US Army Corps
of Engineers
Honolulu District

Regulatory Branch
Building 230
Fort Shafter, Hawaii 96858-5440

PROPOSED SUSPENSION AND MODIFICATION OF NATIONWIDE PERMIT NUMBER 21 IN THE APPALACHIAN REGION OF KENTUCKY, OHIO, PENNSYLVANIA, TENNESSEE, VIRGINIA, AND WEST VIRGINIA

PUBLIC NOTICE DATE: July 24, 2009

EXPIRATION DATE: August 14, 2009

FILE NUMBER: COE-2009-0032

In the July 15, 2009, issue of the Federal Register (copy enclosed), the U.S. Army Corps of Engineers (Corps) published a proposal to take two actions concerning Nationwide Permit (NWP) 21 which authorizes discharges of dredged or fill material into waters of the United States for surface coal mining activities. First, the Corps proposes to modify NWP 21 to prohibit its use to authorize discharges of dredged or fill material into waters of the United States for surface coal mining activities in the Appalachian region of the following states: Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. Second, the Corps is proposing to suspend NWP 21 to provide an interim means of requiring individual permit reviews in Appalachia, while we evaluate the longer-term measure of modifying NWP 21 to prohibit its use to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining activities in the Appalachian region of these six states. The suspension of NWP 21 will provide immediate environmental protection while the Corps evaluates the comments received in response to the proposal to modify NWP 21.

The application of NWP 21 to surface coal mining activities in the rest of the United States would not be affected by the proposed modification or suspension of this NWP.

There has been no historical use of NWP 21 within the Honolulu District (State of Hawaii, Territory of American Samoa, Territory of Guam, Commonwealth of the Northern Mariana Islands), and there is no anticipated future use of this permit.

On June 11, 2009, the Corps, the U.S. Department of the Interior, and the U.S. Environmental Protection Agency signed a Memorandum of Understanding (MOU) implementing an Interagency Action Plan on Appalachian surface coal mining. A copy of this MOU is available at:

http://www.usace.army.mil/CECW/Pages/moumoas.aspx. The MOU includes an Interagency Action Plan (IAP) that was developed to reduce the adverse environmental impacts of surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, while assuring that future mining remains consistent with the Clean Water Act and the Surface Mining Control and Reclamation Act. The IAP is intended to provide greater emphasis on protecting the aquatic and terrestrial environment of the Appalachian region. To accomplish this, the IAP lists several short-term actions to reduce the harmful environmental consequences of Appalachian surface coal mining in these six states. One of the short-term actions commits the Corps to issue a public notice proposing to modify NWP 21 to prohibit its use to authorize discharges of dredged or fill material into waters of the United States in conjunction with surface coal mining activities in the Appalachian region described above.

In accordance with the suspension and modification procedures provided in the NWP regulations, public comment is invited, and a public hearing may be requested. After evaluating all comments pertaining to the proposed suspension and modification that are received in response to this notice and any public hearings, the Corps expects to publish its decisions concerning the NWP 21 suspension and modification in separate Federal Register notices. If the Corps decides to suspend NWP 21, the suspension cannot occur until the effective date, which would be specified in the Federal Register notice announcing the suspension decision. If NWP 21 is suspended, the suspension will remain in effect until NWP 21 is modified or expires, or until the suspension is lifted.

If NWP 21 is suspended for surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, district engineers cannot issue NWP 21 verifications for those activities or accept NWP 21 PCNs for surface coal mining activities in the Appalachian region of those six states that are received after the effective date of the suspension. If the NWP 21 suspension goes into effect, requests for Department of the Army authorization for these activities will be processed through the individual permit process.

For more information, including instructions for submitting comments, please see the attached Federal Register notice. All comments must be submitted directly to the **U.S. Army Corps of Engineers, Attn: CECW-CO (Attn: Ms. Desiree Hann), 441 G Street, NW., Washington, DC 20314–1000.**

George P. Young, P.E.
Chief, Regulatory Branch

Enclosure

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

RIN 0710–ZA04

Proposed Suspension and Modification of Nationwide Permit 21

AGENCY: United States Army Corps of Engineers, Department of Defense.

