DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-CO/Regulatory (1145)

MAR 19 2004

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS AND DISTRICT COMMANDS

SUBJECT: Standard Operating Procedures for Nationwide Permit 21 Processing

1. For those Districts that have issued verification letters that projects that are authorized under the Surface Mining Control and Reclamation and may be authorized under NWP 21 or individual permit, please place the attached mining standard operating procedure document on your website for public information.

2. The Corps application should include the entire scope of their project. However, unusual circumstances may cause applicants to seek a general permit to authorize specific activities which are/were not included in their NWP 21 application/authorization (such as repairing existing features like roads, culverts, etc.). The use of other applicable general permits is within the discretion of the District Engineer.

3. Regulatory Project Managers should be mindful of timeframes established in statute, regulation, and policy guidance and make every responsible effort to adhere to them. In that regard, other Federal and state agencies are expected to meet established timeframes. Delays and requests for time extensions are to be discouraged.

4. Under the Clean Water Act (CWA), the Corps can neither extend nor automatically renew ("grandfather") authorizations previously provided under the 1996 nationwide permits. Mining companies conducting operations authorized under a 1996 NWP 21 can no longer operate under those permits and must submit new preconstruction notifications that include compensatory mitigation for unavoidable impacts to aquatic resources in accordance with the new NWP 21 reissued on January 15, 2002.

5. NWP 21, like other general permits, expires every five years with a one-year grace period to complete operations. Operators desiring to conduct long term mining operations, even those operations currently permitted by NWP 21, are encouraged to pursue individual permit authorizations for those operations. Such applications can be initiated during the period that their NWP 21 authorization is in force. This approach will allow mining operations that are expected to extend beyond the NWP 21 authorization period to achieve a seamless transition and

assure them of permit continuity. Districts will use all relevant and available information from the NWP 21 authorization files and make every reasonable effort to minimize additional requirements for information, studies, or assessments when reviewing IP applications.

FOR THE COMMANDER:

Carl A. Strock
Major General, U.S. Army
Director of Civil Works

STANDARD OPERATING PROCEDURES FOR NATIONWIDE PERMIT 21, SURFACE COAL MINING ACTIVITIES, REVIEW AND EVALUATION OF PRE-CONSTRUCTION NOTIFICATIONS, AND MINIMAL ADVERSE EFFECTS DETERMINATIONS

STANDARD OPERATING PROCEDURES

Preamble. The Army's Regulatory Program must be efficient, effective, and responsive, and operated with integrity in order to protect and enhance our Nation's aquatic environment while authorizing important development activities. The program must be transparent, consistent, and clear, providing regulatory predictability and certainty. Toward that end, this Standard Operating Procedure has been developed to enhance consistency by describing Nationwide Permit 21 authorization requirements and processes. The SOP is mean to be flexible and not in any way hamper the ability of Corps project managers to use their judgment during the permit evaluation process. This SOP will be a dynamic document. It will be discussed at Division-wide quarterly meetings, its performance monitored, and adjustments made to achieve greater clarity, as necessary. This SOP will help Corps project managers, mining companies and their consultants, and the public at large to understand the requirements and processes.

1. PRE-APPLICATION MEETING. The Corps project manager (PM) should encourage/initiate pre-application consultation with the applicant, Office of Surface Mining and/or the designated state regulatory agency at the earliest, practicable stage so that Section 404 of the Clean Water Act (CWA) and Surface Mining Control and Reclamation Act (SMCRA) permitting are coordinated early in the process.

a. All waters of the U.S., including streams and wetlands, should be clearly identified and verified by the Corps of Engineers prior to submittal of an application;

b. The preapplication consultation should ensure that all pertinent information necessary for a complete preconstruction notification (PCN) is developed prior to submittal to the Corps of Engineers so that unnecessary delays are avoided or minimized (see below).

c. The preapplication consultation should address the mitigation necessary to offset impacts to the aquatic resource. The applicant should be encouraged to coordinate the mitigation plan with the Corps, OSM and/or the state regulatory agency to ensure the mitigation plan meets the requirements and needs of Section 404 of the Clean Water Act and SMCRA and is not in conflict with other permitting authorities.

d. The applicant should provide the number of copies of the PCN required in each state, and the four or 5 copies required for Federal agencies (see para. V) in order to expedite agency notification (see below). Submission of electronic copies of information is encouraged.

e. The preapplication consultation should include a field review of the affected aquatic environment.

