



June 16, 2021

*Via email and Certified Mail*

Director, Office of Surface Mining  
Reclamation and Enforcement  
c/o Glenda Owens, Deputy Director  
Department of Interior  
1849 C. Street NW  
Washington, DC 20240  
gowens@OSMRE.gov

Debra Haaland, Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington, DC 20240  
exsec@ios.doi.gov

Kathy Love, Director  
Bobby Humphrey, Commissioner  
Kenneth Russell, Commissioner  
Carol Farrell, Commissioner  
James Jeter, Commissioner  
John Stevens, Commissioner  
Steven A Thomas, Commissioner  
Edward White, Commissioner  
Alabama Surface Mining Commission  
State of Alabama  
PO Box 2390  
Jasper, AL 35502-2390  
kathy.love@asmc.alabama.gov

**RE: Notice of Intent to Sue for Violations of the Endangered Species Act Relating to Mays Mine No. 5**

Dear Deputy Director Owens, Secretary Haaland, Director Love, and Commissioners Humphrey, Russell, Farrell, Jeter, Stevens, Thomas, and White:

The Center for Biological Diversity (“Center”) and Black Warrior Riverkeeper (“Riverkeeper”) hereby notify you of their intent to sue the U.S. Fish and Wildlife Service (“Service”), Office of Surface Mining Reclamation and Enforcement (“OSMRE”), Secretary of the U.S. Department of Interior, the director and members of the Alabama Surface Mining Commission (“ASMC”) in their official capacities, and Mays Mining, Incorporated for violations the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), in connection with violations of Section 7(a)(2) of the ESA, id. § 1536(a)(2), from authorization, construction, and mining activities at Mays Mine No. 5 and the Service’s March 27, 2019 jeopardy determination. Specifically, the OSMRE, Director Love and the Commissioners of ASMC, and the Service have violated Section 7 and Section 9 of the ESA as detailed below.

Construction of Mays Mine No. 5 is currently taking place and resulting in negative effects to the flattened musk turtle, a federally protected endangered species that is at risk of extinction. The continuance of these activities without the necessary conservation measures will have clear and lasting adverse impacts on the flattened musk turtle’s downstream habitat and the survival and recovery of the species. Although a 2020 programmatic biological opinion contemplates such consequences and the need for conservation measures to avoid the likelihood of jeopardy for this

species, OSMRE, Secretary of Interior, and Director Love and the Commissioners have failed to ensure that Mays Mine No. 5 will not jeopardize the continued existence of the flattened musk turtle in violation of Section 7(a)(2) of the ESA. In the absence of such measures and/or compliance with the 2020 biological opinion, Mays Mine No. 5 is causing and will continue to cause such adverse effects and hence “take” flattened musk turtles. OSMRE, the Secretary of Interior, and the ASMC, are therefore liable for unlawful take of members of an endangered species in violation of Section 9, 16 U.S.C. § 1538(a)(1)(B).

The Center for Biological Diversity and Black Warrior Riverkeeper are non-profit environmental conservation organizations. The Center for Biological Diversity (“the Center”) is a national, nonprofit conservation organization with more than 1.7 million members and online activists, including many in the State of Alabama, that is dedicated to the protection of all species hovering on the brink of extinction, including the flattened musk turtle.

Black Warrior Riverkeeper (“Riverkeeper”) is a nonprofit organization whose mission is to protect and restore the Black Warrior River and its tributaries, including the Mulberry Fork which flows adjacent to Mays Mine No. 5. Riverkeeper’s members use and enjoy the water resources of the Black Warrior River basin for recreational, aesthetic, economic, and other beneficial purposes. These include members who live near, recreate in, and otherwise enjoy the Mulberry Fork, which is home to federally protected endangered and threatened species, including the flattened musk turtle, whose interests are harmed by surface coal mining operations being conducted in violation of the ESA.

### **THE FLATTENED MUSK TURTLE**

Flattened musk turtles, endemic to the upper Black Warrior River drainage, require relatively clear water (low turbidity) and habitat with rock voids and interstitial spaces.<sup>1</sup> Sedimentation (or “siltation”) is the primary threat to the species’ continued existence, because sediment clogs rock voids and smothers snails and bivalves, the turtles’ primary food source.<sup>2</sup> The primary source of sediment is surface coal mining, which exacerbates the harmful effects of agricultural runoff, forestry, and development. The Service has found that “legacy effects from inadequately reclaimed surface coal mines and present-day coal mining is a threat to flattened musk turtle.”<sup>3</sup>

There is a strong correlation between elevated siltation levels and population declines. It has been estimated that 56.3 percent of once-suitable habitat has been degraded to the point that most flattened musk turtle populations have been lost, and another 36.9 percent has been so severely degraded that just a few populations remain, leaving just 6.9 percent of the species’ historic range where the species clings to existence.

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<sup>1</sup> Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009); FWS Fact Sheets and Sampling Protocols; Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005).