ACTION: Notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is proposing to take two actions concerning Nationwide Permit (NWP) 21, which authorizes discharges of dredged or fill material into waters of the United States for surface coal mining activities. First, the Corps proposes to modify NWP 21 to prohibit its use to authorize discharges of dredged or fill material into waters of the United States for surface coal mining activities in the Appalachian region of the following states: Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia until it expires on March 18, 2012. The proposed modification would enhance environmental protection of aquatic resources by requiring surface coal mining projects in the affected region to obtain individual permit coverage under the Clean Water Act (CWA), which includes increased public and agency involvement in the permit review process, including an opportunity for public comment on individual projects. The application of NWP 21 to surface coal mining activities in the rest of the United States would not be affected by this proposed modification.

Second, the Corps is proposing to suspend NWP 21 to provide an interim means of requiring individual permit reviews in Appalachia, while proposing to undertake the longer-term measure of modifying NWP 21 to prohibit its use to authorize discharges of dredged or fill material into waters of the United States associated with surface coal mining activities in the Appalachian region of these six States. The Corps is also proposing to suspend NWP 21 to provide immediate environmental protection while it evaluates the comments received in response to the proposal to modify NWP 21.

In accordance with the suspension and modification procedures provided in the NWP regulations, public comment is invited, and a public hearing may be requested. After evaluating all comments pertaining to the proposed suspension and modification that are received in response to this notice and any public hearings, the Corps will publish its decisions concerning the NWP 21 suspension and modification in the **Federal Register**. If NWP 21 is suspended, the suspension would remain in effect until NWP 21 is modified or expires, or until the suspension is lifted.

DATES: Written comments, including requests for a public hearing, must be submitted on or before August 14, 2009.

ADDRESSES: You may submit comments, identified by docket number COE–2009–0032, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: U.S. Army Corps of Engineers, Attn: CECW-CO (Attn: Ms. Desiree Hann), 441 G Street, NW., Washington, DC 20314–1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

We will not accept e-mailed or faxed comments. We will post all comments on *http://www.regulations.gov* under docket number COE–2009–0032.

Instructions: When submitting comments via *http://www.regulations.gov*, direct your comments to docket number COE–2009–0032. All comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through regulations.gov or e-mail. The regulations.gov web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment.

If you submit an electronic comment by sending a CD–ROM to Corps Headquarters, we recommend that you submit those comments via overnight mail to ensure timely receipt. We also recommend that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Ms. Desiree Hann or Mr. David Olson, Headquarters, Operations and Regulatory Community of Practice, Washington, DC. Ms. Hann can be reached at 202–761–4560 and Mr. Olson can be reached at 202–761–4922.

SUPPLEMENTARY INFORMATION: Nationwide permit (NWP) 21 was first issued in 1982, pursuant to section 404(e) of the Clean Water Act, to authorize structures, work, and discharges associated with surface coal mining activities, provided those activities were authorized by the Department of the Interior, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Each time since 1982 that the Corps reissued its NWPs, it also reissued NWP 21, often with modifications that were made after considering comments received in response to the various proposals to reissue that NWP.

The current NWP 21 was published in the March 12, 2007, edition of the **Federal Register** (72 FR 11092) after going through public notice and comment and interagency review. This NWP authorizes "discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977." This NWP is currently scheduled to expire on March 18, 2012.

Since NWP 21 was first issued in 1982, surface coal mining practices have changed, and surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia have become more prevalent and have resulted in greater environmental impacts. Mountaintop surface coal

mining activities increased because many of the remaining coal seams in the Appalachian region were less accessible to non-surface coal mining techniques. Since the late 1990s, there have been increases in concerns regarding the individual and cumulative adverse effects of those activities on the human environment and the natural resources in this region, including streams and other aquatic resources.

On June 11, 2009, the Corps, the U.S. Department of the Interior, and the U.S. Environmental Protection Agency signed a Memorandum of Understanding (MOU) for implementing an Interagency Action Plan on Appalachian surface coal mining. A copy of this MOU is available at: *http://www.usace.army.mil/CECW/Pages/moumoas.aspx*. The MOU includes an Interagency Action Plan (IAP) that was developed to reduce the adverse environmental impacts of surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, while assuring that future mining remains consistent with the Clean Water Act and the Surface Mining Control and Reclamation Act.

