

TALKING POINTS for the U.S. Army Corps of Engineers hearing on October 13

- * **I support the Army Corps of Engineers' proposal to end the use of Nationwide Permit 21 for coal mining valley fills** in Central Appalachia. In fact, enforcing the law is the least you should do to protect our land, water and people.
- * **Valley fills have had a devastating impact on local communities, the economy, and our environment.** In Kentucky alone, more than 1,400 miles of streams have been buried or significantly damaged by valley fills between 1981 and 2005. This figure represents a distance that is slightly more than the distance between Pikeville and Denver, Colorado. This number is also likely a significant undercount of the actual extent of stream damage.
- * Share some of the reasons you personally oppose coal mining valley fills. If you are directly affected by nearby mining, describe some of those impacts. If you live downstream, express your concerns about water quality and costs to your community.
- * **The nationwide permit should never have been used for coal mining valley fills.** This fast-track permit process is only supposed to be used for projects that have "minimal" environmental effects. For decades the U.S. Army Corps and U.S. EPA looked the other way. They accepted the coal industry's claims and ignored science, common sense and the law. They allowed coal companies to use a cheaper, faster permitting process and avoid meaningful environmental review or public input. By using the NWP 21 process for coal mining valley fills, these agencies failed in their responsibility to fully enforce the Clean Water Act and protect public health and the environment.
- * For all those reasons, it is encouraging to see signs of life coming from this administration and the federal agencies that are charged with enforcing mining laws. **The proposals being discussed at this hearing are a step in the right direction.**
- * **The proposals being considered are reasonable and responsible.** Using the individual permitting process will require coal companies to do a meaningful environmental assessment of the site specific and cumulative environmental impacts. It will give regulatory agencies the chance to take a closer look in order to minimize damage and ensure protection of our water quality. And it will allow the public to have input into the process. These things are not too much to ask. They are also what the law requires.
- * The EPA has made it clear that **the fast-track NWP 21 approval process is not appropriate for coal mining valley fills** in Central Appalachia. In its recent review of 79 permit applications, EPA found that most have the potential to cause violations of water quality standards. The coal companies had not done enough to minimize or avoid water quality impacts or to evaluate cumulative impacts. Finally, the EPA recognized the importance of headwater streams to ecosystem health and said additional steps are needed to ensure that stream mitigation requirements are adequate. **All of these concerns are significant, and require the sort of careful environmental review not possible under the NWP 21 process.**
- * Because the impacts of MTR are significant and permanent, **the Corps should not issue any additional authorizations under NWP 21** while the agency finalizes the process of modifying the permit to prohibit its use in Appalachia.

BACKGROUND INFORMATION on NWP 21 Permits

What is this public hearing in Pikeville about?

The U.S. Army Corps is holding six hearings in the coal producing states of Central Appalachia to gather public input about two proposed changes to their permitting process for coal mining valley fills:

- 1) The agency's first proposal is to put an end to the use of a "fast-track system that coal companies have traditionally used to get permits to create valley fills in the Central Appalachian region. The agency would no longer allow companies to use a shortcut process called the "nationwide permit 21" or NWP 21 for valley fills. Instead, coal companies would be required to obtain individual permits. Unlike the NWP 21 process, these individual permits require a case-by-case environmental assessment, closer agency review, and an opportunity for public comment.
- 2) The second proposal is to stop using the NWP 21 process soon, even before the agency has evaluated public comments or reached a final decision on the first proposal. Instead, coal companies would be required to obtain individual permits even before the first proposal is finalized.

You can read more about this hearing here: <http://www.lrl.usace.army.mil/>

What is a Nationwide Permit 21?

Under section 404 of the Clean Water Act, anyone who proposes an activity that would put fill material in waters of the United States is required to apply for a permit from the U.S. Army Corps of Engineers.

To speed up the process for many applicants, the Army Corps goes through a process every five years to create a general, or nationwide permit. Each section of the nationwide permit deals with a different type of activity that frequently impacts waterways. The part that deals with coal mining valley fills is called Section 21.