<sup>2</sup> Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009); Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005).

<sup>3</sup> 2020 BiOp, C-18.

## THE ENDANGERED SPECIES ACT

Congress enacted the Endangered Species Act in 1973 “to halt and reverse the trend toward species extinction, whatever the cost.”<sup>4</sup> To that end, the ESA provides a program for conserving endangered and threatened species and the ecosystems upon which they depend.<sup>5</sup> “Conservation” means “to use and the use of all methods and procedures which are necessary to bring” the species “to the point at which the measures provided pursuant to this chapter are no longer necessary.”<sup>6</sup>

Section 7(a)(2) of the ESA affirmatively commands all federal agencies, in consultation with and with the assistance of the Service, to “insure that *any action*” they authorize, fund, or carry out “is not likely to jeopardize the continued existence of any endangered species.”<sup>7</sup> Section 7(a)(2) and its implementing regulations contain both procedural and substantive requirements that agencies must comply with in order to discharge their affirmative duty to avoid jeopardy to any endangered species.<sup>8</sup>

Thus, to avoid jeopardy, the “action agency”—the federal agency that is taking the action which may affect an endangered species—must engage in “formal consultation” with the Service, to identify and evaluate the adverse effects of the proposed action on listed species that occur within the “action area” and develop appropriate terms and conditions to minimize and/or mitigate those effects, thereby ensuring that authorized activities are not likely to jeopardize the continued existence of the affected species.<sup>9</sup>

The ESA’s definition of agency “action” is broad and includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” including the granting of permits for activities that may affect land, water or air, such as mining permits under the Surface Mining Control and Reclamation Act program.<sup>10</sup> Likewise, “action area” is defined broadly to include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”<sup>11</sup> The duties in Section 7(a)(2) may only be fulfilled through the action agency’s strict compliance with these requirements and completion of formal consultation, culminating in the Service’s preparation of a “biological opinion.” Any action that is “likely to adversely affect” a protected species may only proceed thereafter, in accordance with the necessary conservation measures as set forth in the biological opinion (“BiOp”).<sup>12</sup>

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<sup>4</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978).

<sup>5</sup> 16 U.S.C. § 1531(b).

<sup>6</sup> *Id.* § 1532(3).

<sup>7</sup> *Id.* § 1536(a)(2).

<sup>8</sup> *Id.* § 1536(a)(2).

<sup>9</sup> *Id.*; *id.* § 1536(b)(4).

<sup>10</sup> 50 C.F.R. § 402.02; explained in more detail below.

<sup>11</sup> *Id.*

<sup>12</sup> *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1055-57 (9th Cir. 1994).

If, in formal consultation, the Service finds that the proposed agency action will likely jeopardize a listed species, the Service must develop a “reasonable and prudent alternative” that would allow the proposed action to proceed while minimizing the consequences to endangered species.<sup>13</sup>

If the Service finds that the proposed action will avoid jeopardy yet still result in the “take” of some members of an endangered species, the Service must include an “incidental take statement” in the biological opinion.<sup>14</sup> “Take” is defined in the “broadest possible manner to include every conceivable way” in which a person could harm or kill wildlife, including “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”<sup>15</sup> The ESA’s implementing regulations further define “harm” to mean “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>16</sup> The term “harass” in the ESA’s definition of “take” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”<sup>17</sup> Thus, the incidental take statement specifies the allowable amount of such “incidental take”—i.e., take which is “incidental” to an otherwise-lawful activity—sets forth “reasonable and prudent measures” to minimize such take as well as the “terms and conditions” that the action agency must comply with to implement those measures.<sup>18</sup> If the action agency adopts such measures and implements the terms and conditions, the authorized incidental take is exempt from liability for violation of the ESA’s take prohibition.

However, allowing activities that take federally protected species absent compliance with these procedural requirements exposes any “person”, including State official and private corporations to liability and subject to civil penalties. Thus, Section 9(a)(1)(B) of the ESA prohibits any “person” from engaging in any activity that causes unauthorized take of any endangered species.<sup>19</sup> “Persons” include individuals and corporations, as well as “any officer, employee, agent, department, or instrumentality of the Federal Government... [or] any State.”<sup>20</sup> Furthermore, “[t]he ESA prohibitions apply to actions by State agencies where their regulatory programs approve actions by third parties that contribute to causing the take.”<sup>21</sup>

Incidental take may be authorized under Section 7(a)(2) through an incidental take statement.<sup>22</sup> However, proceeding with activities which are likely to take an endangered species without such

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<sup>13</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>14</sup> *Id.* § 1536(b)(4).

<sup>15</sup> *Id.* § 1532(18); *Strahan v. Coxe*, 127 F.3d 155, 162 (1st Cir. 1997) (“‘Take’ is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”).

<sup>16</sup> 50 C.F.R. § 17.3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>20</sup> *Id.* § 1532(13).

