



**US Army Corps
of Engineers**
Fort Worth District

Nationwide Permit 21 Guidance

Regulatory Branch, Fort Worth District

U. S. Army Corps of Engineers

October 6, 1999



Reference Nationwide Permit (NWP) 21 for Surface Coal Mining Activities. Such activities may be authorized under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 provided they are authorized by the Department of the Interior Office of Surface Mining, or by states with approved programs under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), and the permit applicant satisfies all conditions of NWP 21, including the preconstruction notification (PCN) condition.

We recommend evaluating lignite surface mine projects using the approach described below for initial Railroad Commission of Texas (RRC) permits and permit renewals and for RRC permit revisions that involve proposed mine boundary changes:

1. For each project, the mining company will conduct and submit a preliminary jurisdictional determination for waters of the United States, including wetlands, for all unmined areas within the RRC permit mine boundary. The operations within the mine boundary may average approximately 30 years, but this time frame may vary. Also, the time required to complete all operations within the mine boundary may not be the same as the original projection. When the Regulatory Branch, Fort Worth District, U. S. Army Corps of Engineers (USACE) receives the preliminary jurisdictional determination, the USACE will log in the project and assign one USACE project number for each area for which a single RRC permit identifier (usually a number followed by a letter) will be assigned. The RRC permit identifier corresponds to a five-year initial or renewal mining area. The Corps must review and approve the preliminary jurisdictional determination. Opportunity must be given in every case for a field evaluation of the preliminary determination. Jurisdictional determinations will be revisited with each application for RRC permit renewal (usually every five years) and updated based on current law, regulation, guidance, and environmental changes. Changes may result in increases or decreases to the total area of waters of the United States within the mine boundary. However, the USACE anticipates that once a preliminary jurisdictional determination has been completed by a mining company and verified by the USACE, any subsequent updates would be much less labor and time intensive.

2. After, or concurrent with, providing the preliminary jurisdictional determination, the mining company will provide a preliminary PCN to the Corps, the RRC, and the resource agencies (U. S. Environmental Protection Agency, U. S. Fish and Wildlife Service, Texas Natural Resource Conservation Commission, Texas Parks and Wildlife Department) for review. Contact information for the resource agencies may be obtained from the USACE. The preliminary PCN should include all information specified in nationwide permit general condition 13 (Federal Register, Vol. 61, No. 241, Friday, December 13, 1996). For NWP 21 PCNs, the information should include conceptual details about mining, reclamation and mitigation for the next RRC permit term focused on projected impacts to waters of the United States and mitigation (avoidance, minimization, and compensation) of those adverse impacts. This preliminary PCN must be consistent with the information that has been, or is to be, submitted to the RRC to satisfy requirements of the approved state program under Title V of the SMCRA. The preliminary PCN should include:

- a. a project area map showing current mine permit boundary, proposed mine permit boundary changes, and projected resource area recovery blocks (mine pit progression) and five-year mining impact boundaries;

- b. the projected general mining plan for the RRC permit term being addressed;
- c. a functional evaluation of waters of the United States within the entire mine boundary that potentially could be mined within the RRC permit term (this may be the entire area within the mine boundary);
- d. an analysis of the expected beneficial and adverse environmental impacts of the mining operation;
- e. identification of areas within the mine boundary within which the mining company plans no activities during the life of the project because of lack of lignite, environmental sensitivity, or any other reason (avoidance mitigation); and
- f. a description of the proposed mitigation and monitoring for the RRC permit term being addressed. Normally, this would include the timing, nature, and extent of mitigation for any area that would be adversely impacted by mining operations. This should generally focus on mitigation and monitoring for types or classes of areas rather than specific locations, and should include all such areas that could be mined within the subject RRC permit term. Specific areas should be addressed if unique or particularly notable. The mining company will identify the mitigation approach it plans to take for all of the waters of the United States that it will be adversely impacting during the RRC permit term being addressed.

Mitigation elements of the preliminary PCN should be consolidated into a discrete section designated as the “mitigation plan”. During the review of this information, the mining company should provide the USACE and the resource agencies an opportunity to visit the mine site and tour the areas that would be adversely impacted by the mine operation. This site visit may be conducted concurrently with the site visit for field verification of the preliminary jurisdictional determination.

3. After providing the USACE and the resource agencies an opportunity to comment on the preliminary PCN for the upcoming RRC permit term, the mining company should consider those comments in the RRC permitting process. The mining company should submit a revised preliminary jurisdictional determination to the USACE for concurrence and a revised preliminary PCN for comment. The company may request that the USACE provide comments directly to the RRC. The mining company should then provide the proposed mitigation plan to the RRC for approval.
4. The mining company should submit a final PCN to the USACE to satisfy the requirements of NWP General Condition 13 (see Federal Register, Vol. 61, No. 241, December 13, 1996) upon receipt of an RRC order for issuance of a state mining permit. The objective is to have all appropriate concerns of the USACE and the resource agencies incorporated into the final PCN at this point. The USACE would then proceed with the review of the final PCN and respond to the mining company within the specified time.
5. Any USACE letter to the mining company verifying nationwide permit 21 authorization would require all appropriate and practicable mitigation in the form of one or more special conditions. Items that may be addressed include mitigation methods, mitigation ratios, performance standards, deed restrictions, monitoring requirements, and as-built plans for mitigation areas. Monitoring reports will normally be required at least annually. If all of these items are specified in the mitigation plan, only one special condition may be required to address mitigation. If one special condition is used for mitigation, it should state that the permittee shall implement and abide by the mitigation plan, and include a specific reference. A statement should be included in all NWP 21 verifications that the Department of Army authorization for the activity under NWP 21 is valid for the term of the applicable Surface Mining Permit issued by the RRC unless modified, suspended, or revoked by the USACE.

6. The mining company must implement the mitigation plan and comply with all terms and conditions, including special conditions, of the USACE NWP 21 authorization. The mining company is responsible for meeting all requirements of the USACE NWP 21 authorization, including implementing the mitigation plan for all adverse impacts to waters of the United States that occur within the area initially disturbed during the term of the particular RRC initial permit or permit renewal. Mitigation should be implemented concurrent with or as soon as practicable after impacts to waters of the United States have occurred. During mining and reclamation, the mining company should monitor the adverse impacts to waters of the United States and associated mitigation as specified in the mitigation plan and any permit condition(s). Monitoring reports should include a description of the adverse impacts and mitigation that have occurred within the subject USACE NWP 21 permit term which corresponds to the area initially disturbed within the time period covered by the initial RRC permit or permit renewal to which the NWP 21 authorization applies. Monitoring reports should also include a summary of cumulative adverse impacts and mitigation that have occurred to date within the entire mine boundary. Details should include acreage, functions and values, and map location, of the waters of the United States adversely impacted and of the waters of the United States created, restored, enhanced, or preserved as compensatory mitigation. This information may be provided in a matrix or other acceptable format.

For more information about the use of nationwide permit 21 or about the Regulatory Program in general, please contact the Fort Worth District Regulatory Branch at (817)978-2681 or visit our homepage at <http://www.swf.usace.army.mil> (select "Permits").