

Substance of Announcement:

Q: How many permit applications did EPA put on its initial list as requiring further coordination?

EPA identified the need for further review of all 79 applications remaining on the Corps' list for the Enhanced Coordination Procedure (ECP). EPA determined that there are remaining water quality and/or regulatory compliance issues with all of the applications. However, EPA further concluded that some applications are clearly not ready for processing, and that others are likely to be readily resolved upon further discussion with the Corps.

Q: What is the ECP?

The Enhanced Coordination Procedure (ECP) is a coordination process that establishes procedures by which the Corps and EPA will evaluate pending surface coal mine projects that were initially coordinated prior to March 31, 2009. The goal of these procedures, jointly developed by EPA and the U.S. Army Corps of Engineers (Corps), is to strengthen the environmental review and ensure timely, consistent, transparent, and environmentally effective review of permit applications under existing law and regulations.

Q: Why has the Corps' list changed since June 11?

An initial list of 108 pending Clean Water Act permit applications for proposed coal mines was provided by the Corps and published at the same time as the June 11, 2009 MOU. The original group of 108 projects included 13 projects whose permit applications have subsequently been withdrawn by the mining company, 8 projects for which permit issuance was imminent and occurred prior to, or concurrent with, the publication of the list, 3 projects for which an ongoing enforcement action currently precludes a permit decision, 1 permit application not complete, 1 project for which the work does not require a permit, and 5 underground mining projects determined not appropriate for the ECP. Also, 2 additional projects were added to the original list. In summary, 31 projects were removed from the original list of 108, and 2 were added, resulting in a total of 79 projects identified as remaining on the ECP list

Q: Will EPA stop some projects from being authorized?

EPA's action today does not prohibit any project, nor does it reflect a judgment about the likelihood that a project will or will not be authorized. EPA's action identifies projects that require additional coordination and review in cooperation with the Corps and mining companies before a permit decision can be made. Projects that the Corps determines to be in compliance with Section 404 of the Clean Water Act may be authorized by the Corps.

Q: Does EPA's action today mean that mountaintop mining activities can not be authorized under Section 404 of the Clean Water Act?

No. The recommendations made as part of the ECP do not constitute a determination by EPA under its CWA Section 404(c) authority that surface coal mining can not be permitted under CWA Section 404, nor does it represent a final recommendation from EPA to the

Corps on these proposed projects. Instead, EPA's decision will help to ensure that mining projects approved under the CWA are fully consistent with the requirements of the law and will protect water quality and the environment.

Q: How has EPA addressed surface coal mining since the 4th Circuit Court Appeals decision?

Since the 4th Circuit Court decision, EPA and the Corps worked with Council on Environmental Quality to address 48 mining permits that the Corps identified for immediate issuance. After review, EPA raised environmental concerns with six out of the 48 permits. Following that effort, EPA, Corps and DOI issued a MOU which identified a pending application list of 108 projects (now 79) for screening. EPA continues to work with the Corps on permit applications that have been submitted after March 31, 2009. Where EPA believes the information contained in the public notice raises environmental concerns, we are submitting comments to the Corps explaining these concerns and our recommended actions to resolve the concerns.

Q: Is the screening process too difficult for any mining application to be approved?

The screening process itself does not establish any standard for evaluating mining projects. CWA standards used by the Corps to make permit decisions about proposed mining projects are established in the Clean Water Act's Section 404 (b)(1) Guidelines and the Corps' permit implementing regulations. EPA relies on these standards in our review of mining projects and in making decisions about which projects are consistent with the law.

Q: Does the ECP constitute a policy change for EPA regarding surface coal mining?

No. Proposals subject to the enhanced coordination procedures were evaluated for compliance with existing regulations and policies. In order to receive authorization under the Clean Water Act, proposed projects must comply with all requirements of the Section 404 regulations, regardless of activity type. Nationwide, EPA reviews proposed Clean Water Act permits through public notices and other coordination with Corps Districts and submits comments and recommendations when appropriate. The ECP protocol was designed to strengthen the environmental review of surface coal mining proposals.

Q: What is the EPA "initial list" that was made public today?

The enhanced coordination procedures establish a process by which EPA will transmit an initial list to the Corps identifying permit applications about which EPA has environmental concerns and permit applications with which the Corps may proceed without further action by EPA. The procedures establish a 45-day period for EPA to complete this action. Consistent with the procedures, EPA has transmitted the information to the Corps and is making the same information publicly available. Following a 14-day period for public review, EPA will transmit a final list of applications raising environmental concerns to the Corps.

Q: How did EPA decide that all of the permit applications should be on the list for enhanced coordination?

Decisions regarding which applications will be subject to enhanced coordination were made based upon the Clean Water Act and its implementing regulations. Specifically, EPA based its determinations on the Section 404(b)(1) Guidelines. The Section 404(b)(1) Guidelines are a set of regulations developed jointly by EPA and the Corps pursuant to Section 404(b)(1) of the Clean Water Act. They can be found in Title 40, Part 230 of the Code of Federal Regulations (<http://www.epa.gov/owow/wetlands/pdf/40cfrPart230.pdf>). The Section 404(b)(1) Guidelines establish a number of requirements for determining whether to issue a Section 404 permit and what conditions to place in a permit. All of the permits on the list showed the potential to violate one or more of the requirements in the Guidelines.

Q: What environmental concerns does EPA have?

The review of pending surface mining applications indicated potential compliance issues with the Guidelines for avoidance and minimization of impacts to aquatic resources, water quality, cumulative effects, and/or mitigation.

- The majority of the proposals recommended for further evaluation may not have adequately demonstrated avoidance and minimization of impacts in accordance with the Guidelines.
- Over 80% of the proposals recommended for further evaluation exhibited the potential for excursions from state narrative water quality standards.
- Over 50% of the proposals recommended for further evaluation raise concerns regarding the potential for significant degradation of the aquatic ecosystem, either individually or cumulatively.
- The scientific literature, EPA field experience, and available project information suggest that the mitigation proposed may not be adequate to offset proposed impacts.

EPA reviewed all proposals in light of available project data, the current science, and with regard to Clean Water Act regulations and has identified opportunities for benefits to the environment, while advancing the Administration's interest in a clean energy economy.

Q. Does EPA have concerns about the approach the Corps is using to comply with NEPA for these pending permits?

The Corps is ultimately responsible for demonstrating compliance with National Environmental Policy Act (NEPA) for the pending permits. However, as EPA works with the Corps to review the permits in more detail, EPA will evaluate and discuss the Corps' plans for NEPA compliance, as well as the Clean Water Act Section 404 permitting factors.

Q: Where can I submit comments on EPA's initial list?

EPA has made the initial list available to the public on our website at <http://www.epa.gov/owow/wetlands/guidance/mining.html>. The Agency is not opening a traditional comment period nor will the Agency be responding to any comments submitted. Should the public want to submit information, however, it may do so through the EPA Docket; number EPA-HQ-OW-2009-0627. The process for submitting information to the docket is posted on this website.

Q: What happens next?

No later than fourteen days after the initial list is made public (September 11, 2009), each EPA Region (Regions 3, 4 and 5) will inform EPA Headquarters of their final conclusions as to the permit applications that raise concerns and the permit applications (if any) that may proceed without further action by EPA. EPA Headquarters will then promptly transmit to the Corps of Engineers a final consolidated list of permit applications that will be subject to enhanced coordination and review and those (if any) with which the Corps may proceed without further action by EPA.

EPA Regions and Corps Districts should begin discussions immediately in order to resolve EPA's concerns on those applications that will be ready for processing in the near future. When an application is ready for formal coordination under the ECP, the Corps District will notify the appropriate EPA Region in writing, which begins the 60-day review period. During this time, the Region and Corps District will coordinate with applicants, relevant State agencies, and consultants, as necessary, to reach a timely resolution of the environmental concerns identified.

Q: How long will this enhanced coordination take?

The environmental, technical and procedural circumstances associated with each of these 79 applications vary. As such, the time needed to commence and complete review will also vary. It is expected that for some applications, the environmental concerns will be resolved in less than 60 days. In some instances, EPA and the Corps have already begun discussions on the proposals to identify methods for resolution of environmental concerns. Based on these discussions with the Corps, EPA has also come to understand that some proposals may not be at the stage of evaluation where they are ready for coordination.

Q: Will EPA meet with the individual companies involved to try to resolve concerns with these permit applications?

EPA, together with the Corps, expects to meet with some of the applicants. The enhanced application review process envisions these meetings and EPA believes they can be valuable in effectively addressing environmental concerns. In order to ensure only the least environmentally damaging practicable alternative will be authorized, EPA and the Corps may need to confirm project-specific information on mine design and minimization of impacts to aquatic resources. In some cases, EPA has already initiated communication with project applicants and consultants in order to verify data and project status. We appreciate the willingness these applicants have demonstrated to work with EPA under the ECP.

Effect of Announcement:

Q: Does the ECP usurp the Corps' authority?

No, the Corps makes final permit decisions. The Corps has not made any decisions on the proposals subject to the enhanced coordination procedures, and the MOU is not intended to alter the Corps' decision authority for Clean Water Act Section 404 permits. Corps

permitting regulations provide for coordination with other Federal agencies in order to seek a better understanding of that agency's concerns. According to Corps regulations, "If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency" (33 CFR 325.2(a)(3)).

Q: How does EPA plan to deal with the magnitude of these impacts?

EPA will coordinate with the Corps to make sure that the applications comply with the 404(b)(1) Guidelines. During the 60-day individual application review period called for in the MOU, EPA will discuss the basis for environmental concerns, recommend methods to resolve those concerns, and work with the Corps Districts and project applicants to improve environmental protection consistent with the Clean Water Act. The Clean Water Act does not prohibit all environmental impacts in order to comply with the requirements of the 404(b)(1) Guidelines, but generally requires the applicant for a proposed activity to first avoid impacts to aquatic resources, minimize any unavoidable impacts, and then evaluate the need to compensate for any remaining impacts.

Q: How is EPA dealing with surface coal mining applications outside the ECP list?

Clean Water Act permit applications submitted to the Corps after the March 31, 2009, cutoff for the ECP are being processed according to the Corps' permitting process, which includes coordination with the EPA via either a Public Notice or a Pre-Construction Notification. This means that public notices are being published for proposed standard permits and EPA is continuing to review these public notices as usual, and pre-construction notifications are being provided to the EPA by the Corps for any projects being considered under a Nationwide Permit. Where EPA believes the information contained in the public notice raises environmental concerns, we are submitting comments to the Corps explaining these concerns and our recommended actions to resolve the concerns. A list of comment letters regarding proposed coal mine projects that EPA has submitted to the Corps Districts since March 31, 2009 can be found on the EPA headquarters website (<http://www.epa.gov/owow/wetlands/guidance/mining-letters.html>).

EPA's Evaluation Process:

Q: What was EPA's process for identifying environmental concerns in applications?

EPA reviewed all available data regarding the proposed mine, the existing environmental condition in the watershed where the mine is proposed, and the nature of environmental impacts predicted to result from construction and operation. This review is in keeping with the requirements of the 404(b)(1) Guidelines, which contain evaluations of a proposed activity's direct impacts, as well as the potential for significant degradation of the broader aquatic ecosystem, either individually or through cumulative effects.

Q: Where did you get the data to conduct this review?

The majority of information on the proposed mines was extracted from the Corps' permit applications and from SMCRA permits. In order to ensure consistent and up-to-date

information, mine applicants and/or consultants were contacted in order to verify available data. We appreciate the companies' willingness to work with EPA, their timely responses, and the updated information provided. Data on watershed condition was provided by EPA programs and State reporting data (water quality sampling data, impaired waters, etc.). The U.S. Fish and Wildlife Service and U.S. Geological Survey provided data on the presence of federally listed threatened and endangered species, critical habitat, land use and land cover.

Q: How was the data used to develop the list?

Gathering basic mine and watershed data from the sources discussed above allowed EPA staff to perform an analysis of the potential direct, secondary, and cumulative effects of the proposed mine, without subjecting all the applications to a full case-specific review, which would have increased the time needed to develop the initial list. EPA Regional experts reviewed all available data on an individual and watershed basis in order to identify potential environmental concerns with water quality, cumulative impacts, fill minimization, and significant degradation of the aquatic ecosystem.

Q: I've heard that EPA used something called "MIRA" to identify the permit applications that would be subject to enhanced coordination. Is that true?

MIRA (Multi-criteria Integrated Resource Assessment) is a data-gathering and analysis approach used by EPA decision makers to help them evaluate the permit applications. MIRA was used by EPA officials to screen the permit applications to help identify which would be subject to enhanced coordination.

Q: What is MIRA?

MIRA is a tool that EPA has developed to assist program managers' consideration of a broad array of scientific and technical information in their program and policy decisions. MIRA assists program managers by organizing and comparing pieces of relevant project data and information. It allows decision makers to compare different decision options based upon one or more common criteria and become more informed regarding the various criteria and how those criteria can be considered. With respect to Appalachian surface coal mining, MIRA was used to process an extensive set of technical data and generate summary information to facilitate program management decisions. In this case, the MIRA approach promoted consistency by allowing decision makers from three EPA regions to review, discuss and reach consistency and consensus using a common set of data for discussion and analysis.

Q: Was MIRA developed specifically for coal mining?

No. MIRA is an existing approach that EPA decision makers have utilized in a variety of contexts, including developing budgets and making certain designations under the Clean Air Act. More information about MIRA can be found on the EPA Region 3 website (<http://www.epa.gov/reg3esd1/data/mira.htm>).

Q: How was MIRA used to decide which permit applications would be subject to enhanced coordination?

MIRA was used by EPA officials to screen available information on the proposed projects and assist them in their decisions about which applications to further evaluate. This process allowed EPA to organize the relevant data for all mines into a central location. Using the data, EPA reviewers were able to better understand the mining impacts, including cumulative impacts. Data that is relevant to evaluation under the Section 404(b)(1) Guidelines was gathered and input into MIRA. MIRA was then used to assist program managers in considering the data in various combinations to identify potential areas of concern, and analyze the proposed mines in the context of the Section 404(b)(1) Guidelines. After reviewing the information provided through the MIRA screening and conducting additional analysis, EPA decision makers determined which permit applications would be on the initial list.

Q: Did EPA use MIRA to create a new standard for proposed permit review?

No. MIRA does not create a new standard. The data input into MIRA are the same data and criteria that would be considered pursuant to the Section 404(b)(1) Guidelines. In the end, each permit application is subject to review under the Section 404(b)(1) Guidelines. MIRA was not used as a substitute or surrogate for the Section 404(b)(1) Guidelines analysis. The advantage of using MIRA in this particular circumstance is to provide a consistent and timely initial review of all permit applications subject to the enhanced coordination procedures.

Q: How was the use of MIRA appropriate given that MIRA is not designed to make discrete decisions, such as decisions about a permit application?

The MIRA process did not make discrete decisions about particular permit applications. Rather, it facilitated the analysis and supported the discussions regarding the aquatic ecosystem, the proposed applications' effects on that ecosystem, and potential compliance with the Section 404(b)(1) Guidelines.

Q: Do the Section 404(b)(1) Guidelines apply only to coal mining permits?

No. The Section 404(b)(1) Guidelines apply to all applications for permits pursuant to Section 404 of the Clean Water Act, regardless of the project purpose. That includes applications for Section 404 permits for discharges of dredged and/or fill material associated with mining activities.

Q: What kinds of factors are in the Section 404(b)(1) Guidelines?

Because they apply nationally, the Section 404(b)(1) Guidelines are designed to address a wide variety of permit applications and site-specific environmental conditions. Some of the key requirements are:

- The Corps may not authorize a discharge if there is another less environmentally damaging way by which the permit applicant can accomplish the same project purpose (40 CFR § 230.10(a)).
- The Corps must ensure that the proposed project has avoided and minimized to the

maximum extent practicable the discharge of fill to waters of the United States (33 CFR 332.1(c); 40 CFR 230.10(a)(1)(i); 40 CFR 230.10(d); 40 CFR 230.70-.77).

- The Corps may not issue a permit if the discharge will cause or contribute to a violation of any applicable State water quality standard (40 CFR 230.10(b)(1)).
- The Corps may not issue a permit if the discharge will cause significant degradation to waters of the United States, including significant adverse effects on the aquatic ecosystem. This includes adverse effects on life stages of naturally occurring aquatic organisms, and aquatic ecosystem diversity, productivity and stability (40 CFR 230.10(c); 40 CFR 230.31; 40 CFR 230.61(b)(3); 40 CFR 230.22(b)).
- The Corps must consider both the impacts from the project individually and its impacts in combination with other known existing or planned activities that will affect the same ecosystem. Although the impact of a particular discharge may be minor, the cumulative effect of numerous discharges can result in a major impact to water resources and the aquatic ecosystem (40 CFR 230.1(c); 40 CFR 230.11(g)).

Q: What evaluation was conducted outside of MIRA?

Throughout the 45-day review period, EPA Regional experts have been evaluating available data on the proposed mines and condition of the watersheds in which they are proposed. This review focused on placing available data on environmental effects in the context of the 404(b)(1) Guidelines and evaluating the reasonable potential for the proposed action to violate one or more of the requirements of the Guidelines. Representatives from EPA Regions 3, 4, and 5 met on multiple occasions to discuss concerns and ensure all permit applications were evaluated in a consistent manner and using consistent criteria. EPA also consulted with representatives of the U.S. Fish and Wildlife Service, U.S. Geologic Service, and the Corps to solicit their professional knowledge and feedback.