

THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

BLACK WARRIOR RIVERKEEPER, )  
Inc. and DEFENDERS OF WILDLIFE, )  
Plaintiffs, )

v. )

U.S. ARMY CORPS OF ENGINEERS )  
and U.S. FISH & WILDLIFE )  
SERVICE, )  
Defendants. )

Case No. \_\_\_\_\_

**COMPLAINT**

**INTRODUCTION**

1. This action challenges the U.S. Army Corps of Engineers' ("Corps") unlawful approval of a Clean Water Act ("CWA") Section 404 permit for the new 287-acre Black Creek Mine, SAM-2012-01210-CMS, located on Crooked Creek and the Locust Fork of the Black Warrior River in Jefferson County, Alabama. This permit allows Global Met Coal Corporation ("Global Met"), the permit applicant, to fill 9,760 linear feet (~ 2 miles) of streams and nearly an acre of important wetlands in the Black Warrior River watershed in connection with surface coal mining operations.

2. The Black Warrior River watershed has lost miles of streams to filling from coal mining. From 2008 to 2010 alone, the Corps authorized the destruction of at least 45 miles of streams at approximately 59 surface coal mines in the Black Warrior River watershed. Yet the Corps failed to adequately consider the cumulative impact of this filling, or to require meaningful mitigation and allow for public comment on this mitigation, as required by the CWA and the National Environmental Policy Act (“NEPA”).

3. In addition to these CWA and NEPA issues, the Black Creek Mine is located in an ecologically sensitive area. Nine species listed as threatened and endangered under the Endangered Species Act (“ESA”), including the Cahaba shiner, the flattened musk turtle, the Alabama moccasinshell, the dark pigtoe, the orange-nacre mucket, the plicate rocksnail, the triangular kidneyshell, the ovate clubshell, and the upland combshell occur within or near the project area, and designated critical habitat for six species occurs immediately adjacent to the project area. For some of these species, the waters near this mine are their only remaining habitat in the world. All of these species are known to be negatively affected by the impacts of surface coal mining, yet the Corps arbitrarily found that this project would have “no effect” on them. Moreover, while this mine will discharge directly into designated critical habitats, the Corps unlawfully failed to

determine whether the project would result in the destruction or adverse modification of such habitats.

4. In violation of the CWA, 33 U.S.C. § 1344, NEPA, 42 U.S.C. §§ 4321–42, the ESA, 16 U.S.C. § 1536, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, the Corps issued the permit based on an insufficient environmental analysis, without completing consultation with the U.S. Fish and Wildlife Service (“Service”), and without allowing the public to provide meaningful comments on proposed compensatory mitigation.

5. Plaintiffs ask the Court to (1) declare that Defendants have violated the statutory and regulatory duties described in this Complaint; (2) vacate the Section 404 permit for the Black Creek Mine, SAM-2012-01210-CMS; (3) grant preliminary and permanent injunctive relief requiring Defendants to order the permit holder to suspend all activities authorized under the permit; and (4) award Plaintiffs their costs and expenses, including reasonable attorneys’ and expert fees.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201, 2202 (declaratory judgment), 16 U.S.C. §§ 1540(c), (g)(1) (the ESA citizen-suit provision), and the APA, 5 U.S.C. §§ 701–706.

7. The violations of law alleged herein have occurred within the Northern District of Alabama. Venue is therefore proper in this Court pursuant to

28 U.S.C. § 1391(e)(1)(B) and 16 U.S.C. § 1540(g)(3)(A). Both the Black Creek Mine and the Corps office responsible for this permitting decision are located in the Northern District of Alabama.

8. Pursuant to 16 U.S.C. § 1540(g)(2)(A), Plaintiffs gave written notice of the ESA violations alleged herein to Defendants by letter dated July 24, 2015, provided to Defendants via certified U.S. mail more than sixty days before initiating this lawsuit. A copy of Plaintiffs' notice letter is attached hereto as Exhibit 1.

### **PARTIES**

9. Plaintiff Black Warrior Riverkeeper, Inc. ("Riverkeeper") is a nonprofit organization whose mission is to protect and restore the Black Warrior River and its tributaries, such as the Locust Fork and Crooked Creek that flow adjacent to the Black Creek Mine. Riverkeeper's members use and enjoy the water resources of the Black Warrior River basin for recreational, aesthetic, economic, and other beneficial purposes. Riverkeeper has members who live near, recreate in, and otherwise enjoy the Locust Fork, which is home to ESA-listed species and designated critical habitat adversely affected by surface coal mining operations.

10. Plaintiff Defenders of Wildlife ("Defenders") is a nonprofit, science-based conservation organization headquartered in Washington, D.C. The organization is dedicated to the protection and restoration of all native wild

animals and plants in their natural communities and the preservation of the habitat that they depend on. Founded in 1947, it is one of the nation's leading advocates for imperiled species and their habitats. Defenders has more than 1.2 million members and supporters nationwide, including more than 9,500 in Alabama. Defenders has members who use and enjoy the water resources of the Black Warrior River basin for recreational, environmental, scientific, professional, and/or economic interests.

11. Plaintiffs' members have suffered and will suffer injuries to their recreational, aesthetic, environmental, scientific, professional and/or economic interests by Defendants' issuance of the Section 404 permit for the Black Creek Mine.

12. These members are interested in and concerned about water quality and the survival of the sensitive and rare species found around Crooked Creek and in the Locust Fork. They are especially worried that the Black Creek Mine has been permitted to operate in the critical habitat area of the Locust Fork. They are concerned that the stream fills and pollution from the Black Creek Mine will be especially hard on water quality and these rare and sensitive species. They would enjoy Crooked Creek and the Locust Fork more if this special habitat were protected so these rare and sensitive species could survive.