2. RECEIPT OF APPLICATION. Upon receipt of the Preconstruction Notification (PCN) package, the PM shall make a determination of completeness within 30 days (see para. IV below). In addition to the basic requirements of Nationwide Permit General Condition 13 (b), a complete PCN will contain the following elements:

a. A detailed description of proposed mining activity.

(1) Provide the approximate linear feet and flow regime(s), depth and acres (extending to the ordinary high water mark) of stream(s) that would be impacted by the proposed activity. - Be specific

(a) Direct Impacts

-Footprints of hollow fills or other permanent fills

-Footprints of sediment pond embankments or other temporary fills

-Road Crossings

-Mining through streams

-Other direct placement of fill or dredged material into waters

(b) Indirect Impacts

-Reach of stream impacted by sediment pond pool

-Reach of stream impounded by sediment transport

-Diversion of waters

-Excavation

-Other secondary impacts

(2) Provide the drainage acreage for the proposed activity (if a valley fill is involved, the drainage acreage must be calculated from the toe of the fill).

(3) Describe the proposed activity's purpose.

(4) Provide the date you propose to begin work on the mining activity and the date work is expected to be completed.

(5) Describe the type (rock, sand, dirt, rubble, etc.) and quantity (cubic yards) of dredged or fill material proposed to be discharged into the aquatic environment.

b. Minimal Impact Determination- This includes the information to allow the District Engineer to determine if a project will result in minimal adverse environmental effects on the aquatic environment, both individually and cumulatively:

(1) Loss of aquatic functions as a result of proposal

(2) Gain of aquatic functions with compensatory mitigation

(3) A discussion of how the project has been designed and constructed to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the site. This discussion may include, but not limited to, the following:

(a) Demonstration that there is not a practicable alternative in waters of the U.S., including other alternatives that were considered

(b) Discussion of how impacts to waters of the U.S. have been avoided and minimized

(c) Avoidance of high quality waters

(d) Demonstration that sediment control structures will be located as close as practical to the fill(s) and/or mining area with which it is associated

(e) A general description of the aquatic environment directly affected, as well as the aquatic resources a reasonable distance downstream. For stream impacts, the areas to be impacted shall be assessed to include the stream pattern, profile and dimensions.

(f) Summarize results of functional (habitat) assessment

(g) Waters of the U.S. Delineation

-Date(s) delineation and/or assessment was/were conducted.

-Name and contact information of individual(s) conducting the assessment.

-A site map indicating location(s) of delineation(s) and/or assessment(s) and associated photographs in relation to the proposed activity.

(h) A description of relative stream quality based on an assessment methodology acceptable to the Corps such as the EPA's Rapid Bioassessment Protocols For Use in Streams and Wadeable Rivers, Eastern Kentucky's Headwaters Integrity Assessment and should also indicate the ephemeral, intermittent and perennial reaches to be impacted. A functional assessment is required for wetland impacts (i.e. Ohio Rapid Assessment Method [ORAM], HGM subclass, Cowardin classification) and it should indicate the wetland type(s) to be impacted. Other approved functional assessment methodologies are also acceptable. The assessment must include a brief discussion of the rationale supporting the conclusion.

(4) Cumulative impacts analysis that must include an evaluation of the impact on the environment that results from the incremental impact of the proposed activity when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes them. An example would be to consider other land disturbance activities and watershed improvement projects within the same watershed as the proposed activity on water quality and aquatic habitat.

