



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MEMORANDUM

TO: Shawn Garvin
Regional Administrator, Region III

OFFICE OF
WATER

Gwendolyn Keyes Fleming
Regional Administrator, Region IV

Susan Hedman
Regional Administrator, Region V

FROM: Nancy K. Stoner
Acting Assistant Administrator

A handwritten signature in purple ink, appearing to read "Nancy K. Stoner", written over the printed name.

SUBJECT: Transmittal of Department of the Army Memo on "Decision in *National Mining Association et al. v. Jackson, et al.*"

On October 6, 2011, the Federal District Court for the District of Columbia set aside the Enhanced Coordination Procedures (ECP)¹ developed by the Department of the Army and the Environmental Protection Agency to expedite review of 79 pending Appalachian surface coal mining permit applications. *National Mining Association, et al., v. Jackson, et al.* [1:10-cv-01220-RBW]. As a result of this decision and pending potential action by the U.S. government to seek an appeal in this matter, the agencies will no longer use the ECP process for any purpose.

To help reduce the uncertainty created by this decision, I am transmitting to you the attached memorandum to Corps Districts, signed by Assistant Secretary of the Army Jo-Ellen Darcy. This memorandum provides several helpful clarifications on the roles of both agencies moving forward. I would like to specifically emphasize the following points further discussed in the attached memorandum.

- The ECP process was set aside, so you have ceased coordination under the ECP. Please work with the Corps consistent with existing statutory and regulatory authorities and roles.
- Regions continue to have a critical role under Section 404 of the Clean Water Act to provide comments to the Corps about areas in which EPA has expertise, including water quality matters and the Clean Water Act section 404(b)(1) Guidelines.

¹ See Section IV of the Memorandum of Understanding Among the US Department of the Army, US Department of the Interior, and US Environmental Protection Agency: Implementing the Interagency Action Plan on Appalachian Surface Coal Mining, dated June 11, 2009.

- Consistent with the Clean Water Act and existing regulations and interagency memoranda, Regions should continue their collaboration with the Corps, as appropriate, to review proposed discharges of dredged or fill material pursuant to Clean Water Act Section 404. It is through regular interaction that the agencies work together most effectively to share information, identify issues of concern, and reach environmentally responsible permit outcomes.

Thank you for your continuing efforts to assure effective protection for water quality, public health, and the environment for communities throughout Appalachia. If you have questions, please contact Dave Evans, Director of the Wetlands Division, at (202) 566-0535

Attachment



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

NOV 16 2011

MEMORANDUM FOR DIRECTOR OF CIVIL WORKS

SUBJECT: *National Mining Association et al. v. Jackson, et al.* (2011) – Implementation Guidance

1. On October 6, 2011, the Federal District Court for the District of Columbia set aside the Enhanced Coordination Procedures (ECP)¹ developed by the Environmental Protection Agency and the Department of the Army to expedite review of 79 pending Clean Water Act Section 404 permit applications associated with Appalachian surface coal mining projects. *National Mining Association, et al., v. Jackson, et al.* [1:10-cv-01220-RBW]. The United States is still considering its options with respect to the District Court's decision. This memorandum provides direction to assure that Corps Districts take appropriate actions consistent with the District Court's decision. You are directed to transmit this guidance to the appropriate District Commanders at the earliest possible opportunity.

2. I have been assured that the Corps Districts involved have all ceased using the ECP as of the date of the District Court's decision. Pending further judicial order, the Corps shall continue to process permit applications without regard to the ECP. It is important to note that while the court invalidated the ECP, the decision does not affect or invalidate requirements established under the Clean Water Act or the Corps' Section 404 permitting regulations. Thus, I expect the Corps will continue working with the U.S. Environmental Protection Agency (EPA) consistent with the Clean Water Act, applicable permitting regulations, and associated interagency memoranda.

3. There are currently 21 Clean Water Act Section 404 permit applications pending for surface coal mining projects in West Virginia and Kentucky that were covered by the ECP. The following principles should guide review of those applications:

- Foremost, final responsibility for making decisions regarding issuance of permits pursuant to Clean Water Act Section 404(a) rests with the Corps District Commanders.

¹ See, Section IV of the Memorandum of Understanding endorsed by the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency entitled: Implementing the Interagency Action Plan on Appalachian Surface Coal Mining, dated June 11, 2009. In addition to invalidating the ECP, the District Court set aside EPA's use of the screening procedure that involved the Multi-Criteria Integrated Resource Assessment (MCIR).

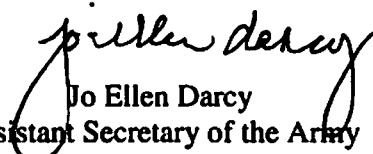
- Within the Section 404 program, EPA has responsibility for promulgation of the Section 404(b)(1) Guidelines in consultation with the Corps, as well as the authority to prohibit, deny, restrict, or withdraw the specification of a disposal site pursuant to Section 404(c) and implementing regulations.
- The Section 404(q) coordination process remains in place for the Spring Fork Surface Mine (Frasure Creek Mining). The Corps will proceed consistent with the terms of the Section 404(q) Memorandum of Agreement with respect to that permit application.
- EPA has provided comments on two pending projects (Blue Branch Refuse and Buffalo Mountain Surface Mine) pursuant to the ECP. The Corps is not required to reply to those comments; however, the District Commander has the existing discretionary authority to decide whether and how to consider those comments in making a permit decision.
- District Commanders should realize that EPA may provide comments on issues for which EPA has expertise, including the Section 404(b)(1) Guidelines and water quality. Notwithstanding the invalidation of the ECP, District Commanders have existing discretionary authority to consider EPA comments in making decisions on these remaining 21 applications; however, the Corps is not required to respond to such comments. District Commanders may consult with EPA and other Federal agencies, as well as with applicants as appropriate, in order to effectively and efficiently implement the Corps' Clean Water Act responsibilities associated with making final permit decisions.
- As the permitting authority, District Commanders may seek input from EPA on issues associated with the 21 pending permit applications for which EPA has expertise -- including water quality-related matters, the Section 404(b)(1) Guidelines, and the potential that the project may result in significant environmental degradation or unacceptable adverse environmental effects -- when the District Commander determines such information is needed to ensure compliance with applicable standards. Such input may be obtained in the context of phone conversations, electronic mail, letters, or meetings.
- District Commanders should evaluate all information provided by the permit applicant and determine if additional information is needed or if there are any public or agency comments that require further clarification. District Commanders will continue to identify the project-specific information necessary to reach a decision on each of these 21 permit applications consistent with existing statutory and regulatory authorities. If additional information is needed from the applicant, District Commanders will allow the applicant the opportunity to provide the information within 30 days, unless an extension is requested and granted pursuant to existing permitting regulations. Note, 33 C.F.R. § 325.2(d)(5).

4. The Corps and EPA have worked hard over many years to develop effective and collaborative relationships in order to facilitate their respective responsibilities under the Clean Water Act and associated regulations. The District Court's decision does not and should not affect these

relationships. The Corps will continue to promote those relationships consistent with the procedures established under the existing statute and regulations, while remaining mindful that the ECP remains invalid, pending further judicial order.

5. In the event that a specific question arises as to how to proceed in accordance with this guidance, Corps staff is strongly encouraged to seek guidance from their counsel. Questions regarding this guidance may be directed to Mr. Chip R. Smith, OASA (CW), at (703) 693-3655.

6. Your continuing efforts to assure effective protection for water quality, public health, and the environment for communities throughout Appalachia are appreciated.


Jo Ellen Darcy
Assistant Secretary of the Army
(Civil Works)