<sup>21</sup> *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997); *see also Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231 (11th Cir. 1998).

<sup>22</sup> Alternatively, an individual or may secure authorization for incidental take by obtaining an “incidental take permit”

authorization and compliance with the terms and conditions of a biological opinion and incidental take statement exposes agencies and private actors to take liability.<sup>23</sup>

### **COAL MINING UNDER SMCRA**

The mining of coal from land surfaces, whether it entails strip, open-pit, or mountain-top mining, typically involves clearing the mine site of trees and vegetation, removing “overburden” (soil and rock layers) from the “coal seam,” and blasting and removing the coal. Mining “waste” is dumped into “fills” in nearby valleys and hollows, smothering streams and freshwater habitats. Surface coal mining typically disturbs large land areas, destroys forests and landscapes, and deposits sediment and heavy metals into streams and waterbodies, with devastating consequences for local stream health and biodiversity. Surface coal mines adversely affect hundreds of endangered and threatened species across the United States, including the flattened musk turtle in Alabama.

Unless delegated to a State (or Tribe), OSMRE regulates surface coal mining in the United States under the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1309b (“SMCRA”). SMCRA prohibits surface mining activities which may jeopardize the continued existence of endangered species.<sup>24</sup> Chapter V of SMCRA allows OSMRE to delegate administration of surface coal mining if the State develops a regulatory program that meets all requirements of SMCRA and its implementing regulations.<sup>25</sup> A State becomes the primary regulator of surface coal mines within its jurisdiction, and thus assumes permitting, inspection, and enforcement responsibilities, when OSMRE approves its regulatory program.

Pursuant to this authority, OSMRE entered into a “cooperative agreement” with the State of Alabama in 1982 which delegated SMCRA authority to the ASMC, which is administered by the ASMC Director and Commissioners.<sup>26</sup> Under the agreement, OSMRE has ongoing oversight of the ASMC program, under the direction of the Commissioners, and retains the affirmative duty to avoid jeopardy under Section 7(a)(2). For instance, OSMRE must “concur”—“make a written concurrence”—in an ASMC determination to permit surface coal mining that may affect an endangered species in the “action area,” which is the area affected by the proposed operations,

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<sup>23</sup> 16 U.S.C. § 1536(o); *Bennett v. Spear*, 520 U.S. 154, 170 (1997); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 481 F.3d 1224, 1230 (9th Cir. 2007); *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1580 (9th Cir. 1993) (holding that violation of an ITS would remove protective coverage from take liability); *Or. Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 995 (D. Or. 2010); *see also South Yuba*, 629 F. Supp. 2d at 1132 (applicants or regulatory authorities that do not comply with the terms of a biological opinion” will “not be protected by the Biological Opinion’s safe harbor” and are liable for unlawful take).

<sup>24</sup> 30 C.F.R. § 816.97(b) (“No surface mining activity shall be conducted which is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary ... in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*). The operator shall promptly report to the regulatory authority any State- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.”).

<sup>25</sup> 30 U.S.C. § 1253.

<sup>26</sup> 30 C.F.R. § 901.30 (“Cooperative Agreement”).

and must provide terms or conditions as needed to avoid jeopardy.<sup>27</sup> ASMC must obtain OSMRE's concurrence and incorporate such terms or conditions into any final permit it issues.<sup>28</sup> In addition, OSMRE retains enforcement authority and provides funding for the State's regulatory program.<sup>29</sup> Thus, pursuant to the Cooperative Agreement, SMCRA regulations, and Section 7(a)(2) of the ESA, OSMRE retains an important, ongoing oversight role in permits issued by ASMC, and the discretion to condition any final permits with necessary conservation measures to avoid jeopardy to any endangered species that is adversely affected.

A programmatic Biological Opinion prepared by the Service in 1996 ("1996 BiOp") purported to "address[] all present and future Federally listed and proposed species and designated or proposed critical habitats that may be affected by" SMCRA-regulated surface coal mining throughout the nation.<sup>30</sup> The 1996 BiOp included an incidental take statement that provided blanket authorization for the incidental take of "all present and future Federally listed and proposed species" affected by any and all SMCRA-regulated surface coal-mining operations across the nation, at any time.<sup>31</sup> The 1996 BiOp required the Service to coordinate with OSMRE and the State authority (such as ASMC) to require site- and species-specific measures to minimize impacts to listed species.<sup>32</sup> To accomplish this, OSMRE and the ASMC required permittees to develop a "Protection and Enhancement Plan" ("PEP") for species affected by a surface coal mine which describe "how ... the [mine] operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act ... ." <sup>33</sup>

Due to many flaws in the 1996 BiOp, in 2019 the Center challenged it as inconsistent with the substantive and procedural requirements of ESA Section 7(a)(2) and its implementing regulations. According to a settlement agreement that resulted from that lawsuit, the Service issued a revised programmatic SMCRA Biological Opinion in 2020 ("2020 BiOp").<sup>34</sup>

