

U.S. ARMY CORPS OF ENGINEERS

TESTIMONY OF:

MARGARET GAFFNEY-SMITH
CHIEF, REGULATORY PROGRAM

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON REGULATORY AFFAIRS, STIMULUS OVERSIGHT
AND GOVERNMENT SPENDING

UNITED STATES HOUSE OF REPRESENTATIVES

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Chairman Jordan, Ranking Member Kucinich, and Members of the Subcommittee, I am Margaret (Meg) Gaffney-Smith, Chief of the Regulatory Program for the U.S. Army Corps of Engineers (Corps). Thank you for the opportunity to discuss the Corps regulatory authority under Section 404 of the Clean Water Act (CWA) and to specifically discuss our regulatory involvement in surface coal mining activities. As Chief, I oversee national program implementation, which involves over 65,000 authorizations and 100,000 jurisdictional determinations, annually, all accomplished in the Corps Districts. As a career civil servant, I am fully prepared to address Section 404 program implementation.

Background on Clean Water Action Section 404

Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into “waters of the United States”. Since the late 1970s, the Corps has regulated discharges of dredged or fill material into streams and wetlands related to activities such as highway construction; residential, commercial, and industrial developments; energy projects; and other projects. It is important to note that when I use the term “streams” I am referring to a very large category of waterbodies ranging from major rivers, like the Potomac, to much smaller perennial, intermittent, and ephemeral streams. Many of the surface coal mining activities in Appalachia authorized by the Corps involve very small but potentially ecologically significant ephemeral streams.

Discharges of dredged or fill material into streams and wetlands that are waters of the United States will require authorization from the Corps of Engineers. Activities that are similar in nature and that are expected to cause no more than minimal effects, individually and cumulatively, as described in Section 404(e) of the CWA, may be authorized by a “general permit”. General permits protect the aquatic environment, but provide applicants with a quicker authorization process because impacts are anticipated to be minor. The CWA stipulates that general permits expire after five years, at which point the Corps must evaluate them, update them if necessary, and reissue them through a public notice and comment process. All Federal and state agencies have an opportunity to comment on general permits as part of the reissue process and the Corps uses input received to improve the general permits and environmental protection requirements.

Activities that do not meet the criteria for a general permit are typically processed under the “standard individual permit” procedures. These procedures include issuance of a public notice, preparation of an environmental document in accordance with requirements of the National Environmental Policy Act, and application of the Section 404(b)(1) Guidelines developed by the U.S. Environmental Protection Agency (EPA) in conjunction with the Corps. Regulatory program personnel in Corps districts work with applicants to avoid and minimize impacts to waters of the United States and to develop satisfactory compensatory mitigation plans for unavoidable impacts to aquatic resources. For these individual permit applications, the Corps conducts a full public interest review balancing the anticipated benefits against the anticipated impacts. The Corps can only authorize those activities that are not contrary to the public interest, and must authorize the least environmentally damaging practicable alternative, so long as the alternative does not have other significant adverse environmental consequences.

When implementing the Corps regulatory program, the Corps is neither an opponent nor a proponent for any specific project; the Corps' responsibility is to make fair, objective, and timely permit decisions. The Secretary of the Army, through the Chief of Engineers, has delegated responsibility for making final decisions on permit applications to the Corps of Engineers District Commanders. The regulatory program is implemented day-by-day at the district level by staff that know their regions, resources, and the public they serve.

Longstanding regulations state that a Corps District Commander may issue a permit only where he determines that a particular proposal complies with the Section 404(b)(1) Guidelines and is not contrary to the public interest.

Section 404 Permits for Activities Related to Surface Coal Mining

Various components of surface coal mines such as valley fills, sediment control ponds, stream "mine throughs", road crossings, and surface features associated with deep mines typically involve the discharge of fill material into "waters of the United States". Because of this, a Section 404 permit application must be submitted to the Corps for evaluation, and an authorization obtained from the Corps prior to beginning work in these jurisdictional waters. In the Appalachian region, these activities usually occur in small, but ecologically significant, ephemeral and intermittent streams in the upper reaches of the watersheds. Due to the large size of surface mines (typically at least several hundred acres) in the region, these proposed activities often have the potential to impact thousands of linear feet of these small streams.