13. Without relief from this Court, these interests will continue to be harmed by Defendants' statutory and regulatory violations of their duties under the CWA, NEPA, and the ESA to protect the water quality, ESA-listed species, and designated critical habitats from sedimentation and pollution caused by the mining through of streams and wetlands. The relief in this Complaint will redress these injuries.

14. Plaintiffs' members use and value Crooked Creek and the Locust Fork of the Black Warrior River for recreation, including but not limited to, canoeing, kayaking, fishing, swimming, hiking, wildlife observation, nature and landscape observation, photography, and for aesthetic enjoyment.

15. Defendant the Corps is an agency within the United States Department of Defense and is charged with regulating the dredging and filling of waters of the United States under Section 404 of the CWA.

16. Defendant the Service is the federal agency charged with administration of the ESA and is the consulting agency when federal actions may affect listed species and designated critical habitat. The Service oversees ESA issues for all listed species and designated critical habitat occurring in Alabama, including all impacts from federally permitted surface coal mining in Alabama.

## **STATUTORY AND REGULATORY BACKGROUND**

### **I. The Endangered Species Act**

17. Section 7 of the ESA directs all federal agencies, in consultation with the Service, to “insure that any action authorized, funded, or carried out by such agency (hereinafter . . . referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2).

18. Agency actions subject to this requirement include “all activities or programs of any kind authorized, funded, or carried out, in whole or in part” by the agency, and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

19. The action area includes “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”

*Id.*

20. The determination of the scope of an “action area” requires application of scientific methodology. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002).

21. For each federal action, the federal action agency must request from the Service a list of any ESA-listed species, designated critical habitat, or species

proposed for listing that may be present in the action area. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c).

22. Action agencies, as part of their duties under section 7(a)(2) of the ESA, must engage in formal consultation with the Service whenever their actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To fulfill this requirement, an agency must obtain a list of all threatened or endangered species that may be present in the action area and determine whether the proposed project “may affect” those species. 16 U.S.C. § 1536 (c)(1); 50 C.F.R. § 402.12. “Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement . . . .” 51 Fed. Reg. 19,926, 19,949 (Jun. 3, 1986).

23. If the action agency determines that the action is not likely to have an adverse effect, formal consultation is not required so long as the Service concurs with that assessment. *See* 50 C.F.R. § 402.12(k)(1).

24. Effects determinations must be based on the sum of the direct, indirect, and cumulative effects of the action, added to the environmental baseline and interrelated and interdependent actions. 50 C.F.R. § 402.02 (defining “effects of the action”).

25. To complete informal consultation, the action agency must determine, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat. *Id.* § 402.13(a).

26. To complete formal consultation, the Service must provide the action agency with a biological opinion, explaining how the proposed action will affect the listed species or critical habitat, together with an incidental take statement and any reasonable and prudent measures necessary to avoid jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(g)–(i).

27. Throughout the consultation process, both the action agency and the Service “shall use the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

28. The statutory obligations imposed by ESA Section 7 are non-delegable. The statute’s plain language requires the action agency—not the permit applicant—to consult with the Service to insure against jeopardy. 16 U.S.C. § 1536(a)(2). Even where the ESA allows the permit applicant to request that the action agency engage in consultation with the Service on a prospective agency action, the plain language of the statute makes clear that the consultation obligation is on the action agency, not on the permit applicant. 16 U.S.C. § 1536(a)(3).

29. An action agency’s determination that the proposed action will have “no effect” on listed species and designated critical habitat is judicially reviewable

under the APA and will not be upheld if it is arbitrary and capricious. *See W. Watersheds Projects v. Kraayenbrink*, 632 F.3d 472, 481, 495–97 (9th Cir. 2010) (rejecting BLM finding that grazing regulations would have no effect on listed species and critical habitat).

## **II. The Clean Water Act**

30. Congress passed the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this objective, the CWA prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters unless authorized by a CWA permit. *Id.* § 1311(a).

31. All discharges of dredged or fill material into waters of the United States, including wetlands, must be authorized under a Section 404 permit issued by the Corps, unless exempted under circumstances not relevant to this action. *Id.* § 1344(a)–(f); 33 C.F.R. § 323.3(a).

32. Before issuing a Section 404 permit, the Corps must provide public notice and an opportunity for public hearing. 33 C.F.R. § 325.3(a). The public notice must “include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” *Id.*

33. Likewise, the Corps’ public notice must include sufficient information to enable the public to provide meaningful comment on the proposed

compensatory mitigation. *Id.* § 332.4(b)(1). The notice must specifically address the amount, type, and location of the proposed compensatory mitigation. “The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts.” *Id.*

34. The Corps also must comply with rules developed by the U.S. Environmental Protection Agency (“EPA”) under Section 404(b) of the CWA, known as the “404(b)(1) Guidelines,” prior to issuing a Section 404 permit. 33 U.S.C. § 1344(b).

35. The 404(b)(1) Guidelines provide, *inter alia*, that no discharge of dredged or fill material may be permitted if: (1) there is a “practicable alternative” available that is less damaging on the aquatic ecosystem; (2) the discharge jeopardizes the continued existence of ESA-listed threatened or endangered species or results in the destruction or adverse modification of critical habitat; or (3) the discharge will “cause or contribute to significant degradation” of waters of the United States. 40 C.F.R. § 230.10(a)–(c). In addition, no discharge of dredged or fill material may be permitted “unless appropriate and practicable steps have been taken which will minimize potential impacts of the discharge on the aquatic ecosystem.” *Id.* § 230.10(d).

36. The 404(b)(1) Guidelines require the Corps to analyze, “in writing,” the potential effects of the proposed discharge of dredged or fill material on the

physical, chemical, and biological components of the aquatic environment. *Id.* § 230.11. As part of this analysis, the Corps must determine the “nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure *and function* of the aquatic ecosystem and organisms.” *Id.* § 230.11(e) (emphasis added).

