



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

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OFFICE OF
WATER

Honorable John Paul Woodley
Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army
108 Army Pentagon – Room 3E446
Washington, D.C. 20310-0108

Dear Assistant Secretary Woodley:

I am writing to provide clarification regarding the applicability of Clean Water Act (CWA) Section 404 to the regulation of waste treatment systems, constructed in waters of the United States, associated with surface coal mining activities. Our respective staffs have coordinated to ensure that this clarification is fully consistent with the CWA and with the agencies' implementing regulations and policies.

The clarification provided in this letter is intended to apply only to the particular circumstances of surface coal mining operations as practiced in the Appalachian Mountain states. These operations typically involve construction of "valley fills" that fill the upper reaches of headwater streams with dirt and rock from mining overburden. At the "toe" of such valley fill, rainwater (and/or spring water) laden with sediment enters the stream below the valley fill. This sediment-laden water flows downstream to a settling pond located as close as practicable to the toe of the valley fill. The Corps regulates, under CWA Section 404, the fill for the embankment that impounds the stream to create the sediment pond and the discharge of mining overburden into the stream that constitutes the valley fill. This letter addresses the legal status, under the CWA, of the stream segment between the toe of the valley fill to where it enters the sediment pond, and the sediment pond itself.

The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) regulations include, within the definition of the term "waters of the United States," a provision stating that "*waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.*" (See 40 CFR 232.2 and 33 CFR 328.3(a).) The applicability of the waste treatment system exclusion was clarified in a 1992 memorandum from EPA Assistant Administrator for Water, LaJuana Wilcher. (see October 2, 1992, memorandum from LaJuana S. Wilcher to Charles E. Findley.) That

memo states, in part, that impoundments created by the discharge of fill material and permitted by the Corps under CWA section 404 for purposes of creating a waste treatment system. "would no longer be waters of the United States." The memo goes on to clarify that discharges into such waste treatment systems do not require a CWA permit, although discharges from these systems to waters of the U.S. would require a permit under CWA Section 402 from EPA or an approved State program.

In May, 2004, EPA provided additional information clarifying the framework governing the regulation of mine tailings discharged in waters of the U.S. associated with hard rock mining in Alaska. (See May 17, 2004 memorandum from Diane Regas, James Hanlon, and Geoffrey Grubbs to Randy Smith regarding Clean Water Act Regulation of Mine Tailings.) In that memo, EPA recognized that the agencies' revised definition of the term "fill material" (67 Fed. Reg. 31129, May 9, 2002) makes clear that mine tailings placed into impounded waters, as proposed in the Kensington mine project in Alaska, are regulated as a discharge of fill material under CWA Section 404 because the tailings have the effect of raising the bottom elevation or converting waters to dry land. Our conclusion in that memo is based on the agencies' analysis of how the May 9, 2002, rulemaking applies to the regulation of discharges of mine tailings into waters impounded for the purpose of containing and isolating those materials. The memo proceeds to clarify that the rulemaking did not alter our interpretation of the waste treatment exclusion as defined in the agencies' regulations. While the agencies chose not to rely on the use of the waste treatment system exclusion in the permitting context for the Kensington mine, nothing in the May 2004 memo was intended to preclude us from relying on use of the exclusion in other circumstances that meet the agencies' definition.

The waste treatment system exclusion continues to apply to the creation or use of a waste treatment system in waters below a valley fill permitted by the Corps under CWA Section 404.¹ As provided in the agencies' regulations, a waste treatment system is "designed to meet the requirements of the CWA." (40 CFR 232.2 and 33 CFR 328.3(a).) The Corps, EPA and states ensure that the waste treatment systems meet those requirements through the section 404 permitting process for discharges of dredged or fill material, the section 402 permitting process for discharges from the sediment pond, and the section 401 certification process. All three programs ensure that the system is constructed and operated in compliance with the CWA. In order to minimize the physical extent of the waste treatment system and to reduce potential adverse environmental effects, to the maximum extent practicable the Corps requires under its Section 404 authorities that the sediment pond be located as close to the toe of the valley fill as possible². However, it is generally not practicable to locate the sediment pond

¹ The agencies' designation of a portion of the waters of the U.S. as part of a waste treatment system does not itself alter CWA jurisdiction over any waters remaining upstream of such system.

