

June / July 2002 Report
West Virginia Permitting Activities
September 9, 2002

I. INTRODUCTION

Purpose of This Report

The purpose of this report is to update the West Virginia Congressional Delegation and the public on the status of pending West Virginia surface coal mining permit applications containing plans to construct valley fills. The report covers the activities of the Fish and Wildlife Service (FWS), the Office of Surface Mining (OSM), the U.S. Army Corps of Engineers (COE), the U.S. Environmental Protection Agency (EPA), and the West Virginia Department of Environmental Protection (WVDEP) during the period from June 1, 2002, through July 31, 2002. It relates to both the surface mining program under the authority of the Surface Mining Control and Reclamation Act (SMCRA) and water quality programs authorized by the Clean Water Act (CWA). The background for the activities covered by the report and the individual agency responsibilities are discussed in Appendix II.

On May 8, 2002, Judge Charles H. Haden, II of the United States District Court for the Southern District of West Virginia entered a decision in *Kentuckians for the Commonwealth, Inc., v. Colonel John Riverburgh* stating that excess spoil fills may not be permitted solely to dispose of waste under Section 404 of the Clean Water Act. The Judge enjoined the Corps of Engineers from issuing any Section 404 permits that have no primary purpose or use but the disposal of waste. The injunction applied to all activities within the Corps' Huntington District. The Decision has been appealed and is awaiting a decision.

Due to this Decision, permitting activity for mining operations with excess spoil fills has been significantly reduced. No mining operation has received all of the permits necessary to begin operations since the Decision was issued. As a result, the agencies involved in preparing the Report have decided that it will be discontinued until a final judicial decision is reached on excess spoil fills. Once a final decision is issued, the agencies will decide if continued reporting on permitting activities involving excess spoil valley fills is warranted.

II. PERMIT REVIEW STATUS SUMMARY

Since the last report listing seventy-two SMCRA applications for proposed operations and fifteen revision/amendment applications for previously permitted operations, no application received all of the necessary approvals to begin operations.

One application for a proposed operation, Independence Coal S- 4010-01, was terminated and has been removed from the report. Two applications were withdrawn and removed from the report, Kanawha Energy U-3023-00 and Kanawha Energy U-3021-99.

Six applications for new operations were submitted in June and July. The number of pending applications for proposed new operations is now seventy-five and the number of revision/amendment applications remains fifteen. These ninety applications need at least one of the four approvals necessary to begin operations.

Revisions were made to the June and July estimated decision dates for eleven SMCRA applications and four revision/amendment applications. The following is a list of the applications and an explanation of why the estimated decision date was revised:

- Fola Coal Company S-201398 Pending review by the WVDEP Regional office. The estimated decision date is now January 2003.
- Independence Coal S-5012-00 Pending review by the WVDEP Regional office. The estimated decision date is now February 2003.
- CC Coal S-5017-99 Pending review by the WVDEP Regional office. The estimated decision date is now July 2003.
- Wild Cat S-3006-00 Pending submission of corrections by the applicant. The estimated decision date is now December.
- Elk Run Coal S-5028-98 Pending review by the WVDEP Regional office. The estimated decision date is now February 2003.
- White Flame Energy S-5015-01 Pending review by the WVDEP Regional office. The estimated decision date is now January 2003.
- Falcon Land S-5014-01 Pending review by the WVDEP Regional office. The estimated decision date is now March 2003.
- Vandalia Resources O-3001-00 Pending submission of corrections by the applicant. The estimated decision date is now November.
- Hanna Land S-3001-01 Pending submission of corrections by the applicant. The estimated decision date is now September.
- Independence Coal S-3012-99 Pending submission of corrections by the applicant. The estimated decision date is November.

- Coal-Mac S-5013-01 Pending submission of correction by the applicant. The estimated decision date is now March 2003.
- Alex Energy S-000580, Amd1 Pending submission of corrections by the applicant. The estimated decision date is now March 2003.
- Aracoma Coal S-5013-90, Amd1 Pending submission of corrections by the applicant. The estimated decision date is now March 2003.
- Midland Trail Resources S-3010-99, Amd1 Pending submission of corrections by the applicant. The estimated decision date is now December.
- Hobet Mining S-5013-97, IBR1 Pending submission of corrections by the applicant. The estimated decision date is now December.

