MEMORANDUM OF UNDERSTANDING
AMONG THE U.S. ARMY CORPS OF ENGINEERS,
THE U.S. OFFICE OF SURFACE MINING,
THE U.S. ENVIRONMENTAL PROTECTION AGENCY, AND
THE U.S. FISH AND WILDLIFE SERVICE
FOR THE PURPOSE OF PROVIDING CONCURRENT AND COORDINATED
REVIEW AND PROCESSING OF SURFACE COAL MINING APPLICATIONS
PROPOSING PLACEMENT OF DREDGED AND/OR FILL MATERIAL
IN WATERS OF THE UNITED STATES

## I. INTRODUCTION

The purpose of this Memorandum of Understanding (MOU) among the U.S. Army Corps of Engineers (Corps), the U. S. Office of Surface Mining (OSM), the U.S. Environmental Protection Agency (EPA) and the U.S. Fish & Wildlife Service (FWS) is to provide a framework for establishing alternative joint procedures for coordination under the Clean Water Act (CWA) Section 404 regulatory program to process applications for surface coal mining operations that result in the placement of dredged or fill materials in waters of the United States. Alternative joint procedures for Corps Division and District Engineers are authorized and encouraged by Corps regulations at 33 CFR 325 when another state or Federal agency has responsibilities for approving activities also regulated by CWA Section 404, such as surface coal mining operations under the jurisdiction of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). This MOU describes how these alternative joint procedures could relate to the SMCRA and CWA permitting activities. It strongly encourages SMCRA regulatory authorities and Corps Division and District Engineers to develop integrated permitting processes in coordination with EPA, FWS and other appropriate agencies.

EPA's responsibilities under CWA Section 404 include promulgating and interpreting environmental criteria used in evaluating permit applications under Section 404(b)(1), and coordinating with the Corps of Engineers in the review of Section 404 permit applications. The Corps and EPA share responsibilities for determining the geographic scope of CWA jurisdiction. Authority for FWS's mandated role in this program is provided by the Fish and Wildlife Coordination Act (FWCA) and CWA Section 404 (m). FWS also coordinates with the Corps in the review of Section 404 permit applications. FWS coordinates with SMCRA state and Federal regulatory authorities in the review of SMCRA permit applications in accordance with the 1996 Biological Opinion issued under Section 7 of the Endangered Species Act (ESA).

The Corps is solely responsible for making final permit decisions pursuant to section 404(a) of the Clean Water Act, including final determinations of compliance with the Corps permit regulations, the Section 404(b)(1) Guidelines, and Section 7(a)(2) of the Endangered Species Act. The framework for alternative joint procedures described in this MOU preserves the authorities and responsibilities of each agency while integrating

efforts and establishing joint, concurrent procedures to the extent allowed by statute and regulation.

This MOU strongly encourages Tribes, states, OSM offices for Federal program states and Indian land programs, Corps District/Division offices, and EPA and FWS regional or field offices to develop collaborative processes that emphasize early and close interagency coordination while maintaining applicable and independent jurisdictional roles. It is in the best interest of the government, public, and regulated communities to include as many regulatory programs as possible into a single, coordinated process to avoid duplication of information.

The signatory agencies enter into this agreement with the goals, to the extent practicable and allowable by law, to:

- Avoid and minimize adverse environmental impacts from surface coal mining and reclamation operations as a result of the placement of dredged and/or fill materials in the waters of the U.S.;
- Improve decision-making by making the permit process more transparent and available to the public, more predictable and understandable for the regulated community, and reliant on sound scientific information;
- More effectively catalogue threatened and endangered (T&E) species, cultural, and historic properties, and address related issues at the earliest possible stages of permit review;
- Establish the SMCRA regulatory authority as the suggested focal point for initial data collection, resulting in a complete application;
- Enhance communications through joint pre-permit application meetings;
- Create a collaborative permitting review process with early, close coordination that results in concurrent reviews and in agency decisions that ensure compliance with all applicable Federal and state regulations, laws and guidance;
- Improve the efficiency and effectiveness of permitting steps including timelines, clarity, and predictability in the permit decision-making process; and,
- Improved decision-making under the respective programs and enhance communication among stakeholders and regulators.

This MOU reflects similar administrative mandates to minimize duplication among the regulatory programs [30 U.S.C. 1211(c)(12); 30 U.S.C. 1292(c) and 1303(a), and 33 CFR 322.2(f)(2)]. These statutory and regulatory provisions encourage the best use of available resources so as to prevent, to the maximum extent possible, needless duplication and paperwork, and unnecessary delays in rendering permit decisions.

## II. SCOPE AND APPLICABILITY

A. Sections 503, 504, and 506 of SMCRA provide for state regulatory authorities, pursuant to an approved state regulatory program and with appropriate technical assistance and/or oversight from the OSM, to review applications for, and issue permits to engage in surface coal mining operations. In the absence of a state SMCRA regulatory program, OSM will implement, administer, and enforce a Federal regulatory program consistent with the requirements of SMCRA.

B. Section 404 of the CWA authorizes the Corps, or approved state CWA Section 404 program, to permit the discharge of dredged and/or fill material in waters of the U.S. The Federal regulations at 33 CFR 325 provide for the processing of Department of the Army permits. At 33 CFR 325.2(e) Corps Division and District Engineers are authorized and encouraged to use alternative processing procedures in certain specified circumstances. Specifically, at 33 CFR 325.2(e)(3), Corps Division and District Engineers are authorized and encouraged to develop joint procedures with Tribes, states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures set out in 33 CFR 325.2(a)(1) through (a)(5) "provided that the substantive requirements of those sections are maintained".

C. The coordination process established by this agreement applies to the review and evaluation of permit applications for surface coal mining and reclamation operations resulting in the placement of dredged or fill material in the waters of the U.S. for both the CWA Section 404 and SMCRA regulatory programs. Where practicable, and to the extent allowed by law and regulation, and as agreed to by these agencies, the processes and procedures common to both permitting programs should be conducted jointly or concurrently. This coordinated process, with a minimization of duplicative efforts for both regulators and the regulated community, is in keeping with the implementation goals set out in the CWA, SMCRA, and the National Environmental Policy Act (NEPA).

