November 16, 2021

Via email and Certified Mail

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RE: <u>Supplement to June 16, 2021 Notice of Intent to Sue for Violations of the Endangered Species Act, the Clean Water Act, and the Surface Mining Control and Reclamation Act Relating to Mays No. 5 Mine</u>.

Dear Deputy Director Owens, Secretary Haaland, Director Williams, Mr. Pearson, Director Love, Commissioners Humphrey, Russell, Farrell, Jeter, Stevens, Thomas, and White and Mr. Mays:

This letter serves as a supplemental notice of intent to sue pursuant to 16 U.S.C. § 1540(g) and 30 U.S.C. § 1270 on behalf of the Center for Biological Diversity ("Center") and Black Warrior Riverkeeper ("Riverkeeper") for violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, as well as an initial notice of intent to sue for violations of the Clean Water Act

("CWA"), 33 U.S.C. §§ 1365,1344 and Title V of the Surface Mining Control and Reclamation Act ("SMCRA") 30 U.S.C. § 1251-1279 in connection with the U.S. Fish and Wildlife Service ("Service"), Office of Surface Mining Reclamation and Enforcement's ("OSMRE"), and the Alabama Surface Mining Commission's ("ASMC") authorization and oversight of the mining activities at Mays No. 5 Mine, as well as the Service's and OSMRE's implementation of the 2020 Surface Mining Control and Reclamation Act Biological Opinion and Incidental Take Statement ("2020 SMCRA BiOP").

The Center and Riverkeeper previously served a Notice of Intent upon the Service, OSMRE, Secretary of the U.S. Department of Interior, and the Director and members of the ASMC in their official capacities, dated June 16, 2021 ("June 16 Notice") regarding the agencies' violations of the ESA Section 7(a)(2) and Section 9 in connection to the authorization, construction, and mining activities at Mays No. 5 Mine. The June 16 Notice is incorporated by reference.

Additional information regarding the review, permitting, and oversight of Mays No. 5 Mine underscores the legal violations set forth in the June 16 Notice but also calls into question the validity of critical assumptions in the 2020 SMCRA BiOP that the Service and OSMRE are relying on to ensure that listed species will not be jeopardized by SMCRA-regulated mining activities. Moreover, recent photographs of the Mays No. 5 Mine site taken on May 7, June 28, July 29 and September 3, 2021 and included in this Notice, appear to reveal extensive violations of CWA § 404 and violations of SMCRA § 520. The ongoing sedimentation and runoff from the mine documented throughout this letter are the very conditions the Service has identified as responsible for the decline of the flattened musk turtle.[1]

As set forth in the declaration of Mark Bailey, which is included with this Notice, the area in the immediate vicinity of, and directly affected by, Mays No.5 Mine is in fact occupied by threatened flattened musk turtles (*Sternotherus depressus*). Yet the mine operator has never been required to develop, let alone implement, a Protection and Enhancement Plan ("PEP") for the species. Even worse, No. 5 Mine *continues* to threaten the viability of the remaining members of the species in the area through repeated discharges of sediment into the species' habitat and without any meaningful corrective action being undertaken by the Service, OSMRE, or ASMC.

ASMC's failure to address the impacts of Mays No. 5 Mine on the flattened musk turtle in a PEP and the Service's failure to require a PEP for the species violates SMCRA. Also, OSMRE and the Service's failure to ensure that corrective steps are taken to halt the ongoing degradation of turtle habitat, violates SMCRA, but also undermines crucial representations and assumptions made in the 2020 SMCRA BiOP. The 2020 SMCRA BiOP represents and assumes OSMRE's oversight role and the Service's implementation of protective measures through PEPs to mitigate impacts to affected species. Therefore, in addition to the violations set forth in the June 16 Notice, these failures require ASMC and OSMRE to suspend or rescind the permit for Mays No. 5 Mine pending development and approval of an appropriate PEP for the flattened musk turtle.

[1] Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009); Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005) (Sedimentation is the primary threat to the species' continued existence, because sediment clogs rock voids and smothers snails and bivalves, the turtles' primary food source.).

Moreover, the Service and OSMRE are required to reinitiate consultation on OSMRE's implementation and enforcement of Title V of SMCRA and its effects on listed and proposed species and their designated and proposed critical habitats pursuant to the clear language of the 2020 SMCRA BiOp.[2]

SURFACE MINING CONTROL AND RECLAMATION ACT

SMCRA was established to "protect society and the environment from adverse effects of surface coal mining operations."[3] SMCRA and implementing regulations prohibit surface mining activities which may jeopardize the continued existence of endangered or threatened species.[4] SMCRA requires surface mining permit applicants "include fish and wildlife resource information for the permit area and adjacent area" that shall include "site-specific resource information necessary to address the respective species or habitats when the area adjacent to the permit area is likely to include threatened species.[5] SMCRA also requires applications to provide a PEP - a description of how the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the Endangered Species Act, during the mining and reclamation operations and how enhancement of these resources will be achieved where practicable.[6] The PEPs must include protective measures that will be used during the active mining phase of operation and enhancement measures that will be used during reclamation and postmining phase of operation to develop aquatic and terrestrial habitat.[7] SMCRA prohibits the approval of a surface mining permit unless the application demonstrates compliance with SMCRA and the applicable state regulatory program.[8]

SMCRA also requires the regulatory authority to review circumstances under which the permit was issued if the regulatory authority "has reason to believe [it] improvidently issued a permit."[9] A permit is improvidently issued if the mine operator: 1) continues to own or control the mine with the unabated or uncorrected violation; 2) the violation remains unabated or uncorrected; and 3) the violation would cause the mining operator to be ineligible under the permit eligibility criteria as set forth in the SMCRA regulations.[10] If a permit is found to be improvidently issued, the regulatory authority must suspend or rescind the permit.[11]

Persons seeking to engage in surface coal mining operations in the Alabama must first obtain a permit for those operations in accordance with the state's regulatory program.[12] "[N]o person shall engage in or carry out surface coal mining within the State of Alabama unless that person

[2] 30 C.F.R. §§ 773.22(a); 773.21(b); 50 C.F.R. § 402.16(a)
[3] 30 U.S.C. § 1202(a).
[4] 30 C.F.R. § 816.97(b); 30 C.F.R. § 773.15(j).
[5] 30 C.F.R. § 780.16(a)(2)(i)
[6] *Id*. § 780.16(b).
[7] *Id.* § 780.16(b)(3).
[8] 30 C.F.R. § 773.15(a).
[9] 30 C.F.R. § 773.21(a).
[10] *Id*. § 773.21(b).
[11] *Id*. § 773.22(a).
[12] *See* Ala. Admin. Code r. 880-X-8A-.03(1).

has first obtained a valid permit issued by the State Regulatory Authority."[13] "All persons shall conduct surface coal mining and reclamation operations under permits issued pursuant to this Chapter and by the State Regulatory Authority and shall comply with the terms and conditions of the permit."[14] Violations of applicable regulatory standards is a violation of SMCRA § 503.[15] Included in Alabama's surface coal mining and reclamation regulatory program are environmental protection performance standards applicable to surface coal mines promulgated by the Alabama Surface Mining Commission.[16]

The 2020 SMCRA BiOP is predicated on numerous representations and assumptions that both the Service and OSMRE relied on for their conclusion that listed species would not be jeopardized by coal mining activities. This includes, foremost, that the Service would ensure compliance with SMCRA, including that a sufficient PEP is in place for each affected species, and that OMSRE would maintain ongoing monitoring and oversight of the implementation of state programs and permits issued under those state programs that would be sufficient to address impacts to listed species and their habitats.

With regard to OMSRE, the 2020 SMCRA BiOp represents that OSMRE will evaluate and oversee the effectiveness of state program administration[17] and that OSMRE will invoke its oversight authority in the event it receives information from any person that a permitted mine will result in significant, imminent environmental harm to ESA listed species.[18] According to the 2020 SMCRA BiOp, "OSMRE has structured [] its regulatory program to ensure its implementation is not likely to jeopardize the continued existence of proposed or listed species or result in the destruction or adverse modification of proposed or designated critical habitat."[19] Indeed, the 2020 SMCRA BiOp is replete with assurances that OSMRE will exercise its oversight authority in a manner that insures that impacts on listed species are properly considered.[20] The 2020 SMCRA BiOp further specifically represents that SMCRA requires OSMRE to ensure that each state regulatory authority is satisfying its legal obligations under its programs, including the protection of listed species, by evaluating the administration of state

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[13] Ala. Admin. Code r. 880-X-8B-.03.
[14] Ala. Admin. Code r. 880-X-8B-.04.
[15] 30 U.S.C. § 1253
[16] *See* Chapter 880-X-10A and 10C.
[17] SMCRA BiOP at 4.
[18] SMCRA BiOp at 24.
[19] SMCRA BiOp. at 62.
[20] *See, e.g.* BiOp at 23 ("OSMRE is responsible for overseeing the effectiveness of the state's implementation, administration, or enforcement of its approved program, which ensures that State regulatory authorities are enforcing the State counterparts to the Federal regulations. *OSMRE's oversight authority is both permit-specific and programmatic*.") (emphasis added); *id*. at 63 ("the majority of permits issued under SMCRA will be issued by States, and *OSMRE has an ongoing oversight role in the administration and enforcement of mining programs in the States that have assumed primary regulatory authority*") (emphasis added); *id*. at 4 *("OSMRE's role under SMCRA does not end once it has approved a State or Tribal regulatory authority's program*. SMCRA gives OSMRE ongoing authority to oversee the effectiveness of the State or Tribal regulatory authority's implementation of the approved program . . . OSMRE . . . is responsible for ensuring that the State or Tribal authority is effectively implementing, administering, maintaining, and enforcing their program.") (emphasis added).

regulatory programs upon the receipt of information alleging that the State is not effectively implementing its approved program.[21]

With regard to the Service, the 2020 SMCRA BiOp likewise represents that the Service will ensure that each application for a state-issued permit will incorporate a PEP for all affected listed species, which describes "how, to the extent possible using best technology currently available, the operator will minimize disturbances and adverse impacts on fish and wildlife and related environmental values, including compliance with the ESA."[22] Moreover, the 2020 SMCRA BiOP assumes that the Service will effectively coordinate with state regulatory authorities in accordance with the "SMCRA Coordination Process" as set forth in the 2020 SMCRA BiOP Appendix A, which requires, among other things, the permit applications to include a PEP.[23] The 2020 SMCRA BiOP also assumes that the Service will obtain the PEPs and other fish and wildlife resource information from the state regulatory authority for all actions that may affect listed species.[24]