37. The Corps has an additional duty under the 404(b)(1) Guidelines to determine the “cumulative effects [of the proposed discharge] on the aquatic ecosystem.” *Id.* § 230.11(g). Cumulative effects “are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment . . . and interfere with the productivity and water quality of existing aquatic ecosystems.” *Id.* § 230.11(g)(1).

38. To assess the cumulative impacts of the proposed discharge of dredged or fill material, the Corps must “collect information and solicit information from other sources,” and document and consider that information during the decision-making process. *Id.* § 230.11(g)(2).

### **III. The National Environmental Policy Act**

39. Congress enacted NEPA to “promote efforts which will prevent or eliminate damage to the environment . . . .” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to consider fully and to disclose the environmental consequences of an agency action before proceeding with that action. *Id.* § 4332(2)(C); 40 C.F.R. §§ 1501.2, 1502.5.

40. Agencies’ evaluation of environmental consequences under NEPA must be based on scientific information that is both “[a]ccurate” and of “high quality.” 40 C.F.R. § 1500.1(b).

41. Federal agencies must notify the public of proposed projects and allow the public the opportunity to comment on the environmental impacts of their actions. *Id.* § 1506.6.

42. NEPA requires federal agencies to prepare or adopt an Environmental Impact Statement (“EIS”) for any “major Federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

43. NEPA regulations provide that “significantly,” as used in the statute, requires considerations of both context and intensity. 40 C.F.R. § 1508.27.

44. When considering “context” for site-specific projects, agencies must assess “short and long term effects” in the locality. *Id.* § 1508.27(a).

45. In considering the “intensity” or the “severity of impacts” of a project, agencies must consider a number of factors, including, among others, unique characteristics of the geographic area such as proximity to ecologically critical areas, the cumulatively significant nature of the impacts, and the degree to which the action may adversely affect endangered or threatened species and their habitat. *Id.* § 1508.27(b). Any “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005); *see also North Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125, 1131 (4th Cir. 1992) (holding that agencies’ refusal to prepare EIS “is arbitrary and capricious if its action *might* have a significant environmental impact”).

46. Where agencies cannot readily discern how significant the environmental effects of a proposed action will be, they may prepare an Environmental Assessment (“EA”) to establish the project’s level of impact. 40 C.F.R. §§ 1501.4(b), 1508.9(a)(1); 33 C.F.R. §§ 230.10–230.11.

47. An EIS or EA must discuss the direct, indirect, and cumulative impacts of the proposed action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.14, 1508.7, 1508.8. Cumulative impact means “the impact on the environment which results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7.

48. A federal agency’s “choice of [cumulative impacts] analysis scale must represent a reasoned decision and cannot be arbitrary.” *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002). According to the Council on Environmental Quality, “the boundaries for evaluating cumulative effects should be expanded to the point at which the resource is no longer affected significantly or the effects are no longer of interest to the parties.” Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* 8 (Jan. 1997).

49. If an EA concludes that there are no potentially significant impacts to the environment, the agency must provide a detailed statement of reasons why the project’s impacts are not significant and issue a “finding of no significant impact” (“FONSI”) on the environment. 40 C.F.R. § 1508.13. The agency must make a convincing case for a FONSI. *See Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66–67 (D.C. Cir. 1987).

50. NEPA regulations also require agencies to analyze measures needed to mitigate the adverse impacts of proposed actions. 40 C.F.R. §§ 1502.14(f), 1502.16(h). An agency’s analysis of mitigation measures must be “reasonably complete” in order to evaluate properly the severity of the adverse effects of a proposed action before the agency makes a final decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

#### **IV. The Administrative Procedure Act**

51. The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702.

52. The Corps and Service are federal agencies subject to the APA.

53. The APA provides that a court shall set aside agency “findings, conclusions, and actions” that are “arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

54. The reviewing court must carefully “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

### **FACTS**

#### **I. Surface Coal Mining in the Black Warrior River Watershed and Subwatersheds**

55. The Black Creek Mine is a 287-acre<sup>1</sup> surface coal mine located in Jefferson County, Alabama, on Crooked Creek and the Locust Fork of the Black

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<sup>1</sup> The Decision Document is inconsistent when referring to the size of the mine. Portions of the Decision Document state that the mine is 287 acres, while other portions state that the mine is 278 acres. *Compare* Decision Document at 3, 4 *with* Decision Document at 8, 10. Upon information and belief, the mine is 287 acres.

Warrior River. Using hydrologic unit codes established by the U.S. Geological Survey, the mine lies within the 10-digit Lower Locust Fork watershed (HUC 0316011104), a subwatershed of the larger 8-digit Locust Fork watershed (HUC 03160111). The Locust Fork watershed, in turn, is a subwatershed of the larger 6-digit Black Warrior – Tombigbee watershed (HUC 031601).

56. The Black Warrior River watershed has been mined extensively for several decades, resulting in impaired water quality, the destruction of streams and riparian habitat, and detrimental impacts to aquatic species.

57. With over 95 active coal mines in the Black Warrior River watershed, coal mining is one of the biggest threats to water quality in the region. The Alabama Department of Environmental Management (“ADEM”) has listed more than a dozen stream segments in the watershed as impaired by prior surface mining activities under CWA Section 303(d), 33 U.S.C. § 1313(d). *See* 2014 Alabama CWA Section 303(d) List, *available at* <http://adem.state.al.us/programs/water/wquality/2014AL303dList.pdf> (last visited Aug. 5, 2015).

58. Strip mining, a common method of surface mining in Alabama, will be employed at the Black Creek Mine. During the destructive process of strip mining, vegetation is cleared and the overlying soil and rock layer is scraped away to expose the coal seams for removal. Natural drainages of ephemeral or

intermittent streams are either mined through, i.e., destroyed, or dammed to construct treatment ponds for mining waste.