Impacts to wetlands are usually minimal, because wetland resources are typically not found on the steep slope terrain of Appalachia. Under the Corps regulatory authority, it is responsible for evaluating impacts to aquatic resources resulting from the placement of fill into the streams, immediately adjacent riparian corridors, and very occasionally, wetlands. When considered in a surface area context, the stream and riparian areas within the Corps' scope of analysis normally comprises a small percentage of the total acreage involved for a surface coal mining project in Appalachia. It is not uncommon for entities commenting on project proposals to express concerns about impacts that are not within the regulatory purview of the Corps, such as upland impacts.

Surface Mining Regulatory Framework

Several key agencies have the legal authority to regulate or comment on various aspects of surface coal mining projects. The Office of Surface Mining Reclamation and Enforcement (OSM) within the Department of the Interior administers and enforces the Surface Mining Control and Reclamation Act of 1977 (SMCRA). SMCRA establishes a program of cooperative federalism that allows the States to enact and administer their own regulatory program within limits established by Federal minimum standards and with backup authority exercised by OSM. All but one of the Appalachian States (Tennessee), have assumed jurisdiction over surface coal mining operations within their borders by developing a regulatory program that meets the

standards of SMCRA and that has been approved by OSM. In general, SMCRA authorizes regulation of the environmental effects of surface coal mining.

In addition to their SMCRA responsibility, the states also have authority under Section 401 and Section 402 of the Clean Water Act for ensuring that discharges do not violate state water quality standards. As EPA's testimony today describes, EPA has an oversight role with respect to the states' 402 programs. All Corps permits, general or individual, stipulate that the authorizations cannot be used until the applicant has a valid CWA Section 401 certification and a valid Section 402 permit provided by the appropriate regulatory entity. State water quality agencies, along with EPA, have authority to evaluate and regulate broad surface water quality issues such as selenium concentrations and concerns about groundwater contamination. The Corps must consider adverse effects of any proposed project on water quality, and generally defers to the State's conclusions.

Earlier Regulation of Surface Coal Mining

In the early 2000s, poor integration of federal and state agency regulatory programs dealing with surface coal mining projects coupled with each regulatory entity's propensity to focus on its niche of responsibility caused inefficient regulatory and environmental effects evaluations.

In 2005, four federal agencies developed and signed an interagency Memorandum of Agreement (MOU) to improve the integration of regulatory processes, minimize redundancy, and improve coordination and information sharing, with the ultimate goal of improving environmental protection, but implementation of the MOU was somewhat inconsistent. Thus, at the beginning of this Administration in 2009, the regulatory environment was still somewhat disjointed. Agency requirements were not communicated to the industry and the general public in as clear, consistent and transparent a manner as we would have liked. For example, applicants could work with one agency to design its mine to satisfy that agency's requirements only to find out later that some design features might be contrary to what another regulatory agency required.

June 2009 Interagency MOU

In June 2009, continued concerns resulted in the Department of Interior, EPA, and the Department of the Army entering into a new MOU to implement an Interagency Action Plan (IAP) intended to further reduce the harmful environmental consequences of Appalachian surface coal mining operations, while ensuring that future mining remains consistent with federal law. The IAP contained a number of agency commitments to implement short and long term actions to minimize environmental harm while allowing continued permitting of environmentally responsible surface coal mining projects. Progress has been made on several of these short-term initiatives as I will describe in more detail later in my testimony.

Longer term initiatives included consideration of:

- Revisions to key provisions of current SMCRA regulations;
- Eliminating the use of Nationwide Permit #21 in Appalachia to authorize mining proposals – The Corps suspended its use in 2010; and,
- Revisions to how surface mining activities are evaluated, authorized, and regulated under the Clean Water Act.

Enhanced Coordination Procedures

In conjunction with the June 2009 MOU, the Corps and EPA established a review framework called the *Enhanced Coordination Procedures* or ECP. The ECP applied only to permit applications that the Corps had previously public noticed as of March 31, 2009. The purpose of the ECP was to provide the agencies with an opportunity to more closely coordinate on these projects. The ECP specified time frames and procedures that the Corps and EPA would follow as they worked through this list of applications. Through today, of the 79 applications that were on the final ECP list, eight permits have been issued, 50 applications have been withdrawn for a variety of reasons, and 21 applications are still pending (see attached chart). The Corps staff continues to work with the applicants, EPA and other state and federal agencies to review the remaining 21 applications and move toward permit decisions.

