

PRE-CONSTRUCTION NOTIFICATION REQUIREMENTS FOR NATIONWIDE PERMIT 21, SURFACE COAL MINING ACTIVITIES

The purpose of this public notice is to detail the information requirements for a Nationwide Permit (NWP) 21 evaluation. Section 404 of the Clean Water Act requires that a Department of the Army permit be obtained prior to the discharge of dredged or fill material into waters of the United States. These requirements must be met for any mining operation which will result in a discharge of dredged or fill material into waters of the United States, which include perennial, intermittent, and ephemeral stream channels as well as jurisdictional wetlands. These requirements are valid for new projects, current ongoing projects seeking re-authorization, and projects that have never received authorization. The provisions of Section 404 of the Clean Water Act are explained in detail within the attached fact sheet.

Nationwide Permit 21 authorizes the discharge of dredged or fill material into waters of the United States associated with surface coal mining and reclamation activities provided the activities are authorized by DOI, OSM, or states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 provided the permittee notifies the District Engineer in accordance with the “notification” general condition. In addition, to be authorized by this nationwide permit, the District Engineer must determine the adverse environmental effects associated with the activities are minimal both individually and cumulatively and must notify the project sponsor in writing.

It is imperative that all mining operations that are currently discharging, or propose to discharge dredged or fill material into waters of the United States contact this office immediately to apply for a Section 404 permit.

In addition to the basic requirements of General Condition 13 (Notification) (b) of the NWPs, which are available on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/2002nwps.pdf>, the following information is required in the Pre-Construction Notification (PCN):

1. A detailed description of proposed mining activity.
 - a. Provide the approximate linear feet and flow regimes (e.g., ephemeral, intermittent, or perennial) of stream(s) that would be impacted by the proposed activity.
 - b. Provide the approximate acres of wetland(s) that would be impacted by the proposed activity.
 - c. For discharges into special aquatic sites, including wetlands and riffle and pool complexes, the PCN must also include a delineation of affected sites.
 - d. 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).
 - e. Describe the proposed activity’s purpose.
 - f. Provide the date you propose to begin work on the mining activity and the date work is expected to be completed.
 - g. 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.

2. 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:

- a. 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:
 - i. Demonstration that there is not a practicable alternative outside of waters of the U.S., including other alternatives that were considered.
 - ii. 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.
 - b. An assessment of the waters of the U.S. proposed to be impacted by the project. The assessment must include the following information.
 - i. 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. The stream assessment (e.g., the Eastern Kentucky Stream Assessment Protocol) shall include a characterization and functional assessment of the streams within the project area and an analysis of how the proposed project will impact these streams. The analysis should also discuss how impacts to streams have been avoided and minimized when practicable. A functional assessment is also required for wetland impacts (e.g., the Hydrogeomorphic Approach to Assessing Wetland Functions (HGM)). The assessment should indicate the wetland type(s) to be impacted (i.e., HGM subclass and Cowardin classification). Other approved functional assessment methodologies are also acceptable. The assessment must include a brief discussion of the rationale supporting the conclusion.
 - ii. Date(s) delineation and/or assessment was/were conducted.
 - iii. Name and contact information of individual(s) conducting the assessment.
 - iv. A site map indicating location(s) of delineation(s) and/or assessment(s) and associated photographs in relation to the proposed activity.
 - c. A summary of the proposed impacts to the aquatic resources. This summary 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 such as mining, logging, agriculture, or road construction, within the same watershed as the proposed activity on water quality and aquatic habitat.
3. The PCN should include an original and five copies of the above information to expedite agency coordination.

In accordance with the conditions of NWP 21 a compensatory mitigation plan must be submitted in order to offset the unavoidable permanent and temporary losses of aquatic functions and values and ensure those losses result in minimal adverse effects on the aquatic environment. The compensatory mitigation plan must be developed in accordance with General Condition 19 of the NWPs and the Corps Regulatory Guidance Letter 02-2 dated December 24, 2002, available on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/RGL2-02.pdf> . The following is a brief description of the required information to be submitted in a compensatory mitigation plan:

1. Baseline Information;
2. Goals and Objectives;
3. Site Selection;
4. Mitigation Work Plan;
5. Performance Standards;
6. Project Success;
7. Site Protection;
8. Contingency Plan;
9. Monitoring and Long-term Management;
10. Financial Assurances.

Typically, compensatory mitigation consists of on-site and/or off-site stream/wetland restoration, enhancement or creation projects in order to offset the unavoidable impacts to the functions and values of the aquatic resource(s) to be impacted by a proposed operation. However, in some instances, it may be acceptable to allow the use of mitigation banks or an in-lieu fee arrangement. Use of mitigation banks requires a signed purchase agreement for the number of required credits to offset the unavoidable impacts to the aquatic resource. Under an in-lieu fee arrangement the applicant would contribute a fee into a fund to be used by an independent recipient to accomplish the appropriate compensatory mitigation. In-lieu fee arrangements are only acceptable if federally approved. A performance mitigation bond or other appropriate financial instruments may also be required to ensure that proposed impacts to waters of the U.S. have been successfully mitigated. The performance bond would be released after mitigation success criteria have been met.

We hope this guidance will assist you in preparing your NWP 21 PCN request. If you have any questions concerning the above, please contact Mr. Jerry Sparks at 606-642-3053.