## III. JOINT PROCEDURES

**A. General.** The procedures for processing applications for CWA Section 404 permits are set forth at 33 CFR 325. Under the authority of 33 CFR 325.2(e)(3) procedures developed jointly with state and other Federal agencies with permit programs for activities also regulated by the Corps may be substituted for the procedures at 33 CFR 325.2(a)(1) through (a)(5), if the substantive requirements of 33 CFR 325.2(a)(1) through (a)(5) are maintained. The agencies find the SMCRA program and the CWA Section 404 procedures have sufficient similarities that Corps District and Division offices can develop joint procedures that will maintain the substantive requirements of those sections. For example:

- A CWA Section 404 application is assigned an identification number, reviewed for completeness, and if incomplete, any additional information necessary for

further processing of the application is requested [33 CFR 325.2(a)(1)]. Similarly, SMCRA regulations discuss the use of an identification number [30 CFR 773.6(a)(3)] and provide for an administrative completeness determination [30 CFR 773.6(a)(1)]. These procedures could be refined in a joint permit process to meet the needs of both agencies.

- When the Corps receives a complete application, a public notice is issued, providing an opportunity for public and agency comments. For incomplete applications, the Corps informs applicants what information must be provided to make a complete application. A second public notice may be issued if changes are made after the first public notice. [33 CFR 325.2(a)(2)]. Once an application is determined complete for SMCRA purposes, SMCRA regulations require publication of a public notice by the applicant for four consecutive weeks, [30 CFR 773.6(a)(1)]. The SMCRA program provides for a longer public notice period and clearly meets the substantive requirements for public participation. The joint procedures could ensure that the public advertisement meets both agencies' public notice requirements.

- All comments received in response to the public notice are considered fully and appropriately addressed in the Corps' permit conditions, NEPA compliance documents, or the administrative record for the application. Further review and processing of substantive matters takes place as appropriate [33 CFR 325.2(a)(3)]. Under SMCRA regulations, any person having an interest may file written objections within 30 days of the last publication of the applicant's public notice [30 CFR 773.6(b)(2)]. Joint procedures could eliminate redundancy by having a single public notice and by ensuring that all public input is shared by the SMCRA agency and the Corps and is placed in an administrative record for use by both agencies. Agreement could be developed on the format for the administrative record.

- The Corps application is reviewed in accordance with NEPA and documentation required by Appendix B of 33 CFR 320-330. Either an environmental assessment (EA) or an environmental impact statement (EIS) is required, unless superseded by a categorical exclusion [33 CFR 325.2(a)(4)]. In certain circumstances (Federal programs, Indian Lands, etc.), OSM retains responsibility for NEPA. Joint procedures could be developed to ensure that, to the extent possible, a single NEPA document is developed to satisfy both the Corps and OSM NEPA responsibilities. Permitting actions approved by a state SMCRA regulatory authority are not considered as Federal actions and do not normally require adherence to NEPA. However, as shown in Appendix B of this MOU, the SMCRA application may have many of the elements normally found in a Corps NEPA document. Joint procedures between a state SMCRA agency and the Corps could assist in soliciting appropriate information to satisfy the Corps' NEPA needs.

- The Corps application is evaluated to determine whether a public hearing (pursuant to 33CFR 327) is needed [33 CFR 325.2(a)(5)]. SMCRA regulations require an informal conference, if one is requested [30 CFR 773.6(c)]. Joint procedures could ensure that a single public forum allows appropriate public input and satisfies the requirements of both the Corps and the SMCRA regulatory programs.

With the exception of the Federal NEPA requirement, the SMCRA application, completeness review, public comment period, and informal hearing processes can be utilized in joint procedures to be developed by Corps District and Division offices to satisfy substantive requirements of comparable elements and steps in the Corps CWA Section 404 application process. This MOU establishes no requirement for state, Federal SMCRA agencies, or Corps offices to enter into collaborative review. However, this MOU strongly encourages that states choosing to develop local MOUs include regional representatives of the signatory and other appropriate agencies for maximum input into this collaborative process.

**B. Joint Procedure Development.** The Corps District/Division and the SMCRA regulatory authority joint procedures may describe how the agencies, in coordination with other relevant state or Federal partners, will participate in pre-application meetings; coordinate the sequencing of the CWA Section 404 permit application process with other authorizations; come to common understandings on technical analyses so as to not issue contradictory permit deficiency letters, findings, or conditions; and describe each agency's role in the process. Appendix A of this MOU identifies corresponding processes for both the CWA (as implemented by the Corps) and SMCRA (as implemented by state or federal regulatory authorities). These processes have similar requirements for information, public participation, review processes, and objectives and may be conducted jointly and/or concurrently in a coordinated process benefiting the regulators, the public, and the regulated community. OSM will provide technical assistance, upon request, to state SMCRA regulatory authorities and Corps District/Division offices in developing state-specific joint procedures.

Improved data collection resulting from a coordinated CWA Section 404 and SMCRA regulatory program should lead to more thorough, descriptive characterization of environmental resources within or affected by the proposed mine plan and this data will improve impact assessments and enhance environmental protection. Agencies are encouraged to adopt and employ standard scientific approaches for data collection and to make such data available to all agencies involved in the regulatory review. Interagency coordination will also allow improved inspection and monitoring of impacts based on changes from the baseline condition and enable mining operations to demonstrate mine plan compliance and reclamation/mitigation success.

Joint procedures developed between Corps District/Division offices and the SMCRA regulatory agencies should improve consistency, permit coordination, and processing time frames with logical, concurrent processes. An understanding of the necessity to collect

particular data (e.g., benthics, hydrological conditions, ESA surveys) at certain times of year should also allow applicants to build lead times into mine plan development. Such clarified regulatory concepts provide a basis for more predictable business and mine planning decisions by applicants and for other stakeholders to evaluate mining proposals.

