



COALEX STATE INQUIRY REPORT - 166

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TOPIC: PERMITTING OF WETLANDS - PROCEDURES FOR NOTIFYING THE ARMY CORPS OF ENGINEERS

INQUIRY: The Army Corps of Engineers (the Corps) is one of the federal agencies that is notified of and given an opportunity to review surface coal mining permit applications (33 CFR 330.5 Nationwide Permits, Paragraph 21). If wetlands are included in the area to be permitted, does the Corps always require the operator to obtain a separate "404 permit" (33 CFR 330.5 (26))? What procedures do the eastern states follow in notifying the Corps of permit applications? Do any states have a single permitting process which satisfies both SMCRA and Section 404 (Clean Water Act, 33 USCS 1344) permitting requirements?

SEARCH RESULTS: A survey of eight eastern states was conducted. The survey began asking each state for comments on how the Corps applies 33 CFR 330.5 (21) versus 33 CFR 330.5 (26) for applications including wetlands. It was quickly determined that the question was too narrowly focused and, as a result, the following set of questions were developed:

1. What procedures does your state follow in notifying the Corps when a permit application is received? Are any different procedures followed, either with the Corps or the applicant, when the area to be permitted includes wetlands? Do the district engineers with jurisdiction for your state generally require separate 404 permits for wetlands (33 CFR 330.5(26)) or are the standard review and permitting procedures sufficient (33 CFR 330.5(21))?
2. Does the Corps require a 404 permit when there will be no net loss of wetlands?
3. Has there been any recent change in the Corps' enforcement of its regulations? In particular, has there been any recent change in the amount or type of information the Corps requests from state regulatory authorities (RAs)?

Copies of the CFR and USCS sections as well as excerpts from relevant Federal Register preambles are attached.

ARKANSAS

1. Arkansas has no wetlands/mining problems. Wetlands are located in the eastern, agricultural, part of the state. Arkansas does not routinely notify the Corps when a permit application is



received. If an area to be permitted included wetlands, the RA would notify the Corps and the state game and fish service to determine the need for a 404 permit.

The state has problems with the Corps and 404 permitting when wetlands occur on abandoned mine land (AML) sites. The RA notifies the Corps and the state game and fish service in such cases. Generally, the 404 permitting process takes six months and requires cite specific permit conditions rather than a nationwide permit. The state has encountered considerable difficulty getting landowners to agree to sign the 404 permit and allow the state right of entry because the 404 remains in effect "in perpetuity". The state is often caught in the middle between the Corps and the landowners.

Arkansas is introducing legislation in Congress to amend the Clean Water Act in the following ways:

- a. Establish a more specific definition of wetlands.
- b. Exempt AML projects from Corps permitting.
- c. Establish a termination date for the 404; once the goals of the permit are accomplished, return the land back to the landowner.

2. The Corps determines the need for 404 permits.

3. The Little Rock Corps office strictly enforces the "perpetual maintenance" aspect of the AML 404 permits. Other Corps offices do not seem to be as strict on this issue.

ILLINOIS

1. The Illinois RA sends notification to the appropriate Corps district office when a permit application is received. It is the Corps' responsibility to determine whether a 404 permit is required and notify the applicant of its determination.

2. Corps makes all determinations on the need for 404 permits.

3. Illinois has a meeting scheduled with the Corps to discuss a number of permitting-related issues. The RA recently received a letter from the St. Louis Corps office requesting that the RA send them more information on each permit application the state receives. The Louisville Corps office continues to request more information from the RA than simple notification of a new permit application. The Corps seems to want the state RA to help them decide if the operator needs a 404 permit.

INDIANA

1. The Indiana RA sends the Corps notification when a new permit application is received. Indiana screens the application in advance for the likelihood of the need for a 404 permit; however, the Corps makes the actual determination. For applications which might require a 404 permit, the RA informs the state fish and wildlife service representative, located in the same



office. The state representative notifies the U.S. Fish and Wildlife Service so that they have the appropriate information in the event the Corps notifies them of the need for a 404 permit for a particular operator.

When necessary, the RA acts as a facilitator or mediator between the operator and the Corps to ensure all of the requirements of the 404 permit are met.

2. The Corps makes all determinations on the need for a 404 permit.M
3. Indiana has not noticed any recent change in the Corps' enforcement of the regulations.

KENTUCKY

1. Western Kentucky has a large number of wetlands. When Kentucky receives a permit application, the RA notifies the applicant if the area to be permitted contains regulated wetlands and requires the operator to contact the Corps for a determination of the need for a 404 permit. If a 404 permit is required, the state will facilitate and coordinate activities among the state agencies (e.g., the Division of Water), the Corps and the operator. The operator is required to follow a stringent set of state regulations whether or not a 404 permit is required by the Corps. For example, the RA notifies the state Division of Water to track the impact of mining on the water quality and may include conditions in the permit requiring avoidance, recreation or mitigation of the wetlands. Permit specific conditions for wetlands are incorporated into the state surface mining permit.

2. The Corps makes all determinations on the need for 404 permits.

3. There has been no change in the Corps' enforcement of the regulations in Kentucky. The state rules regulating mining on wetlands are more stringent than the federal rules. Industry prefers the 404 permit; they find it easier to obtain a 404 permit than a state permit.

