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October 6, 2009

U.S. Army Corps of Engineers  
Regulatory Community of Practice  
CECW-CO, Attn: Desiree Hann  
441 G Street, NW  
Washington, D.C. 20314-1000

Re: Docket Number COE-2009-0032

Dear Ms. Hann:

I am writing to provide comment on the proposal of the United States Army Corps of Engineers, pursuant to the June 11, 2009 Memorandum of Understanding among the U.S. Environmental Protection Agency, the U.S. Department of the Interior and the U.S. Department of the Army, to modify use of the Nationwide Permit (NWP) 21 to preclude its use to authorize the discharge of fill material into streams for surface mining activities in the Appalachian Region.

The Clean Water Act, Section 404, requires that surface mining operations be reviewed and permitted by the United States Army Corps of Engineers in order to assure that all environmental concerns with respect to the effect of the operation on the waters of the United States are fully addressed in the mining plans. Under Section 404, the NWP 21 has been used successfully by the Corps in Virginia to assure the implementation of responsible environmental practices at surface mining operations that are deemed to have "minimal impacts." This permit offers an effective, streamlined approval process for many mining operations in Virginia that are small in scope and that have minimal effects. Combined with permit reviews performed by the Virginia Division of Mines, Minerals and Energy under the Surface Mining Control and Reclamation Act, the NWP 21 has allowed minimal impact projects to move forward without the time consuming, expensive and sometimes duplicative requirements imposed by the Individual Permit that is required for larger projects.

In June of this year, the Army Corps of Engineers proposed eliminating the use of the NWP 21 for surface mining operations in the Appalachian region. Given the safeguards described above, I am concerned that this proposal if enacted will adversely affect the economy of our region without providing the desired benefit to the environment. Mining in the Appalachian Region creates some of the highest paying jobs in the local economy, and the products and services purchased in the course of mining operations create thousands of additional jobs in support industries. Tax revenues from the extraction of coal provide funding for schools, roads and other essential services, and the coal produced at these operations provides affordable and reliable electricity for residents, businesses and industry.

The mining industry is the cornerstone of the economy of Virginia's coal producing region, and an appropriate balance must be struck between protecting the environment of the region and allowing essential coal mining activities that support economic growth. For that reason I have proposed to the Army Corps of Engineers a three-tiered permitting system that accomplishes both purposes.

- \* Rather than precluding the use of NWP 21 for all surface mining operations as proposed, I am asking that the USACE allow the continued use of the NWP 21 for projects with "minimal impacts" that are defined by specific criteria, such as upward limits on the maximum number of linear feet of stream affected, the maximum amount of watershed affected, the proximity of the proposed fill to the headwaters of the stream and/or upward limits on the total number of cubic yards of fill to be deposited. Establishing acceptable limits for use of the NWP 21 would enable surface mining operations permitted under it to take place in a timely manner and in an environmentally responsible fashion.
- \* For operations with more than minimal impacts that are of mid-size, I am asking that the USACE explore the potential of creating and implementing a new Appalachian Regional Permit that recognizes and possibly incorporates the SMCRA permitting process as part of the application process. Perhaps shared public notices and a concurrent review by both agencies (leading to separate decision making) could occur, but the Section 404 review would stop short of the requirements of the Individual Permit process.
- \* Operations exceeding the threshold for the Appalachian Regional Permit, suggested above, would be permitted under the Individual Permit process.

Page 3  
October 6, 2009

Finally, in order to provide some degree of financial certainty to coal operators in Virginia, I urge that those mining operations for which the NWP 21 has already been issued but which have not yet been completed should be allowed to proceed to completion while the Corps evaluates the comments received on the proposed modifications to the NWP 21 and reaches its decision. Further, such projects should be allowed to proceed to completion under their existing permits even if the USACE ultimately decides to modify the use of the NWP 21 to preclude its use for surface mining operations.

I appreciate your attention to these comments. With kind regards, I am

Sincerely,



Rick Boucher  
Member of Congress

C: Stephen Walz, Director, Virginia Division of Mines, Minerals and Energy  
Butch Lambert, Deputy Director, Virginia Division of Mines, Minerals and Energy  
Barbara Altizer, Director, Eastern Coal Council  
Bill Bledsoe, Executive Director, Virginia Mining Association

RB/bc