

April 2001 Monthly Report
West Virginia Permitting Activities
May 17, 2001

I. INTRODUCTION

Purpose of This Report

The purpose of this report is to update the West Virginia Congressional Delegation and the public on the status of pending West Virginia surface coal mining permit applications containing plans to construct valley fills. The report covers the activities of the Fish and Wildlife Service (FWS), the Office of Surface Mining (OSM), the U.S. Army Corps of Engineers (COE), the U.S. Environmental Protection Agency (EPA), and the West Virginia Division of Environmental Protection (WVDEP) during the period from April 1, 2001, through April 30, 2001. It relates to both the surface mining program under the authority of the Surface Mining Control and Reclamation Act (SMCRA) and water quality programs authorized by the Clean Water Act (CWA). The background for the activities covered by the report and the individual agency responsibilities are discussed in Appendix II.

II. PERMIT REVIEW STATUS SUMMARY

Since the last report listing sixty-eight SMCRA applications for proposed operations and seven revision/amendment applications for previously permitted operations, one application, Mingo Logan Coal Co. S-5019-98, received all of the necessary approvals to begin operations. In addition, several corrections resulting from prior actions have been made to the report this month. These corrections are as follows:

- Bluestone Coal Corp S4009-00 was inadvertently omitted from the report at the time of submission and has been added to the Pending Applications listing on page 3 of Appendix I.
- Hampden Coal Company U-5004-01 was erroneously added to the list of Pending Applications and now has been removed from Appendix I.
- Independence Coal Company, Inc. S-5014-00 received all necessary approvals by February 26, 2001, but was inadvertently left on the Pending Applications list. It now has been placed on the Issued Permits listing on page 5 of Appendix I.
- Mid Vol Leasing S-4015-00 was inadvertently omitted from the report at the time of submission and has been added to the Pending Applications listing on page 3 of Appendix I.

- Terry Eagle Coal LLC originally submitted S-3004-00 but the applicant name was later changed to Powellton Coal Company LLC (a sister company of Terry Eagle). The name change has been indicated on the Pending Applications listing on page 2 of Appendix I.
- Upper Kanawha Valley Development S-3013-00 received SMCRA and NPDES approvals by January 12, 2001. The permit did not require a CWA 404 Authorization or a CWA 401 Certification. It has been removed from the Pending Applications listing of Appendix I and moved to page 5 of the Appendix.
- Falcon Land P-606, IBR #8 received SMCRA and NPDES approvals by May 11, 2000. The IBR overbonded one of Falcon's existing underground permits that already had a CWA 404 Authorization and 401 Certification. The application has been removed from the Pending Revisions listing of Appendix I and moved to page 5 of the Appendix.

Hobet Mining Inc. has submitted an Incidental Boundary Revision to the previously approved SMCRA permit and a revision to the existing NPDES permit for their proposed Spruce No. 1 mine (S-5013-97). The proposed operation has been listed in previous reports on the Pending Applications section of Appendix I due to the pending CWA 404 Individual Permit action. Now that revision applications have been received for the SMCRA and NPDES permits, the listing has been moved to the Pending Revisions section of the Appendix.

Two applications for new operations were submitted in April. The number of pending applications for proposed new operations is now sixty-seven and the number of revision/amendment applications remains at seven. These seventy-four applications need at least one of the four approvals necessary to begin operations.

Revisions were made to the April estimated decision dates for four SMCRA applications and one amendment application. The following is a list of the applications and an explanation of why the estimated decision date was revised:

- Baystar Coal Co. S-4006-98 Pending submission of company corrections. The estimated decision date is now August.
- CC Coal Co. O-5002-99 Pending review of corrections by the WVDEP regional office. The estimated decision date is now July.
- Coastal Coal WV LLC U-2014-00 Pending review of corrections by the WVDEP regional office. The estimated decision date is now November.
- Independence Coal Co., Inc. S-4005-00 Pending submission of company corrections. The estimated decision date is now May.
- Aracoma Coal Co. S-5013-90, Amd 1 Pending review of corrections by the WVDEP regional office. The estimated decision date is now July.

III. APPENDICES

Appendix I - *West Virginia Permitting Status*

Appendix II - *Background and Agency Responsibilities and Coordination*

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APPENDIX II

Background

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

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

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

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

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

Agency Coordination and Responsibilities

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

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

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

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

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

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