We are using the Appalachian Regional Commission's list of counties in Appalachia to clarify the geographic area subject to the proposed suspension and potential modification:

Kentucky: Adair, Bath, Bell, Boyd, Breathitt, Carter, Casey, Clark, Clay, Clinton, Cumberland, Edmonson, Elliott, Estill, Fleming, Floyd, Garrard, Green, Greenup, Harlan, Hart, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Menifee, Metcalfe, Monroe, Montgomery, Morgan, Nicholas, Owsley, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Russell, Wayne, Whitley, and Wolfe.

Ohio: Adams, Ashtabula, Athens, Belmont, Brown, Carroll, Clermont, Columbiana, Coshocton, Gallia, Guernsey, Harrison, Highland, Hocking, Holmes, Jackson, Jefferson, Lawrence, Mahoning, Meigs, Monroe, Morgan, Muskingum, Noble, Perry, Pike, Ross, Scioto, Trumbull, Tuscarawas, Vinton, and Washington.

Pennsylvania: Allegheny, Armstrong, Beaver, Bedford, Blair, Bradford, Butler, Cambria, Cameron, Carbon, Centre, Clarion, Clearfield, Clinton, Columbia, Crawford, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lackawanna, Lawrence, Luzerne, Lycoming, McKean, Mercer, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Schuylkill, Snyder, Somerset, Sullivan, Susquehanna, Tioga, Union, Venango, Warren, Washington, Wayne, Westmoreland, and Wyoming.

Tennessee: Anderson, Bledsoe, Blount, Bradley, Campbell, Cannon, Carter, Claiborne, Clay, Cocke, Coffee, Cumberland, De Kalb, Fentress, Franklin, Grainger, Greene, Grundy, Hamblen, Hamilton, Hancock, Hawkins, Jackson, Jefferson, Johnson, Knox, Lawrence, Lewis, Loudon, McMinn, Macon, Marion, Meigs, Monroe, Morgan, Overton, Pickett, Polk, Putnam, Rhea, Roane, Scott, Sequatchie, Sevier, Smith, Sullivan, Unicoi, Union, Van Buren, Warren, Washington, and White.

Virginia: Alleghany, Bath, Bland, Botetourt, Buchanan, Carroll, Craig, Dickenson, Floyd, Giles, Grayson, Henry, Highland, Lee, Montgomery, Patrick, Pulaski, Rockbridge, Russell, Scott, Smyth, Tazewell, Washington, Wise/Norton, and Wythe.

West Virginia: All counties.

The IAP is intended to provide greater emphasis on protecting the aquatic and terrestrial environment of the Appalachian region. To accomplish this, the IAP lists several short-term actions to reduce the harmful environmental consequences of Appalachian surface coal mining in these six States, one of which commits the Corps to issue a public notice proposing to modify NWP 21 to prohibit its use in conjunction with surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia to authorize discharges of dredged or fill material into waters of the United States.

The proposed modification of NWP 21 in accordance with the IAP would result in surface coal mining activities in the Appalachian region of these six States being processed as individual permits. Using the individual permit process would provide more information for the Corps to consider for making decisions on these permit applications, because of increased public and agency involvement, such as the opportunity to comment on public notices for individual surface coal mining activities in Appalachia. This additional information could help improve the Corps' analysis of impacts to public interest review factors, including the aquatic environment and other relevant environmental factors within the Corps' Federal control and responsibility. This action would also be consistent with a recent decision of the United States District Court for the Southern District of West Virginia which directed the Corps to cease processing of NWP 21 PCNs in that District.

To provide more immediate environmental protection while the comments received in response to the proposal to modify NWP 21 are being evaluated, the Corps today is also proposing to suspend NWP 21 in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. After thorough consideration of the comments received in response to today's proposal to suspend NWP 21, we will decide whether to issue a "final" notice in the **Federal Register** suspending NWP 21. Should we decide to suspend, the suspension would temporarily prohibit the use of NWP 21 to authorize discharges of dredged or fill material into waters of the United States for surface coal mining activities in Appalachia, until the Corps makes a final determination on the modification of NWP 21.

