



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Kennedy

JUN 30 2008

Ginger Mullins, Chief
Regulatory Branch
Huntington District
U.S. Army Corps of Engineers
502 Eighth Street
Huntington, West Virginia 25701-2070

Re: Public Notice 200100895; Loadout, LLC

Dear Ms. Mullins:

The U.S. Environmental Protection Agency (EPA) has completed its review of Loadout, LLC's proposal to construct, operate, and reclaim the Nellis Surface Mine near the town of Nellis, in Boone County, West Virginia. The applicant proposes to discharge dredged or fill material into waters of the United States (U.S.) permanently impacting 11,194 linear feet of ephemeral and intermittent stream channels (1.53 acres) and temporarily impacting 1390 linear feet of intermittent stream channel (0.23 acres) for the construction of four valley fills and three sediment ponds.

The fundamental precept of the Clean Water Act (CWA) Section 404(b)(1) Guidelines is that no dredged or fill material should be discharged into waters of the United States unless it has sufficiently been demonstrated that such a discharge will not have an unacceptable adverse impact to the aquatic ecosystem, especially to special aquatic sites including wetlands and riffle-pool complexes. The proposed project is not a water dependent activity meaning that it does not require or need to be sited in or near water to meet its basic project purpose. The Clean Water Act Section 404(b)(1) Guidelines clearly state that alternatives are presumed to be available for non-water dependent activities that do not involve the use of the aquatic ecosystem, including jurisdictional wetlands [40 CFR 230.10(a)(3)] and therefore upland alternatives are presumed to be available. The applicant should continue to evaluate all practicable alternatives which would further minimize the impacts to the aquatic ecosystem, including reducing the amount of coal mined.

The upper reaches of first order streams are vital components of the ecosystem. These ephemeral and intermittent streams provide high levels of water quality and quantity, sediment control, nutrients, and organic contributions and as a result, are largely responsible for maintaining the quality of downstream riverine systems for considerable distances. These streams provide not only vital habitat and biological functions they also provide chemical and physical functions which contribute to the health and stability of waters onsite and downstream. The newly proposed rule issued on March 28, 2006, *Compensatory Mitigation for Losses of*

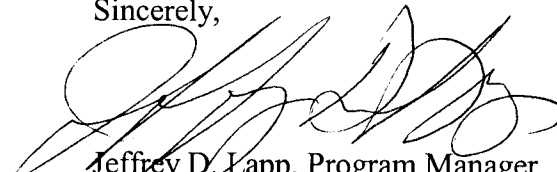


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Aquatic Resources, emphasizes the need for mitigation to compensate for the functions which are lost due to the impacts to the aquatic resource. The proposed method of mitigation, Stream Habitat Unit (SHU) methodology, is not a true functional assessment methodology. The SHU method only evaluates one aspect of stream function. The proposed rule indicates that for certain types of aquatic resources, such as streams it may be more appropriate to quantify credits and debits by using linear feet unless there is a functional assessment method available, appropriate and practical to use. Until the Huntington District finalizes the stream assessment methodology that has been agreed to by the resource agencies for determining credits and debits, required compensation should be determined based on linear feet. The value of credit or debit is dependent upon the amount of aquatic resource function provided per linear feet.

Thank you for opportunity to provide comments for this proposed project to discharge dredged and/or fill material into waters of the U.S. in conjunction with the construction, operation, and reclamation of the Nellis surface mine. EPA recommends that a permit not be issued until the applicant has complied with the 404(b)(1) Guidelines by demonstrating that the least environmentally damaging practicable alternative available has been proposed, and that the mitigation proposed adequately offsets the proposed impacts. Finally, the Corps must do a thorough analysis of the direct, indirect and cumulative impacts of this project. Should you have any questions please feel free to contact Ms. Jessica Martinsen at 215-814-5144 or by email at martinsen.jessica@epa.gov.

Sincerely,



Jeffrey D. Lapp, Program Manager
Wetlands and Oceans Program