² The siting of sediment ponds below the valley fill is dependent on a number of site specific engineering and environmental factors. Ponds are designed and located to ensure that they have sufficient volume and reduce the rate of flow to provide for effective settling of suspended sediments. The agencies require that ponds be located as close as is practicable to the toe of the fill in order to minimize temporary adverse environmental impacts associated with the construction and operation of the waste treatment system.

immediately below the valley fill. Consequently, some segment of the stream must be used to convey water from the fill to the sediment pond below. Such stream segment is an unavoidable and necessary component of the treatment system because it is required to convey water and because it also provides initial treatment by settling some fraction of suspended sediments in the flow. In these circumstances, the physical extent of the waste treatment system is defined by the location of the embankment for the sediment pond at one end and the toe of the valley fill at the other because the entire system contributes to ensuring that the discharge from the sediment pond meets the requirements of the CWA.³ The waste treatment system exclusion applies whether the Corps has authorized the fills in waters of the U.S. using a standard individual permit or general permit that ensures an individualized review of the proposed project consistent with the considerations discussed in this letter.

The discharge of fill material into waters of the U.S. associated with the creation of a valley fill, as well as the construction of an embankment to create a sediment pond below the valley fill, is subject to permitting under CWA section 404. As a part of its environmental review for these activities, the agencies' regulations, including the Section 404(b)(1) Guidelines, require that all practicable steps be taken to avoid and minimize potential adverse environmental effects (both permanent and temporary) that may result from the direct, indirect, and cumulative effects of the proposed discharges of fill material. Included in this review are actions to reduce the size and number of valley fills as well as steps to reduce temporary adverse environmental effects associated with the creation, use and operation of the waste treatment system. In addition, the Corps authorization for the mining project is conditioned to require that waters adversely affected while being used as a waste treatment system are restored as soon as the mining operation is completed and water coming from a valley fill no longer requires treatment. Such restoration would generally include elimination of the sediment pond embankment and removal of sediment that may have accumulated in the stream between the embankment and valley fill. Once restoration is complete, the stream segment that was waters of the U.S. before application of the waste treatment system exclusion, resumes its jurisdictional status as a water of the U.S. The Corps also requires mitigation (e.g., stream restoration, wetlands creation) from the mining operator to offset all remaining adverse environmental effects associated with the proposed discharges, including temporary impacts associated with the creation and operation of the waste treatment system. It is important to emphasize that the Corps' authorization is subject to certification by the State under CWA Section 401 to ensure that the proposed activity will not cause or contribute to a violation of the State's water quality standards.

Once the environmental review is complete and the project is authorized under CWA Section 404, the authorization has the effect of changing the legal status of those waters of the U.S. that are a part of the waste treatment system, consistent with any relevant terms and conditions established in the authorization. Neither the statute nor the

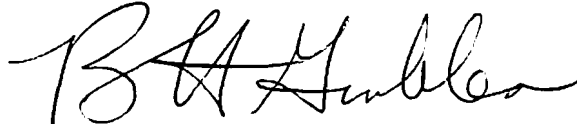
³ Although we have determined that the physical extent of the waste treatment system is defined by the location of the embankment for the sediment pond at one end to the toe of the valley fill at the other, we have not opined on whether the discharge from the toe of the fill would otherwise be subject to section 404 or section 402.

agencies' regulations requires an explicit determination by the Corps that the exclusion is being relied upon so long as the record for the Corps decision includes the analysis required by the regulations, i.e., that the waste treatment system be designed to meet the requirements of the CWA. As a general matter, however, it is our recommendation that the Corps include an explicit determination, including defining the physical extent of the waste treatment system to which the exclusion applies. In any case, there is no need for a CWA permit for a discharge into the waste treatment system, including a discharge from the toe of the valley fill.

As previously discussed, a CWA Section 402 permit is required for any discharge from the waste treatment system to waters of the United States: for example, a discharge to waters of the U.S. below the embankment for the sediment pond. The Corps has authority to enforce the terms and conditions of the CWA Section 404 authorizations, including those relating to potential water quality impacts associated with the construction and operation of the waste treatment system. Similarly, EPA or an approved state program under Section 402, has authority to enforce relevant terms and conditions of the CWA Section 402 permit, including those relating to potential water quality impacts associated with the use and operation of the waste treatment system.

I believe EPA and the Corps are in agreement regarding the applicability of the waste treatment system exclusion to the surface coal mining activities described in this letter. I look forward to continuing our coordination on this issue to assure that the waste treatment system exclusion is consistently and appropriately applied in a manner that protects human health and the environment. Should you have any questions about the issues raised in this letter, please feel free to contact me or have your staff call my Chief of Staff, Gregory Peck, at 202-564-5700.

Sincerely,

A handwritten signature in black ink, appearing to read "B H Grumbles". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Benjamin H. Grumbles
Assistant Administrator