Current Application Processing

One of the major improvements stimulated by the 2009 MOU is the increased collaboration that is occurring among the regulatory agencies. We are meeting to discuss mine projects earlier in the design process and attempting to address all agency concerns closer to the beginning of the process instead of many months into the process. Regularly scheduled meetings in the Appalachian states allow applicants to meet with the regulatory agencies and discuss their upcoming mine proposals. In Tennessee, the agencies developed and signed a *Local Interagency Working Agreement* which includes *Standard Operating Procedures* that the agencies have agreed to follow during the review of mining applications. Similar procedures are being developed in other states and discussions about developing formal local agreements are ongoing.

One important consideration for the Corps in these agreements is that it will now identify jurisdictional waters at the beginning of the process. Making jurisdictional determination at the beginning of the coordinated review will help us work with applicants to identify and avoid or minimize impacts to waters of the U.S. These agreements have only recently been put into place – we anticipate that the benefits of these coordinated reviews will become evident as we start to process new applications submitted in accordance with these procedures.

Another major initiative is to improve the ecological success of stream mitigation performed in association with these mining projects. Personnel from my staff along with personnel from other agencies have been carefully reviewing lessons learned from previous mitigation efforts, performing site visits to mitigation projects, considering potential ways to collaborate with other programs, and writing a technical guidance document that will serve as a guide for our project

managers, consultants, and other agency personnel. The Corps must have confidence that the proposed mitigation is practicable and will adequately compensate for the aquatic resources that are lost as a result of the discharge of fill material. Other improvements that the Corps has implemented include publishing a stream impact assessment tool in 2010 which will enable us to better evaluate impacts and proposed mitigation plans. In summary, we feel like these improvements will allow us to make progress in performing more timely and sound reviews of permit applications.