59. Under Section 404, a mining operator must receive a permit from the Corps to fill the streams or construct the treatment ponds, because these activities constitute “the discharge of dredged or fill material into the navigable waters,” 33 U.S.C. § 1344(a), which are “waters of the United States,” *id.* § 1362(7). In past decisions, the Corps has acknowledged that “[s]urface coal mining activities in wetlands and open waters will have adverse effects on water quality” and “can cause increases in nutrients, sediments, and pollutants in the water.” *See* 2012 Nationwide Permit 21 Decision Document at 47. Moreover, these activities “may alter the habitat characteristics of streams and wetlands, decreasing the quantity and quality of fish and wildlife habitat.” *Id.* at 44.

60. Discharges from the Black Creek Mine will enter a section of the Locust Fork that is listed under CWA Section 303(d) as impaired for “siltation (habitat alteration)” and nutrients due to past surface mining activities and agriculture. *See* 2014 Alabama CWA Section 303(d) List.

61. From 2008 to 2010 alone, the Corps authorized the destruction of at least 239,360 linear feet (45.3 miles) of streams at approximately 59 surface coal mines in the Black Warrior River watershed.

62. From April 2004 to April 2014, within the Lower Locust Fork watershed, the Corps authorized the filling of 148,957.7 linear feet (28.2 miles) of streams and approximately 13.3 acres of wetlands. A significant portion of those impacts resulted from surface coal mining activities.

63. The EPA has acknowledged in comments on other proposed mines along the Locust Fork that the mitigation measures and effluent limitations imposed by the state permitting agencies (such as ADEM) are not effective at maintaining water quality. In EPA's words, "stream/river buffers required by the Surface Mining Control and Reclamation Act along with the effluent guidelines are not adequate to protect the Locust Fork River and will continue to cause degradation of the river." Letter from Duncan Powell, Chief, Mining Section, Region 4, U.S Environmental Protection Agency, to Colonel Steven Roemhildt, Mobile District, U.S. Army Corps of Engineers, at 3 (Oct. 21, 2010).

## **II. Endangered and Threatened Species and Critical Habitat at the Mine**

64. Alabama ranks first in the nation in freshwater species biodiversity. Yet the state has more species at risk of extinction because of water pollution issues than does most of the rest of the nation. In fact, "no state east of the Colorado River has more wildlife species at risk than Alabama." *See Alabama's Comprehensive Wildlife Conservation Strategy*, Ch. 1, p. 4, available at

<http://www.outdooralabama.com/sites/default/files/Chapter1.pdf> (last visited Oct. 7, 2015).

65. The permitting of the Black Creek Mine implicates nine threatened and endangered species and designated critical habitats for six of those species that are protected by the ESA.

66. On October 1, 2012, the Service advised the permit applicant that the following nine threatened and endangered species (and one candidate species) may live within or near the Black Creek Mine:

Alabama moccasinshell <i>acutissimus</i> )	Threatened	( <i>Medionidus</i>
Black Warrior waterdog <i>alabamensis</i> )	Candidate	( <i>Necturus</i>
Cahaba shiner	( <i>Notropis cahabae</i> )	Endangered
Dark pigtoe	( <i>Pleurobema furvum</i> )	Endangered
Flattened musk turtle	( <i>Sternotherus depressus</i> )	Threatened
Orange-nacre mucket	( <i>Hamiota perovalis</i> )	Threatened
Ovate clubshell	( <i>Pleurobema perovatum</i> )	Endangered
Plicate rocksnail	( <i>Leptoxis plicata</i> )	Endangered
Triangular kidneyshell	( <i>Ptychobranhus greenii</i> )	Endangered
Upland combshell	( <i>Epioblasma metastriata</i> )	Endangered

Letter from Dan Everson, Deputy Field Supervisor, Alabama Ecological Services Field Office, U.S. Fish & Wildlife Service, to Heath Franks, PERC Engineering, Co. 1 (Oct. 1, 2012).

67. The Service also advised the permit applicant that six species of freshwater mussels—the Alabama moccasinshell, the dark pigtoe, the orange-nacre

mucket, the ovate clubshell, the triangular kidneyshell, and the upland combshell— have designated critical habitat in the Locust Fork adjacent to the project area. *Id.*

68. The Service has explained that water quality degradation is one of three major threats to the listed freshwater mussel species that may occupy waters near the mine. 58 Fed. Reg. 14,330, 14,335 (Mar. 17, 1993). Studies of mussel species have routinely documented that mussels, and especially juvenile mussels, are particularly susceptible to contaminants from coal mining.

69. Likewise, the Service has explained that designated critical habitat for these mussels may be destroyed or adversely modified by “[a]ctions that would significantly alter channel morphology or geometry to a degree that appreciably reduces the value of the critical habitat for both the longterm survival and recovery of the species. Such activities could include . . . mining, [and] destruction of riparian habitat.” 68 Fed. Reg. 14,752, 14,770–71 (Mar. 26, 2003).

70. On October 25, 2012, a consultant hired by the permit applicant performed an environmental survey of the Black Creek Mine. The consultant discovered highly endangered plicate rocksnailes in the Locust Fork section of the project area that was surveyed.

71. While plicate rocksnailes historically were found throughout the Black Warrior, Little Warrior, and Tombigbee River basins, their entire range is now limited to a 20-mile reach of the Locust Fork, including the area proposed for the

Black Creek Mine. Plicate rocksnails are considered “critically endangered” by the International Union for the Conservation of Nature due to environmental threats and a severely reduced geographic range. Pollution is the main threat to this small surviving population of the plicate rocksnail. 63 Fed. Reg. 57,610, 57,615 (Oct. 28, 1998).

72. The consultant also documented that potential habitat for other threatened and endangered species is present in the Locust Fork area of the proposed mine site.