The proposed suspension and modification of NWP 21 actions are being undertaken to respond to increased concerns regarding how adverse effects on the aquatic environment and other public interest review factors relevant to jurisdictional waters of the United States in the Appalachian region of these six States are being addressed for surface coal mining activities. The Corps now believes it would be more appropriate to evaluate these adverse effects through the individual permit process, with a full public interest review, rather than through NWP 21. The decision to authorize a particular surface coal mining activity under NWP 21 is based on an evaluation of not only the potential individual and cumulative adverse effects of the proposed activity on the aquatic environment, but also on the potential adverse effects on Corps' other public interest review factors listed at 33 CFR 320.4(a)(1), such as conservation, aesthetics, economics, land use, recreation, fish and wildlife values, energy needs, food and fiber production, and general considerations of property ownership, to the extent that those public interest factors are relevant to waters of the United States subject to CWA jurisdiction.

The June 11, 2009, MOU and IAP commit the Corps to reexamine the appropriateness of using NWP 21 to authorize discharges of dredged or fill material into waters of the United States for surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. We are seeking comment on whether NWP 21 should be suspended and/or modified in the Appalachian region of these six States, because of the effects that discharges of

dredged or fill material into waters of the United States associated with surface coal mining activities have on the aquatic environment and other public interest review factors, as they relate to jurisdictional waters of the United States.

In the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, NWP 21 has been used to authorize surface coal mining activities that involve discharges of dredged or fill material into waters of the United States that have resulted in adverse environmental impacts that may be more than minimal on a cumulative basis. For this reason, the Corps now believes that impacts of these activities on jurisdictional waters of the United States, particularly cumulative impacts, would be more appropriately evaluated through the individual permit process, which entails increased public and agency involvement, including an opportunity for public comment on individual projects.

Proposed Suspension of NWP 21

The Corps regulations governing the issuance, modification, suspension, or revocation of NWPs are found at 33 CFR 330.5. According to those regulations, suspension is a short-term measure for quickly halting the use of an NWP in response to identified concerns about impacts to jurisdictional waters of the United States or other public interest review factors, while modification of an NWP is the long-term solution for addressing those concerns. The modification of an NWP is a rulemaking activity that requires the completion of additional tasks, such as the preparation of NEPA documentation and compliance with the requirements of the Administrative Procedure Act. According to these regulations, the Chief of Engineers cannot suspend an NWP until he or she has issued a notice soliciting public comment, and provided the opportunity for interested parties to request a public hearing (*see* 33 CFR 330.5(b)(2)(i)). The purpose of the proposed suspension is to provide additional protection to the aquatic environment until the Corps makes its decision on whether to modify NWP 21 or to retain NWP 21 in its current form. If use of NWP 21 is suspended for the Appalachian region, the suspension would remain in effect until NWP 21 is modified or expires, or until the suspension is lifted. We will publish our decision regarding the proposed suspension of NWP 21 in the **Federal Register**. If we decide to suspend NWP 21, that suspension cannot occur until the effective date provided in that **Federal Register** notice.

Public Hearing

When proposing to suspend an NWP, the NWP regulations require the Corps to provide the opportunity for interested parties to request a public hearing (*see* 33 CFR § 330.5(b)(2)(i)). Requests for a public hearing must be submitted in writing to the address in the **ADDRESSES** section of this notice. Such requests must state the reason(s) for holding a public hearing. If we determine that a public hearing or hearings would assist in making a decision on the proposed suspension or modification of NWP 21, a 30-day advance notice will be published in the **Federal Register** to advise interested parties of the date(s) and location(s) for the public hearing(s). Any announcement of public hearings would also be posted as supporting material in the docket at *http://www.regulations.gov.*

Grandfathering

If NWP 21 is suspended for surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, those activities that were verified by district engineers prior to the effective date of the suspension as being authorized by NWP 21 will continue to be authorized by that NWP, unless the district engineer takes action to modify, suspend or revoke a particular NWP authorization on a case-by-case basis in accordance with the procedures at 33 CFR 330.5(d). If NWP 21 is modified to prohibit its use to authorize surface coal mining activities in Appalachian region of those six States, then the "grandfather" provision at 33 CFR 330.6(b) would apply, giving each permittee 12 months (from the date the NWP is modified) to complete the authorized activity, unless the district engineer modifies, suspends, or revokes the NWP 21 authorization for that particular activity. To qualify for the grandfather provision at 33 CFR 330.6(b), the activity must have commenced construction, or be under contract to commence construction, before the effective date of the modification.

