



mines under the auspices of a “Grandfather Provision” contained in paragraph (a) of the 2012 NWP 21. Upon information and belief, the Corps has authorized the fill of at least an additional 28,877 linear feet of stream (over 5 miles) at mining projects under individual Section 404 permits since the expiration of the Grandfather.

3. Yet the Corps failed to adequately consider the cumulative impact of this filling or past filling, or to require meaningful mitigation, as required by the CWA and the National Environmental Policy Act (“NEPA”).

4. In addition to these CWA and NEPA issues, BWM Mine #2 is located in an ecologically sensitive area. According to Corps documents, twenty-six species listed under the federal Endangered Species Act (“ESA”) may occur in the area near the mine, including numerous species of fish, mussels, snails, and bats.

5. In violation of the CWA, 33 U.S.C. § 1344, the 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 and without appropriate mitigation.

6. 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 BWM Mine #2, SAM-2014-01336-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**

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. §§ 2201, 2202 (declaratory judgment); and the APA, 5 U.S.C. §§ 701–706.

8. The violations of law alleged herein have occurred within the Northern District of Alabama. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

**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 Turkey Creek and Crooked Creek which are tributaries of the River’s Locust Fork that flow adjacent to BWM Mine #2. 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 Turkey Creek and the Locust Fork, which is home to numerous 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 2,968 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 BWM Mine #2. 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.

12. Plaintiffs' members use and value Turkey 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. The violations alleged herein have lessened their recreational and aesthetic enjoyment of Turkey Creek and the Locust Fork. They would use and enjoy these areas more if the violations alleged herein are abated.

13. 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.

14. Defendant Lieutenant General Todd T. Semonite is the Chief of Engineers and Commanding General of the U.S. Army Corps of Engineers. He is charged with the supervision and management of all Corps decisions and actions, including the evaluation of Corps' decisions and actions under Section 404 of the CWA, the ESA, and NEPA.

15. Defendant Colonel James DeLapp is the Commanding Officer for the Mobile District office of the Corps in Mobile, Alabama. The Mobile District office is responsible for

issuing CWA Section 404 permits for discharges of dredged and fill material into waters of the United States in the Black Warrior River watershed.

## **STATUTORY AND REGULATORY BACKGROUND**

### **I. The Clean Water Act**

16. 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).

17. 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).

18. 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.*

19. 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). In such cases, 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.*

20. 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).

21. 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).

22. 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).

23. 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).

24. 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).

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

25. Congress enacted NEPA to “promote efforts which will prevent or eliminate damages to the environment . . . .” 42 U.S.C. § 4321. To achieve this goal, NEPA requires federal agencies to consider fully and 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.

26. 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).

27. 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.

28. 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).

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

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

31. 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).

32. 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.

33. 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.

34. 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).

35. Agencies also must consider “[c]onnected actions,” “[c]umulative actions,” and “[s]imilar actions” together in one environmental impact statement. *Id.* § 1508.25(a)(1)-(3).

Actions are “connected actions” if they:

“[a]utomatically trigger other actions which may require environmental impact statements,”

“[c]annot or will not proceed unless other actions are taken previously or simultaneously;” or



“[a]re interdependent parts of a larger action and depend on the larger action for their justification.”

*Id.* § 1508.25(a)(1)(i)-(iii).

36. 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.

*Id.* § 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).

37. 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).

### **III. The Administrative Procedure Act**

38. 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.

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

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

41. 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**

42. BWM Mine #2 is a 1300-acre surface coal mine located in Jefferson County, Alabama, on tributaries of Crooked Creek and Turkey Creek of the Black Warrior River. The mine lies within the 10-digit Lower and Middle Locust Fork watershed, subwatersheds of the larger 8-digit Locust Fork watershed (HUC 03160111).

43. The Black Warrior 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.

44. 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 twenty stream segments in the watershed as impaired at least in part by prior surface mining activities. *See* 2016 Alabama CWA Section 303(d) List, *available at* <http://www.adem.state.al.us/programs/water/wquality/2016AL303dList.pdf> (last visited March 6, 2017).

45. The Locust Fork of the Black Warrior River, where some of the tributaries carrying surface water from BWM Mine #2 will drain, is listed as impaired due to nutrients and siltation from past surface mining and agricultural impacts.

46. From 2008 to 2010 alone, the Corps authorized the destruction of at least 239,360 linear feet (over 45 miles) of streams at approximately 59 surface coal mines in the Black Warrior River watershed.