The SMCRA regulatory authority and District/Division Engineer joint procedures should entertain joint pre-application meetings and site visits to highlight areas of special concern (e.g., jurisdictional determinations, special aquatic sites, unique site conditions, water quality impacts, stream assessment/sampling, T&E species considerations, National Historic Preservation Act (NHPA) issues, etc.), thus maximizing application completeness and adequacy upon submission. This approach is consistent with the current practice of SMCRA agencies and also identified in the Corps regulations at 33 CFR 325.1(b) and 325.2(e)(3).

Joint procedures should detail how and when the SMCRA regulatory authority would consult with the Corps on each agency's concurrent or separate review findings. For example, the applicant would be jointly notified of additional data and/or analysis needs or other shortcomings that must be addressed to satisfy NEPA, SMCRA, ESA, NHPA, CWA Sections 401, 402, and 404, etc. The Corps and SMCRA regulatory authorities would continue to coordinate until the applicant provides all required components and the final permit decisions are made.

Permitting data collection: SMCRA regulatory authorities may elect to modify the SMCRA permit application form to incorporate elements of the CWA Section 404 ENG Form 4345 to create a joint application form that would satisfy the informational needs of CWA Section 404 and SMCRA permitting requirements. Key components of the CWA Section 404 (b)(1) Guidelines, public interest review, NEPA compliance data elements, as well as informational narratives, technical analyses, and affirmative demonstrations by the applicant, should guide the development and successful integration of a joint SMCRA/CWA application (see also Appendix B for corollary CWA and SMCRA data, demonstration, and analytical considerations relevant to joint application development). The Corps regulations allow the District or Division Engineer to utilize local variations of the ENG Form 4345 (Office of Management and Budget (OMB) Approval Number 49-R0420), for the purposes of facilitating coordination with Federal, Tribal, state and local agencies [33 CFR 325.1(c)]. The Corps Division/District Engineers are limited by 33 CFR 325.1(d) in the amount of additional information that may be requested for a complete application (above-and-beyond the ENG Form 4345) and are not authorized to develop additional information forms but may request specific information on a case-by-case basis.

As an alternative to a joint application, Corps Districts could identify additional data needs not satisfied by the SMCRA permit application. Certain information needed for determining compliance with the 404(b)(1) Guidelines (e.g., 40 CFR Part 230.10(a) alternatives analysis) may not be completely addressed in the SMCRA application. To satisfy the CWA Section 404 process, Corps Districts could develop a supplemental

listing of the missing data, information and analyses that could be provided by the applicant for CWA 404 application processing.

The SMCRA regulatory authority, as the primary point of contact for initial data collection, could request that the applicant prepare the appropriate number of application packages, based on the SMCRA application, the Corps ENG Form 4345, and the Corps supplemental information listing. The joint application (or, alternatively, the SMCRA application, ENG Form 4345, and Corps supplemental information package) should be submitted to the Corps and SMCRA regulatory agency to begin completeness review. If the SMCRA regulatory agency becomes the focal point for initial receipt of permit applications packages, Corps Districts and other appropriate agencies should receive application packages as soon after receipt as possible.

Additionally, the OSM Applicant Violator System (AVS) is available as a mechanism in determining whether permit applicants are responsible for or linked to uncorrected violations of environmental laws. Continued data sharing through use of this system presents opportunities for improved interagency coordination in ensuring environmental protection through the permitting process.

Completeness review: Upon development of a joint or supplemental application form, the Corps and the SMCRA regulatory authority should consider the processing steps necessary by each agency to determine application completeness. The joint procedures between the Corps District/Division office and the SMCRA agency should encourage development of joint deficiency letters and other coordination until the application is complete.

Public notices and hearings: Corps and SMCRA regulatory authority joint procedures should define the joint public notice process in recognition of the variations in scope of notified parties, time frames, and other required components. The CWA requirement for conducting a public hearing could, to the extent allowable under 33 CFR 327, be satisfied by the SMCRA program requirement to hold an informal conference upon receipt of a request for informal conference from the public. The SMCRA informal conference is publicly advertised and an official record made of the proceedings. The Corps could either formally or informally participate in the SMCRA conference to satisfy the CWA Section 404 requirement; or, to merely observe the proceedings to gain insight on issues, factor public hearing comments into further CWA Section 404 application processing, and/or to establish CWA Section 404 permit conditions.

Technical adequacy: Under the concept of this MOU, the Corps District or Division Engineer would collaborate with the SMCRA regulatory authority, combining respective mining/civil engineering, geological, biological, hydrologic, water quality and other expertise of each agency to collaborate in considering all practicable alternatives to the proposed placement of dredged and/or fill material in waters of the U.S. This joint review would examine alternatives to avoid and minimize impacts, and whether appropriate alternative analyses have been performed. In addition, the joint review could

help to determine if the proposed fill sites located in waters of the U.S. have been adequately minimized and characterized and whether practical upland alternatives or less environmentally damaging alternatives to the project proposal exist, as well as compliance with other provisions of the CWA Section 404(b)(1) Guidelines.

The agencies are encouraged to jointly evaluate probable hydrologic consequences of the proposed operation and consider cumulative hydrologic impact assessments for the proposed and other ongoing mining operations within the defined cumulative impact area (CIA) to assure that state water quality or effluent standards will not be exceeded, and as factors in determining compliance with 40 CFR Part 230.10(c) significant degradation. Consideration could be given to other types of cumulative impacts, as well as secondary impacts, for purposes of NEPA and CWA Section 404(b)(1) analysis.

The roles of Federal and state partners: Other agencies are involved in the review and authorization of surface coal mining permits. The FWS has the responsibility of providing Federal leadership in conserving the public's fish and wildlife resources through implementation of the broad mandate of the Fish and Wildlife Coordination Act, and other legislation such as the Migratory Bird Treaty Act, Endangered Species Act, and National Environmental Policy Act. The FWS provides science-based recommendations for minimizing and compensating the impacts to fish and wildlife resources.