District engineers will continue to process NWP 21 pre-construction notifications (PCNs) for surface coal mining activities in Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia until a notice announcing the suspension decision is published in the **Federal Register**, and unless and until a suspension goes into effect.[1] District engineers will carefully review those NWP 21 PCNs and will exercise discretionary authority to require an individual permit in accordance with the procedures at 33 CFR 330.5(d) in cases where the proposed surface coal mining activity presents the potential for more than minimal individual and/or cumulative adverse effects on the aquatic environment or other public interest review factors relevant to jurisdictional waters of the United States. As part of the review process for the NWP 21 PCNs, Corps staff will carefully consider any comments received from the appropriate regional offices of the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and appropriate State agencies.

Pending the Corps' final decision on the suspension of NWP 21, those entities proposing surface coal mining activities involving discharges of dredged or fill material into waters of the United States in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia may wish to consider whether it would be more prudent to request individual permits instead of submitting NWP 21 PCNs. The information required for the submittal of a complete application for a standard individual permit is different from the information required for the submittal of a complete NWP 21 PCN. Since NWP 21 could be suspended before a district reaches a decision on an NWP 21 PCN, the prospective permittee may choose to initially request an individual permit to avoid having to later submit a separate application for a standard individual permit, thereby saving his or her time and resources during the permit decision making process.

It is important to note that NWP 21 differs from most other NWPs in that it requires district engineers to issue written verifications before proposed activities are authorized by NWP 21 (see the "Notification" provision of NWP 21, as published in the March 12, 2007, issue of the **Federal Register** (72 FR 11184)). Unless an activity is authorized by NWP 21 through an NWP verification letter issued by the district engineer, the grandfathering provision at 33 CFR 330.6(b) does not apply.

If NWP 21 is suspended for surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and

[1] In accordance with the decision of the United States District Court for the Southern District of West Virginia (Civil Action No. 3:03–cv–2281), the Corps ceased processing NWP 21 PCNs in that District on March 31, 2009.

West Virginia, district engineers cannot issue NWP 21 verifications for those activities or accept NWP 21 PCNs for surface coal mining activities in the Appalachian region of those six States that are received after the effective date of the suspension. If the NWP 21 suspension goes into effect, requests for Department of the Army authorization for these activities will be processed through the individual permit process. This may require permit applicants to submit additional information for a complete application for an individual permit.

Modification of NWP 21

The suspension of an NWP is only a short-term measure for addressing concerns about the individual and cumulative adverse effects of surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, while we consider the comments received in response to today's proposal to modify NWP 21 to prohibit its use to authorize discharges of dredged or fill material into waters of the United States for surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

The modification of NWP 21 is being proposed to address concerns about the adverse individual and cumulative effects of surface coal mining activities on the aquatic environment and other factors of the public interest relevant to jurisdictional waters in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. Evaluating these activities through the individual permit process will help provide more information for decision making, through the public notice and comment process. Comments on the proposed modification are to be submitted in accordance with the procedures described in the **ADDRESSES** section, above. The Corps will announce its decision on whether to modify NWP 21 in a separate **Federal Register** notice.

Water Quality Certification

Because the current version of NWP 21 authorizes discharges of dredged or fill material into waters of the United States for surface coal mining activities, State or Tribal water quality certification, or waiver thereof, was required by Section 401 of the Clean Water Act. However, given the fact that this **Federal Register** notice proposes to modify NWP 21 so that it could no longer be used to authorize discharges of dredged or fill material in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, we believe that it is not necessary to request water quality certification from those States. Because the proposed modification would prohibit the use of NWP 21 to authorize surface coal mining activities only in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, we believe it is not necessary for any state water quality certification agency to change the water quality certification decision issued in response to the reissuance of NWP 21 in March 2007. We are seeking comments from these six States to determine whether it is necessary for the Corps to request water quality certification for the proposed modification of NWP 21.

Section 307 of the Coastal Zone Management Act (CZMA)

This **Federal Register** notice serves as the Corps determination that the proposed modification of NWP 21 is, to the maximum extent practicable, consistent with State CZMA programs. States are requested to agree or disagree with the consistency determination following 33 CFR 330.4(d) for this NWP.