For years, if a coal company wanted to create a valley fill, they could apply to do so under the Nationwide Permit 21 (NWP 21). In order to qualify, the company was supposed to demonstrate that its plans would have "minimal or insignificant" individual or cumulative impact on water quality. The Corps of Engineers routinely accepted those claims and granted NWP 21 permits for coal mining valley fills.

Getting an NWP 21 meant that no additional environmental review or public input was required. These types of permits were cheaper and faster for the coal companies, but they did not allow for meaningful evaluation of the individual or cumulative impacts of valley fills on water quality, health and the environment.

For more in depth information about NWP 21s refer to the Congressional Research Service report to congress on 4/2/08. Information on coal mining can be found on pages 17-19:

https://www.policyarchive.org/bitstream/handle/10207/19763/97-223_20080402.pdf?sequence=2

What is an individual permit?

Section 404 of the Clean Water Act also creates the option for the Corps of Engineers to require an individual permit for some projects that would put fill material in the waters of the United States. The Corps requires individual permits for projects that have the potential for more than “minimal” environmental impact.

Unlike the NWP 21 process, the individual permit process requires an environmental impact assessment, closer agency review, and public input before the project can be approved. An individual permit requires the evaluation of the site specific and cumulative environmental impacts of proposed valley fills. However, in our experience, meaningful cumulative impacts are seldom done.

As part of the permit process, applicants have to demonstrate that they have minimized environmental damage and develop a plan for “mitigating” the negative impacts to streams. The mitigation requirement is often met by paying a fee into funds used for wetland or stream restoration, sometimes as places far away from the mining site.

What is the role of the EPA in reviewing permits for valley fills?

While the Corps of Engineers issues these permits for valley fills, the EPA shares the duty of enforcing section 404 of the Clean Water Act. The EPA is supposed to develop and interpret environmental criteria used in evaluating permit applications. It has the authority to review and makes comment on individual permit applications. Section 404(c) of the Clean Water Act also authorizes the EPA to override a Corps decision based on ‘unacceptable adverse effect’ on the aquatic environment. (<http://www.rivernetnetwork.org/rn/cwa/wetland-protection>)

If the EPA believes the project will have unacceptable adverse effect on the health of the stream then the EPA has the power to require changes to the proposed permit or to veto the permit. However, until recently the EPA has not exercised its authority to review valley fill permits for coal mining granted by the Corps of Engineers.

Under the Obama administration, the EPA is taking a more active role in this process. In June the administration released a Memorandum of Understanding (MOU) describing how the Corps of Engineers, Environmental Protection Agency and Office of Surface Mining Reclamation and Enforcement (OSMRE) would work together to better protect the environment and prevent the destruction of waterways from coal mining valley fills.

As part of the MOU, the Corps of Engineers agreed to change the process it has used in the past to evaluate and grant permits for valley fills. The public hearing in Pikeville is a step in that process.

You can read the MOU here: https://www.policyarchive.org/bitstream/handle/10207/19763/97-223_20080402.pdf?sequence=2

I’ve heard that the EPA has put a hold on 79 valley fill permits. What’s going on?

On September 30, 2009, the U.S. EPA sent a notice the Army Corps of Engineers stating that it would require further review of 79 coal mining valley fill permits. The EPA believes these permits may have “unacceptable adverse effects” on the headwater streams. The EPA has not yet

indicated whether they plan to veto these permits or if they will try to require additional mitigation efforts to protect the water quality of the streams before allowing the projects to begin operation. Of the 79 permits in question, 49 are in Kentucky.

For more information about the role of the EPA in reviewing these 79 valley fill permits, visit: http://www.epa.gov/owow/wetlands/pdf/EPA_Letter_to_Army_Final_ECP_09-30-09.pdf
http://www.epa.gov/owow/wetlands/pdf/ECP_Q&A_09-30-09_final.pdf

What are the EPA's major concerns about coal mining valley fills in Central Appalachia?

In a recent letter to the Army Corps of Engineers, the EPA spelled out its four major concerns about these 79 permits under the Clean Water Act 404(b)(1) Guidelines:

1. **Avoidance and minimization** — EPA believes that the majority of the permit applications have not yet adequately demonstrated that anticipated adverse environmental and water quality impacts have been fully avoided and minimized. The additional permit reviews, EPA said, “will allow the agencies, in coordination with the mining companies, to evaluate practicable opportunities to, for example, reduce the size and number of valley fills, in order to minimize potential adverse environmental and water quality impacts.”