47. From March 2002 to March of 2016, within the Lower and Middle Locust Fork watersheds, the Corps authorized the filling of 158,148 linear feet of streams and approximately 26.7 acres of wetlands. A significant portion of those impacts were for surface coal mining activities.

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

48. 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 most of the country. In fact, “no state east of the Colorado River has more wildlife species at risk than Alabama.” *See Outdoor Alabama*, Alabama’s Comprehensive Wildlife Conservation Strategy, *available at* <http://www.outdooralabama.com/sites/default/files/Chapter1.pdf> (last visited March 6, 2017).

49. The permitting of BWM Mine #2 implicates a number of threatened and endangered species.

50. According to the Fish and Wildlife Service, the following threatened and endangered species may live within or near the BWM Mine #2 site:

### **Mussels:**

- Alabama moccasinshell
- Dark pigtoe
- Finelined pocketbook
- Orange-nacre mucket
- Ovate clubshell
- Southern Acornshell
- Southern Clubshell
- Southern Pigtoe
- Triangular kidneyshell
- Upland combshell

### **Fish:**

- Cahaba shiner
- Goldline darter
- Rush darter
- Vermillion Darter
- Watercress Darter

**Bats:**

Grey Bat  
Indiana Bat  
Northern long-eared Bat

**Reptiles:**

Flattened musk turtle

**Snails:**

Cylindrical Lioplax  
Plicate Rocksnail  
Round Rocksnail

U.S. Fish & Wildlife Service, IPaC Trust Resource Report, Alabama Ecological Services Field Office (Aug. 20, 2015).

51. The Service has explained that “water quality degradation” is one of three major threats to listed freshwater mussel species that may live 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.

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

53. On April 10, 2015, a consultant hired by the permit applicant prepared a “Biological Habitat Assessment” of BWM Mine #2. The consultant surveyed the site for 6 days in March of 2015.

54. The consultant did not survey adjacent waters in Turkey Creek or Crooked Creek, which are fed by tributaries that receive the mine discharges. The consultant also did not consider that Turkey and Crooked Creeks drain into the critical habitat area the Locust Fork or

specifically evaluate the possible impacts that additional surface mining discharges could have for critical habitat.

55. With respect to the numerous aquatic species at issue, the consultant concluded that “[t]here is no continuous flowing water on this site to support the threatened and endangered aquatic species.” Presumably for this reason, the consultant explained that “[f]ocused surveys for sensitive aquatic species were not performed.”

56. The consultant did not follow established FWS sampling protocols for certain species such as the Flattened Musk Turtle. FWS sampling protocol for this species explains that multiple days of trapping effort for these turtles should be done between April and October when Flattened Musk Turtles are active.

57. On April 14, 2015, the consultant wrote to the FWS explaining that it was seeking approval to proceed with this project and attaching the Biological Habitat Assessment.

58. On April 29, 2015, the FWS rubber stamped the consultant’s letter, finding that with the exception of bats “[n]o other federally listed species/critical habitat are known to occur in the project area.”

59. FWS’s approval is in stark contrast to the IPaC report listing multiple aquatic endangered species that may occur in the project area.

60. Recent scientific information demonstrates the presence of the endangered Flattened Musk Turtle downstream from the proposed mine in Turkey Creek. For example, in 2014, a hatchling Flattened Musk Turtle was observed in Turkey Creek near the intersection with Morris Majestic Road. In 2016, a Flattened Musk Turtle was observed near the confluence of Turkey Creek and Sardis Road, the precise area where discharges from the BWM Mine #2 site would flow. Both of these observations have been recorded with the Alabama Natural Heritage

Program (ALNHP), Auburn University Museum of Natural History (AUMNH), and Alabama Herp Atlas (AHAP).

61. Endangered darters are known to be present in Turkey Creek upstream of the proposed mine, and the Cahaba shiner has been documented at the confluence of Crooked Creek and the Locust Fork.

### **III. The Corps' Issuance of the Permit for BWM Mine #2**

62. On August 27, 2015, the Corps issued a public notice of BWM's application for a CWA Section 404 permit.

63. Plaintiffs submitted comments on the permit application to the Corps on September 28, 2015. Plaintiffs explained that issuance of the permit would violate the CWA, NEPA, and the Endangered Species Act ("ESA") for a variety of reasons.

64. The Corps issued its Decision Document approving the Section 404 permit (and the final mitigation plan) on July 13, 2016 without addressing the issues raised by Plaintiffs and others. The Corps failed to specifically notice Plaintiffs regarding the issuance of this Permit. Upon learning of the permit's issuance, Plaintiffs promptly filed a request under the Freedom of Information Act for the Corps' regulatory file for the project, which was provided on or about October 19, 2016.