Under CWA Section 401, no Federal permit or license may be issued that may result in a discharge to waters of the United States, unless the authorized Tribe or state where the discharge would occur has certified that the permit or license is consistent with water quality objectives, or has waived certification. Among factors a state or authorized Tribe considers are whether the discharge would be consistent with applicable water quality standards, effluent limitations, new source performance standards, toxic pollutant control requirements, and relevant requirements of Tribal and state law. The 401 certification can include conditions, which must become a term of the permit or license. If the Tribe or state denies 401 certification, the Federal permit or license may not be issued. In instances where a State or Tribe does not have certification authority, such as in parts of Indian Country, EPA exercises certification authority by considering the same factors.

As authorized by CWA Section 402, the National Pollutant Discharge Elimination System (NPDES) permit program controls water pollution by regulating point sources that discharge pollutants into waters of the United States. EPA oversees implementation of the NPDES program, and may authorize state permit programs to operate in lieu of the Federal program. At present, 45 state programs have been authorized; EPA issues NPDES permits in remaining states and territories. As described in the following section, this MOU encourages dialogue and development of procedures that take into account the various inter-related roles and jurisdictions to share data and information, minimize duplication, and to improve coordination of application processes and decision making.

**C. Additional State-Specific Procedural Considerations**. In addition to the joint procedures contemplated under 33 CFR 325.2(e)(3), which apply to requirements under

33 CFR 325.2(a)(1) through (a)(5), there are other areas where the development of additional state-specific procedural considerations could facilitate a more efficient joint permit process and minimize duplication. Such procedural considerations could be developed in cooperation with all the signatory agencies and other appropriate regulatory and reviewing agencies, in addition to the joint procedures contemplated under 33 CFR 325.2(e)(3). Some examples of areas where additional state-specific procedural considerations may be appropriate are:

- Stream Delineations: There are often different methods and approaches used by state and Federal agencies to determine whether a stream is ephemeral, intermittent, or perennial--terms common to both the CWA and SMCRA programs. "Waters of the State/U.S." are also often terms common to the state water quality and CWA programs. As part of the joint permit process, Corps District and the SMCRA regulatory authorities could attempt to reach a consensus or a common understanding related to the appropriate timing and type of approach used for data collection that informs the various jurisdictional determinations.

- Background Hydrologic and Water Quality Data and Continued Monitoring: CWA and SMCRA permitting activities both require data and analysis of the area's hydrologic resources, water quality and projected impacts. The signatory agencies encourage the development of a common, preferred approach as an example to provide to applicants to improve the efficiency of data collection.

- Pre-Application Meetings and Timing: Many SMCRA regulatory agencies offer informal meetings with potential applicants to facilitate project development. Scheduling these events to encourage greater participation from respective agencies may help the quality of the applications.

- Endangered Species Act (ESA): Both SMCRA and the CWA processes require compliance with the ESA. State and Federal SMCRA permits are covered by a 1996 FWS Biological Opinion that provides for incidental take and coordination with the FWS for the entire project area, including waters of the U.S. In establishing the coordinated permitting process, compliance in the SMCRA process may minimize the need for further ESA coordination on the COE jurisdictional area (e.g., waters of the U.S.). In limited circumstances, coordination with the Department of Commerce, NOAA Fisheries Service, may be appropriate.

- National Historic Preservation Act: SMCRA and CWA require protective measures of historic properties. The agencies coordinate with the same State Historic Preservation Officer. The state permit includes a larger area than just the waters of the U.S. and cooperative efforts could assist both agencies in meeting responsibilities related to historic properties.

- Mitigation: State water quality certification of CWA Section 404 projects, as

governed by CWA Section 401, often reflects state laws requiring mitigation for unavoidable impacts to aquatic resources. The state mitigation requirements might overlap with some Corps CWA Section 404 mitigation provisions and may be another area for joint consideration. Similarly, CWA Section 402 requirements are often administered by the state SMCRA agency or through coordination with a sister state agency. Collaboration with the Corps and EPA in this area (e.g., in order to satisfy effluent guidelines, receiving stream standards, total maximum daily loads, and other holistic watershed considerations in the CWA Section 404 project determinations) may be relevant to development of joint procedures. The goal of such procedures would be to consider decisions regarding reclamation under SMCRA and mitigation under the CWA Section 404, pursuant to the Section 404(b)(1) Guidelines and other CWA program requirements.

## IV. INFORMATION SHARING

The interagency coordination process envisioned by this agreement is intended to facilitate permit decisions by both permitting authorities. The SMCRA permit application is an inclusive environmental document containing much, but not all, of the information necessary for the CWA Section 404 permit application. The similarities should be identified in joint procedures and utilized, to the maximum extent possible, to the benefit of the regulatory agencies, the regulated community, and public stakeholders.

For instance, inclusion of common data elements in a joint application form and the use of common approaches to data collection should lead to a more efficient way to solicit and collect information. The reviewing agencies can then provide more informed comments, and the regulatory agencies can make more informed decisions regarding permit issuance. Reliance on common data elements and analytical results provided by the applicant should facilitate agreements among agencies and provide a basis for the coordinating State and Federal agencies to be informed by each agencies' findings.

## V. GENERAL

1. Nothing in this MOU is intended to diminish, modify, or otherwise affect existing agreements between the Corps, OSM, or other State and Federal agencies related to the CWA Section 404 and/or SMCRA regulatory programs.

2. Nothing in this MOU is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities or requirements of signatory agencies. All formal guidance interpreting and further implementing the goals of this MOU and background materials upon which this MOU is based will be issued jointly by the agencies.

3. The policy and procedures discussed in this MOU are intended solely as guidance and do not create any rights, substantive or procedural, enforceable by any party. This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, Tribes, 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 statues, regulations, and agency policy and procedures.

4. Nothing in this MOU will be construed as indicating a financial commitment by the signatory agencies or any state regulatory authority for the expenditure of funds, except as authorized by law.