Thus, the 2020 BiOp sets forth procedural requirements for the Service and terms and conditions that State regulatory authorities must follow.<sup>35</sup> To authorize coal-mining activities that cause

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<sup>27</sup> *Id.* Article VI(B)(5) ("Prior to making a decision on a [permit application] for proposed surface coal mining and reclamation operations for which there is no other concurrent Secretarial action that would trigger compliance with section 7 of the Endangered Species Act, 16 U.S.C. 1536, ASMC shall obtain the written concurrence of OSM regarding the effect the proposed operations would have on threatened and endangered species ... in the area affected by the proposed operations, and shall include in any permit that is issued for such operations any terms or conditions which OSM may require to avoid the likelihood of actions which would jeopardize the continued existence of any such species ... .").

<sup>28</sup> *Id.*

<sup>29</sup> 30 U.S.C. § 1271(b); 30 C.F.R. §§ 780.16, 773.15(j); OSMRE, Ten Day Notice Directive INE-35 at 4 (Jan. 31, 2011); 30 C.F.R. § 842.11 (requiring OSMRE to provide notice to the relevant state regulatory authority whenever it has reason to believe that there has been a violation of SMCRA, the approved state regulatory program, or a permit condition).

<sup>30</sup> 30 C.F.R. §§ 816.97, 817.97.

<sup>31</sup> 1996 SMCRA BiOp at 6; *id.* at 11 (assigning "an unquantifiable level of take" to surface coal mining operations and authorized "the unavoidable taking of some individuals" of any listed species affected by surface coal mining).

<sup>32</sup> 1996 SMCRA BiOp at 12, 13.

<sup>33</sup> 30 C.F.R. § 780.16(b).

<sup>34</sup> 2020 SMCRA BiOp.

<sup>35</sup> *Id.* at 82.

incidental take of endangered species, State regulatory authorities must “engage the Service in review and comment on proposed” permits “in accordance with the SMCRA Coordination Process.”<sup>36</sup> The SMCRA Coordination Process requires the State regulatory authority to describe: the action under consideration; the areas to be disturbed; the specific area that may be affected including “both the proposed permit area and the adjacent area”; any listed or proposed species or designated critical habitat that may be affected; how the operator will minimize disturbance and adverse impacts and comply with the ESA during mining and reclamation; how the applicant will avoid or minimize adverse impacts on listed species via PEPs; and how the applicant will enhance fish, wildlife and related environmental values.<sup>37</sup> Importantly, the Service evaluates coal mines on a “project-specific basis” and must quantify “the amount and extent of incidental take anticipated.”<sup>38</sup>

The 2020 BiOp supersedes the 1996 BiOp, which no longer has any operative effect. The 2020 BiOp covers newly issued and previously issued permits.<sup>39</sup> Thus, when addressing impacts to endangered species like the flattened musk turtle, OSMRE and ASMC must comply with the more protective terms and conditions set forth in the 2020 BiOp to ensure that authorized actions do not jeopardize the continued existence of the species.

### **MAYS MINE NO. 5**

Mays Mine No. 5 is a surface coal mine located on the banks of the Mulberry Fork of the Black Warrior River. The “permit area” consists of 156 acres in Walker County, Alabama on a previously permitted mine and a former plywood plant. The river bank along most of the project area is a steep slope of sand- and silt-based soil extending 10 and 15 feet above normal flow levels.<sup>40</sup>

A surviving population of flattened musk turtles has been documented both adjacent to and downstream from Mays Mine No. 5.<sup>41</sup> The Service further has recognized that habitat surveys done at the Mays Mine No. 5 project site indicate that potential habitat may exist.<sup>42</sup> In 2005, the Service recognized the presence of flattened musk turtles on the mine site and less than 1.25 miles downstream.<sup>43</sup>

In 2005, following the receipt of Mays Mine No. 5 permit application, the Service requested additional surveys for consideration of the mine’s effects on the turtle.<sup>44</sup> Following the receipt of

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<sup>36</sup> *Id.* at 84.

<sup>37</sup> *Id.* at Appendix A, 2 (citing 30 C.F.R. §§ 780.16(b) and 784.21(b)).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 63, 74, 80, 83; Letter from FWS to Black Warrior Riverkeeper (Mar. 31, 2021).

<sup>40</sup> Yokley Environmental Consulting Services, Environmental Assessment (Nov. 3, 2008).

<sup>41</sup> Baily, Mark A, Bailey Karen A., Threatened and Endangered Species Field Survey, Mulberry Fork, Walker County Alabama (June 23, 2019, June 12, 2005).

<sup>42</sup> *Id.*

<sup>43</sup> Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009), FWS Fact Sheets and Sampling Protocols; Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005). An additional and independent survey for the flattened musk turtle was done in 2019, again confirming the presence of the species 1.25 miles downstream from Mays Mine No. 5.