III. APPENDICES

Appendix I - *West Virginia Permitting Status*

Appendix II - *Background and Agency Responsibilities and Coordination*

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APPENDIX II

Background

There are four environmental permits and/or approvals needed for any coal mining operation proposing to place mining material (excess spoil) in the waters of the United States, i.e., to construct a valley fill. These include a surface coal mining permit issued under authority of the Surface Mining Control and Reclamation Act (SMCRA), and three approvals/permits issued under authority of the Clean Water Act (CWA). The CWA approvals/permits consist of a Section 402 National Pollutant Discharge Elimination System permit, a Section 401 water quality certification, and a Section 404 permit. Five agencies have primary responsibilities related to the review and/or issuance of these approvals/permits; the Fish and Wildlife Service (FWS), the Office of Surface Mining (OSM), the U.S. Army Corps of Engineers (COE), the U.S. Environmental Protection Agency (EPA), and the West Virginia Department of Environmental Protection (WVDEP).

In West Virginia, federal authorization to issue three of the four required approvals/permits has been delegated to WVDEP. The authority to issue the fourth permit, the CWA Section 404 permit, is with COE. Section 404 permits can be either a General Permit for discharges that have only minimal adverse effects or an Individual Permit for projects that have impacts above the minimal level to the waters of the United States.

In the summer of 1998, several West Virginia citizens and the West Virginia Highlands Conservancy filed suit against WVDEP and COE in Federal District Court claiming approval of valley fills and other mining practices were resulting in an inappropriate application of the requirements of CWA and the approved West Virginia program under SMCRA. In December 1998, the parties to the suit, as well as EPA, FWS, and OSM, negotiated a Settlement Agreement for the portions of the litigation dealing with COE activities. The Settlement Agreement committed EPA, COE, OSM, FWS, and WVDEP to two major activities:

1. Prepare an Environmental Impact Statement considering policies, guidance and decision-making processes to minimize certain adverse environmental effects of mountaintop mining operations and to environmental resources that could be affected by the size and location of valley fills, and
2. Develop an interim permitting process, including a Memorandum of Understanding (MOU), providing for interagency coordination to ensure compliance with all applicable federal and State requirements. The interim approach also requires an Individual Permit under Section 404 of CWA for any mountaintop mining operation in West Virginia that has more than minimal adverse effects to the waters of the United States (as specified by the Settlement Agreement, generally those with fills in streams draining watersheds of 250 acres and greater, or those with more than minimal cumulative adverse impacts).

The required MOU was signed by the five agencies on April 7, 1999. This report addresses the MOU and the interim permitting activities discussed under paragraph 2 above. It includes permitting activities for all pending applications proposing to construct valley fills, regardless of whether they qualify for a General Permit or require an Individual Permit under Section 404 of CWA. It includes applications undergoing review by COE or WVDEP at the time the settlement agreement was signed, as well as additional applications received since that time.

Agency Coordination and Responsibilities

Each of the five signatory agencies to the Settlement Agreement has specific duties and responsibilities under applicable laws and regulations. A brief description of these duties follows.

WVDEP is the first agency approached when a mine operator seeks the necessary environmental approvals and permits to conduct a proposed surface coal mining operation. It is responsible for implementation, administration, and enforcement of the SMCRA regulatory program in West Virginia. This includes review and approval of permit applications for surface mining operations as well as inspection and enforcement at the mine site until reclamation responsibilities are completed and all performance bonds are released. WVDEP also has responsibility for the National Pollutant Discharge Elimination System (NPDES) program for coal mining operations in accordance with Section 402 of CWA and the water quality certification required by Section 401 of CWA.

COE is the agency authorized by Section 404 of CWA to issue permits regulating the discharge of dredged or fill material into the waters of the United States, including valley fills. These permits consist of two basic types, Individual Permits which are specific to a particular site and Nationwide permits which are issued under the General Permit process. General Permits may be granted for discharges that have no more than minimal adverse impacts on the waters of the United States. If the discharge may have more than minimal impacts, an Individual Permit under Section 404 of CWA is required. These Individual Permits can be issued only after practicable alternatives which are less damaging to the aquatic environment have been considered and it is determined that the waters of the United States will not be significantly degraded.

EPA is responsible for providing technical assistance to COE for the CWA Section 404 regulatory program and oversight of and technical assistance to WVDEP for the NPDES program.

FWS is responsible for the implementation, administration, and enforcement of the Endangered Species Act. In addition, under the Fish and Wildlife Coordination Act, agencies proposing projects affecting waters of the United States are required to consult with FWS to ensure that fish and wildlife conservation is considered along with other features. Coordination with FWS is required for both SMCRA and CWA actions.

OSM is responsible for oversight of and technical assistance to the SMCRA regulatory program implemented by WVDEP. The oversight provisions of SMCRA do not provide for direct federal review of permit applications nor grant veto authority over the issuance of a specific permit. However, for activities under the MOU, OSM is providing technical assistance to the WVDEP by reviewing pending applications and coordinating with other federal agencies.