	Ohio American Energy	Red Bird South
Pittsburgh	200701180	10399	Oxford Mining Company LLC	Ellis Area

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 11 2009

THE ADMINISTRATOR

Mr. Terrence Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, D.C. 20310-0108

Dear Acting Assistant Secretary Salt:

As you know, the U.S. Environmental Protection Agency, the U.S. Department of the Interior, and the U.S. Army Corps of Engineers, in coordination with the Council on Environmental Quality, have developed a new Memorandum of Understanding and "Interagency Action Plan" designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining is consistent with federal law. One component of the IAP is the establishment by EPA and the Corps of enhanced coordination procedures to improve the joint review of pending Clean Water Act permit applications. EPA has given thought to how we intend to conduct the review of the approximately 110 pending permit applications subject to these enhanced procedures, and I am writing to provide you with a summary of the regulations and key factual considerations that will form the basis for our identification of pending permit applications that will require further coordination between EPA and the Corps.

The Section 404(b)(1) Guidelines promulgated by EPA in conjunction with the Secretary of the Army establish the substantive environmental standards applied in the review of projects proposing to discharge dredged or fill material in waters of the United States. The Guidelines establish a "sequence" of review requiring: (1) an evaluation of all practicable alternatives that meet the project's basic purpose to ensure that only the least environmentally damaging alternative is permitted; (2) taking all appropriate and practicable steps to minimize potential adverse impacts; and (3) compensation for all remaining unavoidable impacts to aquatic resources. In addition, the Guidelines require that no discharge may be permitted that would cause or contribute to "significant degradation" of the waters of the United States. The Guidelines, therefore, will guide our review of the pending permit applications, and we have highlighted particularly relevant provisions below:

- Guidelines Section 230.10(a) provides that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have

less adverse impact on the aquatic ecosystem. The Guidelines require consideration of project alternatives to eliminate and/or reduce the number of discharges of dredged or fill material occurring in the waters of the United States. When evaluating permit applications in light of this provision, key factual considerations include: the adequacy of the alternatives analysis submitted; the number of valley fills; the number of streams to be impacted; and the number and location of sediment ponds.

- Guidelines Section 230.10(b) provides that no discharge may be permitted that would cause or contribute to an exceedance of an applicable water quality standard, violate any applicable toxic effluent standard, or jeopardize the existence of threatened or endangered species. When evaluating permit applications in light of this provision, key factual considerations include: the pre-mining water quality and potential for water quality impacts downstream of proposed sediment ponds, including impacts from selenium, conductivity, pH, turbidity, dissolved solids, and manganese; and potential impacts to biotic integrity and to threatened and endangered aquatic species.

- Guidelines Section 230.10(c) provides that no discharge shall be permitted that will cause or contribute to significant degradation of the waters of the United States. When evaluating permit applications in light of this provision, key factual considerations include: the cumulative effects of the proposed mine in consideration of previous and reasonably foreseeable future impacts; a watershed assessment of total length of streams to be impacted and/or total area of valley fills in waters of the United States; the extent of high-value streams to be impacted, including extent of impacts to critical headwater streams and/or perennial reaches; the geographic location of the proposed mine; and an assessment of impacts based on a watershed-scale evaluation of stream quality, water temperature, stream diversity, etc.

- Guidelines Section 230.10(d) provides that no discharge shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse environmental impacts of the discharge on the aquatic ecosystem. When evaluating permit applications in light of this provision, key factual considerations include: the total length of streams to be impacted by the proposal; the total length of instream mining-related discharges; the total length of waters affected between the toe of valley fill and sediment ponds; and the adequacy of proposed mitigation to fully compensate for impacts consistent with the requirements of the recently revised mitigation regulations.

These are factors EPA intends to use to screen and evaluate the pending permit applications to determine which permit applications require further coordination between EPA and the Corps. To expedite this process and assist in making EPA's decisions efficient, consistent, and transparent, we intend to utilize a database containing information on each of the pending permit applications. We will review the database's parameters and data requirements with your staff in the near future.

I hope that our agencies will be able to reach agreement on the pending permit applications. While this letter lays out factual considerations EPA expects to review when evaluating the pending permit applications, any action EPA takes, including, if appropriate, any

exercise of EPA's authority under Section 404(c) of the CWA to restrict or prohibit the use of a site for disposal of dredged or fill material, will be based on the statute and regulations.

I look forward to this enhanced cooperation and coordination between our two agencies.

Sincerely,

Lisa P. Jackson

MEMORANDUM OF UNDERSTANDING AMONG THE
U.S. DEPARTMENT OF THE ARMY,
U.S. DEPARTMENT OF THE INTERIOR,
AND U.S. ENVIRONMENTAL PROTECTION AGENCY

IMPLEMENTING THE INTERAGENCY ACTION PLAN ON APPALACHIAN SURFACE COAL MINING[1]

JUNE 11, 2009

PREAMBLE

The mountains of Appalachia possess unique biological diversity, forests, and freshwater streams that historically have sustained rich and vibrant American communities. These mountains also contain some of the nation's richest deposits of coal, which have been mined by generations of Americans to provide heat and electricity to millions in the U.S. and around the world. After generations of mining, however, the region's most readily available coal resources have diminished, and the remaining coal seams are less accessible to non-surface mining methods.