5. This MOU will take effect on the date of the last signature below and will continue in effect until modified or revoked by agreement of all signatory agencies, or revoked by any of the signatory agencies alone upon 90 days written notice. Modifications to this MOU may be made by mutual agreement and Headquarters level approval by all of the signatory agencies. Such modifications will take effect upon signature of the modified document by all the signatory agencies.

**SIGNATORS:**

John Paul Woodley, Jr. 4 Feb 05
John Paul Woodley, Jr. (Date)
Principal Deputy Assistant Secretary
Of the Army (Civil Works)
U.S. Department of the Army

2/7/05
Jeffrey D. Jarrett (Date)
Director, Office of Surface Mining
U.S. Department of the Interior

2/8/05
Steven A. Williams (Date)
Director, Fish and Wildlife Service
U.S. Department of the Interior

2-7-05
Benjamin H. Grumbles (Date)
Assistant Administrator
U.S. Environmental Protection Agency

**APPENDIX A**
**to the**
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## Corresponding Permitting Provisions of Regulations Adopted to Implement the Clean Water Act Requirements (33 CFR) and the Surface Mining Control and Reclamation Act (30 CFR)

As discussed in the accompanying Memorandum of Understanding, 33 CFR 325.2(e)(3) authorizes and encourages Division and District Engineers to develop joint procedures with states and other Federal agencies with ongoing programs for activities also regulated by the Department of the Army. The regulation provides for the use of alternative procedures to those specified in 33 CFR 325.2(a)(1) through 325.2(a)(5), to expedite the decision-making process. The following table is a comparison of the provisions of 33 CFR 325, including other provisions referenced in those sections, with the corresponding provisions from the permitting requirements of 30 CFR Part 773.6 and other referenced provisions applicable to surface mine permitting.

| ACTION | 33 CFR 325 (or referenced provisions) | CWA TIMEFRAME | 30 CFR 773 (or referenced provisions) | SMCRA TIMEFRAME |
|---|---|---|---|---|
| | | | | |
| 1. assign number | 325.2(a)(1) | immediately | 773.6(a)(3) | not specifically required but must be included in notification to local, state, and Federal agencies |
| 2. determine completeness | 325.2(a)(1) and (2) [refers to 325.1(d)(9)] | 15 days | 773.6(a)(1) | timeframe not specified |
| 4. public notice content | 325.2(a)(2) [refers to 325.3(a)&(b)] | N/A | 773.6(a)(1) and (a)(2) | N/A |
| 5. public comment period | 325.2(a)(2) [refers to 325.2(d)(2)] | 15 – 30 days | 773.6(b)(2) | 30 days after last advertisement by applicant |
| 6. acknowledge comments | 325.(a)(3) | not specified | not required | N/A |
| 7. furnish public comments to applicant | 325.2(a)(3) | earliest practicable time | 773.6(b)(3)(i) | upon receipt |
| 8. applicant contacts commenters | 325.2(a)(3) | optional | not specified | N/A |
| 9. NEPA (Note: 40 CFR 1500.3 mandates all Federal agencies must comply with NEPA) | 325.2(a)(4) [refers to Appendix B of 33 CFR Part 230] | Unless categorically excluded, NEPA must be completed before permit decision | 740.4(c)(7), 740.13(b)(3)(iii) and 746.13(b) | Unless categorically excluded, NEPA must be completed before permit decision |
| 10. public hearing | 325.2(a)(5) COE determines need [refers to 33 CFR 327] | determined by COE | 773.6(c) informal conference upon request | reasonable time after request |

**APPENDIX B**
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# GUIDANCE FOR IMPLEMENTING JOINT SMCRA AND CWA 404 PROCEDURES

## INTRODUCTION

In addition to the Surface Mining Control and Reclamation Act (SMCRA) requirement to obtain a permit for a proposed surface coal mining operations, mining activities that place dredged and/or fill material within waters of the U.S. also require a Clean Water Act (CWA) Section 404 permit from the Corps. To issue a CWA Section 404 permit, the Corps must conclude that the project is consistent with the Section 404(b)(1) Guidelines (Guidelines) and that the project is not contrary to the public interest. The CWA Section 404(b)(1) Guidelines are the substantive environmental standards against which discharges of dredged or fill material are evaluated. Evaluation of potential impacts on the physical, chemical and biological characteristics of the aquatic ecosystem is a key consideration in determining compliance with the Guidelines. Specifically, Part 230.10(a) of the Guidelines states, "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." Part 230.10(b) prohibits discharges that violate certain other environmental standards, i.e., state water quality standards, toxic effluent standards, Endangered Species Act, and Marine Protection, Research and Sanctuaries Act. In addition, 230.10(c) prohibits discharges "which will cause or contribute to significant degradation of the waters of the United States." Furthermore, 230.10(d) states, "no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."

If an Individual Permit (IP) is required in order to comply with Section 404, an analysis of environmental impacts must occur in accordance with the National Environmental Policy Act (NEPA). This analysis occurs in a NEPA document as either an environmental assessment (EA) or an environmental impact statement (EIS). The environmental analysis in the 404(b)(1) review and NEPA document provide the factual basis for the

Corps to make the aforementioned conclusions to facilitate permit decisions, which are summarized in an Environmental Assessment and/or Statement of Findings (EA/SOF) or a Record of Decision (ROD).

Should a proposed mining activity require authorization under an IP, the topics covered in the SMCRA permit contain much, but not all, of the information necessary to facilitate the Corps 404(b)(1) review and preparation of the required NEPA document. For example, in conducting the 404(b)(1) review, the Corps must determine: (1) whether the proposed project represents the least environmentally damaging, practicable alternative of impacts to the aquatic ecosystem, so long as the alternative does not have other significant environmental consequences; (2) whether all state and/or federal environmental criteria will be met; (3) whether the project will result or contribute to significant degradation of the aquatic environment; and, (4) whether all appropriate and practicable steps have been taken to minimize the potential adverse impacts of the discharge on the aquatic ecosystem.