73. On December 3, 2012, the Service wrote to the permit applicant regarding this project and indicated that it was extremely concerned about the current habitat quality within the Locust Fork, given the high levels of sedimentation observed. Letter from Dan Everson, Deputy Field Supervisor, Alabama Ecological Services Field Office, U.S. Fish & Wildlife Service, to Heath Franks, PERC Engineering, Co. 1–2 (Dec. 3, 2012) [hereinafter Dec. 3, 2012 Letter from Service].

74. The Service specifically noted the presence of the endangered plicate rocksnail at the mine site and stated that sedimentation is a “known threat” to the species. *Id.* at 1. According to the Service, excessive sediment can lead to asphyxiation and may interfere with plicate rocksnail movement, feeding, and reproduction. *Id.*

75. The Service also informed the permit applicant that the “endangered Cahaba shiner, while not found during this survey, has previously been documented within Locust Fork around the confluence with Crooked Creek.” *Id.*

76. Siltation from strip-mining activities can have adverse effects on the water quality necessary to sustain the Cahaba shiner, and historically siltation has already seriously affected populations of this fish species. 55 Fed. Reg. 42,963 (Oct. 25, 1990).

77. In the December 3, 2012 letter to the permit applicant, the Service explained that “any additional impairment [to the Locust Fork] will only further degrade an already stressed habitat.” Dec. 3, 2012 Letter from Service at 2.

78. Contrary to EPA’s stated position on other mines in this area, the Service explained that “if BMPs [best management practices] and sediment controls are implemented and fully adhered to . . . impacts to these listed aquatic species *can be minimized.*” *Id.* (emphasis added). Notably, the Service did not say that adverse impacts would be totally avoided by these measures, nor did it issue an official “not likely to adversely affect” determination.

### **III. The Corps’ Issuance of the Section 404 Permit for the Black Creek Mine**

79. On June 18, 2013, the Corps received the application for the Black Creek Mine Section 404 permit and a draft mitigation plan.

80. The Corps and ADEM issued a joint public notice of the application on July 26, 2013. This public notice solicited comments on the application by August 26, 2013.

81. Plaintiffs submitted comments on the permit application to the Corps on August 26, 2013. Plaintiffs explained that issuance of the permit would violate the CWA, NEPA, and the ESA for a number of reasons.

82. The Corps issued its Decision Document approving the Section 404 permit (and the final mitigation plan) on December 16, 2014, without adequately addressing the issues raised by Plaintiffs and others.

#### **A. The Corps' ESA Review**

83. In issuing the permit, the Corps acknowledged that the “action area” for an ESA analysis means “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” Decision Document at 10.

84. Rather than analyzing adjacent or downstream areas where listed species and/or designated critical habitats may be adversely affected by polluted runoff from the mine site, the Corps limited its consideration of the action area here to the “mine site of [287] acres.”<sup>2</sup>

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<sup>2</sup> The Corps also included upland areas substantially removed from waters of the United States, but only for the purpose of analyzing effects on the Indiana bat and the gray bat, species not at issue in this case.

85. The Corps did not initiate or complete formal or informal consultation with the Service on this proposed project, but instead determined that the project will have “no effect” on any ESA-listed species, including the highly endangered plicate rocksnail found during site surveys.

86. In making its “no effect” determination, the Corps asserted that, “[a]lthough the plicate rocksnail was found during the species survey in Locust Fork adjacent to the project site, proper installation, use, and maintenance of BMPs as required in the ADEM Clean Water Act section 402 permit<sup>3</sup> would reduce water quality impacts and therefore have no effect on the plicate rocksnail.” Decision Document at 15.

87. The Corps’ determination that the project will have “no effect” on six species of ESA-listed freshwater mussels, the Cahaba shiner, and the flattened musk turtle also appears to be based on its conclusion that there is “no suitable habitat located on the site” and that those species were “not found in perennial waters adjacent to the site.” *Id.* at 11–15.

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<sup>3</sup> The EPA has delegated to ADEM the authority to issue and administer CWA § 402 National Pollution Discharge and Elimination System (“NPDES”) permits in the State of Alabama. 33 U.S.C. § 1342(b). NPDES permits, also referred to in Alabama as ADEM 402 permits, are required for the discharge of any pollutant from a point source into waters of the United States.

88. The Corps briefly mentioned designated critical habitat, noting that the Locust Fork is designated critical habitat for certain mussel species. The Corps did not specifically determine whether the proposed project “may affect” critical habitat. Rather, the Corps simply stated that there “would be no direct impacts to Locust Fork.” *Id.* at 15.

89. The Corps also explained that it was relying on a 1996 Biological Opinion covering surface mining operations authorized under regulations promulgated by the Office of Surface Mining Reclamation and Enforcement, an agency within the U.S. Department of the Interior, to implement the Surface Mining Control and Reclamation Act. The Corps concluded that compliance with this Biological Opinion “ensures the mining companies and A[labama] S[urface] M[ining] C[ommission] will provide protection for listed species and critical habitat.” *Id.* at 16.

### **B. Public Notice of Compensatory Mitigation**

90. The July 26, 2013 joint public notice of the application for a Section 404 permit for the Black Creek Mine did not include the original mitigation plan. Rather, the notice contained only the following brief paragraph on mitigation:

The applicant utilized the Mobile District 2012 Compensatory Stream Mitigation Standard Operation Procedures and Guidelines to establish the number of stream credits required to mitigate for stream impacts, which is 21,203.8. The applicant will generate the required number of stream credits through on-site stream reconstruction and buffer restoration following completion of mining activities at the site.

Utilizing the Wetland Rapid Assessment, 0.42 wetland credits are required to mitigate for the wetland impacts. The applicant proposes to create 0.7 wetland credits on-site following mining activities at the site.

Joint Public Notice at 3.

91. Plaintiffs submitted comments on August 26, 2013, criticizing the Corps for not including the mitigation plan in the public notice.