<sup>44</sup> *Id.*

the surveys, the Service confirmed the presence of the flattened musk turtle adjacent to and within the southern portion of the proposed mine area.<sup>45</sup> In 2005, the Service set forth guidelines to “avoid formal consultation” (“2005 Guidelines”)—meaning, to avoid these adverse effects.<sup>46</sup> According to the 2005 Guidelines, no mining or other disturbance should occur in “any inundated portion of the creek or within 100 feet of the creek,” erosion control structures and diversions must be inspected regularly, and “immediate corrective action” must be “taken if a turbidity plume or sediment runoff into Mulberry Fork is observed.”<sup>47</sup>

In 2009, the Service again acknowledged the presence of flattened musk turtles immediately downstream and that flattened musk turtles may exist in the “permit area”—within the area of the mine’s direct footprint—and thus requested another detailed survey of the species.<sup>48</sup> According to Service protocols, such surveys “should not be conducted during periods when [flattened musk turtle] are typically inactive (about the second week of October until about the third week of April).”<sup>49</sup> Yet, Yokley Environmental Consulting Service set traps for flattened musk turtle in the Mulberry Fork, immediately next to the project site, during March 6-9, 2009.<sup>50</sup> Based on these results, Yokley found “no evidence” of flattened musk turtles.<sup>51</sup> Within a week, the Service provided a two-sentence “written concurrence,” stating that “[b]ased upon our records and the information provided in your letter, we agree with your finding that no federally listed species/critical habitat occur in the project area.”<sup>52</sup>

Since 2006, several different operators have been granted permits to mine at the location of the Mays Mine No. 5. The ASMC approved the most recent permit renewal and application for revision on August 27, 2019.<sup>53</sup> In 2019, the permit applicants provided the Service with a letter and “Biological Habitat Assessment” again declaring that “habitat for [the flattened musk turtles] does not exist” on the project area.<sup>54</sup> The assessment failed to mention the presence of flattened musk turtles less than 1.25 miles downstream. To date, about 38 acres have been cleared in preparation for mining. This permit included no terms and conditions to avoid incidental take or jeopardy to the surviving population of flattened musk turtles within the area affected by this mine.

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<sup>45</sup> Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009).

<sup>49</sup> *Id.*

<sup>50</sup> Yokley Environmental Consulting Service, Environmental Assessment (Mar. 9, 2009).

<sup>51</sup> *Id.*

<sup>52</sup> Letter from McGehee Engineering Corp. to FWS (Mar. 11, 2009), stamp from FWS on final page.

<sup>53</sup> Revision to Permit for Surface Coal Mining Operations, Alabama Surface Mining Commission, P-3957-64-24-S, Mays Mining Inc. (Aug. 15, 2019).

<sup>54</sup> Biological Habitat Assessment (Mar. 22, 2019) 12.

## ENDANGERED SPECIES ACT VIOLATIONS

### **I. Violation of the Affirmative Duty under Section 7(a)(2) of the ESA to Avoid Jeopardy: OSMRE and the ASMC Director and Commissioners Have Failed to Ensure that Mays Mine No. 5 Is not Likely to Jeopardize the Flattened Musk Turtle.**

Section 7(a)(2) of the ESA requires all federal agencies to ensure that any action that they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species.<sup>55</sup> This mandatory, affirmative duty applies to any agency action wherein the agency maintains discretionary involvement and control.<sup>56</sup> As explained above, under the Cooperative Agreement, SMCRA, and the ESA, OSMRE retains discretionary involvement over the permits issued by ASMC. Thus, OSMRE retains the duty to ensure that ESA listed species are not likely to be jeopardized by activities authorized under individual permits issued by ASMC.

Here, it is undisputed that the flattened musk turtle occurs just over one mile downstream from the Mays Mine No. 5.<sup>57</sup> It is undisputed that turbidity adversely affects flattened musk turtles.<sup>58</sup> Riverkeeper has documented uncontrolled runoff from the mine directly into the Mulberry Fork as recently as February 24 and May 7, 2021.<sup>59</sup> Yet, OSMRE and the ASMC Director and Commissioners have taken no corrective action to stop or minimize this runoff which results in sedimentation and turbidity of the Mulberry Fork of the Black Warrior River and adversely affects the surviving population of endangered flattened musk turtles that occur just over a mile downstream of the mine. In fact, on November 3, 2020 and again on February 1, 2021, May's Mining Inc. received a notice of violation of the Alabama Surface Mining Control Act for failing to maintain sediment-control measures.<sup>60</sup> It is clear that the 2005 Guidelines set forth by the Service are both ineffective and not being adhered to. Avoiding formal consultation and jeopardy was predicated on compliance with these 2005 Guidelines.<sup>61</sup>

Under the Alabama Cooperative Agreement, OSMRE is required to provide written concurrence with the ASMC regarding whether Mays Mine No. 5 may affect the flattened musk turtle population that occurs downstream from the project site and provide any terms and conditions necessary to effectively minimize take of the flattened musk turtle that may occur from the Mays Mine No. 5.<sup>62</sup> However, OSMRE does not have the authority or expertise to evaluate the effects of the mine or make a determination as to whether the mine will likely jeopardize a listed species, nor can it provide terms and conditions to minimize take.<sup>63</sup> Thus, under the Cooperative

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<sup>55</sup> 16 U.S.C. § 1536(a)(2).