(a) Land Disturbance Activities
- -Mining and re-mining
- -Logging
- -Agriculture
- -Road Construction

(b) Watershed Improvement Projects
- -Preservation areas
- -Restoration of previously mined areas
- -Enhancement activities i.e. mitigation bank, acid mine reclamation projects, or dedicated natural areas

c. Compensatory Mitigation. A mitigation plan developed in accordance with General Condition 19 of the NWPs and the Corps Regulatory Guidance Letter dated December 24, 2002, available on the Internet at http://www.usace.army.mil/inet/functions/cw/cecwo/reg/RGL2-02.pdf Mitigation Banks and In-lieu Fee arrangements may also be considered, if available and best for the aquatic environment as part or all of a compensatory mitigation plan. At a minimum, the applicant's on-site or off-site compensatory mitigation plan shall contain the following elements:

(1) Baseline Information

(a) Location

(b) Size (Linear feet and acreage of streams, wetland acreage)

(c) Aquatic resource type

(d) Pre-existing conditions
- -(e.g., Ecological Integrity Index prior to any mitigation work being done)
- -Stream patterns, profiles, dimensions
- -Recent land disturbance history

(2) Goals and Objectives

(a) Discussion of the aquatic resource type(s) and functions impacted by the authorized work and comparisons to the aquatic resource type(s) and functions being proposed at the compensatory mitigation site(s).

(b) Objectives statement should describe the loss(es) of aquatic

(c) functions on the authorized impact site and compare that

(d) to the amount of compensatory mitigation needed to offset the unavoidable impacts to

waters of the U.S.

(3) Site Selection. Describe the factors considered during the site selection process and plan formulation such as:

(a) Watershed considerations

-How the chosen mitigation site contributes to the specific aquatic resource needs of the impacted watershed

-Practicability

(b) Cost, existing technology, and logistics

(4) Mitigation Work Plan

(a) Boundaries of proposed mitigation sites (maps and drawings)

(b) Construction (methods, timing, and sequence)

(c) Water source(s) and connectivity to existing aquatic resources

(d) Native vegetation proposed for planting

(e) Allowances for natural regeneration

(f) Plans for control of exotic invasive vegetation

(g) Elevations and slopes

(h) Erosion control

(i) Geomorphology & special stream structure(s)

(j) Proposed patterns, profiles, dimensions

(k) Natural stream design techniques, i.e. cross-vanes, etc.

(l) Site Management & Maintenance Plan

(5) Performance Standards

(a) Standards for assessing whether or not the mitigation is achieving planned goals

-These will become special conditions on the permit

-Incorporated into monitoring plan

-Should be measurable

(b) Adaptive Management

-How will changes be identified and made if mitigation is less than acceptable or not successful during monitoring

(c) Project performance evaluations

-Corps will use monitoring reports and compliance checks to determine whether or not the "gains" or environmental benefits of the mitigation equal or exceed the "losses" of the authorized project

(6) Project Success

(a) Identify all parties responsible for compliance with the mitigation plan and their role in the mitigation project

(b) These will be incorporated into special conditions of the permit

(7) Site Protection

(a) A written description of the legal means for protecting the mitigation area(s) (e.g., deed restrictions, conservation easements)

(b) Permits will be conditioned accordingly

(8) Contingency Plan

(a) Unanticipated site conditions or changes

(b) Remedial measures

(c) Adaptive Management (may allow for modification of performance standards)

(9) Monitoring and Long-Term Management

(a) Identify the parties responsible for accomplishing, maintaining, and monitoring the mitigation

(b) Monitoring Plans will be required

-The monitoring should be meaningful in the context of the established objectives.

-A five year annual monitoring and management plan must be provided for the restoration site.

- This monitoring and management plan will evaluate the success of the mitigation work and will allow for any necessary adjustments to assure success of the restoration site.
- The management plan should lay out the specifics for how the site will be used and maintained. This plan should also state who is responsible for the work and what will be the schedule for the restoration activities. The management plan must be very clear as to what conditions will trigger needs for certain maintenance or management activities. Plans for invasive species control, fencing and signage should be included. The short- and long-term plans for the site should be described.
- Annual monitoring reports will be submitted to appropriate Corps office no later than December 31 of the year following completion of the mitigation measures.
- These monitoring reports shall include the inspector's report and photographs with locations or stations depicted on plan views.
- The monitoring reports should restate the compensation site plan goals, objectives and performance standards, identify of any structural failures or external disturbances on the site, and describe any management activities and/or corrective measures that were implemented during the previous year.
- The monitoring reports should include a site map showing the location of data collection, an assessment of the presence and level of occurrence of invasive species, an assessment of the degree to which performance standards are being met, proposed corrective actions to improve attainment of performance standards, and a narrative summary of the results and conclusions of the monitoring.