92. The Corps received the final mitigation plan from the applicant ten months later, on June 30, 2014. Upon receiving revisions to the mitigation plan from the applicant, the Corps did not notify the public of any changes to the mitigation plan.

93. In the Decision Document, the Corps responded to Plaintiffs' comments and contended that it had provided the minimum amount of information required by the regulations: the amount of proposed mitigation, the type of proposed mitigation, and the location of the proposed mitigation. The Corps never sent Plaintiffs a copy of the applicant's mitigation plan or any revisions thereof.

94. Yet the Corps sent copies of the draft mitigation plan to EPA and the Alabama Department of Conservation of Natural Resources for review and comment.

### **C. The Corps' Analysis of Stream Function**

95. The Corps' factual determinations concerning the proposed project's effects on "the structure and function of the aquatic ecosystem and organisms," 40

C.F.R. § 230.11(e), largely focused on the anticipated effects to federally protected species and water quality in the Locust Fork. Decision Document at 29–30.

96. The Corps’ analysis briefly mentioned structural impacts to on-site streams, noting that streams would be impounded and/or mined through and that three stream segments would be “re-constructed” for mitigation purposes. *Id.* at 6, 30.

97. The Corps’ limited analysis of stream function only noted that the permit applicant had calculated the amount of mitigation required by using the Mobile District 2012 Compensatory Stream Mitigation Standard Operation Procedures and Guidelines (“2012 Stream SOP”), which includes several parameters dealing with stream function.

#### **D. The Corps’ Cumulative Impacts Analysis**

98. In conducting the cumulative impacts analysis, the Corps stated it had limited the scope of its review to past, present, and reasonably foreseeable future activities within the 10-digit Lower Locust Fork watershed (HUC 031601104).

99. The Black Creek Mine is located in the northern portion of the Lower Locust Fork watershed, close to the watershed’s boundary with the Middle Locust Fork watershed (HUC 0316011103), which lies upstream.

100. The Corps excluded past, present, and reasonably foreseeable future activities in the Middle Locust Fork watershed from its cumulative impacts

analysis, even though activities in that watershed have affected and will continue to affect the Locust Fork at the Black Creek Mine site.

101. The Corps also failed to explain or analyze the full scope of activities that may occur at the site. Pursuant to the NPDES permit for the Black Creek Mine, the site actually consists of 400 acres. Yet the Corps permit discloses that the applicant plans to mine only 287 acres at the site.

102. Even under its more limited scope of review, the Corps did not analyze the contribution of sediment and other pollutants to the Locust Fork and Crooked Creek from all currently active, reclaimed, and abandoned coal mines in the vicinity of the Black Creek Mine.

103. In addition, the Corps did not consider the cumulative impacts to the Locust Fork and Crooked Creek from all reasonably foreseeable future coal mining activity in the area.

104. The Corps stated that, when conducting a cumulative impacts analysis, it typically considers the Cumulative Hydrologic Impact Assessment (“CHIA”), which is prepared by the Alabama Surface Mining Commission and assesses the probable cumulative impacts of all anticipated mining activities in the area immediately surrounding the mine site (but not the entire 10-digit watershed).

105. But the Corps did not consider the CHIA in this case, because the CHIA had not yet been completed.

106. In its analysis, the Corps cited to and referenced an ADEM study, *Assessment of Water Quality in Wadeable Streams near Surface Coal Mining Facilities in the Black Warrior River Basin in Alabama* (Dec. 2013) [hereinafter, “ADEM Water Quality Study”], which provided some of the following “key takeaway points”:

- Macroinvertebrate community health in the Black Warrior was generally scored as “Poor” or “Very Poor” at stations located near surface coal mining sites.
- The quality of available aquatic habitat in wadeable streams decreases as the amount of disturbed acres increases in the watershed.
- Total nitrogen concentrations increased significantly . . . from upstream to downstream of treatment pond outfalls.
- Elevated conductivity and [total dissolved solids] TDS can continue after the site has been reclaimed.

107. Yet even in the face of this study, the Corps concluded that the Black Creek Mine would not result in significant cumulative impacts to the human and/or aquatic environment, because “recent” water quality and biological data has indicated the watershed is sufficiently absorbing the impacts without significant aquatic impairment and/or degradation. Decision Document at 52–53.

### **E. The Corps’ Mitigation Analysis**

108. The Corps did not analyze the effectiveness of the proposed mitigation in the Decision Document.

109. The Corps cited no evidence proving that on-site stream reconstruction is likely to succeed.

110. Regarding the timing of mitigation, the Corps indicated that stream mitigation would begin approximately two to two-and-a-half years after mining begins on each increment and that the completion time for each stream reconstruction should be between four and eight months, depending on the length of the stream.

111. Nowhere in the Decision Document did the Corps indicate when the reconstructed streams are expected to become fully functional.

112. In addition, the Corps did not discuss whether the approved compensatory mitigation accounted for the temporal loss of stream structure and function between the time of mine-through and/or impoundment and the time the reconstructed streams are expected to become fully functional.

#### **F. The Corps' Finding of No Significant Impact**

113. The Corps concluded that the Black Creek Mine would have no significant impact on the environment. Decision Document at 59.

114. The Corps thus failed to prepare an EIS for this project.

#### **CLAIMS FOR RELIEF**

#### **Count I: The Corps has violated the ESA and APA in approving the Black Creek Mine**

115. All allegations set forth above are incorporated herein by reference.

116. In authorizing the Black Creek Mine permit, the Corps completed a final “agency action” subject to consultation under Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02, 402.03.

117. The Corps granted the permit for the Black Creek Mine without initiating or completing informal or formal consultation with the Service.

118. The Corps determined that the Black Creek Mine would have “no effect” on the highly endangered plicate rocksnail found during site surveys.

119. The Corps and the Service did not complete informal consultation. Although the Service stated in a letter to the applicant’s consultant that impacts may be minimized through the use of certain best management practices, the Corps did not make a determination, and the Service did not concur in writing on that determination, that the project may affect but would not likely adversely affect listed species.