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

65. The July 13, 2016 joint public notice of the application for a Section 404 permit for BWM Mine # 2 did not include the original mitigation plan. Rather, the notice contained only a brief paragraph explaining that mitigation would be assessed using Corps guidelines and that the Corps "**has not verified the adequacy of the applicant's compensatory mitigation plan at this time.**" Joint Public Notice at 2-3 (emphasis in original).

66. Upon receiving revisions to the mitigation plan from the applicant, the Corps did not notify the public of any changes to the mitigation plan.

67. Plaintiffs submitted comments criticizing the Corps for not including the mitigation plan in the public notice.

68. In response to Plaintiffs, the Corps 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.

69. The Corps did not send Plaintiffs a copy of the applicant's mitigation plan or any revisions thereof.

70. The mitigation plan was not finalized by the applicant and accepted by the Corps until February 2016, almost 6 months after the Corps issued its public notice for this site.

#### **B. The Corps' Cumulative Impacts Analysis**

71. 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 and Middle Locust Fork watersheds.

72. The Corps did not analyze the contribution of sediment and other pollutants to Turkey Creek, Crooked Creek, and the Locust Fork from all currently active, reclaimed, and abandoned coal mines in the vicinity of BWM Mine #2.

73. The Corps incorrectly assumed that there are no continuing effects of past mines permitted before 2002 merely because the Corps did not track the impacts of those projects.

74. The Corps also failed to consider the cumulative impacts of all mines permitted under Nationwide Permit 21.

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

76. 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 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 well after the site has been reclaimed.

77. Yet even in the face of this study, the Corps concluded that that BWM Mine #2 would not result in significant cumulative impacts to the human and/or aquatic environment, and that adverse impacts to water quality would be “minimal.” Decision Document at 60–63.

78. Likewise, while noting that waters in the watershed are impaired due to past mining, the Corps concluded that “water quality associated with streams in this watershed has not been significantly affected by permitted mining activities” and that new mining will have no significant adverse effects.

### **C. Segmentation**

79. The BWM Mine #2 is contiguous to and an extension of the BWM Mine #1, an adjacent mine that was originally permitted in January 2011 and subsequently reverified under the NWP 21 Grandfather in December 2012.



80. The BWM Mine #1 has had extensive negative impacts on water quality in the area. For example, a recent survey of Crooked Creek at its confluence with the Locust Fork downstream of Black Creek Mine #1 reflects the negative impacts of surface mining discharges at the site: there are no endangered Plicate rocksnails along the left descending bank (adjacent to the confluence of Crooked Creek and the Locust Fork). M. Gangloff, *Survey for Threatened and Endangered Mollusks in the Locust Fork of the Black Warrior River in Jefferson County, Alabama* (November 29, 2016) at 5. “Plicate rocksnails were absent immediately downstream from Crooked Creek population numbers recovered quickly from the effects of this degraded stream .... **[s]ediment-related impacts from Crooked Creek and other small channels draining lands with active surface mines are a major threat to the future survival of Plicate rocksnails**” and indicating that impacts to habitat and water quality from Crooked Creek (where Mine #1 discharges) contribute to the absence of Plicate rocksnail populations at the confluence of Crooked Creek and the Locust Fork. *Id.* (emphasis added). BWM Mine #1 is currently the only “active surface mining operation” in this area of Crooked Creek. According to the survey, “continued habitat and water quality degradation by surface mining in this reach [of the Locust Fork below Mine # 1] may directly jeopardize the prospects of these species for avoiding extinction. *Id.* at 6.

81. The Corps also failed to analyze the BMW Mine #2 as a connected action to the BWM Mine #1 that is adjacent to, and part of, this project. The Corps failed to consider these two mines as one project under NEPA. This is so even though the mines are permitted under one NPDES permit (AL0079707). This is so even though the two operations are contiguous surface mining concerns operated by the same company in the same area of the watershed. This is so even though the two mines originally had overlapping areas to be mined under their two

Alabama Surface Mining Commission permits (P-3950 and P-3987), which were later revised October 20, 2016 to permit the overlap solely under Mine # 2.

**D. The Corps' Mitigation Analysis**

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

83. The Corps cited no evidence proving that on-site stream buffer enhancement is likely to succeed.

84. Nowhere in the Decision Document did the Corps indicate when the reconstructed stream is expected to become fully functional.

