

11 August 2003

## MEMORANDUM FOR RECORD

**SUBJECT:** Pine Branch Coal Sales, Inc.; KDSMRE #897-3055 Amendment No. 1; ID No. 200300028-ejs; ATF Nationwide permit consideration for surface coal mining activities.

1. During a 23 December 2002 meeting at the Eastern Kentucky Regulatory Office agent representatives for Pine Branch Coal Sales, Inc. reported that they had performed unauthorized work in the watersheds of Lead Branch, Bobbin Branch, Spencer Creek and several unnamed tributaries to the North Fork Kentucky River near Krypton in Perry County, Kentucky. This work included the placement of fill material into these waters during the construction of three hollow fills and several associated sediment ponds and is referenced as Kentucky Department for Surface Mining and Reclamation Enforcement (KDSMRE) No. 897-0355 Amendment No. 1 Revision 4.
2. The unauthorized discharges of fill material into these waters were confirmed by a follow-up inspection on 02 January 2003 by Corps of Engineers personnel. Pine Branch Coal Sales, Inc. constructed three hollow fills and three embankment ponds without prior authorization. This work involved the construction of one new hollow fill (referred to as HF "20") and the extension of two hollow fills (referred to as HF "B" and HF "F", respectively). The Corps subsequently issued a cease and desist order dated 22 January 2003.
3. The applicant received authorization from the KDSMRE for permit No. 860-0383 Amendment No. 4 on 28 January 2003, and is eligible for the general 401 Water Quality Certification for NWP No. 21 from the Kentucky Division of Water.
4. On 4 April 2003 this office received an incomplete application submitted by EcoSource, Inc. on behalf of Pine Branch Coal Sales, Inc., for the subject surface coal mining operation. The applicant requested Nationwide 21 authorization for this activity. On 16 June 2003 this office accepted an addendum to the mitigation plan submitted by EcoSource, Inc. that made the application complete and constituted the pre-construction notification (PCN) of the proposal. The U.S. Environmental Protection Agency (USEPA), Kentucky Division of Water (KDOW), U.S. Fish and Wildlife Service (USFWS), Kentucky Department of Fish and Wildlife Resources (KDFWR), and the Office of Surface Mining (OSM) were notified of the proposal by a faxed letter dated 22 June 2003. A copy of the application was forwarded to each agency on the same day. The above-mentioned agencies were given 10 calendar days from 25 June 2003, to advise us if they would provide substantive comments and, if needed, an additional 15 days to forward them to this office.
5. In a letter dated 16 July 2003 the USFWS stated that any potential impacts to potential habitat for the Indiana bat (*Myotis sodalis*) should have been authorized as part of the DSMRE permitting process under the

SUBJECT: Pine Branch Coal Sales, Inc.; KDSMRE #897-3055 Amendment No. 1; ID No. 200300028-ejs; ATF Nationwide permit consideration for surface coal mining activities.

Surface Mining Control and Reclamation Act (SMCRA). This process is covered by a programmatic Biological Opinion written by the USFWS under Section 7 of the Endangered Species Act. Therefore, any potential effects to federally listed species would not be attributable to the Louisville District's proposed permitting action and the requirements of Section 7 of the ESA have been satisfied. The service recommended that the Louisville District reconsider its obligations under Section 7 of the ESA if new information reveals potential effects to listed species. Additional comments recommend upland disposal of overburden material and using native groundcover, shrub and woody species in restoration of a 100-foot wide riparian corridor with at least 70 percent of woody stems being trees with no more than 25 percent being soft mast producers (75+ percent remaining as hard mast producers). A survival rate of 80 percent was recommended by the USFWS as success criteria. The applicant has managed overburden on upland sites to KDSMRE review standards, thus minimizing aquatic resource impacts. The applicant proposes 100+ foot wide riparian vegetation buffers by planting native tree, shrub and groundcover species in areas of stream bank instability. Species selection and distribution are derived from Kentucky Division of Water "Guidelines for Stream and Wetland Protection in Kentucky". The recommended 80 percent survival rate is proposed in the mitigation plan. Detailed maps, plans and drawings are included in the mitigation proposal within the application that was coordinated with resource agencies as described in item #5.

6. The applicant received authorization from the KDSMRE for permit No. 897-3055 Amendment 1 Revision 4 on 06 December 2001, and is eligible for the general 401 certification for NWP No. 21.