Although SMCRA does not require that practicable alternatives to the proposed mining be identified and analyzed in a permit application, in order to recover the greatest amount of coal resource with the least amount of associated disturbance/cost and minimize the potential for future disturbance, extensive mine planning and analysis is performed by the applicant to propose a viable SMCRA surface coal mining application. Much of the information and analysis required in a SMCRA permit application is directed toward minimizing potential adverse impacts to the environment, including the aquatic ecosystems. If the applicant provided relevant alternative mining scenarios developed during preparation of the SMCRA permit application, this type of information could be of benefit to the Corps in conducting the 404(b)(1) Guidelines, NEPA, and public interest reviews.

This document is intended to assist in determining what information, beyond that already required in SMCRA, may be necessary for the Corps to determine aspects of its public interest factors and Section 404(b)(1) Guidelines compliance decisions and to facilitate compliance with NEPA. The information necessary for the Corps to conduct its review will vary on a case-by-case basis and may be more or less than this document describes. The information required by SMCRA may be sufficient to address NEPA for certain public interest factors, but does not address the assessment of cumulative impacts, with the exception of hydrology. The public interest factors that must be addressed to meet the Corps requirements and the information found in SMCRA permits are compared in Table 1.

In most cases the Corps will be the only Federal agency involved in permitting a proposed mining-related activity and as such, will be responsible for compliance with NEPA. The requirement for providing the Corps with basic information about a project and its environmental effects falls on the permit applicant. The Corps begins the environmental review process by obtaining a document, prepared by the applicant, containing necessary

information for the NEPA analysis that may not otherwise be reflected in the SMCRA permit application.

## PUBLIC INTEREST FACTORS

In addition to determining if the proposed project complies with the Section 404(b)(1) Guidelines, the Corps must also ensure that the project is not contrary to the public interest, in order to render its decision regarding placement of dredged or fill material in waters of the U.S. Since the list of public interest factors represents much of the information required by the Corps to aid in the decisions regarding public interest review and CWA Section 404(b)(1) Guidelines, that list is repeated below with brief discussion as to related SMCRA and CWA information requirements. For some of the factors identified, a general statement, rather than project-specific analysis, may meet the information requirements. Each of the public interest factors listed below is discussed in the following format:

Information Available in SMCRA Permit – A description of the information generally found in the SMCRA permit application.

Additional Information Needed for Corps Review - A description and degree of detail of the information required for 404(b)(1) compliance and public interest review not otherwise captured in the SMCRA permit application.

## Table 1

| Corps Public Interest Factor* | SMCRA Requirement** |
|---|---|
| A. Conservation | Reclamation plan §780.18/784.13 |
| B. Economics | Generally not covered. See discussion of this factor below |
| C. Aesthetics | Generally not covered. See discussion of this factor below |
| D. Wetlands | Fish and Wildlife Information §780.16/784.21 |
| E. Historic Properties | Cultural Resources §783.12 |
| F. Flood Hazards | Hydrologic Information §780.21/784.14; Diversions §816/817.43(a)(2) & (b)(3) |
| G. Floodplain Values | Generally not covered. See discussion of this factor below |
| H. Land Use | Reclamation Plan: Land Use Information; Postmining Land Use §780.23/784.15; §816/817.133 |
| I. Navigation | Not covered and generally not applicable to mining |
| J. Recreation | Reclamation Plan: Land Use Information; Protection of publicly owned parks and historic places §780.23/784.15; 780.31/784.17 |
| K. & L. Energy and Mineral Needs | Generally not covered. See discussion of this factor below |

| | |
|---|---|
| M. Safety..... | Reclamation plan: Siltation structures, impoundments, banks, dams, and embankments §780.25/784.16; Disposal of excess spoil §780.35/784.19 & 816/817.71; Subsidence control plan §784.20; Operation plan: Blasting §780.13 & 816/817.61-.68 |
| N. Water Quality..... | Hydrologic Information §780.21/784.14 |
| O. Fish and Wildlife Values..... | Fish and Wildlife Information. §780.16/784.21 |
| P. Shore Erosion and Accretion..... | Not covered and generally not applicable to mining |
| Q. Water Supply and Conservation | Hydrologic Information §780.21/784.14 |
| R. Food and Fiber Production..... | Reclamation Plan: Land Use Information §780.23/784.15 |
| S. Property Ownership..... | Property Interest Information §778.13 |
| T. General Environmental Concerns | Various sections of SMCRA |
| U. Needs and Welfare of the People | Generally not covered. See discussion of this factor below |

* The left column contains a list of topics that the Corps requires the applicant to provide environmental information on when applying for a CWA Section 404 Individual Permit.
** The column on the right identifies the corresponding SMCRA requirement.

## A. CONSERVATION

Information Available in SMCRA Permit

Information on prevention or minimization of impacts to the various natural resources is found throughout the SMCRA permit. Measures incorporated within the SMCRA permit application which are intended to conserve/protect the natural resources in the area of the proposed action include the approximate original contour requirement, restoration of land use, plans for both minimizing impacts to fish and wildlife and related environmental values and enhancing these values during reclamation, protections for parks and historic lands, surface and ground-water quality protections, maximizing the utilization and conservation of the solid fuel resource being recovered so that the likelihood of re-affecting the land in the future will be minimized, etc.

Additional Information Needed for Corps Review

Information on extent of resources (e.g. miles of stream, acres of land, etc.) conserved (compared to original project footprint) as a result of application of the Corps required alternatives analysis and other environmental concerns. Information on aquatic resource impacts such as stream miles or acres of wetlands to be impacted, as well as onsite and offsite mitigation requirements and aquatic resource functions that will (or will not) be replaced.

## B. ECONOMICS

Information Available in SMCRA Permit

The SMCRA requirements contain very little information that would support an evaluation of economic impact. The only information available in the permit application that would help in evaluating this issue is coal production (annually and permit life).

Additional Information Needed for Corps Review
An analysis of any anticipated impacts of the proposed mine on the local communities infrastructure including public roads, housing, educational system, utilities, recreational resources, medical and public safety services, etc. must be provided. Information must be provided indicating whether, and to what extent the mined properties, reclaimed in accordance with approved plans, including any AOC variance, will have any long-term impacts on the economy of the impact area.