120. The Corps also reached an arbitrary and unsupported “no effect” determination for the other ESA-listed species (six species of freshwater mussels, the Cahaba shiner, and the flattened musk turtle) that may be adversely affected by this project.

121. The Corps’ determination that the project will have “no effect” on these eight other species is based on the Corps’ arbitrary conclusion that there is

“no suitable habitat located on the site” and that the species were “not found in perennial waters adjacent to the site.” Decision Document at 11–15.

122. Contrary to the Corps’ determination, all six species of freshwater mussels at issue in this case, the Cahaba shiner, and the flattened musk turtle are likely to be present within or near the project site, as explained by the Service. Because surface mining at the Black Creek Mine will directly or indirectly affect these species on or near the project site, the Corps unlawfully limited its analysis of the “action area” to the 287-acre mine site.

123. Accordingly, the Corps’ conclusion that this project will have “no effect” on the plicate rocksnail, six listed freshwater mussels, the Cahaba shiner, and the flattened musk turtle is arbitrary, capricious, and an abuse of discretion, and fails to consider the best available scientific information. 16 U.S.C. § 1536(a)(2), (b)(3); 50 C.F.R. § 402.14(g).

124. The Corps’ Decision Document barely even references the existence of designated critical habitats for six listed species in the project area, and contains no determination of whether the Black Creek Mine permit “may affect” any critical habitats.

125. The Corps merely contends that there would be “no direct impacts to Locust Fork.” This finding is insufficient to constitute a “no effect” determination.

126. But to the extent this finding is a “no effect” determination for critical habitats, the Corps’ determination is unsupported, arbitrary, and capricious, because discharges from the Black Creek Mine will flow directly into designated critical habitats and plainly “may affect” those critical habitats within the action area as defined by the ESA’s implementing regulations.

127. Moreover, the Corps failed to consider whether the Black Creek Mine will indirectly affect designated critical habitats.

128. Because this project “may affect” listed species and designated critical habitats, the Corps has violated Section 7(a)(2) of the ESA and its implementing regulations by failing to initiate and complete consultation with the Service and by failing to ensure through consultation that its actions do not jeopardize the continued existence of endangered and threatened species and do not destroy or adversely modify designated critical habitats. 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 402.

129. To the extent that the Corps relies on the 1996 Biological Opinion to cover any take of listed species or adverse modification of critical habitat, this reliance is arbitrary, capricious, and an abuse of discretion in violation of the APA.

**Count II: The Service’s conclusions are arbitrary, capricious, and an abuse of discretion in violation of the APA**

130. All allegations set forth above are incorporated herein by reference.

131. As explained above in Count One, the Corps' Decision Document makes a "no effect" determination for all listed species and critical habitat. The Corps did not determine that the project may affect but would not likely adversely affect listed species or critical habitat. The Service did not provide written concurrence on a may affect, not likely to adversely affect determination by the Corps.

132. To the extent that Defendants contend that they engaged in informal consultation and characterize the exchange of letters between the applicant's consultant and the Service as having properly concluded informal consultation, however, the Service acted arbitrarily, capriciously, and abused its discretion in concluding that the permit was not likely to adversely affect listed species or critical habitat and/or would have no effect on such species or habitat, in violation of the APA.

**Count III: The Corps violated NEPA and the APA by failing to prepare an EIS and by making an arbitrary and capricious Finding of No Significant Impact**

133. All allegations set forth above are incorporated herein by reference.

134. The Corps' issuance of the Section 404 permit for the Black Creek Mine is a "major Federal action" requiring NEPA review.

135. The Corps' issuance of the permit will result in significant environmental impacts. First, the permit authorizes the discharge of dredged or fill

material into approximately two full miles of streams and nearly an acre of important wetlands in a watershed that is already impaired in numerous places due to previous mining activities. *See* 40 C.F.R. § 1508.27(b)(3). Second, the permitted activities here, when combined with ongoing surface coal mining and anticipated surface coal mining activities in the region, are likely to have cumulatively significant impacts on the environment. *See id.* § 1508.27(b)(7). Finally, this permit may adversely affect threatened and endangered species and/or critical habitat. *See id.* § 1508.27(b)(9).

136. Given the triggering of multiple “significance factors” under 40 C.F.R. § 1508.27, the Corps was required to prepare an EIS in connection with its approval of the permit.

137. The Corps’ finding of no significant impact from the Black Creek mine is arbitrary, capricious, and contrary to law, in violation of the APA, 5 U.S.C. § 706(2)(A), and NEPA, 42 U.S.C. § 4332(C).

**Count IV: The Corps failed to include sufficient details about the mitigation plan in the public notice in violation of the CWA and the APA**

138. All allegations set forth above are incorporated herein by reference.

139. The only details about the proposed compensatory mitigation in the Corps’ public notice of the Black Creek Mine Section 404 permit application concerned the amount, type, and location of the proposed mitigation.

140. Given the potential direct and indirect impacts of the proposed project on ESA-listed species and critical habitat, water quality, and riparian habitat, the Corps should have included more information about the proposed mitigation, such as the timing of the mitigation and the effectiveness of the mitigation.

141. Accordingly, the Corps failed to give sufficient public notice on the details of planned mitigation commensurate with the scope and scale of the proposed project's impacts, in violation of the CWA. *See* 33 C.F.R. § 332.4(b)(1). The Corps' decision not to include sufficient details about the mitigation plan in the public notice was also arbitrary and capricious and in violation of the APA, given that the Corps shared the draft mitigation plan with EPA and Alabama state agencies for review and comment, but not the general public, including Plaintiffs and their members. The public, including Plaintiffs and their members, were thereby denied their right to obtain sufficient information to enable meaningful comment on the proposed compensatory mitigation plan, in violation of the CWA and APA.

