



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Pennsylvania Field Office
315 South Allen Street, Suite 322
State College, Pennsylvania 16801-4850

July 31, 1998

Mr. Thomas J. Maslany, Director
Water Protection Division (3WP00)
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Re: NPDES Draft Permit No. WV1017021
Hobet Mining, Inc.
Spruce No. 1 Surface Mine

Dear Mr. Maslany:

On July 27 and July 28, 1998, the Fish and Wildlife Service conducted a site investigation of the proposed Hobet Spruce No. 1 Surface Mine in Logan County, West Virginia. The mine will affect 3,113 acres through surface mine, auger mine, and high-wall, thin-seam mine operations in headwater streams of the Spruce Fork of Little Coal River. Part of the project will be a mountaintop removal operation involving mining by dragline. Four stream valleys--Seng Camp Branch, Pigeonroost Branch, Oldhouse Branch, and White Oak Branch, all tributaries to Spruce Fork--will be filled with overburden. If permitted, this project will be the largest surface mine ever constructed in the State.

The following report has been prepared pursuant to the Fish and Wildlife Coordination Act (48 Stat. 401, 16 U.S.C. 661 *et seq.*) and the Endangered Species Act of 1973 (87 Stat. 884, as amended), and is provided to the Environmental Protection Agency to assist you in determining whether to file a specific objection to the proposed NPDES permit.

Fish and Wildlife Service Surveys and Investigations

Service biologists visited three of the valleys proposed for filling on July 27 and 28, 1998. We walked or drove far into the upstream reaches of Pigeonroost Branch, Oldhouse Branch, and White Oak Branch. A fourth valley (Seng Camp Branch), was reportedly already affected by ongoing mountaintop removal operations and was not included in our field investigation. The purpose of our visit was to evaluate the quality of terrestrial and aquatic habitats that would be directly affected by the proposed project. Using standard sampling methods, we collected benthic invertebrate samples at two or three locations on each stream (sample locations are marked on the attached map). In addition, fish were sampled from pool areas of Pigeonroost Branch. All sample stations were at locations that would be covered and eliminated by the proposed valley fills.

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Terrestrial Habitats

A few homes are present in the lower reaches of the Pigeonroost valley, but the majority of the valley is uninhabited. The Oldhouse and White Oak valleys are remote and largely undisturbed. Each valley has a road paralleling the streams for much of their lengths, with the roads ranging from short stretches of pavement to gravel, to jeep trails negotiable only by four-wheel drive vehicles, to remnant logging roads accessible only on foot. In Oldhouse Branch, short stretches of the road used portions of the stream as a roadbed.

All three valleys are narrow, deep, and heavily forested. The overstory is composed of mixed-aged beech, tulip poplar, red maple, red oak, shagbark hickory, and ash (many of these greater than 24" dbh), with a dense herbaceous understory present throughout the valleys. The dominant tree species are tulip poplar and beech. Palustrine emergent and scrub/shrub wetlands are scattered throughout the stream floodplains and in isolated seep areas. Large numbers of salamanders were present along the stream channels. We would expect that the combination of forested, spring seep, and stream habitats would support numerous migratory bird, amphibian, small mammal, and game species such as wild turkey and whitetail deer.

The proposed Spruce No. 1 mine is also within the range of the Indiana bat (*Myotis sodalis*), a species that is federally listed as endangered. Although the project area is outside the species core maternity range and fall swarming areas, there is potential summer habitat (i.e., roost trees) within the project area. Therefore, because of the magnitude of this project and the potential for occupied bat habitat in this area, the Service believes that a bat mist net and habitat survey should be conducted on these sites. As a matter of record, the Service is concerned with the cumulative loss of forested stream valleys associated with valley filling, and will be evaluating this and similar projects involving forest clearing for their potential impact on the Indiana bat.

Aquatic Habitats

Individual taxa from the benthic macroinvertebrate samples have not yet been completely identified. Nevertheless, we can characterize the streams from the order- and family-level (and some limited genus-level) identifications conducted thus far.

Pigeonroost Branch. Although Hobet's consultant informed us (David Fisher, Sturm Environmental Services, pers. comm.) that this stream was too dry to sample in October 1997, we found flow adequate to allow sampling from the mouth to the headwaters, and which supported benthic invertebrates as far into the headwaters as we could walk before dense vegetation blocked our way. Crayfish are present throughout the length of this stream. Three families of mayfly, six of stonefly, and four of caddisfly (known respectively as Ephemeroptera, Plecoptera, and Trichoptera or "EPT") were collected in the three stations (all would be eliminated if the fill is permitted). Many of the individual invertebrates (such as pollution-sensitive pteronarcid stoneflies) are large, indicative of flowing water most of the year.

Adult and juvenile fish (creek chubs and blacknose dace) were observed in and collected from pools. The benthic invertebrate and fish communities indicate that the stream flow is of sufficient volume and duration to maintain reproducing populations of aquatic life.

Oldhouse Branch. As with Pigeonroost Branch, Hobet's consultant stated that this stream had little or no flow when sampled in October 1997. Nevertheless, we found flow adequate for sampling, and fish (creek chubs and blacknose dace) were present in pools. The benthic community was similar to that of Pigeonroost Branch. In addition, we walked as far upstream into the upper reaches of the valley as we could before the stream became impassible due to fallen trees from an earlier logging operation, and still observed flow and collected four taxa of benthic invertebrates by hand-picking rocks.