The 2020 SMCRA BiOP specifically provides that the "reinitiation triggers described [in 50 C.F.R. § 402.16(a)] apply to the [programmatic] action described in this Opinion," and, specifically, that "[p]otential reinitiation scenarios exist *if the assumptions outlined in Section 8.2 of this Opinion are proven incorrect*."[25] Those "key assumptions" "include" that "State regulatory authorities and OSMRE will adhere to . . . requirements to minimize potential effects on ESA-listed species"; that the "Service will receive fish and wildlife resource information and PEPs for applications determined by the regulatory authority to be complete and that may affect ESA resources as outlined in the SMCRA Coordination Process"; that coordination between the Service and state regulatory authorities "will minimize the adverse effects of surface coal mining . . . to levels that will avoid the likelihood of jeopardy to listed" species.[26]

<u>CLEAN WATER ACT</u>

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[27] The Clean Water Act makes it unlawful to discharge dredged and fill material into the waters of the United States except in accord with a permitting regime jointly administered by the Army Corps of Engineers (Corps) and EPA.[28]

The Clean Water Act Section 404 permitting program (404 program) regulates the discharge of dredged or fill materials into waters of the U. S., including wetlands.[29] Under the 404 program, the Corps reviews and, where appropriate, approves permits authorizing the discharge of dredged

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[21] SMCRA BiOP at 24.
[22] 30 C.F.R. §§ 780.16(b) and 784.21(b).
[23] SMCRA BiOP at Appex A. Note: the 2020 SMCRA BiOP incidental take statement' terms and conditions also require a PEP.
[24] SMCRA BiOP at 61.
[25]SMCRA BiOP at 85 (emphasis added).
[26] SMCRA BiOp at 61-62.
[27] 33 U.S.C. § 1251.
[28] *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 123 (1985).
[29] 33 U.S.C. § 1344

or fill materials into waters of the U.S. Section 404 requires that a permit be obtained from the Corps for the placement or discharge of dredged and/or fill material into any waters of the U.S., including streams and wetlands, prior to conducting work.[30]

By regulation, the Corps has established a formal procedure for "[a]ffected part[ies]" to solicit its official position about the scope of CWA regulatory jurisdiction.[31] A jurisdictional determination is a "written Corps determination that a wetland ... is subject to regulatory jurisdiction under [the CWA]."[32] Preliminary jurisdictional determinations "are written indications that there may be waters of the United States on a parcel or indications of the approximate location(s) of waters of the United States on a parcel."[33] "Generally, approved JDs should be used to support individual permit applications, but the applicant should be made aware of his or her option to elect to use a preliminary JD wherever the applicant feels doing so is in his or her best interest."[34]

ESA VIOLATION

Failure to reinitiate consultation on the 2020 SMCRA Biological Opinion.

In addition to the violations of ESA Sections 7 and 9 set forth in our prior Notice, the developments set forth above also demonstrate that the Service and OSMRE are in violation of their obligation to reinitiate formal consultation on the programmatic action addressed in the 2020 BiOp.

OSMRE's and the Service's failures to adhere to and fulfill the requirements and key assumptions of the 2020 SMCRA BiOP for the Mays No. 5 Mine establish that the procedures required under the 2020 SMCRA BiOp are proving insufficient to ensure that listed species will not be jeopardized by SMCRA-regulated coal mining.

As set forth above and in our prior Notice, even though the Service has acknowledged the presence of flattened musk turtles only 1 mile downstream of the Mays No. 5 Mine permit area and has conceded that sedimentation from coal mining has an adverse effect on the flattened musk turtle, the Service has not required a PEP for Mays No. 5 Mine as the 2020 BiOp requires. This failure has occurred even though the Center and Riverkeeper provided the Service and OSMRE with information regarding current and *ongoing* sedimentation run off from Mays No. 5 Mine and its imminent impact on the flattened musk turtle downstream from the permit area. The documentation of permit violations and CWA violations as set forth in this notice, including the direct run off from the mine site into the Mulberry Fork as the photographs on pages 20, 21, and 22 of this Notice appear to reveal, further establishes that OSMRE and the Service are failing to adhere and fulfill requirements and assumptions of the 2020 SMCRA BiOP.

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[30] *Id*.
[31] *See* 33 C.F.R. § 331.2.
[32] *Id.; see also Jurisdictional Determinations, Corps Regulatory Guidance Letter 08–02*, at 1 (June 26, 2008) ("An approved [jurisdictional determination] is an official Corps determination that jurisdictional [waters under the CWA] are either present or absent on a particular site.").
[33] 33 C.F.R. § 331.2.
[34] *Jurisdictional Determinations, Corps Regulatory Guidance Letter 08–02*, at 4.

Therefore, OSMRE's and the Service's actions and responses regarding the permitting of Mays No. 5 Mine indicates that key assumptions set forth and relied upon in the 2020 SMCRA BiOP are either insufficient or not being adhered to, and as a result a listed species is being harmed in patent violation of the ESA. Pursuant to the plain language of the 2020 SMCRA BiOp, such failures jeopardize the flattened musk turtle in the manner set forth in our prior Notice and also clearly necessitate reinitiation of consultation on the SMCRA program as a whole.[35]

CWA VIOLATIONS:

Discharge of dredged or fill materials into waters of the United States without a permit.

Instead of obtaining a permit under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, Mays Mining chose to rely upon a Preliminary Jurisdictional Determination (PJD) for the proposed mining activities at Mine No. 5 and avoid waters of the U. S. On May 31, 2019, the Corps issued a PJD for Mine No. 5 which classified the waters of the U.S. at the site. (Attachment A).

The PJD outlines which water features at the mine site are potentially jurisdictional and subject to the 404 program.[36] The PJD contains a jurisdictional determination topo map that identifies all the waterbodies at the site.[37] The only waters the Corps conclusively deemed non-jurisdictional at Mine No. 5 are four ditches (D1, D2, D3 and D4), an upland wetland (W1) and two sediment ponds (P1 and P5).[38] All other waterbodies at the mine are treated as jurisdictional under the PJD: "a permit decision made on the basis of a preliminary JD will treat all waters and wetlands that would be affected in any way by the permitted activity on the site as if they are jurisdictional waters of the U.S."[39]

According to the PJD, if Mays Mining contemplates future work at the site involving "a discharge or placement of dredged and/or fill material into waters of the U.S.," Mays *must* obtain a Section 404 permit prior to the work.[40] "Undertaking any activity in reliance on any form of Corps permit … based on a PJD constitutes agreement that all aquatic resources in the review area affected in any way by that activity will be treated as jurisdictional and [the permittee] waives any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court."[41]

Despite the mandates of the PJD, photographic evidence appears to show that Mays Mining filled a water of the U.S. that the PJD presumes to be jurisdictional without first obtaining the

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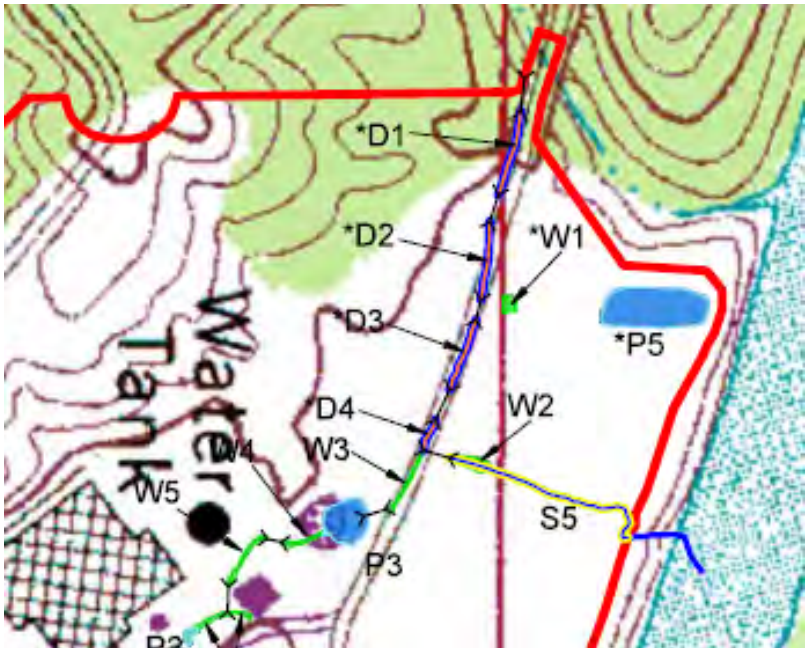
[35] SMCRA BiOP at 85.
[36] *Id.* at 8.
[37] *Id.* at 5
[38] *Id.* at 4.
[39] *See Jurisdictional Determinations, Corps Regulatory Guidance Letter 08–02*, at 3; *see also May 31, 2019 Preliminary Jurisdictional Determination* at 9; ASMC Permit No. 3957 at 2 ("This PJD treats the wetlands and waters of the U.S. on the site as jurisdictional for the purposes of determining impacts and mitigation requirements.")
[40] *May 31, 2019 Preliminary Jurisdictional Determination* at 1 (emphasis added).
[41] *Id.* at 9

required Section 404 permit.[42] According to ASMC Permit No. 3957, R-2, Mays is only authorized to mine Increments 1 and 6 at No. 5 Mine. The attached permit map for P-3957 (Attachment B) shows Increment 1 delineated in pink and Increment 6 delineated in blue. That same map also shows Increment 2 delineated in green.

ASMC Permit No. 3957 R-2, Condition 1 establishes a 50-foot buffer zone around a jurisdictional stream marked as S-5 in Increment 1. The buffer zone around S-5 is delineated in orange on the attached permit map. As demonstrated by the attached permit map, the orange S-5 buffer zone begins at a mine road immediately below Increment 2 and terminates at the Mulberry Fork of the Black Warrior River. S-5 is also depicted on the enlarged section of the PJD topo map below, which similarly shows the mine road immediately below Increment 2 and the buffer zone around S-5.[43] W-3, presumed to be a jurisdictional wetland, and P-3, presumed to be a jurisdictional waterbody, are also depicted by the topo map.[44]

The topo map further shows that W-3 is hydrologically connected to S-5, which has a direct hydrological connection to the Mulberry Fork.



[42] *Id. at* 1.
[43] *May 31, 2019 Preliminary Jurisdictional Determination* at 5.
[44] *Id.*

Id. Below is an Alabama GIS photograph showing W-4, P-3, W-3, and S-5 taken in April 2018, prior to mining at No. 5 Mine.[45]

P-3 is at the top left center of the photograph and W-3 is the dark line that runs parallel to the mining road where (according to the jurisdictional determination topo map) it takes a right turn to flow under the road and into S-5. W-4 can be seen above P-3. (April 2018)

[45] https://www.alabamagis.com/Walker/Frameset.cfm.

The following photograph taken May 5, 2021, appears to demonstrate that Mays Mining has filled a large portion of W-3, even though the PJD presumes W-3 to be jurisdictional and Mays has no Section 404 permit that would potentially authorize the fill of W-3.

