



Questions and Answers

Proposed Rulemaking, 33 C.F.R. Part 325, Appendix B
2 April 2010

Q: How does the proposed rulemaking relate to the June 2009 Memorandum of Understanding implementing the Interagency Action Plan on Appalachian Surface Coal Mining (MOU)? In other words, why is the Army proposing to make this change?

A: In the MOU, the Department of Army, EPA and the Department of Interior committed to a number of actions designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with Federal law. Among those actions was a commitment to strengthen the environmental review of proposed surface coal mining projects in Appalachia under the Clean Water Act (CWA), which the agencies have done through policy guidance. However, in order to ensure that all reasonable and prudent opportunities to improve environmental protection are considered, the Army is proposing this rulemaking. This proposed rulemaking is fully consistent with the commitments made in the June 2009 MOU and will seek robust public and interagency comment on any potential revision to the Corps National Environmental Policy Act (NEPA) regulation relating to the scope of review for activities considered during Clean Water Act Section 404 evaluations of surface coal mining "valley fill" impacts on the aquatic environment in Appalachia.

Q: How is the Army defining the geographical scope of "Appalachia"?

A: While Army and the Army Corps of Engineers have not yet drafted the proposed rule change, it is anticipated that the geographical extent of Appalachia envisioned for this rulemaking effort mirrors that reflected in the interagency MOU; that is the counties in the six state area (Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia) defined by the Appalachian Regional Commission as belonging to "Appalachia".

Q: How will the rulemaking process work?

A: A broad suite of alternatives, including the no action alternative, as required by NEPA, will be considered during the rulemaking process. After publishing notice of a proposed rule change in the Federal Register to seek comments from every part of the public that has an interest in this subject and from other Federal, State, and local governmental agencies, U.S. Army Corps of Engineers (Corps) staff will further describe the options, their potential benefits and adverse

effects, and formulate recommendations for consideration by Corps and Army leadership. The objective is to determine which alternative best balances the views of all levels of government, stakeholders, organizations, and the public. The Corps will also coordinate with Congress, in particular, those members representing Appalachian states and Corps oversight committees. Army will closely coordinate with various Federal and state agencies that regulate surface coal mining activities. It may be determined that making no change to the existing regulations is appropriate. Results of the Army rulemaking effort will be published in the Federal Register upon conclusion of the process.

Q: Will there be workshops or public meetings where individuals and organizations can express their views and discuss their views with Corps staff?

A: While the Corps has not made any decisions regarding workshops and public meetings, Corps staff is working on a comprehensive public involvement plan and details will be made public in the near future.

Q: What are the potential benefits/outcomes of this process?

A: The objective of the rulemaking is to review and evaluate Appendix B, which is 22 years old, in terms of how it has worked for surface coal mining in Appalachia. Based on this analysis, and a comprehensive review of actual projects and Corps-authorized activities, the Army will consider whether changes should be made, consistent with the Clean Water Act, which would achieve this administration's goals for improving environmental protection while allowing appropriate mining activities to continue/occur.

Q: Will the proposed rule for the Army Corps of Engineers scope of review for NEPA be limited to the footprint of the valley fill? Will the scope of review for NEPA include the entire mine site or only the valley fills and other crossings of waters of the U.S. for other purposes?

A: The proposed rule will define a broad range of alternatives for public comment that will enable the Army to best determine how to define the appropriate scope of review.

Q: Will the proposed rulemaking apply to all Clean Water Act and Rivers and Harbors Act standard individual permit applications?

A: The Army will initiate rulemaking to consider modifying Appendix B to 33 C.F.R. Part 325 *NEPA Implementation Procedures for the Regulatory Program* to reflect a limited and targeted

change in policy regarding implementation of NEPA regulations to surface coal mining activities in Appalachia due to concerns expressed over the harmful environmental consequences of "valley fills" in the region. A broad suite of alternatives will be evaluated, enabling the Army to fully consider all potential options, as well as public and agency comments on those alternatives on those alternatives, for action.