<sup>56</sup> 50 C.F.R. § 402.0; *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007).

<sup>57</sup> Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009), FWS Fact Sheets and Sampling Protocols; Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005).

<sup>58</sup> *Id.*

<sup>59</sup> See Attachment A.

<sup>60</sup> See Attachment B.

<sup>61</sup> Letter from FWS to Sloan Mountain Mining LLC (Dec. 22, 2005).

<sup>62</sup> 2020 BiOp, Appendix A.

<sup>63</sup> Section 7 requires every federal agency, in consultation with the expert agency, "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The U.S. Fish and Wildlife Service and the National Marine Fisheries Service share responsibilities for administering the act. 50 C.F.R. § 402.01(b).

Agreement, OSMRE is required to engage in project-level consultation with the Service in order to receive a determination regarding whether Mays Mine No. 5 will jeopardize the flattened musk turtle and if so, incorporate terms and conditions and conservation measures to minimize take of the species. OSMRE and the ASMC's failure to initiate and complete project-level consultation is a violation of ESA Section 7(a)(2).

Further, OSMRE failed to concur in the ASMC's determination that Mays Mine No. 5 will not adversely affect flattened musk turtles that occur downstream from the permit area, and failed to provide any terms and conditions necessary to effectively minimize take of the flattened musk turtle that is resulting from Mays Mine No. 5. Thus, OSMRE and ASMC Director and Commissioners have failed to comply the procedures set forth by the Cooperative Agreement. This is a significant failure because although the flattened musk turtle does not occur within the permit area, the mine activities are adversely affecting flattened musk turtles and future operation of the mine will likely continue to adversely affect and jeopardize the surviving members of the species.

Moreover, OSMRE and the ASMC Director and Commissioners have failed to comply with the terms and conditions of the Incidental Take Statement in the 2020 BiOp which requires a PEP that sufficiently protects listed species from jeopardy.<sup>64</sup> The outdated, inoperable PEP for Mays Mine No. 5 from 2019 did not consider or even mention the presence of the flattened musk turtle population downstream from the project site.<sup>65</sup> The failure to formulate a PEP that adequately protects a known population of listed species within the action area violates the 2020 BiOp and leaves the flattened musk turtle vulnerable to extinction in the absence of the necessary conservation measures.

Therefore, OSMRE and the ASMC officials' failure to comply with the 2005 Guidelines, the State Regulatory Program, and the 2020 BiOp is a failure to carry out their duty to avoid jeopardy to the flattened musk turtle. The Service's approval of Mays Mine No. 5 was based on an outdated BiOp, is arbitrary and capricious, and fails to apply best available science in violation of the ESA. Thus, OSMRE, ASMC Director Love and the Commissioners, and the Service's actions are arbitrary and capricious, and fail to carry out their required duty under Section 7(a)(2) of the ESA to ensure permits issued by the ASMC do not jeopardize the continued existence of listed species.

## **II. Violation of ESA Section 9: Mays Mine No. 5 is Causing Unlawful Take of Endangered Flattened Musk Turtles**

As set forth above, SMCRA and the 2020 BiOp and Incidental Take Statement require OSMRE in coordination with ASMC to develop and implement site- and species-specific measures, or PEPs, to minimize impacts to species at specific mine site and require operators to comply with those measures.<sup>66</sup> Here, OSMRE and ASMC failed to develop adequate measure to minimize impacts to the flattened musk turtle and thus fail to "ensure that [Mays Mine No. 5] does not

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<sup>64</sup> 2020 BiOp, Appendix A.

<sup>65</sup> Centennial Natural Resources, LLC, No. 5 Mine, P-3957, Part II, page 5.

<sup>66</sup> 1996 BiOp at 12, 13

result in the jeopardy to [the flattened musk turtle].” OSMRE and the ASMC officials therefore fail to comply with the terms and conditions of the 2020 BiOp and thus the protective coverage of ESA Section 7(o)(2) no longer applies. The agencies are liable for take under Section 9 of the ESA.

Further, Black Warrior Riverkeeper has documented evidence of active runoff from the mine site into the Mulberry Fork.<sup>67</sup> This runoff is causing unpermitted incidental take in the form of “harm” and “harassment” of flattened musk turtles just downstream from the mine site, and thus within the “action area,” and resulting in unauthorized take of flattened musk turtles in violation of Section 9 of the ESA.<sup>68</sup>

Therefore, OSMRE, ASMC Director Love and the Commissioners are liable for “take” of endangered flattened musk turtles in violation of Section 9 of the ESA.