Apparent fill of W-3 shown within Increment 2 (grey rock in center of photograph), just across the road from the rectangular forested stream buffer at S-5. P-3 is at the top left of the photograph and the unfilled portion of W-3 flows along the mining road to the filled area. (5/5/21)

In the photograph above, the S-5 forested buffer area extends down from the mining road at to the lower left corner of the frame. The area immediately above the mining road, which appears to contain W-3, has been filled. The remainder of W-3 can be seen extending left of the fill area to P-3, but the area above its confluence with S-5 seems to have been permanently destroyed.

Below is another view of the fill taken September 3, 2021. The beginning of the S-5 stream buffer appears to be at the bottom center of the photograph below the mining road. P-3 is out of the frame to the left, but the unfilled portion of W-3 is visible to the left of the fill.

Apparent fill in W-3 within Increment 2 where it parallels and crosses under the mining road into the S-5 forested stream buffer by the Mulberry Fork. Note also the orange runoff which appears to be pooling in Increment 2 (despite silt fencing) at the top center right of the photograph. (9/3/21)

The photographs indicate that Mays Mining may be in violation of Section 404 of the Clean Water Act[46] because it unlawfully filled W-3 without first obtaining a permit. The Center and Riverkeeper intend to pursue this and similar or related violations, including all violations which occur or continue after service of this notice.

SMCRA VIOLATIONS

On June 29, 2018, ASMC Permit No. P-3957 (Permit) was transferred to Mays Mining. The Permit was renewed on May 28, 2019 and revised on August 15, 2019. The Permit contains conditions that Mays Mining must meet in order to mine. Riverkeeper and the Center have documented numerous violations of permit conditions and applicable regulation, which are grounds for suspension or revocation of the Permit.[47] Each violation of permit conditions or

[46] 33 U.S.C. 33 U.S.C. § 1344
[47] ASMC Permit No. P-3957 (May 21, 2018) at 1.

applicable regulatory standards at Mine No. 5 is a violation of SMCRA § 503, 30 U.S.C. § 1253.[48]

Mining in Violation of ASMC Permit P-3957, Condition 14

Photographic evidence appears to show that, in addition to violating the Clean Water Act by filling W-3, Mays Mining has also violated a condition of the Permit by filling water of the U.S. at Mine No. 5 without a Section 404 permit. Condition 14 of the Permit requires that the "permittee shall provide ASMC with written approval by the U. S. Army Corps of Engineers prior to the disturbance in any waters of the U.S. within the ASMC permit boundary."[49] The PJD issued by the Corps treats all waters and wetlands that would be affected in any way by the permitted activity on No. 5 Mine as if they are jurisdictional waters of the U.S.[50] W-3 is presumed by the PJD to be jurisdictional, yet Mays Mining did not provide the ASMC with the Corps' written approval before filling the wetland, a water of the U.S. This violation of Condition 14 of the Permit is a violation of SMCRA § 503, 30 U.S.C. § 1253.[51]

Mining in Violation of Ala. Admin. Code r. 880-X-9A-.04

The Alabama regulatory program prohibits an operator from disturbing surface acreage prior to the ASMC's approval of a performance bond covering the acreage to be disturbed.[52] The ASMC has approved performance bonds for Increments 1 and 6 at Mine No. 5, but the ASMC has not approved a bond for Increment 2.[53]

Despite this fact, Mays Mining appears to have disturbed acreage in Increment 2 even though the acreage is not bonded, in violation of Ala. Admin. Code r. 880-X-9A-.04(3). As described above, Mays Mining has likely filled W-3, which is in Increment 2. Condition 3 of the Permit similarly restricts mining to those areas "for which sufficient bond has been posted with the ASMC" so the disturbance of acreage in Increment 2 with no bond is also a violation of Permit Condition 3.[54] Mays Mining has violated Ala. Admin. Code r. 880-X-9A-.04(3) and Permit Condition 3 at No. 5 Mine by disturbing acreage in Increment 2, even though that increment has not been bonded. These violations of the Permit and regulation are also violations of SMCRA § 503.[55]

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[48] 30 U.S.C. § 1253.
[49] ASMC Permit No. P-3957 (May 21, 2018) at 3.
[50] *See* Jurisdictional Determinations, Corps Regulatory Guidance Letter 08–02, at 3; see also May 31, 2019 Preliminary Jurisdictional Determination at 9; ASMC Permit No. 3957 at 2 ("This PJD treats the wetlands and waters of the U.S. on the site as jurisdictional for the purposes of determining impacts and mitigation requirements.")
[51] 30 U.S.C. § 1253.
[52] Ala. Admin. Code r. 880-X-9A-.04(3).
[53] August 19, 2020 Letter from ASMC Director Kathy H. Love to Rodney H. Mays (acknowledges receipt of bond for Increment 1); ASMC Permit P-3957 (Permit Condition No. 3 states Increment 6 is the only one bonded at that time).
[54] *See* Ala. Admin. Code r. 880-X-8B-.04.
[55] 30 U.S.C. § 1253.

Violation of Performance Standards (Sediment Control Measures and Siltation Structures)

The ASMC adopted Ala. Admin. Code r. 880-X-10C-.16, which provides that appropriate sediment control measures must be designed, constructed, and maintained using the best technology currently available to:

> (a) Prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area,
> (b) Meet the more stringent of applicable State or Federal effluent limitations,
> (c) Minimize erosion to the extent possible.[56]

Ala. Admin. Code r. 880-X-10C-.16(1). In addition, siltation structures must be designed so that

> (a) Additional contributions of suspended solids sediment to streamflow or runoff outside the permit area shall be prevented to the extent possible using the best technology currently available.
> (b) All surface drainage from the disturbed area shall be passed through a siltation structure before leaving the permit area . . . .[57]

Ala. Admin. Code r. 880-X-10C-.17(2). The photos below appear to demonstrate numerous violations of Ala. Admin. Code r. 880-X-10C-.16 and .17 by Mays Mining at Mine No. 5.

[56] Ala. Admin. Code r. 880-X-10C-.16 (1).
[57] Ala. Admin. Code r. 880-X-10C-.17(2).

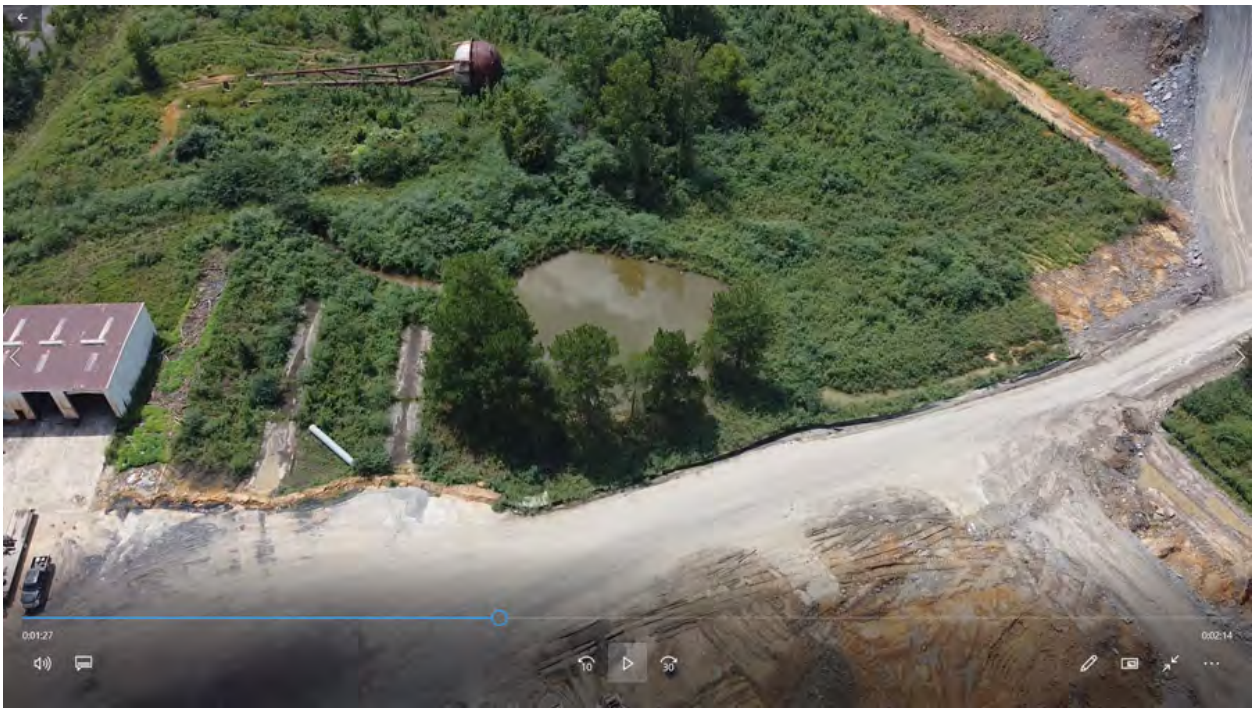
On May 7, 2021, Mays Mining appears to have discharged deep reddish orange polluted water and gray sediment from Increment 1 into three concrete lanes located in Increment 2.

Red water and grey sediment from Increment 1 mine operations appear to flow through concrete lanes, which drain into W-4 (wetland presumed to be jurisdictional that flows into P-3) at the center bottom of picture in Increment 2. (5/7/21)

Another view of what appears to be red water and grey sediment from Increment 1 mine operations migrating toward W-4 above P-3 in Increment 2. (5/7/21)

Those three concrete lanes are adjacent to and appear to flow into W-4 and W-5, which are presumed to be jurisdictional waters of the U.S. PJD at 5.

An additional perspective below, taken September 3, 2021, appears to show water in all three concrete lanes above W-4.



Water which appears to be polluted in 3 concrete troughs that feed into W-4 (left middle of photograph) in Increment 2 [Still capture from drone video]. (9/3/21)

Discharging discolored water and gray sediment into Increment 2 is a violation of several more SMCRA performance standards. First, the photos indicate Mays Mining has not "designed, constructed, and maintained [sediment control structures] using the best technology currently available to prevent additional contributions of sediment to streamflow or to runoff outside the permit area" nor has Mays minimized erosion to the extent possible.[58] In addition, Mays Mining has failed to design siltation structures to prevent additional contributions of suspended solids and sediment to streamflow or runoff outside the permit area.[59] Finally, Mays has failed to pass all surface drainage from the mine's disturbed area in Increment 1 through a siltation structure before leaving the permit area.[60]

[58] *See* Ala. Admin. Code r. 880-X-10C-.16(1)(a) and (c).
[59] *See* Ala. Admin. Code r. 880-X-10C-.16 (1).
[60] *See* Ala. Admin. Code r. 880-X-10C-.17(2).

The silt fencing installed by Mays Mining at No. 5 Mine similarly fails to meet the requirements of Ala. Admin. Code r. 880-X-10C-.16 and 17, as the May 7, 2021 photographs below appear to demonstrate.