In response, a surface mining technique commonly referred to as "mountaintop mining"[2] has become increasingly prevalent in the Appalachian region. Although its scale and efficiency has enabled the mining of once-inaccessible coal seams, this mining practice often stresses the natural environment and impacts the health and welfare of surrounding human communities. Streams once used for swimming, fishing, and drinking water have been adversely impacted, and groundwater resources used for drinking water have been contaminated. Some forest lands that sustain water quality and habitat and contribute to the Appalachian way of life have been fragmented or lost. These negative impacts are likely to further increase as mines transition to less accessible coal resources within already affected watersheds and communities.

With this Memorandum of Understanding (MOU), the Department of the Interior (DOI), U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps)

[1] For purposes of this MOU, "Appalachian surface coal mining" refers to mining techniques requiring permits under both the Surface Mining Control and Reclamation Act (SMCRA) and Section 404 of the Clean Water Act (CWA), in the states of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.
[2] The term "mountaintop mining" may also be referred to as "mountaintop removal" or "valley fill mining."

are announcing this Interagency Action Plan (IAP) designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law. This IAP includes a set of short-term actions to be implemented in 2009 to existing policy and guidance, and a longer term process for gathering public input, assessing the effectiveness of current policy, and developing regulatory actions.

The Federal government has made a commitment to move America toward a 21st-century clean energy economy based on the recognition that a sustainable economy and environment must work hand in hand. Federal Agencies will work in coordination with appropriate regional, state, and local entities to help diversify and strengthen the Appalachian regional economy and promote the health and welfare of Appalachian communities. This interagency effort will have a special focus on stimulating clean enterprise and green jobs development, encouraging better coordination among existing federal efforts, and supporting innovative new ideas and initiatives.

Interagency Action Plan

I. COORDINATION ON REGULATORY PROGRAMS

This MOU formalizes the agencies' IAP for coordinating the regulation of Appalachian surface coal mining. The elements of the plan are:

- A series of interim actions under existing authorities to minimize the adverse environmental consequences of Appalachian surface coal mining;
- A commitment by the agencies to investigate and, if appropriate, undertake longer term regulatory actions related to Appalachian surface coal mining;
- Coordinated environmental reviews of pending permit applications under the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act (SMCRA); and
- A commitment to engage in robust public participation, through public comment mechanisms and Appalachian public outreach events, helping to inform Federal, State, and local decisions.

In addition to the steps taken above, the Federal government will help diversify and strengthen the Appalachian regional economy. This effort will include the agencies to this MOU, and other Federal agencies, as appropriate, and will work to focus clean energy investments and create green jobs in Appalachia.

Coordination of interagency policy discussions and assessment of policy effectiveness will be achieved in consultation with the Council on Environmental Quality.

II. SHORT-TERM ACTIONS TO MINIMIZE ENVIRONMENTAL HARM

The signatory agencies will take the following short-term actions under existing laws, regulations, and other authorities to reduce the harmful environmental consequences of Appalachian surface coal mining.

Before the end of 2009, the Corps and EPA will take the following steps:

- Within 30 days of the date of this MOU, the Corps will issue a public notice pursuant to 33 C.F.R. § 330.5 proposing to modify Nationwide Permit (NWP) 21 to preclude its use to authorize the discharge of fill material into streams for surface coal mining activities in the Appalachian region, and will seek public comment on the proposed action.
- EPA and the Corps, in coordination with DOI's Fish and Wildlife Service (FWS), will jointly develop guidance to strengthen the environmental review of proposed surface coal mining projects in Appalachia under the CWA Section 404(b)(1) Guidelines.
- Recognizing that the regulation of surface coal mining extends beyond CWA Section 404, EPA will improve and strengthen oversight and review of water pollution permits for discharges from valley fills under CWA Section 402, and of state water quality certifications under CWA Section 401, by taking appropriate steps to assist the States to strengthen state regulation, enforcement, and permitting of surface mining operations under these programs.
- The Corps and EPA, in coordination with FWS and consistent with the agencies' regulations governing compensatory mitigation, will jointly issue guidance clarifying how impacts to streams should be evaluated and how to evaluate proposed mitigation projects to improve the ecological performance of such mitigation implemented to compensate for losses of waters of the United States authorized by Section 404 permits.
- EPA, in coordination with the Corps, will clarify the applicability of the CWA waste treatment exemption for treatment facilities constructed in waters of the United States in order to minimize the temporary impacts of mining operations on streams.