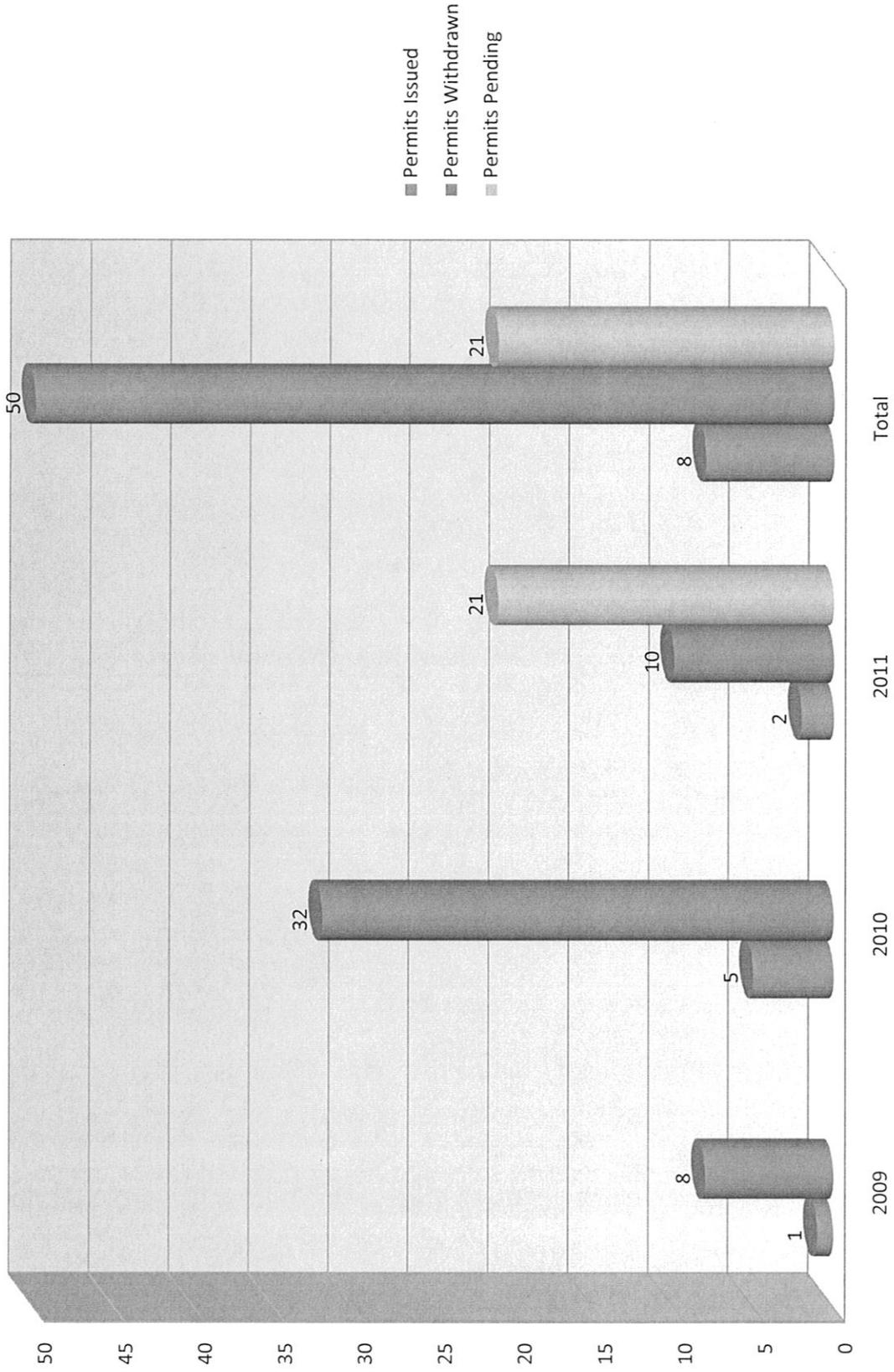
Upcoming Challenges

As we move forward with our review of Section 404 permit applications associated with mining projects, we will continue to face substantial challenges. These applications are very large and complex, involve substantial impacts to aquatic resources, have very technical and complex compensatory mitigation plans. Performing and/or reviewing jurisdictional determinations are very time consuming activities but are essential to our process. We have numerous personnel throughout Appalachia devoted to reviewing permit applications associated with mining projects and districts have assigned additional staff to their “mining” sections to handle the workload.

The Corps understands the economic impact of the mining industry and the importance of the jobs that are associated with the industry. It is also aware of the many concerns that have been expressed about potential impacts to aquatic resources and is working together with other federal and state agencies to take positive steps toward reducing such impacts. The Corps will continue to work with applicants, other agencies, and the general public as it reviews the Section 404 permit applications, and follow the regulations to produce sound, objective, and fair final permit decisions.

I appreciate the opportunity to be here today and I will be happy to answer any questions you may have.

ECP Projects





Margaret (Meg) Gaffney-Smith

U.S. Army Corps of Engineers
Chief, National Regulatory Program

Ms. Gaffney-Smith is located in the Corps Headquarters Office in Washington, DC. She oversees a \$190 million dollar program implemented by 8 divisions and 38 districts across the country, accomplishing over 100,000 jurisdictional determinations and 70,000 written authorizations annually. Ms. Gaffney-Smith oversees the development of regulations and guidance, budget execution, and training for 1,300 Corps regulators and staff from other agencies. She is recognized for her extensive knowledge of the Rivers and Harbors and Clean Water acts, wetland science and policy, and her dispute resolution skills. Since becoming Chief, she has lead the Corps implementation of the 2008 Mitigation Rule, development of the new Nationwide Permits for 2012, development and testing of impact assessment protocols, new regional supplements for the 1987 Wetland Delineation Manual and initiatives to improve the Corps unique "ORM2" data base used to document jurisdictional determinations, permit decisions, and project details. Additionally, she has focused on improving program performance, recruitment activities, and mentoring new regulatory staff. She and her staff provide fair and objective final permit decisions, and work hard to ensure the Regulatory Program is implemented consistently, authorizing projects that appropriately protect the aquatic environment and that are not contrary to the public interest. Prior to coming to Corps Headquarters, Meg was the Chief of the Jacksonville and Baltimore Districts Regulatory Programs. Ms Gaffney Smith has a B.A. degree in biology from Wittenberg University and an M.A. degree in environmental policy from The George Washington University. She lives in Fairfax, Virginia, with her husband, son, and yellow lab Ginger.