Silt fence near Sediment Basin 005 appears to be allowing water and sediment to bury and overtop the fence. The green forested area at the top of the photograph appears to be the 100' stream buffer adjoining the Mulberry Fork. (5/7/21)

Silt fence seemingly not properly installed near Sediment Basin 005, allowing water & sediment to flow over & under silt fence. (5/7/21)

Photographs taken September 3, 2021, show that these failures appear to continue.

Black silt fence along mining road seems to be completely overrun by sediment and rock, allowing muddy water, sediment and debris to enter W-3 (left photo) before it goes under apparent fill and mining road and into the protected stream buffer for S-5. Note visible contrast in stream color in left picture (water is muddier adjacent to downed silt fence). The overrun silt fence is barely visible in the picture at right, which appears to show W-3 flowing down from P-3 (at top of picture) until it hits the apparent unauthorized fill area.

In the center of the photograph, there appears to be polluted orange water running off Excess Spoil Fill No. 2 area flowing horizontally across road and through silt fence into green area adjacent to W-3; a pool of discolored muddy orange water is visible in Increment 2 beyond the silt fence, which indicates the silt fence is not stopping the flow of water and sediment from Increment 1 into Increment 2 adjacent to W-3 [still capture from drone video]. (9/3/21)


Sediment & muddy water deposited (bottom right) near what appears to be Sediment Basin 006 in forested buffer by the Mulberry Fork. (9/3/21)

As the pictures above appear to show, Mays Mining has failed to design, install and maintain appropriate sediment control structures at Mine No. 5 to prevent, to the extent possible, additional contributions of sediment to streamflow or to runoff outside the permit area, in violation of Ala. Admin. Code r. 880-X-10C-.16(1)(a). Mays Mining has also failed to design erosion and sediment control measures to prevent additional contributions of sediment to streams and wetlands and runoff outside the permit area, or route all surface drainage from disturbed areas through a sediment basin, as required, before discharging into waters of the U.S. via permitted National Pollutant Discharge Elimination System (NPDES) outfalls.[61]Accordingly, the violations of applicable performance standards described above are also violations of SMCRA, § 503, 30 U.S.C. § 1253.

Violation of Performance Standards (Protection of Environmental Values and Water Quality)

The ASMC also developed performance standards under SMCRA designed to protect environmental values and water quality at the mine site. "Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that . . . prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution."[62] In addition,

> [d]ischarges from sedimentation ponds permanent and temporary impoundments, coal processing waste, dams and embankments, and diversions shall be controlled, by energy dissipaters, riprap channels, and other devices, where necessary, to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance.[63]

Moreover, "the operator shall, to the extent possible using the best technology currently available, minimize disturbances and adverse impacts on fish, wildlife, and related environmental values and shall achieve enhancement of such resources where practicable.[64]

Mays Mining has not protected water quality at Mine No. 5. Instead, Mays Mining has handled earthen materials, runoff, and surface water discharges in a manner that allows the contribution of suspended solids and other pollutants to W-3, W-4, W-5, S-5, and to the Mulberry Fork of the Black Warrior River. As illustrated below, Mays Mining has not minimized the disturbance of the hydrologic balance at Mine No. 5. These failures by Mays Mining at Mine No. 5 contribute to adverse impacts for fish, wildlife, and related environmental values, including the threatened flattened musk turtle.

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[61] Ala. Admin. Code r. 880-X-10C-.17(2)(a) and (b).
[62] Ala. Admin. Code r. 880-X-10C-.12 (4)(a).
[63] Ala. Admin. Code r. 880-X-10C-.18.
[64] Ala. Admin. Code r. 880-X-10C-.49(1).

Apparent sediment buildup in the Mulberry Fork near Sediment Basin 005 (6/28/21).



S-5 within protected stream buffer appears to be full of sediment and flowing orange into the Mulberry Fork. (6/28/21)

What appears to be sediment buildup in Mulberry Fork near Sediment Basin 005 & S-5 within protected stream buffer full of sediment and flowing orange into the Mulberry Fork. (7/29/21)


Apparent sediment buildup in Mulberry Fork near Sediment Basin 005 & S-5 within protected stream buffer full of sediment and flowing orange into the Mulberry Fork. (9/3/21)

In not handling earthen materials, runoff, and surface water discharges in a manner that prevents the contribution of suspended solids and other pollutants offsite, Mays Mining is in violation of performance standards developed under SMCRA.[65] Accordingly, the violations of applicable performance standards described above are also violations of SMCRA, § 503, 30 U.S.C. § 1253.

Finally, SMCRA and implementing regulations prohibit ASMC from authorizing Mays No. 5 Mine unless the application affirmatively demonstrates that the operation "would not affect the continued existence of endangered or threatened species."[66] SMCRA also prohibits ASMC from authorizing Mays No. 5 Mine unless the permit application includes information regarding the flattened musk turtle downstream from the permit area and an adequate PEP for the species.[67]

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[65] *See* Ala. Admin. Code r. 880-X- 10C-.13(5); Ala. Admin. Code r. 880-X-10C-.12 (4)(a); Ala. Admin. Code r. 880-X-10C-.18; and Ala. Admin. Code r. 880-X-10C-.49(1).
[66] 30 C.F.R. § 816.97(b); 30 C.F.R. § 773.15(j).
[67] 30 C.F.R. §§ 780.16(a)(2)(i), (b).

As set forth above and in our prior Notice, the permit and permit application for Mays No. 5 Mine do not analyze or disclose the presence of the flattened musk turtle population downstream from the permit area or contain a PEP for the flattened musk turtle. Thus, the Mays No. 5 Mine permit application does not comply with SMCRA and the Mays No. 5 Mine Permit was improvidently issued.

Moreover, our June 16 Notice informed the Service, OSMRE, and ASMC regarding the current and *ongoing* sedimentation run off from Mays No. 5 Mine and Mays Mine's receipt of several violations for repeated discharges of sediment into the Mulberry Fork. This Notice provides evidence that these violations are much more egregious and have not received any effective corrective action.[68] The sedimentation runoff from Mays No. 5 Mine is thus unabated and uncorrected and in violation of SMCRA regulations. Worst of all, the ongoing sedimentation and runoff from the mine documented throughout this letter are the very conditions the Service has identified as responsible for the decline of the flattened musk turtle.[69]

Therefore, the permit issued for Mays Mine No 5 violates SMCRA and its implementing regulations and ASMC is required to suspend or rescind the permit for Mays No. 5 Mine.[70]

CONCLUSION

The conspicuous and ongoing failure of the surface mining program to afford protection to the flattened musk turtle despite clear-cut evidence of ongoing harms from a permitted mine not only reinforces the ESA Section 7 and 9 violations set forth in our prior Notice, but it also demonstrates that key assumptions underlying the 2020 SMCRA BiOp have proven incorrect. Since this precise scenario was set forth in the 2020 SMCRA BiOp as an explicit trigger for reinitiation of Section 7 consultation, and because the mandatory reinitiation criteria in the ESA regulations are otherwise satisfied, OSMRE and Service are also in violation of their obligations under Section 7 and the ESA implementing regulations to reinitiate Section 7 consultation. Moreover, recently acquired information appears to show egregious violations of the CWA and SMCRA. These ongoing violations require ASMC to either suspend the permit until the violations are cured or completely rescind the permit.

If Mays Mining has taken any steps to eradicate the violations described above, or if anything in this letter is inaccurate, please let us know. If Mays Mining does not advise of any remedial steps taken during the notice period, we will assume that no such steps have been taken, that there are no material errors in this letter, and that violations are likely to continue.

Please do not hesitate to contact us if we can provide additional information or otherwise assist in this matter, rather than having to resort to the judicial remedies provided by the ESA, CWA, and SMCRA. We look forward to your prompt response.

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[68] See June 16 Notice, Attachment B.
[69] Letter from FWS to McGehee Engineering Corp. (Feb. 12, 2009); Letter from FWS to Sloan Mountain Mining, LLC (Dec. 22, 2005) (Sedimentation is the primary threat to the species' continued existence, because sediment clogs rock voids and smothers snails and bivalves, the turtles' primary food source.).
[70] 30 C.F.R. § 773.23.

Sincerely,

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Staff Attorney
Center for Biological Diversity
P.O. Box 7472
Missoula, MT 59802
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kakland@biologicaldiversity.org

Eva Dillard
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(205) 458-0095
edillard@blackwarriorriver.org

D. Noah Greenwald
Endangered Species Director
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
ngreenwald@biologicaldiversity.org

cc: Michael S. Regan, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Regan.Michael@epa.gov

John Blevins, Acting Regional Administrator
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Homewood, AL 35209
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DECLARATION OF MARK A. BAILEY

I, Mark A. Bailey, under penalty of perjury, declare as follows:

1. I am a resident of Covington, County, Alabama, am over the age of 18, and am competent to give this declaration. This declaration is based on my personal knowledge of the facts below, together with my expertise as a biologist.

2. I am the Senior Biologist at Conservation Southeast, Inc. ("CSI") and have over 25 years of field experience in the Southeast, including extensive experience studying the federally listed threatened flattened musk turtle (*Sternotherus depressus*).

3. For almost 10 years prior to my work with CSI, I was a zoologist for the Alabama Natural Heritage Program. I also served as the herpetology committee chair for Alabama's Second Nongame Wildlife Symposium (2002), was the lead co-author for Habitat Management Guidelines for Amphibians and Reptiles of the Southeastern United States (Partners in Amphibian and Reptile Conservation), and, with Dr. Craig Guyer and Dr. Robert Mount of Auburn University, am co-author of Turtles of Alabama (University of Alabama Press).

4. I have conducted multiple surveys for the flattened musk turtle from the 1990s to the present in Alabama's Black Warrior River basin, where it is endemic.

5. The flattened musk turtle was listed as threatened under the Endangered Species Act in 1987. In a 2014 five-year review, the U.S. Fish and Wildlife Service

determined the flattened musk turtle has continued to decline with "[c]oal mining and non-sustainable land management practices with related water quality and quantity threats continu[ing] to escalate."

6. The Service further concluded in the review that: "[r]unoff from coal surface mining generates pollution through acidification, increased mineralization, and sediment loading, and that "[d]ue to high demand for coal, the Black Warrior River continues to suffer from impaired water quality of heavy metals, acids, and sediments that run off from active and abandoned coal mines."

7. As a biologist who studies sensitive species, I am concerned about the effects of surface mining on the health and survival of these species. Good habitat quality for the Flattened Musk Turtle includes (among other factors) low silt load and deposits as well as minimal pollution. Siltation has been identified as the biggest threat to the flattened musk turtle and a major source is coal mining.

8. I have observed first-hand the degradation of streams in the upper Black Warrior system caused by coal mining, including through biological surveys I have conducted on Mulberry Fork, Locust Fork, and Lost, Turkey, Gurley, and Blackwater Creeks over the past 30 years. Mine runoff and associated habitat degradation from surface mining has greatly reduced the distribution of flattened musk turtles in the Black Warrior River system (Dodd et. al. 1986, Dodd 1990).