### CONCLUSION

The OSMRE and Commissioners have failed to insure that Mays Mine No. 5 does not jeopardize the continued existence of the flattened musk turtle and failed to prevent the unlawful take of flattened musk turtles. Accordingly, the authorization of the Mays Mine No. 5 permit represents an unlawful departure from the ESA’s legally binding mandate to protect and recover imperiled species and their habitats. If the OSMRE and ASMC do not take action to cure the violations of the ESA described above by immediately enjoining all mining activities within 60 days, the Center and Riverkeeper intend to file suit for declaratory and injunctive relief, as well as attorneys’ fees, expert witnesses, and costs.

Sincerely,



Kristine M. Akland  
Staff Attorney  
Center for Biological Diversity  
P.O. Box 7472  
Missoula, MT 59802  
(406) 544-9863  
kakland@biologicaldiversity.org



Eva Dillard  
Staff Attorney  
Black Warrior Riverkeeper, Inc.  
710 37th Street S  
Birmingham, AL 35222  
(205) 458-0095  
edillard@blackwarriorriver.org

cc:

U.S. Fish and Wildlife Service  
1849 C Street, N.W.  
Washington, D.C. 20240

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<sup>67</sup> See Attachment A.

<sup>68</sup> Section 9’s prohibition of “take” of a protection species allies to any person, including corporations. 16 U.S.C. § 1538(a); see also *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995).

# Attachment A

**DANGER**  
OPEN PIT - STAY OUT  
BLASTING AREA  
AUTHORIZED PERSONNEL ONLY



**DANGER**  
OPEN PIT - STAY OUT  
BLASTING AREA  
AUTHORIZED PERSONNEL ONLY



# Attachment B



STATE OF ALABAMA  
 SURFACE MINING COMMISSION  
 1811 2nd Avenue, Pinnacle Bank  
 P.O. Box 2390  
 Jasper, Alabama 35502-2390  
 (205) 221-4130

I/E-84-2

NOTICE OF VIOLATION

NOTICE OF VIOLATION NUMBER: <b>21MLF002</b>	
ISSUED TO: <b>MAYS Mining Inc.</b>	
LEGAL DESCRIPTION (IF NO PERMIT NO.):	
PERMIT NUMBER: <b>P. 3957</b>	COUNTY: <b>Walker</b>
MAILING ADDRESS: <b>P.O. Box 1565 Jasper, AL 35502</b>	
PHONE NUMBER: <b>(205) 512-1222</b>	SUBCONTRACTOR:
NAME AND TITLE OF PERSON SERVED: <b>Rich Weaver - Engineering.</b>	
NAME OF MINE: <b>MINE NO 5</b>	
TYPE OF MINE: SURFACE <input checked="" type="checkbox"/> UNDERGROUND <input type="checkbox"/> OTHER <input type="checkbox"/>	
DATE OF INSPECTION: <b>2-1-2021</b>	DATE OF SERVICE: <b>2-1-2021</b>
TIME OF INSPECTION: From: <b>9:20</b> <sup>AM</sup> PM To: <b>10:30</b> <sup>AM</sup> PM	

Under the authority of the Alabama Surface Mining Control and Reclamation Act of 1981, the undersigned conducted an inspection of the above mine on the above date and has found the violation(s) of the Act, regulations, or permit conditions contained in the attachments to this form. This Notice constitutes a separate Notice of Violation for each violation listed.

YOU MUST ABATE EACH OF THESE VIOLATION(S) WITHIN THE DESIGNATED ABATEMENT TIME.

THE UNDERSIGNED AUTHORIZED REPRESENTATIVE HEREBY FINDS THAT THE NOTICE DOES NOT (DOES) REQUIRE CESSATION OF MINING EXPRESSLY OR IN PRACTICAL EFFECT.

You are entitled to an informal conference or formal review on request, within 30 days after service of this notice (880-X-11C-.06). The informal conference or formal review will be deemed waived unless requested.

This notice shall remain in effect until it expires by the accomplishment of the required action, or until modified, terminated, or vacated by the Authorized Representative of the Commission. The time for correction may be extended by an authorized representative for good cause. If you need additional time to correct the violation(s), please contact the Authorized Representative named below.

IMPORTANT - PLEASE READ CAREFULLY

Any person who willfully and knowingly violates a condition of a permit issued pursuant to this Act or fails or refuses to comply with any order issued under this Act shall upon conviction be punished by a fine of not more than Ten Thousand (\$10,000) Dollars or imprisonment for not more than One Year or both.