## C. AESTHETICS

Information Available in SMCRA Permit
The SMCRA requirements do not specifically address aesthetics, however the reclamation plan contains information regarding the post-mining land configuration and revegetation of disturbed areas that indirectly relate to aesthetics of the post-mining environment.

Additional Information Needed for Corps Review
Include a general description of the proposed project which includes information on visibility of the proposed site from residences, public roads, and public use areas; whether the disturbance will be seasonal or year-round; duration of project; and a description of the appearance of the site currently, during mining, and after reclamation is completed. This section should also state if there are other mining projects in the vicinity.

## D. WETLANDS and OTHER HIGH VALUE AQUATIC SITES

Information Available in SMCRA Permit
The *Resource Information* requirement in SMCRA provides easily accessed information that should identify any wetlands, streams or other high value habitats which may be impacted by the proposed permit. These wetlands and any other high value aquatic habitat resources should be identified during preparation of the permit application as a result of the applicant conducting an on-site review of the proposed permit area.

Additional Information Needed for Corps Review
The Corps must have adequate information to make a public interest review and compliance with the CWA Section 404(b)(1) guidelines analysis, including a demonstration the applicant has avoided and minimized impacts to waters of the U.S. to the maximum extent practicable. A summary discussion of the ecological functions and values provided by the identified wetlands, delineated using the 1987 Corps of Engineers Wetland Delineation Manual, other special aquatic sites (note: special aquatic sites are identified in 40 CFR Part 230, Subpart E) and other high value aquatic sites which may be impacted (i.e., direct, indirect, secondary, and cumulative impacts) by the proposed permit. Remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values.

## E. HISTORIC PROPERTIES

Information Available in SMCRA Permit
The SMCRA permit application identifies cultural and historic resources. The SMCRA regulatory program also requires consultation with the State Historic Preservation Officer.

Additional Information Needed for Corps Review
Unless mitigation requirements included in the disturbances affecting areas beyond the identified SMCRA permit limits, no additional information would likely be needed. State permitting decisions are not subject to Section 106 of the Historic Preservation Act and the Corps may have additional federal duties in certain situations.

## F. FLOOD HAZARDS

Information Available in SMCRA Permit
An analysis of the potential for an increase in flooding as a result of the proposed operation is required in the probable hydrologic consequences determination. This information would be in the form of hydrologic studies or engineering computations that predict either an increase or decrease in the flooding potential as a result of the proposed operation. Additional site-specific information is available as part of the hydrologic reclamation plan. Specific consideration is given to the importance of change in land use and resulting change in runoff potential for affected areas. Any proposed diversion of intermittent or perennial streams must be designed so as to protect against flooding and resultant damage to life and property.

Additional Information Needed for Corps Review
No additional information is likely to be needed beyond that required under SMCRA.

## G. FLOODPLAIN VALUES

Information Available in SMCRA Permit
Under state SMCRA regulatory programs, the permit application contains little or no information that would support an evaluation of floodplain values. Under a Federal SMCRA regulatory program, OSM must comply with Executive Order 11988 as described below.

Additional Information Needed for Corps Review
Presidential Executive Order, E.O. 11988, Sec. 2(a)(4) requires that floodplains that will be impacted by the proposed project be identified in NEPA documentation. Information as to whether the proposed operation will lie within a floodplain must be provided. If the permit area is not located in a defined floodplain, floodplain values will not be affected. If the operation is located within a floodplain, the dredge and/or fill area may affect floodplain values by decreasing the available flood storage area and increasing the peak

flood event. Information needed for 404(b)(1) would include a discussion and supporting studies including calculations of how the proposed operation will impact the floodplain.

## H. LAND USE

Information Available in SMCRA Permit
Land use information is found in the reclamation plan and consists of general descriptions of the condition, capability, and productivity of the land to be mined; of the uses of the land existing at the time the application is filed; and of the proposed post-mining land use(s).

Additional Information Needed for Corps Review
No additional information is likely to be needed beyond that required under SMCRA.

## I. NAVIGATION

This issue would typically not be applicable to a proposed mining operation. Should the Corps determine on a project-specific basis that evaluation of this issue is necessary, the applicant would be notified.

## J. RECREATION

Information Available in SMCRA Permit
The SMCRA permit application specifically requires identification of public parks, important streams, or other habitats of unusually high value for fish and wildlife which exist in proximity of a proposed mine, and if those recreational resources will be affected or impacted by the proposed mine. Pre-mining land use descriptions in the "Land Use" public interest factor would address other recreational land uses that might occur within the proposed permit area.

Additional Information Needed for Corps Review
Determine if and how each recreational resource might be impacted by mining related activities (blasting, transportation of coal, discharges, etc) in the aquatic portions of the site. The rationale for concluding whether recreational resources will be affected must be clearly and logically presented. Impacts to the occasional recreational user of the proposed mine site should be acknowledged and briefly discussed.

## K. & L. ENERGY AND MINERAL NEEDS

Information Available in SMCRA Permit
The SMCRA permit contains information about the anticipated quantity of coal to be produced by the operation, and a discussion and accompanying drawings and cross sections that indicate the location and prevalence of the coal seam(s) as a mineral.

Additional Information Needed for Corps Review
No additional information is likely to be needed beyond that required by SMCRA.

## M. SAFETY

Information Available in SMCRA Permit
The SMCRA application identifies provisions to assure the safety of the public. Some of these include identification of nearby underground mining, static safety factors for fills/backfill, inspection and certification of fills during and after construction, inspection and certification of basins upon completion of construction and annually thereafter, numerous blasting controls, etc.

Additional Information Needed for Corps Review
No additional information is likely to be needed beyond that required by SMCRA.