9. I am very familiar with the area around Mays Mine No. 5. Together with CSI Biologist Karan Bailey, I have performed surveys for the Flattened Musk Turtle adjacent to and downstream from the proposed mine site in the Mulberry Fork of the Black Warrior River, most recently in 2019, as well as in 2005.

10. Flattened musk turtles have previously been reported in Mulberry Fork upstream and downstream of the project area (Mount 1981, Ernst et al. 1983). During our surveys, we confirmed the presence of the species approximately one to one- and one-half miles below the project area (Bailey and Bailey 2005, Bailey and Bailey 2019).

11. In our survey dated May 31, 2005, we captured two Flattened Musk Turtles in 48 trap-nights, which indicates a low-density population. That result is not unexpected given the poor condition of the habitat. We documented two adults, a male and a female, who were actively foraging during the day, as they were captured between the morning and evening trap checks and not overnight (when captures most often are expected).

12. In our survey dated June 23, 2019, we again documented the presence of the flattened musk turtle by the capture of two adults. The capture of only two flattened musk turtles in 69 trap-nights is again indicative of a low-density aging population, which is not unexpected given the continued poor condition of the habitat.

13. The consensus among most biologists working with flattened musk turtles is that the animals in Mulberry Fork are not likely successfully recruiting young animals into the population. Only old turtles have been observed in recent times, but they may live for decades. These adults are probably mating and laying eggs, but the invertebrate prey required by hatchlings and juveniles may not be present in sufficient quantity due to sedimentation and degraded conditions from mining and other activities. If correct, this means that were pollution to the Mulberry Fork reduced, the population of turtles could still recover.

14. I am aware that Black Warrior Riverkeeper has documented several instances of active runoff of sediment-laden water from the Mays Mine No. 5 site into the Mulberry Fork. The mining and mining-related construction activities of Mays Mine No. 5 are therefore causing soil erosion, sediment runoff, and discharges into the Mulberry Fork, which is undoubtedly affecting the threatened population of flattened musk turtles and contributing to the lack of successful recruitment to the population.

15. Alabama coals have been found to be unusually rich in several potentially toxic trace elements (Goldhaber, et al. 2000). Drainage from mine sites has been associated with a variety of acute and chronic effects to aquatic life as well as degradation of aquatic ecosystems and the loss of many sensitive species, like the

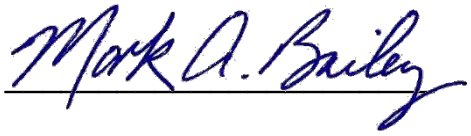
flattened musk turtle. This adds to my concern about the impacts of Mays Mine on the species.

16. In my expert opinion, runoff from the Mays Mine No. 5 is harming the flattened musk turtle population documented just downstream by smothering their habitat and reducing their ability to feed.

17. It is further my expert opinion that the planned future operation of the mine will likely continue to adversely affect and jeopardize this remaining population of flattened musk turtles downstream of the Mays Mine No. 5, potentially resulting in extirpation of the species.

18. Based on my experience with the flattened musk turtle, it is my professional opinion that if the pollution resulting from sources like Mays Mine were ameliorated, the species could again reproduce and recover in the Mulberry Fork, thus contributing to the survival and recovery of the species as a whole.

Pursuant to 28 U.S.C. S 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.



Mark A. Bailey

This 31st day of August, 2021.

Attachment A

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, MOBILE DISTRICT
218 SUMMIT PARKWAY, SUITE 222
HOMEWOOD, ALABAMA 35209

REPLY TO
ATTENTION OF

May 31, 2019

North Branch
Regulatory Division

SUBJECT: Department of the Army Project Number SAM-2009-00470-CTM, Mine No. 5, Mays Mining, Inc.

Mays Mining, Inc.
Attention: Mr. Rodney Mays
345 20th Street West
Jasper, Alabama 35501

Transmitted electronically to rmays@maysmining.com

Dear Mr. Mays:

This is in response to your request for a Department of the Army (DA) jurisdictional determination for property located in Cordova, Walker County, Alabama. More specifically, the site is located within Sections 10, 11, 14 and 15, Township 15 South, Range 6 West and centered at Latitude 33.739602, Longitude -87.147373.

Based on information obtained during our site visit on January 18, 2019, our review of the information and wetland determination data forms your agent furnished, and other desktop information available to our office, we have determined the boundary of waters of the United States (U.S.) to be accurate as shown on the attached delineation boundary figures. For regulatory purposes, the United States Army Corps of Engineers (USACE) defines wetlands as those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Please be advised that this determination reflects current policy and regulation.

Your delineation site was reviewed pursuant to Section 404 of the Clean Water Act. Section 404 of the Clean Water Act requires that a DA permit be obtained for the placement or discharge of dredged and/or fill material into waters of the U.S., including streams and wetlands, prior to conducting the work (33 U.S.C. 1344). If future work proposed at this site includes a discharge or placement of dredged and/or fill material into waters of the U.S., a DA permit is required prior to initiating work.

Attached to this letter is a copy of the Preliminary Jurisdictional Determination (PJD) form for the wetlands and/or tributaries identified on the project site. This PJD treats the wetlands and waters of the U.S. on the site as jurisdictional for the purposes of determining impacts and mitigation requirements. The PJD is a non-binding action and shall remain in effect unless new information or a request for an approved jurisdictional determination supporting a revision is provided to this office. Please note that since this

jurisdictional determination is a preliminary, it is subject to change and therefore is not an appealable action under the Corps of Engineers administrative appeal procedures defined at 33 CFR 331.

The site visit and supporting documentation also revealed areas that are not subject to our Federal permitting authority. The attached approved JD forms describe these areas. If you object to this determination, you may request an administrative appeal under Corps regulations at 33 CFR Part 331. Enclosed you will find a Notification of Administrative Appeal Options and Process and Request for Appeal (RFA) form. If you appeal this determination, you must submit a completed RFA form to the South Atlantic Division Office at the address indicated on the form within 60 days of the date of this letter. It is not necessary to submit an RFA form if you do not object to the determination in this letter.

Please be advised that this approved jurisdictional determination is based on current policy and regulation and is valid for a period of five (5) years from the date of this letter. If after the 5-year period this jurisdictional determination has not been specifically revalidated by the Corps, it shall automatically expire. If the information you have submitted, and on which the Corps has based its determination is later found to be in error, this decision may be revoked.

The statements contained herein do not convey any property rights, or any exclusive privileges and do not authorize any injury to property or obviate the requirements to obtain other local, State or Federal approvals required by law. Nothing in this letter shall be construed as excusing you from compliance with other Federal, State, or local statutes, ordinances, or regulations which may affect this work.

Furthermore, this wetland determination has been conducted to identify the limits of the USACE Clean Water Act jurisdiction for the particular site identified in this request. This determination may not be valid for the wetland conservation provisions of the FSA of 1985, as amended. If the landowner is a U.S. Department of Agriculture (USDA) program participant or anticipates participation in USDA programs, he/she should request a certified wetland determination from the local office of the Natural Resources Conservation Service prior to starting work.

If you intend to sell property that is part of a project that requires DA authorization, it may be subject to the Interstate Land Sales Full Disclosure Act. The Property Report, required by Housing and Urban Development Regulation, must state whether or not a permit for the development has been applied for, issued or denied by the USACE (Part 320.3(h) of Title 33 of the Code of Federal Regulations).

An electronic copy of this letter with attachments is being provided to your consultant, Mr. Zach Wilbanks.

We appreciate your cooperation with the Corps of Engineers' Regulatory Program. Please refer to file number **SAM-2009-00470-CTM** in all future correspondence regarding this project or if you have any questions concerning this determination.

Please contact me by telephone at 205-290-9096 or by e-mail at courtney.m.shea@usace.army.mil should you have any questions. For additional information about our Regulatory Program, visit our web site at http://www.sam.usace.army.mil/Missions/Regulatory.aspx. Please take a moment to complete our customer satisfaction survey located near the bottom of the webpage. Your responses are appreciated and will allow us to improve our services.

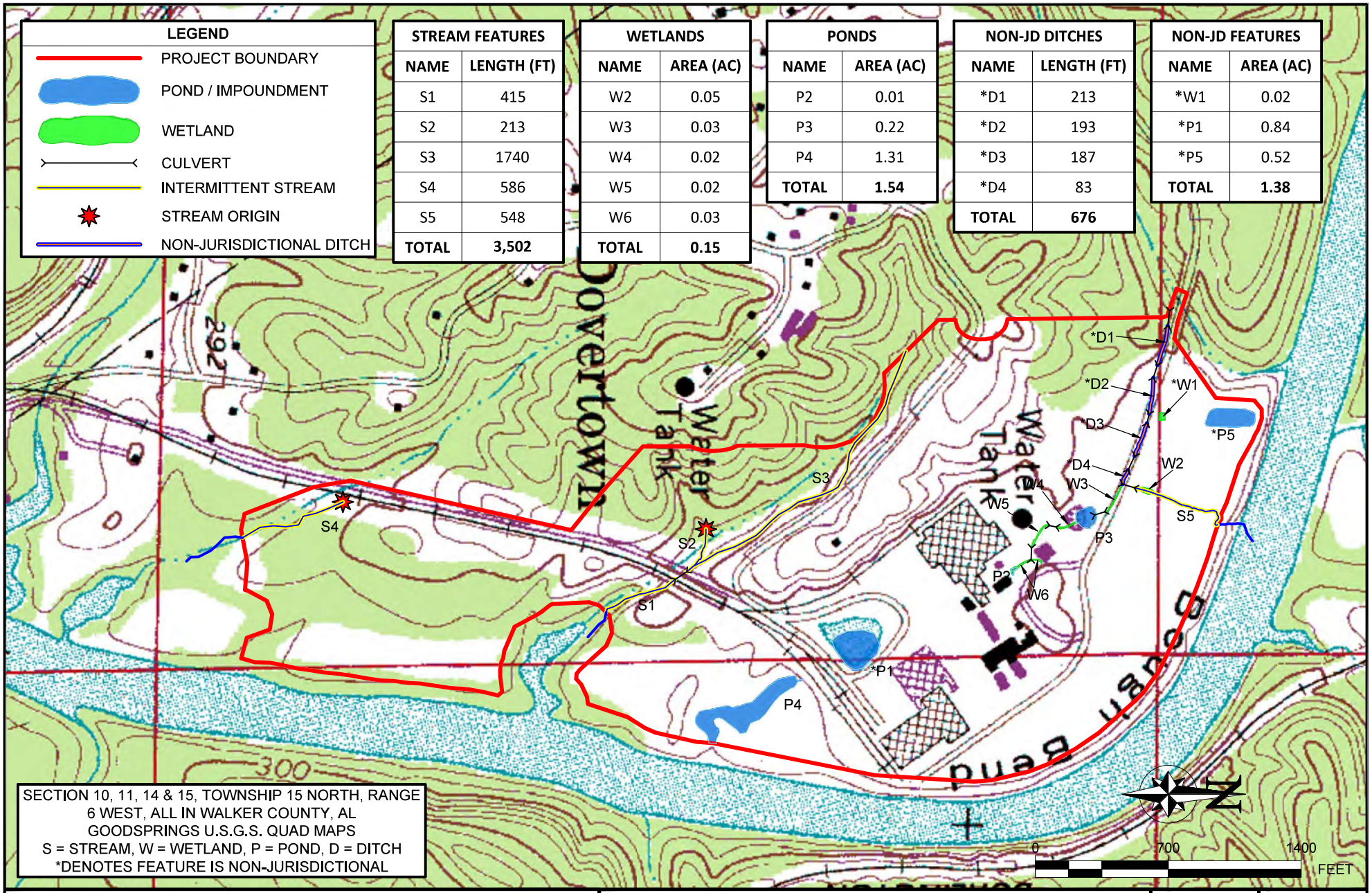
Sincerely,

SHEA.COURTNEY.M.1387610231

Digitally signed by SHEA.COURTNEY.M.1387610231
Date: 2019.05.31 09:25:08 -05'00'