Signature of Person Served: 	Print Name of Authorized Representative: <b>Matthew Franklin</b>
	Signature of Authorized Representative:

STATE OF ALABAMA  
SURFACE MINING COMMISSION

NOTICE OF VIOLATION (CONTINUATION)

Notice of Violation No. 21 MCF 002

Violation(s) No. 1 of 1

NATURE OF PERMIT CONDITION VIOLATED, PRACTICE OR VIOLATION
<i>Failure To Maintain Sediment Control Measures</i>
PROVISION(S) OF THE REGULATIONS, ACT OR PERMIT VIOLATED
<i>ACT 81-435</i>
<i>ASMC Reg. 880-X-106-16</i>
PORTION OF THE OPERATION TO WHICH NOTICE APPLIES
<i>Silt Fencing Along The permit boundary.</i>
CORRECTIVE ACTION REQUIRED (Including Interim Steps, if Any)
<i>1. Repair silt fencing to stop uncontrolled runoff</i>
<i>2. Seed and mulch the area.</i>
TIME FOR ABATEMENT (Including Time for Interim Steps, if Any)
<i>1. 7 days (2-8-2021)</i>
<i>2. 15 days (2-15-2021)</i>



**STATE OF ALABAMA  
SURFACE MINING COMMISSION**  
1811 2nd Avenue, Pinnacle Bank  
P.O. Box 2390  
Jasper, Alabama 35502-2390  
(205) 221-4130

I/E-84-2

**NOTICE OF VIOLATION**

NOTICE OF VIOLATION NUMBER: <i>20 MLF 005</i>	
ISSUED TO: <i>MAVS Mining Inc</i>	
LEGAL DESCRIPTION (IF NO PERMIT NO.)	
PERMIT NUMBER: <i>P-3957</i>	COUNTY: <i>Walker</i>
MAILING ADDRESS: <i>P.O. Box 1565 Jasper AL 35502</i>	
PHONE NUMBER: <i>(205) 512-1222</i>	SUBCONTRACTOR:
NAME AND TITLE OF PERSON SERVED: <i>Kelly Jones - Office Manager</i>	
NAME OF MINE: <i>MINE NO. 5</i>	
TYPE OF MINE: SURFACE <input checked="" type="checkbox"/> UNDERGROUND <input type="checkbox"/> OTHER <input type="checkbox"/>	
DATE OF INSPECTION: <i>11-3-2020</i>	DATE OF SERVICE: <i>11-3-2020</i>
TIME OF INSPECTION: From: <i>9:45</i> <sup>AM</sup> PM To: <i>11:00</i> <sup>AM</sup> PM	

Under the authority of the Alabama Surface Mining Control and Reclamation Act of 1981, the undersigned conducted an inspection of the above mine on the above date and has found the violation(s) of the Act, regulations, or permit conditions contained in the attachments to this form. This Notice constitutes a separate Notice of Violation for each violation listed.

YOU MUST ABATE EACH OF THESE VIOLATION(S) WITHIN THE DESIGNATED ABATEMENT TIME.

THE UNDERSIGNED AUTHORIZED REPRESENTATIVE HEREBY FINDS THAT THE NOTICE DOES NOT (DOES) REQUIRE CESSATION OF MINING EXPRESSLY OR IN PRACTICAL EFFECT.

You are entitled to an informal conference or formal review on request, within 30 days after service of this notice (880-X-11C-.06). The informal conference or formal review will be deemed waived unless requested.

This notice shall remain in effect until it expires by the accomplishment of the required action, or until modified, terminated, or vacated by the Authorized Representative of the Commission. The time for correction may be extended by an authorized representative for good cause. If you need additional time to correct the violation(s), please contact the Authorized Representative named below.

**IMPORTANT - PLEASE READ CAREFULLY**

Any person who willfully and knowingly violates a condition of a permit issued pursuant to this Act or fails or refuses to comply with any order issued under this Act shall upon conviction be punished by a fine of not more than Ten Thousand (\$10,000) Dollars or imprisonment for not more than One Year or both.

Signature of Person Served: <i>Kelly Jones</i>	Print Name of Authorized Representative: <i>Matthew Franklin</i>
	Signature of Authorized Representative: <i>Matthew Franklin</i>

STATE OF ALABAMA  
SURFACE MINING COMMISSION

NOTICE OF VIOLATION (CONTINUATION)

Notice of Violation No. 20 MEF005

Violation(s) No. 1 of 1

NATURE OF PERMIT CONDITION VIOLATED, PRACTICE OR VIOLATION
<i>Failure To MAINTAIN sediment control Measures.</i>
PROVISION(S) OF THE REGULATIONS, ACT OR PERMIT VIOLATED
<i>ACT 81-435</i>
<i>ASMC Reg.: 880-X-10C.16</i>
PORTION OF THE OPERATION TO WHICH NOTICE APPLIES
<i>Silt Fencing Along The permit Boundary LINE</i>
CORRECTIVE ACTION REQUIRED (Including Interim Steps, if Any)
<i>Repair breaches in silt Fencing seed and mulch The disturbed Area.</i>
TIME FOR ABATEMENT (Including Time for Interim Steps, if Any)
<i>14 DAYS - 11-17-2020</i>