MARYLAND

1. The Corps is one of the agencies notified when a surface mining permit application is received. Corps makes its own determinations on the need for 404 permits and sets its own conditions. On January 1, 1991 the Wetlands Protection Act, passed by the Maryland legislature in July, 1989, went into effect. This Act set criteria for wetlands that are the same as the federal criteria. According to this new statute, the state will issue a permit for any wetlands which disturbs less than five acres; the Corps will retain oversight authority. Wetlands over five acres will require a multi-permit application which will trigger coordinated review by the Corps and the other state and federal agencies.

2. The Corps has final authority to require 404 permits.

3. Both Maryland and the Corps have changed. Prior to the enactment of the Wetlands Protection Act, the RA notified the Corps of surface coal mining permit applications and left wetlands



identification and regulation to the Corps. The Maryland Corps district, located in Baltimore, established its authority in requiring 404 permits; however, they conducted little enforcement once the permits were issued. Beginning this January, the state will take a more active role in identification and regulation of wetlands. The Corps has recognized that they are not able to do everything and have to delegate some responsibilities to other agencies.

OHIO

1. The RA sends the Corps notification when a permit application is received. When the RA receives an application which includes wetlands (Ohio does not have much wetlands in the coal mining regions), it usually works directly with the U.S. Fish and Wildlife Service to develop a restoration plan. While the Corps receives information on permit applications and restoration plans for wetlands, they do not usually provide any comments.

2. The restoration plan for a recent wetlands permit, coordinated with the U.S. Fish and Wildlife Service, yielded "no net loss of wetlands". No 404 permit was required: the Corps failed to comment on the plan which had been sent to them.

3. Ohio recently received a request from the Corps to include a notice to surface mining permit applicants indicating that if their permit area includes wetlands they need to contact the Corps. Ohio will send out the notice when the Corps rewrites it, making it more specific to coal mining. The next draft from the Corps is due in about a month.

Most correspondence from the Corps comes from the Huntington, West Virginia office.

PENNSYLVANIA

1. When mining operations effect wetlands, the permitting staff conducts an environmental review and notifies the Corps and appropriate state agencies. The state conducts multi-faceted reviews and tries to incorporate all requirements, including 404 wetlands authorizations, into a single surface mining permit.

2. The Corps determines the need for a 404 permit and issues a separate authorization which may or may not be incorporated into the state permit. Pennsylvania has not encountered a "no net loss" permit request. Operators will generally delete wetlands from their permit area in such instances because the expense is not worth the return.

3. No change in enforcement has been noted.

VIRGINIA

1. There are no significant numbers of wetlands in Virginia. Virginia does not routinely notify the Corps when a permit application is received. The RA would notify the Corps if an area to be permitted included wetlands.



2. The Corps determines the need for a 404 permit.
3. Virginia has "quasi wetlands". It is working with the Corps to establish procedures to regulate these areas.

ATTACHMENTS

- A. 33 CFR 330.5 Nationwide Permits.
- B. 33 USCS 1344 (1990) Permits for dredged or fill material.
- C. 47 FR 31794 (JULY 22, 1982). Interim Final Rule for Regulatory Programs of the Corps of Engineers. [33 CFR Parts 320-330.] {Excerpts}
- D. 48 FR 21466 (MAY 12, 1983). Proposal To Amend Permit Regulations for Controlling Certain Activities in Waters of the United States. [33 CFR Parts 320, 322, 323, 325, 327, 328 & 330.] {Excerpts}
- E. 49 FR 39478 (OCTOBER 5, 1984). Final Regulations for Controlling Certain Activities in Waters of the United States. [33 CFR Parts 320, 323, 325 & 330.] {Excerpts}
- F. 51 FR 41206 (NOVEMBER 13, 1986). Final Rule for Regulatory Programs of the Corps of Engineers. [33 CFR Parts 320-330.] {Excerpts}
- G. 48 FR 30312 (JUNE 30, 1983). Final rule. [30 CFR Parts 816 & 817. Stream Buffer Zones and Fish, Wildlife, and Related Environmental Values.] {Excerpts}
- H. 48 FR 43956 (SEPTEMBER 26, 1983). Final rules. [30 CFR Parts 701, 779,780,783, 784, 816, & 817. Hydrology Permitting and Performance Standards; Geology Permitting.] {Excerpts}
- I. 48 FR 44344 (SEPTEMBER 28, 1983). Final rule. [30 CFR Parts 701, 770, 771, 773, 774, 775, 777, 778, 782, 786, 787 & 788. Permitting -- Processing, General Content, and Legal, Financial, Compliance, and Related Information Requirements of Applications.] {Excerpts}
- J. 47 FR 23886 (JUNE 1, 1982). Final rule. [30 CFR Part 913. Abandoned Mine Land Reclamation Plan for the State of Illinois.] {Excerpts}
- K. 51 FR 40793 (NOVEMBER 10, 1986). Final rule. [30 CFR Part 918. Abandoned Mine Land Reclamation Plan for the State of Louisiana.] {Excerpts}
- L. 52 FR 3004 (JANUARY 30, 1987). Final rule. [30 CFR Part 920. Approval of Maryland Program Amendments.] {Excerpts}