Courtney Shea
Senior Project Manager

Enclosures



LEGEND

- PROJECT BOUNDARY
- POND / IMPOUNDMENT
- WETLAND
- CULVERT
- INTERMITTENT STREAM
- STREAM ORIGIN
- NON-JURISDICTIONAL DITCH

STREAM FEATURES	
NAME	LENGTH (FT)
S1	415
S2	213
S3	1740
S4	586
S5	548
TOTAL	3,502

WETLANDS	
NAME	AREA (AC)
W2	0.05
W3	0.03
W4	0.02
W5	0.02
W6	0.03
TOTAL	0.15

PONDS	
NAME	AREA (AC)
P2	0.01
P3	0.22
P4	1.31
TOTAL	1.54

NON-JD DITCHES	
NAME	LENGTH (FT)
*D1	213
*D2	193
*D3	187
*D4	83
TOTAL	676

NON-JD FEATURES	
NAME	AREA (AC)
*W1	0.02
*P1	0.84
*P5	0.52
TOTAL	1.38

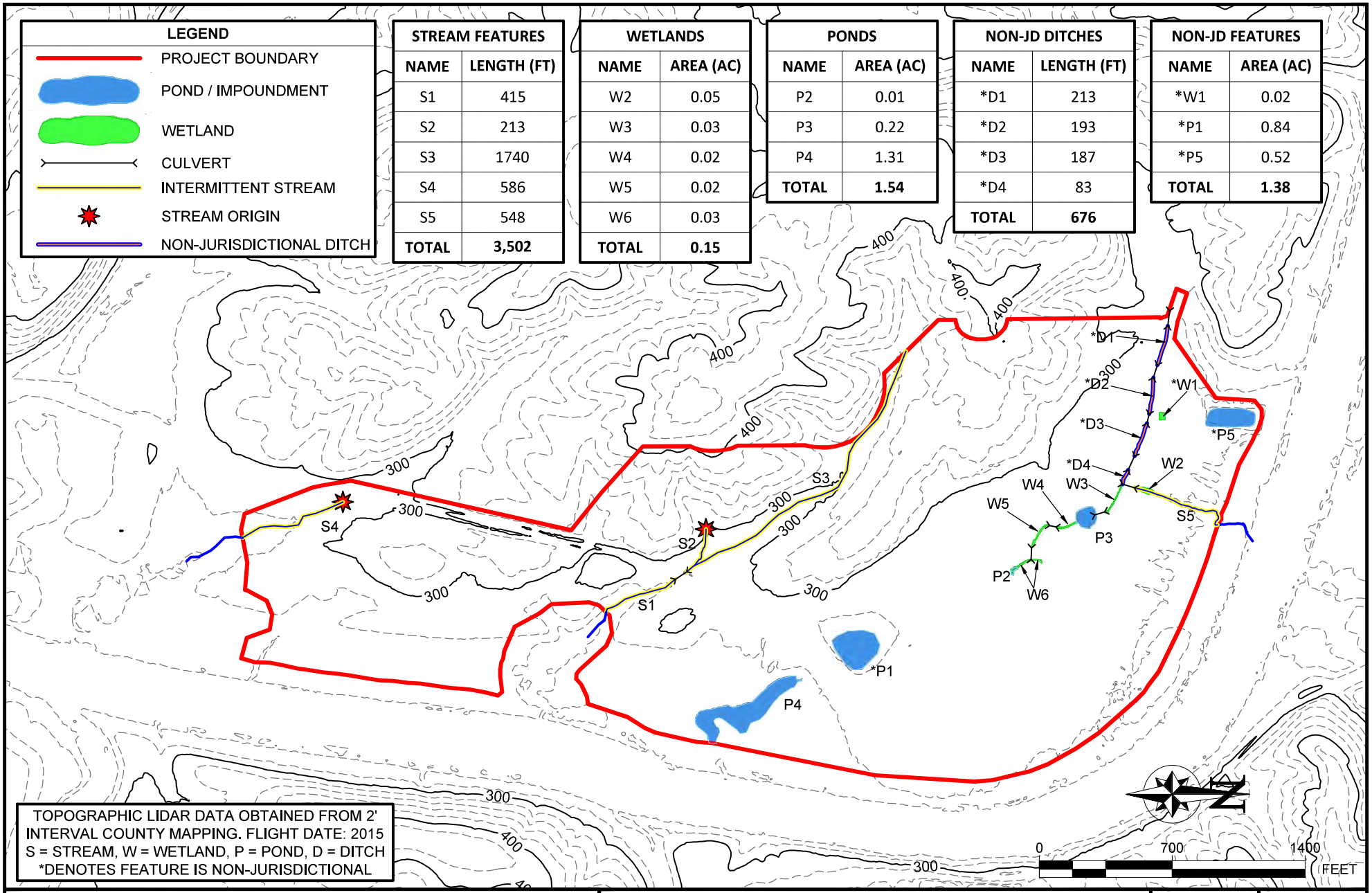
SECTION 10, 11, 14 & 15, TOWNSHIP 15 NORTH, RANGE 6 WEST, ALL IN WALKER COUNTY, AL
GOODSPRINGS U.S.G.S. QUAD MAPS
S = STREAM, W = WETLAND, P = POND, D = DITCH
*DENOTES FEATURE IS NON-JURISDICTIONAL

WILBANKS ENGINEERING
& ENVIRONMENTAL SOLUTIONS, LLC
4117 SKYLINE DR. WARRIOR, AL 35180 (205) 412-3373

FIGURE 10:
JURISDICTIONAL DETERMINATION QUAD MAP

MAYS MINING, INC.
NO. 5 MINE
SAM-2009-00470-CTM

SCALE: 1" = 700'	20' CONTOUR INTERVAL
DATE: 4/18/19	DRAWN BY: J.W.L.



STREAM FEATURES	
NAME	LENGTH (FT)
S1	415
S2	213
S3	1740
S4	586
S5	548
TOTAL	3,502

WETLANDS	
NAME	AREA (AC)
W2	0.05
W3	0.03
W4	0.02
W5	0.02
W6	0.03
TOTAL	0.15

PONDS	
NAME	AREA (AC)
P2	0.01
P3	0.22
P4	1.31
TOTAL	1.54

NON-JD DITCHES	
NAME	LENGTH (FT)
*D1	213
*D2	193
*D3	187
*D4	83
TOTAL	676

NON-JD FEATURES	
NAME	AREA (AC)
*W1	0.02
*P1	0.84
*P5	0.52
TOTAL	1.38

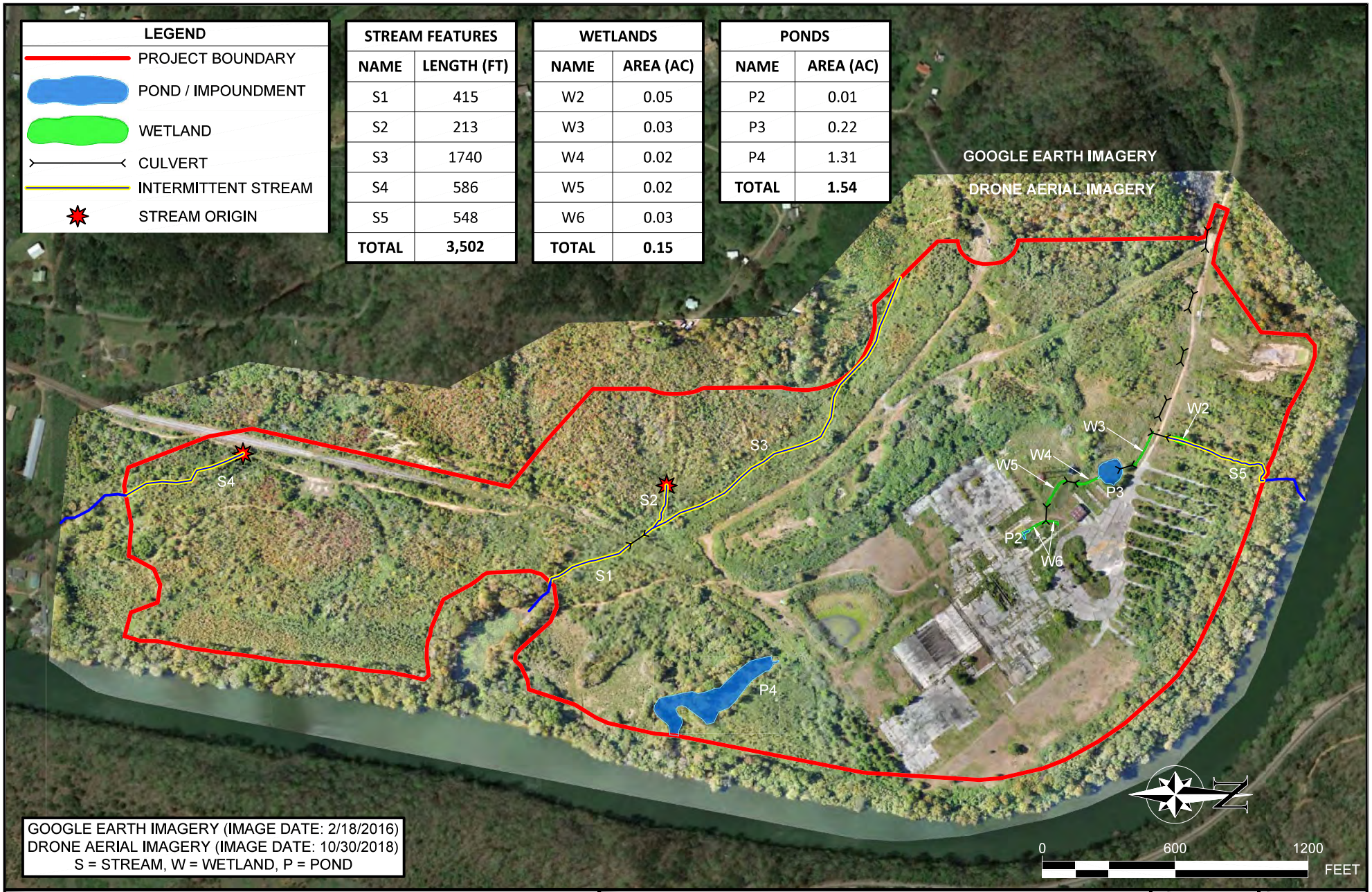
TOPOGRAPHIC LIDAR DATA OBTAINED FROM 2' INTERVAL COUNTY MAPPING. FLIGHT DATE: 2015
S = STREAM, W = WETLAND, P = POND, D = DITCH
*DENOTES FEATURE IS NON-JURISDICTIONAL

WILBANKS ENGINEERING
& ENVIRONMENTAL SOLUTIONS, LLC
4117 SKYLINE DR. WARRIOR, AL 35180 (205) 412-3373

FIGURE 11:
JURISDICTIONAL DETERMINATION TOPO MAP

MAYS MINING, INC.
NO. 5 MINE
SAM-2009-00470-CTM

SCALE: 1" = 700'	20' CONTOUR INTERVAL
DATE: 4/18/19	DRAWN BY: J.W.L.