**Count IV: The Corps violated the CWA and APA in approving the permit without complying with the Section 404(b)(1) Guidelines**

142. All allegations set forth above are incorporated herein by reference.

*Prohibition on Discharges that Jeopardize ESA-Listed Species*

143. As discussed above, the Corps' "no effect" determination as to listed species is arbitrary and capricious, the Corps unlawfully failed to make any effect

determination as to critical habitats, and the Corps failed to ensure, through informal or formal consultation with the Service, that the project will not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat.

144. Thus, the Corps' approval of the Section 404 permit violates regulatory guidelines disallowing permit coverage for jeopardy to listed species or adverse modification of critical habitat. *Id.*

145. Accordingly, the Corps failed to comply with the Section 404(b)(1) Guidelines requirement of 40 C.F.R. § 230.10(b) that no discharge of dredged or fill material may be permitted if the discharge jeopardizes the continued existence of ESA-listed species or results in the destruction or adverse modification of critical habitats.

*Prohibition on Discharges that Cause or Contribute to Significant Degradation*

146. In violation of the Section 404(b)(1) Guidelines requirements that prohibit the discharge of dredged or fill material if the discharge will “cause or contribute to significant degradation” of waters of the United States, 40 C.F.R. § 230.10(c), the Corps did not analyze in writing the “nature and degree of effect,” including individual and cumulative effects, that the proposed discharge will have on the structure and function of the aquatic ecosystem and organisms that the Black Creek Mine will affect, as required by 40 C.F.R. § 230.11(e).

147. Rather, the Corps noted that the permit applicant had used the Mobile District 2012 Compensatory Stream Mitigation Standard Operation Procedures and Guidelines (“2012 Stream SOP”) to calculate the number of stream credits required and that the 2012 Stream SOP considers stream function when calculating that number. This limited analysis is insufficient under the Section 404(b)(1) Guidelines.

148. In addition, the Corps’ reliance on compensatory mitigation to find that the permitted activity will not cause significant degradation was arbitrary and capricious.

149. The Corps did not analyze the effectiveness of the proposed mitigation or provide any evidence proving that stream reconstruction is likely to succeed.

150. The Corps did not discuss the temporal loss of stream structure and function between the time of loss and the time that reconstructed streams will be fully functional.

151. The Corps approved mitigation measures to reconstruct three stream segments on site, without data on function to assess either the impairment of function caused by the streams lost or whether those functions could be provided for adequately by the proposed mitigation.

152. Accordingly, the Corps' determination that the discharge will not "cause or contribute to significant degradation" of waters of the United States was arbitrary and capricious and in violation of the CWA and its implementing regulations and the APA.

**Count VI: The Corps failed to conduct an adequate cumulative impacts analysis, in violation of the CWA, NEPA, and the APA**

153. All allegations set forth above are incorporated herein by reference.

154. The Corps' cumulative impacts analysis is inadequate under both the CWA and NEPA for the following reasons:

- a. The Corps failed to consider the cumulative effects of lost stream function due to past, present, and reasonably foreseeable future Section 404 activities;
- b. The Corps failed to consider the cumulative effects of sediment and other pollutants from all currently active, reclaimed, and abandoned coal mines in the vicinity of the Black Creek Mine, including upstream;
- c. The Corps failed to consider the cumulative effects of the proposed project when added to all reasonably foreseeable future mining activities in the area;
- d. The Corps' findings are counter to the evidence and conclusions reached in the ADEM Water Quality Study;

- e. The Corps failed to consider the cumulative impacts to threatened and endangered species and designated critical habitats from mining activities in the vicinity of the Black Creek Mine; and
- f. The Corps made unsupported and conclusory assertions that no significant cumulative environmental effects were expected.

155. In addition, the Corps arbitrarily limited the scope of its NEPA cumulative impacts analysis to the 10-digit Lower Locust Fork watershed, when the Locust Fork at the project site has suffered and will continue to suffer adverse impacts from activities taking place in the neighboring Middle Locust Fork watershed.

156. Accordingly, the Corps' determination that the Black Creek Mine will not result in significant cumulative impacts to the aquatic and/or human environment is arbitrary, capricious, and an abuse of discretion, in violation of the CWA, NEPA, and the APA.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiffs respectfully request that the Court grant the following relief:

1. Enter a declaratory judgment stating that Department of the Army Permit Number SAM-2012-01210-CMS, issued December 16, 2014, by the Mobile District of the Army Corps of Engineers to Global Met Coal Corporation was unlawfully issued, in violation of the ESA, the CWA, NEPA, and the APA;

2. Vacate and remand the permit to the Corps for further action consistent with the Court's ruling;
3. Grant preliminary and permanent injunctive relief requiring Defendants to order the permit holder to suspend all activities authorized under the permit;
4. Award Plaintiffs all costs and expenses of this action, including reasonable attorneys' fees; and
5. Award such additional relief as the Court appears proper.

This 27th day of October, 2015.

**s/ Eva L. Dillard**

Eva L. Dillard  
ASB-4118-A59E  
Black Warrior Riverkeeper, Inc.  
710 37th Street S  
Birmingham, AL 35222  
(205) 458-0095  
[edillard@blackwarriorriver.org](mailto:edillard@blackwarriorriver.org)

Catherine M. Wannamaker  
Application for admission *pro hac vice*  
forthcoming  
Southern Environmental Law Center  
463 King Street, Suite B  
Charleston, SC 29403  
(843) 720-5270  
[cwannamaker@selcsc.org](mailto:cwannamaker@selcsc.org)

April Lipscomb  
Application for admission *pro hac vice*  
forthcoming  
Southern Environmental Law Center  
127 Peachtree Street, Suite 605  
Atlanta, Georgia 30303  
(404) 521-9900  
[alipscomb@selcga.org](mailto:alipscomb@selcga.org)