(10) Financial Assurances

(a) Identify the party(ies) responsible for managing any financial assurances and contingency funds set aside for remedial measures

-Performance bonds

-Irrevocable trusts

-Escrow accounts

-Casualty insurance

-Letters of credit

(b) Assurances may be phased-out or reduced

3. Bonds. Upon review of the compensatory mitigation plan, the PM shall determine whether or not a bond or other suitable financial instrument is required to ensure the success of the mitigation. If the PM determines a bond or other suitable financial instrument is necessary, a third party would be required to hold the bond.

4. Completeness determination. If the PM determines the PCN is incomplete within the 30 day review period, the applicant shall be notified in writing or via email the reason(s) why (Attachment 1).

5. Agency Coordination. In order to maintain continued coordination among the other Federal and State resource agencies, copies of the PCN shall be provided to the U.S. Fish and Wildlife Service, Office of Surface Mining or state delegated mining regulatory agency, appropriate state natural resource and water quality agencies, U.S. Environmental Protection Agency, State Historic Preservation Office and, if appropriate, the National Marine Fisheries Service via facsimile, overnight mail or other expeditious means.

a. The agencies shall be allowed 10 calendar days from the date the PCN is transmitted to notify the PM if it intends to provide substantive comments on the PCN.

b. If so contacted by an agency, the PM shall wait an additional 15 calendar days before making a decision on the PCN.

c. The PM shall fully consider agency comments received within the 15-day time period but a response to the agency is not required.

d. The PM shall document in the administrative record that agency comments were solicited and considered in making a decision on the PCN.

e. The PM may determine that an applicant's response to agency comments is needed to ensure there will be no more than minimal adverse effects on the aquatic environment. In requesting such a response from the applicant, the PM will make clear which comments from the agency need to be addressed (those comments relating to adverse effects on the aquatic environment).

6. Minimal effects determination. To ensure the project complies with the terms and conditions of the nationwide permit, including any regional conditions developed by the District, the PM must make a minimal effects determination. In making the minimal effects determination, the PM, at a minimum, shall consider and place in the administrative record the following (13 July 2000 Memorandum on NWP 21 PCN Guidance):

a. A general description of the boundaries of the area subjected to the Corps consideration of individual and cumulative adverse effects (the aquatic environment directly affected as well as aquatic resources a reasonable distance downstream) and a brief discussion of the rationale supporting the determination of these boundaries.

b. A summary of the individual effects of the project under consideration.

c. A summary of the effects of existing, reasonably identifiable activities and conditions on the aquatic environment within the area of consideration, and a summary of anticipated effects of reasonably foreseeable activities and conditions are likely to affect the aquatic environment.

d. A discussion of the mitigation proposed by the project applicant or required by the Corps, and

e. A statement signed by the preparer of this documentation, and counter-signed by an approval official designated by the District Engineer, affirming that, in consideration of the foregoing information, it is concluded the project will have no more than minimal adverse effects on the aquatic environment, or a statement describing the rationale for the assertion of discretionary authority where the adverse environmental effects of the proposed surface coal mining activities have been determined to more than minimal on the aquatic environment.

7. Terms and conditions. Upon determining a proposed project will have no more than minimal adverse environmental effects upon the aquatic environment, the Corps will verify the applicant's proposed project meets the criteria for the NWP 21 subject to the terms and conditions of the NWP (e.g., Section 106, ESA) including any special conditions the District Engineer deems necessary. The NWP 21 verification letter shall contain appropriate, enforceable permit conditions that ensure impacts, both individually and cumulatively, are no more than minimal.