LEGEND

- PROJECT BOUNDARY
- POND / IMPOUNDMENT
- WETLAND
- CULVERT
- INTERMITTENT STREAM
- STREAM ORIGIN

STREAM FEATURES	
NAME	LENGTH (FT)
S1	415
S2	213
S3	1740
S4	586
S5	548
TOTAL	3,502

WETLANDS	
NAME	AREA (AC)
W2	0.05
W3	0.03
W4	0.02
W5	0.02
W6	0.03
TOTAL	0.15

PONDS	
NAME	AREA (AC)
P2	0.01
P3	0.22
P4	1.31
TOTAL	1.54

WILBANKS ENGINEERING
& ENVIRONMENTAL SOLUTIONS, LLC
4117 SKYLINE DR. WARRIOR, AL 35180 (205) 412-3373

FIGURE 12:
JURISDICTIONAL FEATURES MAP

MAYS MINING, INC.
NO. 5 MINE
SAM-2009-00470-CTM

SCALE: 1" = 600'	---
DATE: 4/18/19	DRAWN BY: J.W.L.

Appendix 2 - PRELIMINARY JURISDICTIONAL DETERMINATION (PJD) FORM

BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR PJD: 5/31/19

B. NAME AND ADDRESS OF PERSON REQUESTING PJD: Rodney Mays, Mays Mining, Inc., 345 20th Street West, Jasper, AL 35501

C. DISTRICT OFFICE, FILE NAME, AND NUMBER: CESAM-RD-N, Mine No. 5, SAM-2009-00470-CTM

D. PROJECT LOCATION(S) AND BACKGROUND INFORMATION:
(USE THE TABLE BELOW TO DOCUMENT MULTIPLE AQUATIC RESOURCES AND/OR AQUATIC RESOURCES AT DIFFERENT SITES)

State: Alabama County/parish/borough: Walker City: Cordova

Center coordinates of site (lat/long in degree decimal format):

Lat.: 33.739602 Long.: -87.147373

Universal Transverse Mercator:

Name of nearest waterbody: Mulberry Fork

E. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

☐ Office (Desk) Determination. Date:

■ Field Determination. Date(s): 1/18/19 (Corps)

TABLE OF AQUATIC RESOURCES IN REVIEW AREA WHICH "MAY BE" SUBJECT TO REGULATORY JURISDICTION.

Site number	Latitude (decimal degrees)	Longitude (decimal degrees)	Estimated amount of aquatic resource in review area (acreage and linear feet, if applicable)	Type of aquatic resource (i.e., wetland vs. non-wetland waters)	Geographic authority to which the aquatic resource "may be" subject (i.e., Section 404 or Section 10/404)
		SEE	ATTACHED	TABLE	

RGL 16-01: TABLE OF AQUATIC RESOURCES IN REVIEW AREA WHICH "MAY BE" SUBJECT TO REGULATORY JURISDICTION					
Site number	**Latitude (decimal degrees)**	**Longitude (decimal degrees)**	**Estimated amount of aquatic resource in review area (acreage and linear feet, if applicable)**	**Type of aquatic resource (i.e., wetland vs. non-wetland waters)**	**Geographic authority to which the aquatic resource "may be" subject (i.e., Section 404 or Section 10/404)**
P2	33.74235	-87.14725	.01 ACRES	palustrine unconsolidated bottom	Section 404
P3	33.74341	-87.14818	.22 ACRES	palustrine unconsolidated bottom	Section 404
P4	33.73845	-87.14484	1.31 ACRES	palustrine unconsolidated bottom	Section 404
S1	33.73746	-87.14711	415 FEET	riverine intermittent	Section 404
S2	33.73901	-87.14798	213 FEET	riverine intermittent	Section 404
S3	33.7408	-87.15106	1740 FEET	riverine intermittent	Section 404
S4	33.73264	-87.14844	586 FEET	riverine intermittent	Section 404
S5	33.7441	-87.14869	548 FEET	riverine intermittent	Section 404
W2	33.74425	-87.14865	.05 ACRES	palustrine emergent	Section 404
W3	33.74382	-87.1485	.03 ACRES	palustrine emergent	Section 404
W4	33.74314	-87.14802	.02 ACRES	palustrine emergent	Section 404
W5	33.74273	-87.14792	.02 ACRES	palustrine emergent	Section 404
W6	33.74253	-87.14741	.03 ACRES	palustrine emergent	Section 404

1) The Corps of Engineers believes that there may be jurisdictional aquatic resources in the review area, and the requestor of this PJD is hereby advised of his or her option to request and obtain an approved JD (AJD) for that review area based on an informed decision after having discussed the various types of JDs and their characteristics and circumstances when they may be appropriate.

2) In any circumstance where a permit applicant obtains an individual permit, or a Nationwide General Permit (NWP) or other general permit verification requiring "pre-construction notification" (PCN), or requests verification for a non-reporting NWP or other general permit, and the permit applicant has not requested an AJD for the activity, the permit applicant is hereby made aware that: (1) the permit applicant has elected to seek a permit authorization based on a PJD, which does not make an official determination of jurisdictional aquatic resources; (2) the applicant has the option to request an AJD before accepting the terms and conditions of the permit authorization, and that basing a permit authorization on an AJD could possibly result in less compensatory mitigation being required or different special conditions; (3) the applicant has the right to request an individual permit rather than accepting the terms and conditions of the NWP or other general permit authorization; (4) the applicant can accept a permit authorization and thereby agree to comply with all the terms and conditions of that permit, including whatever mitigation requirements the Corps has determined to be necessary; (5) undertaking any activity in reliance upon the subject permit authorization without requesting an AJD constitutes the applicant's acceptance of the use of the PJD; (6) accepting a permit authorization (e.g., signing a proffered individual permit) or undertaking any activity in reliance on any form of Corps permit authorization based on a PJD constitutes agreement that all aquatic resources in the review area affected in any way by that activity will be treated as jurisdictional, and waives any challenge to such jurisdiction in any administrative or judicial compliance or enforcement action, or in any administrative appeal or in any Federal court; and (7) whether the applicant elects to use either an AJD or a PJD, the JD will be processed as soon as practicable. Further, an AJD, a proffered individual permit (and all terms and conditions contained therein), or individual permit denial can be administratively appealed pursuant to 33 C.F.R. Part 331. If, during an administrative appeal, it becomes appropriate to make an official determination whether geographic jurisdiction exists over aquatic resources in the review area, or to provide an official delineation of jurisdictional aquatic resources in the review area, the Corps will provide an AJD to accomplish that result, as soon as is practicable. This PJD finds that there *"may be"* waters of the U.S. and/or that there *"may be"* navigable waters of the U.S. on the subject review area, and identifies all aquatic features in the review area that could be affected by the proposed activity, based on the following information:

SUPPORTING DATA. Data reviewed for PJD (check all that apply)

Checked items should be included in subject file. Appropriately reference sources below where indicated for all checked items:

■ Maps, plans, plots or plat submitted by or on behalf of the PJD requestor: Figures in Wilbanks Engineering submittal dated 4/16/19: delineation maps, USGS topo, FEMA flood map, NWI, soil survey, aerial.

■ Data sheets prepared/submitted by or on behalf of the PJD requestor.
☐ Office concurs with data sheets/delineation report.
Office does not concur with data sheets/delineation report. Rationale:_____.

☐ Data sheets prepared by the Corps:_____.

☐ Corps navigable waters' study:_____.

☐ U.S. Geological Survey Hydrologic Atlas:_____.
☐ USGS NHD data.
☐ USGS 8 and 12 digit HUC maps.

■ U.S. Geological Survey map(s). Cite scale & quad name: Goodsprings Quad.

■ Natural Resources Conservation Service Soil Survey. Citation: websoil survey.

■ National wetlands inventory map(s). Cite name: USFWS NWI map.

☐ State/local wetland inventory map(s):_____.

■ FEMA/FIRM maps:01127C0485E and 01127C0481E.

☐ 100-year Floodplain Elevation is:_____.(National Geodetic Vertical Datum of 1929)

■ Photographs: ■ Aerial (Name & Date):Google Earth 2/18/19; drone 10/30/18_____.
or ■ Other (Name & Date):Site photos agent provided Oct. 2018 and March 2019.

☐ Previous determination(s). File no. and date of response letter:_____.

☐ Other information (please specify):_____.

IMPORTANT NOTE: The information recorded on this form has not necessarily been verified by the Corps and should not be relied upon for later jurisdictional determinations.

SHEA.COURTNEY.M.1387610231 Digitally signed by SHEA.COURTNEY.M.1387610231 Date: 2019.05.31 09:25:38 -05'00'

Signature and date of Regulatory staff member completing PJD	Signature and date of person requesting PJD (REQUIRED, unless obtaining the signature is impracticable)[1]

[1] Districts may establish timeframes for requestor to return signed PJD forms. If the requestor does not respond within the established time frame, the district may presume concurrence and no additional follow up is necessary prior to finalizing an action.

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 4/29/19

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CESAM-RD-N, Mine No. 5, Mays Mining, Inc., SAM-2009-00470-CTM

C. PROJECT LOCATION AND BACKGROUND INFORMATION: The review area for this AJD form encompasses only the area identified as W1 (Wetland 1) identified in the delineation report and figures.