## N. WATER QUALITY

Information Available in SMCRA Permit
SMCRA permits contain a prediction of probable hydrologic consequences (PHC) and a hydrologic reclamation plan (HRP), both of which are specific to the permit and adjacent area. SMCRA permits contain baseline data for surface and groundwater quality and quantity. The data are generally limited to the permit and adjacent area. Additional permits in the area could provide an additional source of baseline information. SMCRA permits contain a cumulative hydrologic impact assessment (CHIA) prepared by the SMCRA authority or applicant. The CHIA is an assessment of the proposed and existing mine operations in the cumulative impact area (CIA). A properly delineated CIA would consider the current land use within the watershed of the area proposed for mining to evaluate surface and groundwater quality.

Additional Information Needed for Corps Review
Permit applications are evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation includes consideration of both point and non-point sources of pollution. State, interstate agency or EPA certification of compliance with applicable effluent limitations and water quality standards pursuant to requirements under CWA Section 401 is generally considered conclusive with respect to water quality considerations unless otherwise advised by EPA.

## O. FISH AND WILDLIFE VALUES

Information Available in SMCRA Permit
The SMCRA permit contains a determination, documented by the FWS, of whether there are any listed or proposed endangered or threatened species of plants or animals or their critical habitats likely to be present within the proposed permit and/or adjacent area. Regulations require permit applications to include a description of how the operator will

comply with the Endangered Species Act (ESA). The permit application also includes fish and wildlife resources information such as a list of species expected to inhabit the proposed permit and adjacent area and a general description of the quality of the existing habitat.

Additional Information Needed for Corps Review

Unless mitigation requirements included disturbances affecting areas beyond the identified SMCRA permit limits, no additional information would be needed for ESA compliance beyond that required under SMCRA. In addition to the SMCRA-required general description of fish and wildlife resources described above, a stream assessment protocol must be used to assess each of the streams within the proposed permit boundary in order to determine the ecological and functional value of the existing streams and identify those streams in which dredge or fill placement could occur with the least environmental impact, as well as the functions provided by the proposed onsite and/or offsite mitigation plan. The assessment needs to follow the CWA Section 404(b)(1) guidelines regarding aquatic ecosystem and organism determinations.

## P. SHORE EROSION AND ACCRETION

This issue would typically not be applicable to a proposed mining operation. Should the Corps determine on a project-specific basis that evaluation of this issue is necessary, the applicant will be notified.

## Q. WATER SUPPLY AND CONSERVATION

Information Available in SMCRA Permit

SMCRA requires the applicant to submit information on surface and ground water systems present in the permit and adjacent areas. All wells, cisterns, and other water systems within one-half mile of the proposed operation must be inventoried. SMCRA further requires that the mining plan must minimize impacts to the hydrologic balance in the permit area, prevent material damage to the hydrologic balance outside the permit area, assure protection/replacement of water rights, and support the approved post-mining land use.

Additional Information Needed for Corps Review

Provide the location of the nearest downstream public service district and an analysis of the potential for impacts.

## R. FOOD AND FIBER PRODUCTION

Information Available in SMCRA Permit

The SMCRA permit application contains a limited amount of information about the existing vegetative cover, land capability, and productivity, while the revegetation plan provides a more specific description of what the post mining vegetative cover and species will be.

Additional Information Needed for Corps Review
If the permit application contains or may impact any lands designated as cropland, provide a detailed analysis of vegetative cover types and the annual production of each crop.

## S. CONSIDERATION OF PROPERTY OWNERSHIP

Information Available in SMCRA
The information contained in the SMCRA permit is sufficient to address consideration of property ownership. All surface and mineral owners within or contiguous to the proposed permit boundary are listed in the application (names and addresses). Names and addresses of any party with leasehold interest or purchaser under a real estate contract must be identified for the proposed permit area. Information regarding whether mining activities will be located within prohibited distances to public buildings, parks, roads, etc. is also provided.

Additional Information Needed for Corps Review
No additional information is likely to be needed beyond that contained in SMCRA.

## T. GENERAL ENVIRONMENTAL CONCERNS

Corps regulations establish the resources or public interest factors that are to be considered in the review of a proposed project. A SMCRA permit application contains a great deal of information that addresses various aspects of General Environmental Concern. Some issues specific to mining that do not fall within other specifically identified public interest factors have been incorporated into this document under General Environmental Concerns.

### Blasting

Information Available in SMCRA
A significant amount of blasting-related information is present within the SMCRA permit application. For purposes of developing the NEPA document, the applicant should provide a summary of the various controls built into the blasting plan and briefly describe how these controls minimize the likelihood of off-site damage and/or provide for public safety.

Additional Information Needed for Corps Review
No additional information would be likely to be needed beyond that required in SMCRA.

**Dust**

Information Available in SMCRA Permit
The SMCRA permit application requires the applicant to provide a fugitive dust control plan for air pollution attendant to erosion. If required by the State regulatory authority, the application must also include an air quality monitoring program. The typical permit application provides a plan for minimizing dust associated with the transportation of coal within the permit area (typically periodic watering of roads). The applicant should briefly summarize all measures that have been taken to control fugitive dust. [Note: Coal mine permit applications in the western U.S. (west of the 100$^{th}$ meridian) that project production in excess of one million tons per year must also include an air pollution control plan.

Additional Information Needed for Corps Review
No additional information would be likely to be needed beyond that required by SMCRA.

## U. NEEDS AND WELFARE OF THE PEOPLE

Information Available in SMCRA Permit
Under state SMCRA regulatory programs, the permit application contains little or no information that would support an evaluation of the needs and welfare of the people, including environmental justice. Under a Federal SMCRA regulatory program, OSM must comply with Executive Order 12898 as described below.

Additional Information Needed for Corps Review
Executive Order 12898 of February 11, 1994, requires that all Federal agency decisions consider the impacts of the proposed action on minority and low-income populations and communities. The applicant should evaluate and clearly state the environmental consequences of the proposed project on minority and low-income populations and communities in the NEPA document.

## V. OTHER ISSUES IDENTIFIED UNDER NEPA DURING SCOPING

Comments received by the Corps during scoping are categorized for evaluation and consideration in the final permit decision document. Some of the comments may be unrelated to the Corps regulatory mandate, but are discussed in the NEPA document with emphasis that they are beyond the scope of the Corps review.