Q: Will the proposed rule have any implications for the scope of analysis that the Corps applies for the evaluation of cultural resource impacts or its Appendix C Regulation?

A: The proposed rule will consider potential modifications to Appendix B to 33 C.F.R. Part 325 *NEPA Implementation Procedures for the Regulatory Program* only, not to Appendix C to 33 C.F. R. 325 *Procedures for the Protection of Historic Properties*.

Q: What changes, if any, will the Army Corps of Engineers implement in the interim timeframe while determining scope of analysis for surface coal mining project applications during the rulemaking process?

A: In keeping with current regulation and policy, the Army Corps of Engineers will consider any comments submitted by the public as well as the results of interagency coordination when evaluating all applications. The Army Corps of Engineers will continue to make final permit decisions, pursuant to Section 404, for proposed surface coal mining operations in Appalachia using the regulations and Army policy guidance currently in place.

Q: What is the impact of the proposed rulemaking on SMCRA?

A: None. The Army's rulemaking will reflect and build upon the fact that the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM) is the primary authority under the Surface Mining Control and Reclamation Act (SMCRA) for regulating all aspects of surface coal mining activities. In all Appalachian states except Tennessee, SMCRA authority has been assumed by the states for implementation by state SMCRA programs. In Tennessee, OSM implements SMCRA as well as acting as the lead Federal agency for the implementation of the National Environmental Policy Act. The Army Corps of Engineers will continue to determine the appropriate scope of review for projects proposed for authorization under section 404 of the Clean Water Act, pursuant to all applicable laws, regulations, and policy. Army views this rulemaking action as an opportunity to enhance the integration of SMCRA and CWA Section 404 reviews, ensure close interagency coordination, eliminate redundancies, and potentially provide additional guidance on achieving environmental objectives.

Q: How will the proposed rulemaking relate to the primacy of the states and EPA regarding water quality under Clean Water Act (CWA) Sections 401 and 402?

A: The proposed rule will reflect and build upon the primary responsibility of the states and EPA to address all water quality concerns relating to valley fills by means of CWA Sections 401 and 402.

Q: What is the connection, if any, between this proposed rulemaking and the recent EPA guidance to the field?

A: One of the commitments in the interagency MOU on Surface Coal Mining was focused on strengthening the environmental review of proposed surface coal mining projects in Appalachia under the Clean Water Act (CWA) Section 404(b)(1) Guidelines. The recently released EPA guidance is consistent with the commitments made in the June 2009 MOU and clarifies how EPA is carrying out their responsibilities, in coordination with our Federal and State partners, to ensure Appalachian surface coal mining operations are fully consistent with the requirements of the law and will protect water quality and the environment.

Q: What office will do the rulemaking and, if members of the public want to provide information, where should it be sent?

A: The rulemaking effort will be led by the Regulatory Branch at Corps Headquarters, supported, as necessary, with staff from Corps District offices in Appalachia and throughout the Nation. The Corps will publish information on this rulemaking on its websites and in the Federal Register and indicate where information and comments can be sent.

Q: What is the schedule for this proposed rulemaking effort?

A: Army and the Corps have not yet developed an overall schedule. This will be one of the first actions undertaken and it will be announced once completed. Army anticipates that the schedule will need to be dynamic because the total extent of the work involved, the number of comments that will be received, and what information will be provided for consideration is unknown at this time.

Q: If the rulemaking does result in significant changes to Army regulations, how will these changes be communicated to the public, mining companies, and contractors?

A: Army will ensure that any changes that may be adopted are made known through electronic and print media, training, and other means yet to be identified.

Q: Will this rulemaking effort tax Corps regulatory staff in Appalachia and at Corps Headquarters to the point where delays in processing permit applications and policy determinations for all proposed activities will occur?

A: As the rulemaking effort proceeds, Corps Headquarters will monitor the performance of the overall Regulatory Program and coordinate with the Office of the Assistant Secretary of the Army for Civil Works to address staffing and resource issues if and when they arise.

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