7. In evaluating this proposal, the boundaries of the area subject to the Corps' consideration of individual and cumulative adverse effects were limited to the "waters of the United States" within the watersheds of the streams in item #1. It is also noted that any impacts to historic resources have been addressed with the State Historic Preservation Officer (SHPO) in the KDSMRE permit process. Also, it is determined that the proposal will have no effect on federally listed threatened or endangered species or critical habitat.

SUBJECT: Pine Branch Coal Sales, Inc.; KDSMRE #897-3055 Amendment No. 1;  
ID No. 200300028-ejs; ATF Nationwide permit consideration for surface  
coal mining activities.

8. The original submission of the proposed mitigation, dated April 2003, proposed stream restoration for the areas of pond removal and an in-lieu-fee for the impacts associated with the footprints of the three hollow fills. This was revised and an up-dated mitigation proposal, dated June 2003, offered a combination of off-site compensatory mitigation and in-lieu-fee for mitigation of the hollow fill impacts. Also, an on-site stream restoration plan for sediment pond removal and drainage corridor from the fill toe(s) to their respective sediment pond was proposed. The stream ecosystem integrity of these systems was evaluated using information obtained during the 02 January 2002 site visit and provided by the applicant and their consultant. Current project assessment of aquatic resource debits/credits are derived from a functional assessment model, USACE Eastern Kentucky Stream Assessment Protocol, by applying an Ecological Integrity Index (EII) per running foot to the impact/mitigation reach length(s). The resulting "currency" of Ecological Integrity Units (EIU's) provides a quantified and qualitative measure to evaluate project debits and/or credits. Using this model, permanent stream impacts associated with this activity and the proposed hollow fills would result in a loss of 1072.40 EIUs. As components of this, the extensions of two hollow fills (referred to as HF "B" and HF "F", respectively) would result in the loss of 239 EIUs. Compensatory off-site mitigation proposed in the June 2003 "Addendum to the Mitigation Plan" offers 260 EIUs of mitigation credit to offset those losses. Pine Branch Coal Sales, Inc. has solicited the assistance of CreekBankers, Inc. to provide this compensatory mitigation. The balance of the losses to aquatic functions incurred by the unauthorized activities (i.e., 833.40 EIUs associated with HF "20") will be offset by the payment of an ILF in the amount of \$360,847.50. This ILF amount was proposed in accordance with the Louisville District's ILF Calculator (version 2002.8) and includes an adjustment factor that takes into account cumulative impacts and temporal loss of aquatic functions.

9. Based on my review of the information provided by EcoSource, the State approved mining permit, the site visit performed on 02 January 2003, the comments received during the Pre-Discharge Notification comment period, the language pertinent to the Nationwide Permit (NWP) authorization under 33 CFR 330, No. 21 (Surface Coal Mining), as published in the Federal Register dated January 15, 2002, and guidance for implementation of NWP 21 from our Regulatory Headquarters (CECW-OR), it is concluded that the project, with the following conditions, would have no more than minimal individual and cumulative adverse effects on

SUBJECT: Pine Branch Coal Sales, Inc.; KDSMRE #897-3055 Amendment No. 1;  
ID No. 200300028-ejs; ATF Nationwide permit consideration for surface  
coal mining activities.

the aquatic environment. Thus, it is determined that the proposal meets  
the requirements for NWP 21.

- 1) The permittee shall adhere to April 2003 "Section 404 Application and Mitigation Plan" as modified by the June 2003 "Addendum To The Mitigation Plan". Upon on-site sediment pond removal and stream channel restoration, and off-site mitigation construction, as-built plans documenting the final conditions of the stream(s) shall be submitted to this office for review and approval.
- 2) The permittee shall provide, within 90 days of the date of this authorization, written verification of the perpetual protection and disturbance restriction placed on all on-site and off-site mitigation areas.
- 3) The permittee shall pay an in-lieu mitigation fee of \$360,847.50 to the Kentucky Department of Fish and Wildlife Resources for the Kentucky Stream and Wetland Mitigation Trust Fund. Written proof of payment must be provided to the U.S. Army Corps of Engineers, Louisville District within 90 days of the date of this authorization.

James M. Townsend  
Chief, Regulatory Branch  
Operations Division  
Sparks/OP-FS/memo-rcd  
Devine/OP-FS  
Townsend/OP-F