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

JUN 11 2009

THE ADMINISTRATOR

Mr. Terrence Salt
Acting Assistant Secretary (Civil Works)
Department of the Army
108 Army Pentagon
Room 3E446
Washington, D.C. 20310-0108

Dear Acting Assistant Secretary Salt:

As you know, the U.S. Environmental Protection Agency, the U.S. Department of the Interior, and the U.S. Army Corps of Engineers, in coordination with the Council on Environmental Quality, have developed a new Memorandum of Understanding and "Interagency Action Plan" designed to significantly reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining is consistent with federal law. One component of the IAP is the establishment by EPA and the Corps of enhanced coordination procedures to improve the joint review of pending Clean Water Act permit applications. EPA has given thought to how we intend to conduct the review of the approximately 110 pending permit applications subject to these enhanced procedures, and I am writing to provide you with a summary of the regulations and key factual considerations that will form the basis for our identification of pending permit applications that will require further coordination between EPA and the Corps.

The Section 404(b)(1) Guidelines promulgated by EPA in conjunction with the Secretary of the Army establish the substantive environmental standards applied in the review of projects proposing to discharge dredged or fill material in waters of the United States. The Guidelines establish a "sequence" of review requiring: (1) an evaluation of all practicable alternatives that meet the project's basic purpose to ensure that only the least environmentally damaging alternative is permitted; (2) taking all appropriate and practicable steps to minimize potential adverse impacts; and (3) compensation for all remaining unavoidable impacts to aquatic resources. In addition, the Guidelines require that no discharge may be permitted that would cause or contribute to "significant degradation" of the waters of the United States. The Guidelines, therefore, will guide our review of the pending permit applications, and we have highlighted particularly relevant provisions below:

- Guidelines Section 230.10(a) provides that no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge that would have

less adverse impact on the aquatic ecosystem. The Guidelines require consideration of project alternatives to eliminate and/or reduce the number of discharges of dredged or fill material occurring in the waters of the United States. When evaluating permit applications in light of this provision, key factual considerations include: the adequacy of the alternatives analysis submitted; the number of valley fills; the number of streams to be impacted; and the number and location of sediment ponds.

- Guidelines Section 230.10(b) provides that no discharge may be permitted that would cause or contribute to an exceedance of an applicable water quality standard, violate any applicable toxic effluent standard, or jeopardize the existence of threatened or endangered species. When evaluating permit applications in light of this provision, key factual considerations include: the pre-mining water quality and potential for water quality impacts downstream of proposed sediment ponds, including impacts from selenium, conductivity, pH, turbidity, dissolved solids, and manganese; and potential impacts to biotic integrity and to threatened and endangered aquatic species.

- Guidelines Section 230.10(c) provides that no discharge shall be permitted that will cause or contribute to significant degradation of the waters of the United States. When evaluating permit applications in light of this provision, key factual considerations include: the cumulative effects of the proposed mine in consideration of previous and reasonably foreseeable future impacts; a watershed assessment of total length of streams to be impacted and/or total area of valley fills in waters of the United States; the extent of high-value streams to be impacted, including extent of impacts to critical headwater streams and/or perennial reaches; the geographic location of the proposed mine; and an assessment of impacts based on a watershed-scale evaluation of stream quality, water temperature, stream diversity, etc.

- Guidelines Section 230.10(d) provides that no discharge shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse environmental impacts of the discharge on the aquatic ecosystem. When evaluating permit applications in light of this provision, key factual considerations include: the total length of streams to be impacted by the proposal; the total length of instream mining-related discharges; the total length of waters affected between the toe of valley fill and sediment ponds; and the adequacy of proposed mitigation to fully compensate for impacts consistent with the requirements of the recently revised mitigation regulations.

These are factors EPA intends to use to screen and evaluate the pending permit applications to determine which permit applications require further coordination between EPA and the Corps. To expedite this process and assist in making EPA's decisions efficient, consistent, and transparent, we intend to utilize a database containing information on each of the pending permit applications. We will review the database's parameters and data requirements with your staff in the near future.

I hope that our agencies will be able to reach agreement on the pending permit applications. While this letter lays out factual considerations EPA expects to review when evaluating the pending permit applications, any action EPA takes, including, if appropriate, any

exercise of EPA's authority under Section 404(c) of the CWA to restrict or prohibit the use of a site for disposal of dredged or fill material, will be based on the statute and regulations.

I look forward to this enhanced cooperation and coordination between our two agencies.

Sincerely,

Lisa P. Jackson