2. **Water quality** – The permit proposals “exhibited the potential to cause or contribute to violations of applicable water quality standards.” EPA said it is “eager to work with the Corps and companies to assess modifications to mining plans, include additional water quality and biological monitoring provisions, and take other appropriate steps to address anticipated water quality concerns associated with these projects.”

3. **Cumulative impacts** — The Clean Water Act and the National Environmental Policy Act require consideration of all direct, indirect and cumulative environmental impacts associated with proposed coal mining projects. In order to fully assess potential cumulative impacts, permit applications must take into account “environmental and water quality effects associated with past, present and reasonably foreseeable surface coal mining activities within a watershed.” EPA is concerned “that additional information regarding potential cumulative impacts is needed to effectively assess” the permits on EPA’s list.

4. **Mitigation** — Headwater streams are vital components of watersheds. They provide critical ecological functions necessary for the health and productivity of downstream systems. EPA believes additional evaluation of the 79 permits is needed “to assess the effectiveness of existing mitigation plans to compensate for anticipated loss of functions associated with the proposed mining-related burial and mine through of headwater streams.”

The full letter is posted at

http://www.epa.gov/owow/wetlands/pdf/EPA_Letter_to_Army_Final_ECP_09-30-09.pdf.

Can you remind me why valley fills are harmful?

Valley fills are one of the most damaging consequences of mountaintop removal and other forms of strip mining. During the mining process, massive amounts of explosives are used to blast soil and rock and expose the seam of coal. Coal companies then dump this excess material, known as “overburden,” into the valleys below, creating valley fills.

Here are a few facts about valley fills from a federal environmental impact statement completed in 2003:

- 724 miles of streams across the Central Appalachian region were buried by valley fills between 1985 and 2001;
- An additional 1,200 miles of streams were impacted by valley fills in that time frame;
- Selenium was found only in those coalfield streams below valley fills (selenium is a heavy metal that, according to the EPA, “can be highly toxic to aquatic life even at relatively low concentrations”);
- Many aquatic life forms downstream of valley fills are harmed or killed by the creation of valley fills.

Subsequent studies indicate that the number of streams buried or severely degraded now tops 1,400 miles in Kentucky alone, just through 2005. Many more miles of valley fills have been permitted.

Valley fills can also be a hazard to people living nearby and downstream. Common impacts include more frequent and more severe flooding, landslides, and increased concentrations of sediment and other pollutants in waterways that provide drinking water to more than a million Kentuckians.

Shouldn't there be a law?

Valley fills used by the coal industry are created for the purpose of waste disposal, which is not legal under the existing Clean Water Act and should not be allowed. Yet for decades the regulatory agencies have looked the other way. A growing grassroots movement has put pressure on public agencies and courts to enforce existing law. The issue is being debated in the courts, state and federal legislative campaigns, and in local communities through public demonstrations and protests.

The best solution for the Central Appalachian region would be an outright ban on the practice of coal companies dumping waste in streams. Legislation to do that is gaining support in both houses of Congress:

- The **Clean Water Protection Act** (HR 1310) would clarify that mine waste is not included in the definition of “fill material” under the Clean Water Act. This bill had 154 sponsors in the House in July 2009, including Kentucky Reps. John Yarmuth and Ben Chandler.
- The **Appalachia Restoration Act** (S 696) is a related bill in the Senate. Its primary sponsors are Senator Lamar Alexander (R-TN), and Senator Ben Cardin (D-MD). The bill received a hearing last spring, the first time in 30 years that a hearing was held in the U.S. Senate about strip mining. It has eight cosponsors.

In Kentucky, the **Stream Saver Bill** has been promoted for several years in the state legislature by Rep. Don Pasley and as many as 20 cosponsors. It would prohibit the dumping of mine waste in the waters of the Commonwealth. The bill received a hearing in 2008 but fell two votes shy of passing the House Appropriations and Revenue Committee. It will be re-filed in 2010.