8. Notification of the need for an Individual Permit. If the Corps determines the PCN is complete but the project does not comply with the terms and conditions of NWP 21, including any District regional conditions, the District Engineer shall notify the applicant in writing that an individual permit will be required for the proposed activity. Such a determination may occur at any stage of the review process. The reason(s) the project cannot be authorized by NWP 21 shall be detailed and recommendations made to bring the project into compliance with the terms and conditions of NWP 21.

Attachment 1

NWP 21 PCN COMPLETENESS CHECKLIST

Date: _____
Applicant: _____
COE Permit No. _____
SMCRA Permit No. _____

The Preconstruction Notification submitted on _____ is incomplete for the following reason(s):

- ☐ Linear feet and flow regimes of stream(s) impacted by the proposed activity not identified for specific impacts (e.g., footprint of valley fill(s), sediment pond(s), or sediment conveying reach(es) between these structures).
- ☐ Acreage of wetland(s) impacted by the proposed activity not quantified.
- ☐ Confirmed wetland delineation, identification of stream riffle and pool complexes and/or other special aquatic sites not provided.
- ☐ Acreage of drainage area impacted by the proposed activity not quantified (If a valley fill is involved, the drainage acreage must be calculated from the toe of the fill).
- ☐ Purpose of the proposed activity not described.
- ☐ Date(s) mining activity and associated mitigation proposed to commence and expected completion date of the work not provided.
- ☐ Type of dredged or fill material proposed for discharge into the aquatic environment not provided.
- ☐ Quantity (cubic yards) of dredged or fill material proposed for discharge into the aquatic environment not provided.
- ☐ An alternatives analysis demonstrating impacts to waters of the U.S. have been avoided and/or minimized to the maximum extent practicable has not been provided.
- ☐ Documentation that sediment control structures are located as close as practical to the fill(s) and/or mining area with which it is associated has not been provided.
- ☐ A general description of the aquatic environment directly affected, as well as the aquatic resources a reasonable distance downstream has not been provided.
- ☐ A description based on sound fluvial geomorphic principles of the affected stream(s) pattern, profile and dimension has not been provided or is insufficient in detail.
- ☐ An assessment of relative stream quality utilizing methodologies such as the U.S. Environmental Protection Agency's Rapid Bioassessment Protocol for Use in Wadeable Streams and Rivers (RBP) or other approved assessment methodologies has not been provided.
- ☐ Date(s) the delineation and/or assessment was/were conducted have not been provided.
- ☐ Name and contact information of individual(s) conducting the assessment has not been provided.
- ☐ A site map indicating location(s) of delineation(s) and/or assessment(s) and associated

photographs in relation to the proposed activity has not been provided.

- ☐ A discussion and evaluation of the proposed project's incremental impact on the environment when added to other past, present and reasonably foreseeable future actions has not been provided. As part of the discussion of past impacts please include information regarding previous fills such as sediment ponds, valley fills, etc. in the project area (e.g., location, size, and date(s) of construction and authorization(s)).
- ☐ Proof not provided that the coal mining activities are authorized by the DOI, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 (e.g., TAC sheet or SMCRA permit face sheet).
- ☐ A mitigation plan was not submitted with the PCN.
- ☐ The mitigation plan is insufficient for the following reason(s) (please refer to RGL-02-02 for a detailed explanation of each of these items) http://www.usace.army.mil/inet/functions/cw/cecwo/reg/RGL2-02.pdf

  - ☐ Baseline Information is lacking
  - ☐ Goals and Objectives (e.g., functional replacement, temporal losses, and risk) have not been identified and/or satisfied
  - ☐ A rationale for mitigation site selection has not been given
  - ☐ The location of the mitigation site has not been shown
  - ☐ Mitigation work plan has not been submitted OR is insufficient
  - ☐ Measurable performance standards/success criteria have not been identified
  - ☐ Site protection measures have not been identified and/or discussed
  - ☐ Contingency plan addressing mitigation success has not been provided
  - ☐ Protection, monitoring and long-term management of the of the mitigation site have not been specified
  - ☐ Financial assurances guaranteeing implementation of the mitigation plan have not been put in place.

_____

Project Manager Date