White Oak Branch. Our headwater station on White Oak Branch was marked by little surface flow, yet seven EPT families were collected, along with a few other taxa including crayfish. At the downstream station, the benthic community was similar (eight EPT families), and fish (including blacknose dace and mottled sculpin) were present in pools. We would consider this a perennial stream for much of its length.

Summary. In all three streams, the benthic communities are similar in that a number of pollution-tolerant and pollution-intolerant taxa are present. The variety of benthic invertebrates is indicative of good water quality and healthy aquatic ecosystems, although the aquatic communities are probably somewhat limited by extremes in flow. We did not consult flow records, although both the applicant's consultant and a company representative (John McDonald) stated that rainfall for the year was below normal.

The benthic macroinvertebrate community present in the streams, along with the fish community, indicate that the streams support aquatic life uses. In addition, all three streams are perennial as defined by West Virginia Water Quality Standards, which define "intermittent streams" as "streams which have no flow during sustained periods of no precipitation and which do not support aquatic life whose life history requires residence in flowing waters for a continuous period of at least six months" (W. Va. Code Section 46-1-2.9). The size, variety, and life history (e.g., dissolved oxygen requirements) of the benthic macroinvertebrates and fish indicate flow for much, if not all of the year.

Conclusions and Recommendations

Your June 5, 1998, letter to the West Virginia Department of Environmental Protection notifying DEP of EPA's general objection to the draft NPDES permit for this project stated EPA's concern that the permit may not comply with the West Virginia Water Quality Standards or the Clean Water Act. Based on the results of our field investigations, which have documented that the streams proposed to be filled for this project support aquatic life and wildlife uses, the Service concludes that the proposed valley fills will in fact violate both West Virginia Water Quality Standards and the Clean Water Act.

"Tier One" of the federal antidegradation policy (40 CFR 131.12(a)(1)) states that any existing use, and the water quality necessary to protect that use, must be maintained and protected. This concept has been called the "floor of water quality," and helps accomplish the Clean Water Act goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The "Anti-Degradation Policy" in West Virginia's Water Quality Standards (W. Va. Code 46-1-4.1.a) duplicates the federal language. Furthermore, the waters of the Spruce Fork drainage are designated under West Virginia Water Quality Standards as "high quality waters," meaning that degradation is allowed, but only where the degradation "shall not result in injury or interference with existing stream water uses or in violation of State or Federal water quality criteria that describe the base levels necessary to sustain the national water quality goal uses of protection and propagation of fish, shellfish and wildlife and recreating in and on the water" (W. Va. Code Section 46-1-4.1.b). Eliminating streams which support healthy aquatic communities and provide fresh water, nutrients, and food organisms to downstream aquatic ecosystems, clearly violates State and federal antidegradation policies and the antidegradation provisions of a high quality water designation, even if numeric water quality criteria would not be exceeded. A 1994 Supreme Court decision clearly affirmed this interpretation of antidegradation by pointing out that States must apply all measures necessary to protect designated and existing uses when sole reliance on numeric water quality criteria will not protect these uses.¹

The Service commends EPA for filing a general objection to this draft NPDES permit, and we recommend that EPA file a specific objection. We do not believe that the State has adequately assessed the effects of this project on waters of the United States. In addition to our conclusion that the Clean Water Act and its antidegradation policy are violated by valley fills such as those proposed in the draft permit, our objection to permit issuance is also based on the following:

- 1) Valley fills have already eliminated 69.5 miles of headwater streams in the Spruce Fork watershed (USFWS, West Virginia Field Office; data on file). The Spruce No. 1 mine will add an additional 5 miles of impacts to this watershed, for a cumulative total of 74.5 miles. Citing the 69.5 mile figure, WV DEP's Cumulative Hydrologic Impact Assessment for this project states: "Though stream water chemistry remains in compliance downstream of the majority of these impacts, no study has been done on what impacts this has on the overall biologic production of Spruce Fork. Such a study is beyond the scope of this report and is not addressed directly by state mining regulations." In other words, West Virginia is proposing to issue this permit without knowing whether or not it will degrade downstream areas.
- 2) Impacts on special aquatic sites (i.e., wetlands) present in these valleys have not been assessed.

¹Public Utilities District No. 1 of Jefferson County and City of Tacoma, petitioners, v. State of Washington, Dept. of Ecology, Dept. of Fisheries, and Dept. of Wildlife, respondents. The Supreme Court ruled 7-2 on May 31, 1994, in favor of the respondents.

- 3) The Corps of Engineers has stated that it will not take Clean Water Act section 404 jurisdiction over the placement of fill into waters of the United States related to mountaintop removal operations, and that projects such as these fall under EPA's authority and jurisdiction under section 402. If this is the case, the Spruce No. 1 mine valley fills cannot be authorized.

In conclusion, the Service recommends that EPA file a specific objection to the Spruce No. 1 NPDES permit, and use its authorities to withhold issuance of this permit until the proposed project and its discharges are modified to avoid the disposal of waste material in waters of the United States.

If you have any questions regarding this report, please contact me or Cindy Tibbott of my staff at 814-234-4090.

Sincerely,



David Densmore
Supervisor