85. 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.

**CLAIMS FOR RELIEF**

**Count I (As to Defendants the Corps and Corps officials): The Corps failed to include sufficient details about the mitigation plan in the public notice so as to enable the public to provide meaningful comment, in violation of the CWA and the APA**

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

87. 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.*

88. 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.*

89. The only details about the proposed compensatory mitigation in the Corps’ public notice of the BWM Mine # 2 Section 404 permit application concerned the amount, type, and location of the proposed mitigation.

90. 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.

91. 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).

**Count II (As to Defendants the Corps and Corps officials): The Corps acted arbitrarily and capriciously by approving the permit under the Section 404(b)(1) Guidelines, in violation of the CWA and the APA**

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

Prohibition on Discharges that Cause or Contribute to Significant Degradation

93. The Section 404(b)(1) Guidelines 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).

94. To make this determination, the Guidelines require the Corps, “in writing,” to 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).

95. In violation of these regulations, the Corps did not analyze in writing the individual and cumulative effects that the proposed discharge will have on stream function.

96. Rather, the Corps noted that the permit applicant had used the 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.

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

98. The Corps did not analyze the effectiveness of the proposed mitigation or provide any evidence proving that buffer enhancement is likely to succeed.

99. 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.

100. Also in violation of these regulations, the Corps did not analyze the individual and cumulative effects that the proposed discharge will have on the ongoing impairment of the Locust Fork due to past mining. Likewise, the Corps did not analyze the cumulative impacts of BWM Mine #1 and BWM Mine #2 on waters in the area.

101. 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 the APA.

**Count III (As to Defendants the Corps and Corps officials): The Corps failed to conduct an adequate cumulative impacts analysis and impermissibly segmented its analysis in violation of the CWA, NEPA, and the APA**

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

103. Under the CWA Section 404(b)(1) Guidelines, the Corps must “determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment” including the “cumulative effects on the aquatic environment.” 40 C.F.R. § 230.11(g).

104. Cumulative impacts “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.” *Id.* § 230.11(g)(1).

105. Under NEPA, the Corps is obligated to consider cumulative impacts, which are impacts on the environment that result “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.* § 1508.7.

106. 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 erroneously assumed that there were no effects of pre-2002 mining because the Corps does not track the effects of these projects;
- c. The Corps failed to consider the cumulative impact of mining authorized by the Grandfather Provision of NWP 21;
- d. The Corps failed to consider the cumulative impact of the BWM Mine #1 and #2 in the same area of the Black Warrior River watershed;

- e. 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 BWM Mine #2;
- f. The Corps failed to consider the cumulative effects of the proposed project when added to all reasonably foreseeable future mining activities in the area;
- g. The Corps' findings are counter to the evidence and conclusions reached in the ADEM Water Quality Study; and
- h. The Corps generally made unsupported and conclusory assertions that no significant cumulative environmental effects were expected.

107. Accordingly, the Corps' determination that BWM Mine # 2 would 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.

108. The Corps' failure to consider the BWM Mine #2 as a connected action to the next door BWM Mine#1 also constitutes illegal segmentation in violation of NEPA and the APA.

**Count IV (As to Defendants the Corps and Corps officials): The Corps failed to prepare an EIS or adequately justify its FONSI, in violation of NEPA and the APA**

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

110. The Corps' issuance of the Section 404 permit for BWM Mine # 2 is a "major Federal action" requiring NEPA review.

111. The Corps' issuance of the permit results in significant environmental impacts requiring the preparation of an EIS. First, the permit authorizes the discharge of dredged or fill material into over 2 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. 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. Finally, this permit may adversely affect threatened and endangered species and/or critical habitat.

112. 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. *See, e.g., 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”).

113. The Corps also unlawfully segmented the BWM Mine #1 and #2 mines so as to avoid significance in violation of NEPA.

114. By failing to prepare an EIS, the Corps violated NEPA and its implementing regulations. The Corps’ issuance of the Section 404 permit for BWM Mine #2 is therefore arbitrary, capricious, and an abuse of discretion in violation of 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-2014-01336-CMW, issued July 13, 2016, by the Mobile District of the Army Corps of Engineers was unlawfully issued, in violation of the CWA, NEPA, and the APA;
2. Vacate and remand the permit to the Corps for further action consistent with the Court’s rulings;
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 attorney's fees; and

5. Award such additional relief as the Court appears proper.

This 21<sup>st</sup> day of March, 2017.



---

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)