Before the end of 2009, DOI will take the following steps:

- If the 2008 Stream Buffer Zone Rule is vacated by the U.S. District Court for the District of Columbia in Coal River Mountain Watch et al v. Kempthorne, 1:08-cv-02212-HHK C, as requested by the Secretary of the Interior on April 27, 2009, the Office of Surface Mining Reclamation and Enforcement (OSM) will issue guidance clarifying the application of the 1983 stream buffer zone provisions to further reduce adverse stream impacts.
- OSM will reevaluate and determine how it will more effectively conduct oversight of State permitting, State enforcement, and regulatory activities under SMCRA.
- OSM will remove impediments to its ability to require correction of permit defects in SMCRA primacy states.

III. DEVELOPMENT OF LONGER TERM REGULATORY ACTIONS TO BETTER MANAGE APPALACHIAN SURFACE COAL MINING

A. OBJECTIVES

The signatory agencies will review their existing regulatory authorities and procedures to determine whether regulatory modifications should be proposed to better protect the environment and public health from the impacts of Appalachian surface coal mining. At a minimum, the agencies will consider:

- Revisions to key provisions of current SMCRA regulations, including the Stream Buffer Zone Rule and Approximate Original Contour (AOC) requirements;
- Eliminating use of Nationwide Permit 21 in connection with surface coal mining in the Appalachian region when the Nationwide Permit Program is reauthorized in 2012; and
- Revisions to how surface coal mining activities are evaluated, authorized, and regulated under the CWA.

B. PROCESS

The signatory agencies will create an interagency working group to coordinate the development of short-term actions, longer term regulatory actions, and coordination procedures for Appalachian surface coal mining. The group will ensure robust public involvement in the development of any proposed actions or regulatory reforms.

For any proposed regulatory revision or other action under this MOU that is a major federal action significantly affecting the quality of the human environment (and is an action subject to NEPA), an Environmental Impact Statement (EIS) will be prepared to inform the decision-making process. At an early stage in the interagency coordination process, the working group will determine whether coordinating these NEPA processes programmatically would more effectively guide regulatory development and decision-making. The interagency group will coordinate with CEQ regarding the implementation of the National Environmental Policy Act (NEPA) in the development of regulatory reforms.

IV. INTERIM INTERAGENCY COORDINATION PROCEDURES

A. Clean Water Act

EPA and the Corps will begin immediately to implement enhanced coordination procedures applicable to the Clean Water Act review of Section 404 permit applications for Appalachian surface coal mining activities that have been submitted prior to execution of this MOU. The goal of these procedures is to ensure more timely, consistent, transparent, and environmentally effective review of permit applications under existing law and regulations. The agencies are issuing these

enhanced joint procedures concurrently with this MOU. Also concurrently, EPA is clarifying the factual considerations it is using to evaluate pending CWA permit applications under the 404(b)(1) Guidelines.

Pending Clean Water Act Section 404 permit applications for Appalachian surface coal mining activities will continue to be evaluated by the Corps and EPA on a case-by-case basis. The agencies will focus their reviews of Appalachian surface coal mining permit applications based on likely environmental impacts with the goal of avoiding, minimizing, and mitigating such impacts to the extent practicable under the CWA Section 404(b)(1) Guidelines and consistent with NEPA. This approach will enable the continued permitting of environmentally responsible projects.

B. Surface Mining Control and Reclamation Act

During 2009, OSM will issue guidance concerning appropriate application of the Stream Buffer Zone rule and other related rules and will ensure that states are implementing their counterpart provisions and SMCRA regulatory programs consistent with the guidance.

V. PUBLIC INVOLVEMENT

This IAP will be accompanied by robust public comment on its short- and longer term actions. The agencies will hold public meetings in Appalachia during 2009 to gather on-the-ground input and encourage ongoing local engagement in the environmental assessment and decision-making process. Additional public participation will occur as agency actions move forward.

VI. GENERAL

A. The policy and procedures contained within this MOU are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This MOU does not constitute final agency action on any issue, and any actions contemplated by this MOU will be carried out in an appropriate administrative process by the action agency in accordance with all applicable laws and regulations.

B. This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.

C. Nothing in this MOU is intended to diminish, modify, or otherwise affect statutory or regulatory authorities of any of the signatory agencies. All formal guidance interpreting this

MOU and background materials upon which this MOU is based will be issued jointly by the appropriate agencies.

D. Nothing in this MOU will be construed as indicating a financial commitment by DOI, the Corps, EPA, or any cooperating State agency for the expenditure of funds except as authorized in specific appropriations.

E. This MOU will take effect on the date shown above and will continue in effect until permanent procedures are established, or unless earlier modified or revoked by agreement of all signatory agencies. Modifications to this MOU may be made by mutual agreement of all the signatory agencies. Modifications to the MOU must be made in writing.

Signed,

Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency

Ken Salazar
Secretary
U.S. Department of the Interior

Terrence "Rock" Salt
Acting Assistant Secretary
of the Army (Civil Works)
U.S. Department of the Army