Ordinarily, when the Corps makes a CZMA consistency determination when the Corps proposes to issue or re-issue an NWP, that determination only applies to NWP authorizations for activities that are within, or that can affect, any land, water uses or natural resources of a State's coastal zone. NWP authorizations for activities that are not within or would not affect a State's coastal zone do not require a Corps CZMA consistency determination and thus are not contingent on a State's agreement with the Corps' consistency determination. Since the proposed modification of NWP 21 would make that NWP inapplicable to proposed surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia, the proposed modification of NWP 21 cannot authorize any activities that would affect the coastal zones of those States. Moreover, the geographic area that would be affected by the proposed modification to NWP 21 lies outside of the coastal zones of Ohio, Pennsylvania, and Virginia. Consequently, we believe that it is not necessary for these states to change the CZMA consistency determinations they issued in response to the reissuance of NWP 21 in March 2007.

Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of "we" in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The proposed modification of NWP 21 will not substantially change paperwork burdens on the regulated public because the requirements for a complete individual permit application and a complete NWP 21 PCN are similar.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003, which expires on June 30, 2009).

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is "significant" and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined that

the proposed modification of NWP 21 rule is a "significant regulatory action" and the draft notice was submitted to OMB for review.

Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The proposed modification of NWP 21 does not have federalism implications. We do not believe that the proposed modification of NWP 21 will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed modification of NWP 21 will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this proposal.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 *et seq.*

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed modification of NWP 21 on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the proposed modification of NWP 21 on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Although small entities will no longer be able to obtain authorizations for discharges of fill material associated with surface coal mining activities in the Appalachian region under NWP 21, they may still obtain required Department of Army authorizations through individual permits. The application procedures for individual permits are similar to those for NWP 21 PCNs. Also, the amount of documentation required to make surface coal mining permit decisions in the Appalachian region is comparable for NWP 21 PCNs and individual permits. Extensive documentation is needed to document minimal adverse effect determinations for NWP 21 PCNs, which is analogous to the quantity of information for decision documents that are prepared for individual permits. Therefore, the proposed modification of NWP 21 will not impose substantially higher costs on small entities when considered in the context of total costs of surface coal mining projects generally. Therefore, there will not be a "significant" impact for a substantial number of small entities.

We are interested in the potential impacts of the proposed modification of NWP 21 on small entities and welcome comments on issues related to such impacts.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law.

Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the proposed modification of NWP 21 does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year, because the requirements for a complete individual permit application and a complete NWP 21 PCN are similar. Also, comparable amounts of documentation are needed to make minimal adverse effect determinations and individual permit decisions for surface coal mining activities decisions in the Appalachian region. Therefore, this proposal is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed modification of NWP 21 contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed modification of NWP 21 is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that:

(1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The proposed modification of NWP 21 is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, the proposed modification of NWP 21 does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." The proposed modification of NWP 21 does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Therefore, Executive Order 13175 does not apply to this proposal. However, in the spirit of Executive Order 13175, we specifically request comment from tribal officials on the proposed rule.

Environmental Documentation

A preliminary decision document, which includes a draft environmental assessment, has been prepared for the proposed modification of NWP 21. This preliminary decision document is available at: *http://www.regulations.gov* (docket ID number COE–2009–0032).

It is also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314–1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final decision concerning the modification of NWP 21 and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed modification of NWP 21 is not a "major rule" as defined by 5 U.S.C. 804(2).

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The proposed modification of NWP 21 is not expected to negatively impact human health or the environment of any community, and therefore is not expected to cause any disproportionately high and adverse human health or environmental impacts to minority or low-income communities. The purpose of the modification is to strengthen environmental protection for all communities by requiring surface coal mining projects in the Appalachian region to obtain authorization through individual permits.

Executive Order 13211

The proposed modification of NWP 21 is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia that involve discharges of dredged or fill material into waters of the United States can be authorized by individual permits.

Authority

We are proposing to modify NWP 21 under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

For the reasons set out in the preamble, the Corps proposes to modify Nationwide Permit 21 as follows:

21. *Surface Coal Mining Operations.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the activities are already authorized, or are currently being processed as part of an integrated permit processing procedure, by the Department of Interior (DOI), Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

This nationwide permit does not authorize surface coal mining activities in the Appalachian region of Kentucky, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia.

Notification: The permittee must submit a pre-construction notification to the district engineer and receive written authorization prior to commencing the activity. (See general condition 27.) (Sections 10 and 404)

Dated: July 10, 2009.

Approved By:

Michael G. Ensch,

Chief, Operations, Directorate of Civil Works.

[FR Doc. E9–16803 Filed 7–14–09; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before September 14, 2009.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice