

NPDES PERMIT NO. NM0030996
STATEMENT OF BASIS

FOR THE DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) PERMIT TO DISCHARGE TO WATERS OF THE UNITED STATES

APPLICANT: Lee Ranch Coal Company
El Segundo Mine
P.O. Box 757
Grants, NM 87020

ISSUING OFFICE: U. S. Environmental Agency
Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

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PERMIT ACTION: First-time permit.

DATE PREPARED: August 18, 2008

40 CFR CITATIONS: Unless otherwise stated, citations to 40 CFR refer to promulgated regulations listed at Title 40, Code of Federal Regulations, revised as of July 5, 2008.

CERTIFICATION: The permit is in the process of certification by the State agency following regulations promulgated at 40 CFR 124.53. A draft permit and draft public notice will be sent to the District Engineer, Corps of Engineers; to the Regional Director of the U.S. Fish and Wildlife Service; and to the National Marine Fisheries Service prior to the publication of that notice.

FINAL DETERMINATION: The public notice describes the procedures for the formulation of final determinations.

I. PROPOSED TERM OF PERMIT

It is proposed that this first-time permit be issued for a 5-year term.

II. APPLICANT ACTIVITY

Under the Standard Industrial Classification (SIC) Code 1221, the applicant operates a coal mine.

III. DISCHARGE LOCATION

As described in the application, the facility is located 35 miles north of Milan, off State Road 509, Grants, in McKinley County, NM. Discharges are into Kim-me-ni-oli Valley Tributary, thence into Chaco River, a tributary of San Juan River which is about 100 miles north-west of the El Segundo Mine.

IV. RECEIVING WATER USES

The general and specific stream standards are provided in "New Mexico State Standards for Interstate and Intrastate Surface Waters," (20.6.4 NMAC, amended through August 1, 2007). The designated uses of Kim-me-ni-oli Valley Tributary, an ephemeral waterbody, in Stream Segment 20.6.4.97 are livestock watering, wildlife habitat, limited aquatic life, and secondary contact. EPA was unable to approve section 20.6.4.97 of the NM WQS because the State did not submit a Use Attainable Assessment (UAA) to support an aquatic life designation that does not meet the CWA §101(a)(2) objective as required by 40 CFR 131.10(j)(1). The CWA sections 101(a)(2) and 303(c) require water quality standards to provide, wherever attainable, water quality for the protection and propagation of fish, shellfish, wildlife, and recreation in and on the water, functions commonly referred to as "fishable/swimmable" uses. EPA's current water quality regulation effectively establishes a rebuttable presumption that "fishable/swimmable" uses are attainable and therefore should apply to a water body unless it can be demonstrated that such uses are not attainable. Prior to submittal of UAA, the designated uses of warmwater aquatic community and primary contact recreation are applicable to the receiving water.

V. DISCHARGE DESCRIPTION AND OPERATIONS

This is a new facility and has not had discharges. To collect effluent characteristics information, the proposed permit requires sampling of mine drainage from each outfall. If no discharge occurs during the term of the permit, samples shall be taken from sediment ponds and reported in the application for permit renewal.

VI. TENTATIVE DETERMINATION

On the basis of preliminary staff review and after consultation with the State of New Mexico, the Environmental Protection Agency has made a tentative determination to issue the permit for the

discharge described in the application.

VII. PROPOSED PERMIT CONDITIONS

The specific effluent limitations and/or conditions will be found in the proposed permit.

VIII. DRAFT PERMIT RATIONALE

The following section sets forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. Also set forth are any calculations or other necessary explanations of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard provisions as required under 40 CFR 122.44 and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

REASON FOR PERMIT ACTION

The permit application and supplemental information were dated November 12, 2007, and December 18, 2007, respectively, and was determined to be administratively complete on January 18, 2008. A letter of Finding of No Significant Impact was issued by EPA on July 30, 2008.

It is proposed that the permit be issued for a 5-year term following regulations promulgated at 40CFR122.46(a).

TECHNOLOGY-BASED VERSUS WATER QUALITY STANDARDS-BASED EFFLUENT LIMITATIONS AND CONDITIONS

Following regulations promulgated at 40 CFR 122.44(l)(2)(ii), the draft permit limits are based on either technology-based effluent limits pursuant to 40 CFR 122.44(a) or on State water quality standards and requirements pursuant to 40 CFR 122.44(d), whichever are more stringent.

Technology-based effluent limitations are established in the proposed permit for the following pollutants: total iron, total suspended solids, and pH.

Water quality-based effluent limitations are established in the proposed permit for the following pollutants: monitor of applicable WQ-based pollutants.

TECHNOLOGY-BASED EFFLUENT LIMITATIONS/CONDITIONS

1. General Comments

Regulations promulgated at 40 CFR 122.44(a) require technology-based effluent limitations to be placed in NPDES permits based on effluent limitations guidelines where applicable, on BPJ (best professional judgment) in the absence of guidelines, or on a combination of the two.

2. Effluent Limitations

Effluent limitation guidelines (ELG) for new source coal preparation, 40 CFR §434.25, ELG for new source alkaline mine drainage, §434.45, ELG for post-mining areas, §434.55 and ELG for western alkaline coal mining, §434.85, are proposed in the permit. ELG for precipitation events are also established as alternate limitations for discharges caused by a 10-year, 24-hour precipitation event within any 24 hour period.

3. Monitoring Frequencies for Limited Parameters

Regulations require permits to establish monitoring requirements to yield data representative of the monitored activity 40 CFR 122.48(b) and to assure compliance with permit limitations contained in 40 CFR 122.44(i)(1). Because mine drainages will be collected in the sediment ponds and all pond capacities are designed for 100-year, 6-hour storm events, the draft permit proposes grab samples when discharges occur.

WATER QUALITY-BASED EFFLUENT LIMITATIONS/CONDITIONS

1. General Comments

Effluent limitations and/or conditions established in the draft permit are in compliance with State water quality standards and the applicable water quality management plan.

2. Post Third Round Policy and Strategy

Section 101 of the Clean Water Act (CWA) states that "...it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited..." To insure that the CWA's prohibitions on toxic discharges are met, EPA has issued a "Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants (49 FR 9016-9019, 3/9/84)." In support of the national policy, Region 6 adopted the "Policy for Post Third Round NPDES Permitting" and the "Post Third Round NPDES Permit Implementation Strategy" on October 1, 1992, and the EPA Region 6 WET Permitting Strategy on May 1, 2005. The Regional policy and strategies are designed to insure that no source will be allowed to discharge any wastewater which (1) results in instream aquatic toxicity; (2) causes a violation of an applicable narrative or numerical State water quality standard resulting in nonconformance with the provisions of 40 CFR 122.44(d); (3) results in the endangerment of a drinking water supply; or (4) results in aquatic bioaccumulation which threatens human health.

3. Implementation

The Region is currently implementing its post third round policy in conformance with the Regional strategies. The NPDES permit contains technology-based effluent limitations reflecting the best controls available. Where these technology-based permit limits do not protect water quality or the designated uses, additional water quality-based effluent limitations and/or conditions are included in the NPDES permits. State narrative and numerical water quality standards are used in conjunction with EPA criteria and other available toxicity information to

determine the adequacy of technology-based permit limits and the need for additional water quality-based controls.

4. State Water Quality Numerical Standards

(a) General Comments

As stated above, the designated uses of the receiving stream are livestock watering, wildlife habitat, limited aquatic life and secondary contact.

(b) Revised Water Quality Standards

The NM WQCC adopted new WQS for the State of New Mexico. The revised WQS as amended through August 1, 2007 are available on the NMED's website at: <http://www.nmenv.state.nm.us/swqb/Standards/20.6.4NMAC.pdf> . The WQCC established the revised WQS in accordance with, and under authority of, the NM Water Quality Act [Chapter 74, Article 6, NMSA 1978 Annotated]. The WQS have been approved by EPA in accordance with Section 303 of the CWA.

(c) Water Quality-based Limits

This is a new facility and no effluent data are available for reasonable potential screening. Monitoring requirements established in the proposed permit are to collect effluent data for further evaluation. Because the facility has sediment ponds to store storm runoffs, discharges are not expected to be frequent. Sampling for each outfall is proposed to be once per calendar year when discharge occurs. If no discharge occurs during the first four years of the term of the permit, samples shall be taken from at least three representative sediment ponds from most active mining areas and analytical results shall be reported with the application for permit renewal.

(d) Aquatic Toxicity Testing

(1) General Comments

The State has established narrative criteria, which in part, state that:

"Surface waters of the State shall be free of toxic substances attributable to discharges in amounts, concentrations or combinations which affect the propagation of fish or that are toxic to humans, livestock or other animals, fish or other aquatic organisms;..." (NM Standards 20.6.4.13 .F)

In a letter from Marcy Leavitt, NMED, to Claudia Hosch, EPA, December 16, 2005, NMED provided Narrative Toxics Implementation Guidance – Whole Effluent Toxicity, (WET Guidance), an update to the 1995 Implementation Guidance.

(2) Permit Action

In accordance with the State WET Guidance, the discharger is required to conduct acute WET testing once a year for *Daphnia pulex*. Because the facility has sediment ponds to store storm

runoffs, discharges are not expected to be frequent. WET testing for each outfall is proposed to be once per calendar year when discharge occurs.

IX. IMPAIRED WATER- 303(D) LIST

The receiving stream is not listed as impaired waterbody. Therefore, there is no additional condition to address the impairment.

X. ANTIDEGRADATION

The New Mexico 20.6.4.8 NMAC "Antidegradation Policy and Implementation Plan" sets forth the requirements to protect designated uses through implementation of the State water quality standards. The limitations and monitoring requirements set forth in the proposed permit are developed from the State water quality standards and are protective of those designated uses. Furthermore, the policy sets forth the intent to protect the existing quality of those waters, whose quality exceeds their designated use. The permit requirements are protective of the assimilative capacity of the receiving waters, and are protective of the designated uses of that water.

XI. HISTORICAL AND ARCHEOLOGICAL PRESERVATION CONSIDERATIONS

The discharger is determined to be a new source. The project is considered to be in compliance with the National Environmental Policy Act (NEPA). The applicant has performed an Environmental Assessment (EA) of the action in compliance with NEPA. The EA indicated that no significant adverse impacts should result from the activity, and that an Environmental Impact Statement (EIS) was not warranted. Based on the EA, EPA issued a Finding of No Significant Impact (FONSI) for the mining activities. Based on the FONSI, historical and/or archeological sites are protected and the overall level of impact is anticipated to be minor.

XII. PERMIT REOPENER

The permit may be reopened and modified during the life of the permit. Modification of the permit is subject to the provisions of 40 CFR 124.5.

XII. ANTIBACKSLIDING

The proposed permit is consistent with the requirements to meet Antibacksliding provisions of the Clean Water Act, Section 402(o) and 40CFR122.44(l)(2)(i)(B), which state in part that interim or final effluent limitations must be as stringent as those in the previous permit, unless information is available which was not available at the time of permit issuance.

XIII. ENDANGERED SPECIES

The facility is located in McKinley County. According to the most recent county listing available at US Fish and Wildlife Service (USFWS), Southwest Region 2 website,

<http://ifw2es.fws.gov/EndangeredSpecies/lists/>, five species in Los Alamos County are listed as endangered or threatened. Four of the species are avian and include the bald eagle (*Haliaeetus leucophaeus*), Mexican spotted owl (*Strix occidentalis lucida*), whooping crane (*Grus americana*) and the southwestern willow flycatcher (*Empidonax traillii extimus*). The remaining species is the black-footed ferret (*Mustela nigripes*). The list for Santa Fe County is identical except the species Rio Grande silvery minnow (*Hybognathus amarus*) is included.

Based on the FONSI, EPA concludes that no threatened, endangered, or rare plant species (T&E) were documented nor were there suitable habitats present for species of concern. No federally or state listed T&E fauna were found during wildlife surveys. EPA determines that the issuance of Permit No. NM0030996 will have “no effect” on the federally listed species nor will it adversely modify designated critical habitats.

XIV. VARIANCE REQUESTS

No variance requests have been received.

XV. ADMINISTRATIVE RECORD

The following section is a list of the fact sheet citations to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by 40 CFR 124.9:

A. APPLICATION(S)

EPA Application Forms 1 and 2F dated November 12, 2007, and Supplemental application data dated December 18, 2007, respectively.

B. STATE WATER QUALITY REFERENCES

The general and specific stream standards are provided in "New Mexico State Standards for Interstate and Intrastate Surface Waters," (20.6.4 NMAC, amended through August 1, 2007).

Region 6 Implementation Guidance for State of New Mexico Standards for Interstate and Intrastate Stream, May 1995.

Narrative Toxics Implementation Guidance – Whole Effluent Toxicity, December 16, 2005.