State:Alabama County/parish/borough: Walker City: Cordova
Center coordinates of site (lat/long in degree decimal format): Lat. 33.739602° **Pick List**, Long. -87.14737° **Pick List**.
Universal Transverse Mercator:
Name of nearest waterbody: Mulberry Fork
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows:
Name of watershed or Hydrologic Unit Code (HUC): Mulberry Fork 03160109

- ☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
- ☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc…) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- ☒ Office (Desk) Determination. Date: 4/29/19
- ☒ Field Determination. Date(s): 10/30/18, 12/19/18 (agent); January 18, 2019 (Corps)

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]

- ☐ Waters subject to the ebb and flow of the tide.
- ☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain: .

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are no** "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. **Waters of the U.S.**
   a. **Indicate presence of waters of U.S. in review area (check all that apply):** [1]
   - ☐ TNWs, including territorial seas
   - ☐ Wetlands adjacent to TNWs
   - ☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs
   - ☐ Non-RPWs that flow directly or indirectly into TNWs
   - ☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
   - ☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
   - ☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
   - ☐ Impoundments of jurisdictional waters
   - ☐ Isolated (interstate or intrastate) waters, including isolated wetlands

   b. **Identify (estimate) size of waters of the U.S. in the review area:**
   Non-wetland waters: linear feet: width (ft) and/or acres.
   Wetlands: acres.

   c. **Limits (boundaries) of jurisdiction** based on: **Pick List**
   Elevation of established OHWM (if known): .

2. **Non-regulated waters/wetlands (check if applicable):**[3]
   - ☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: **W1 is located at 33.744501, -87.149931 in the northern portion of the site. W1 encompasses 0.02 acre and is a**

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.
[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
[3] Supporting documentation is presented in Section III.F.

palustrine emergent wetland. W1 formed in a small depression along an existing dirt access road. W1 is isolated and is not connected hydrologically to a downstream TNW. It is approximately 660 feet from Mulberry Fork, a designated Section 10 water. W1 is not located within the 100 year floodplain. The wetland has no nexus to interstate or foreign commerce. It is not known to be used by interstate or foregn travelers for recreation or other purposes. It does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, and is not known to be used for industrial purposes by industries in interstate commerce. For these reasons, W1 is a non-jurisdictional feature.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW
Identify TNW: .

Summarize rationale supporting determination: .

2. Wetland adjacent to TNW
Summarize rationale supporting conclusion that wetland is "adjacent": .

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:
Watershed size: **Pick List**
Drainage area: **Pick List**
Average annual rainfall: inches
Average annual snowfall: inches

(ii) Physical Characteristics:
(a) Relationship with TNW:
☐ Tributary flows directly into TNW.
☐ Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.
Project waters are **Pick List** river miles from RPW.
Project waters are **Pick List** aerial (straight) miles from TNW.
Project waters are **Pick List** aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain: .

Identify flow route to TNW[5]: .
Tributary stream order, if known: .

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[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.
[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: ☐ Natural
☐ Artificial (man-made). Explain: .
☐ Manipulated (man-altered). Explain: .

Tributary properties with respect to top of bank (estimate):
Average width: feet
Average depth: feet
Average side slopes: **Pick List.**

Primary tributary substrate composition (check all that apply):

☐ Silts	☐ Sands	☐ Concrete
☐ Cobbles	☐ Gravel	☐ Muck
☐ Bedrock	☐ Vegetation. Type/% cover:	
☐ Other. Explain: .		

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: .
Presence of run/riffle/pool complexes. Explain: .
Tributary geometry: **Pick List**
Tributary gradient (approximate average slope): %

(c) Flow:
Tributary provides for: **Pick List**
Estimate average number of flow events in review area/year: **Pick List**
Describe flow regime: .
Other information on duration and volume: .

Surface flow is: **Pick List.** Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .
☐ Dye (or other) test performed: .

Tributary has (check all that apply):
☐ Bed and banks
☐ OHWM[6] (check all indicators that apply):

☐ clear, natural line impressed on the bank	☐ the presence of litter and debris
☐ changes in the character of soil	☐ destruction of terrestrial vegetation
☐ shelving	☐ the presence of wrack line
☐ vegetation matted down, bent, or absent	☐ sediment sorting
☐ leaf litter disturbed or washed away	☐ scour
☐ sediment deposition	☐ multiple observed or predicted flow events
☐ water staining	☐ abrupt change in plant community
☐ other (list):	

☐ Discontinuous OHWM.[7] Explain: .

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

☐ High Tide Line indicated by:	☐ Mean High Water Mark indicated by:
☐ oil or scum line along shore objects	☐ survey to available datum;
☐ fine shell or debris deposits (foreshore)	☐ physical markings;
☐ physical markings/characteristics	☐ vegetation lines/changes in vegetation types.
☐ tidal gauges	
☐ other (list):	

(iii) Chemical Characteristics:
Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).
Explain: .
Identify specific pollutants, if known: .

[6]A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.
[7]Ibid.

(iv) Biological Characteristics. Channel supports (check all that apply):

☐ Riparian corridor. Characteristics (type, average width): .
☐ Wetland fringe. Characteristics: .
☐ Habitat for:
  ☐ Federally Listed species. Explain findings: .
  ☐ Fish/spawn areas. Explain findings: .
  ☐ Other environmentally-sensitive species. Explain findings: .
  ☐ Aquatic/wildlife diversity. Explain findings: .

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:
Properties:
Wetland size: acres
Wetland type. Explain: .
Wetland quality. Explain: .
Project wetlands cross or serve as state boundaries. Explain: .

(b) General Flow Relationship with Non-TNW:
Flow is: **Pick List**. Explain: .

Surface flow is**: Pick List**
Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .
☐ Dye (or other) test performed: .

(c) Wetland Adjacency Determination with Non-TNW:
☐ Directly abutting
☐ Not directly abutting
  ☐ Discrete wetland hydrologic connection. Explain: .
  ☐ Ecological connection. Explain: .
  ☐ Separated by berm/barrier. Explain: .

(d) Proximity (Relationship) to TNW
Project wetlands are **Pick List** river miles from TNW.
Project waters are **Pick List** aerial (straight) miles from TNW.
Flow is from: **Pick List.**
Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) Chemical Characteristics:

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: .
Identify specific pollutants, if known: .

(iii) Biological Characteristics. Wetland supports (check all that apply):

☐ Riparian buffer. Characteristics (type, average width): .
☐ Vegetation type/percent cover. Explain: .
☐ Habitat for:
  ☐ Federally Listed species. Explain findings: .
  ☐ Fish/spawn areas. Explain findings: .
  ☐ Other environmentally-sensitive species. Explain findings: .
  ☐ Aquatic/wildlife diversity. Explain findings: .

3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: **Pick List**
Approximately ( ) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

Summarize overall biological, chemical and physical functions being performed: .

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: .

2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
   - ☐ TNWs: linear feet width (ft), Or, acres.
   - ☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**
   - ☐ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: .
   - ☐ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: .

Provide estimates for jurisdictional waters in the review area (check all that apply):
☐ Tributary waters: linear feet width (ft).
☐ Other non-wetland waters: acres.
Identify type(s) of waters: .

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**
☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):
☐ Tributary waters: linear feet width (ft).
☐ Other non-wetland waters: acres.
Identify type(s) of waters: .

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**
☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

☐ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**
☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**
☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.[9]**
As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.
☐ Demonstrate that impoundment was created from "waters of the U.S.," or
☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]
☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.
☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
☐ which are or could be used for industrial purposes by industries in interstate commerce.
☐ Interstate isolated waters. Explain: .
☐ Other factors. Explain: .

Identify water body and summarize rationale supporting determination: .

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[8] See Footnote # 3.
[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.
[10] Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.*

Provide estimates for jurisdictional waters in the review area (check all that apply):
☐ Tributary waters: linear feet width (ft).
☐ Other non-wetland waters: acres.
Identify type(s) of waters: .
☐ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):
☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
☒ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
☐ Prior to the Jan 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
☐ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: .
☒ Other: (explain, if not covered above): **W1 is located at 33.744501, -87.149931 in the northern portion of the site. W1 encompasses 0.02 acre and is a palustrine emergent wetland. W1 formed in a small depression along an existing dirt access road. W1 is isolated and is not connected hydrologically to a downstream TNW. It is approximately 660 feet from Mulberry Fork, a designated Section 10 water. W1 is not located within the 100 year floodplain. The wetland has no nexus to interstate or foreign commerce. It is not known to be used by interstate or foregn travelers for recreation or other purposes. It does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, and is not known to be used for industrial purposes by industries in interstate commerce. For these reasons, W1 is an isolated, non-jurisdictional feature.**

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):
☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
☐ Lakes/ponds: acres.
☐ Other non-wetland waters: acres. List type of aquatic resource: .
☐ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):
☐ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
☐ Lakes/ponds: acres.
☐ Other non-wetland waters: acres. List type of aquatic resource: .
☐ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):
☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:Figures in Wilbanks Engineering revised submittal dated April 16, 2019: location map, HUC map, USGS topo map, aerial map, FEMA flood map, NWI map, NRCS soil survey map, JD aerial map, wetland detail maps,JD quad map, JD topo map, JD aerial.
☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
☒ Office concurs with data sheets/delineation report.
☐ Office does not concur with data sheets/delineation report.
☐ Data sheets prepared by the Corps: .
☐ Corps navigable waters' study: .
☒ U.S. Geological Survey Hydrologic Atlas: .
☐ USGS NHD data.
☒ USGS 8 and 12 digit HUC maps.
☒ U.S. Geological Survey map(s). Cite scale & quad name:1:24,000, Goodspring, AL.
☒ USDA Natural Resources Conservation Service Soil Survey. Citation:NRCS websoil survey.
☒ National wetlands inventory map(s). Cite name:UFWS NWI map.
☐ State/Local wetland inventory map(s): .
☐ FEMA/FIRM maps: .
☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
☒ Photographs: ☒ Aerial (Name & Date):Google Earth 4/3/18.
or ☒ Other (Name & Date):site photos from agent: 10/30/18 and 12/19/18.
☐ Previous determination(s). File no. and date of response letter: .
☐ Applicable/supporting case law: .

☐ Applicable/supporting scientific literature: .
☐ Other information (please specify): .

B. ADDITIONAL COMMENTS TO SUPPORT JD: .

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 5/31/19

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CESAM-RD-N, Mine No. 5, Mays Mining, Inc., SAM-2009-00470-CTM

C. PROJECT LOCATION AND BACKGROUND INFORMATION: The review area for this AJD form encompasses only the areas identified as P1, P5, D1, D2, D3, and D4.

State:Alabama County/parish/borough: Walker City: Cordova
Center coordinates of site (lat/long in degree decimal format): Lat. 33.739602° **Pick List**, Long. -87.14737° **Pick List**.
Universal Transverse Mercator:
Name of nearest waterbody: Mulberry Fork
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows:
Name of watershed or Hydrologic Unit Code (HUC): Mulberry Fork 03160109

- ☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
- ☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc…) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):

- ☒ Office (Desk) Determination. Date: 5/31/19
- ☒ Field Determination. Date(s): 10/30/18, 12/19/18 (agent); January 18, 2019 (Corps)

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There **Are no** "*navigable waters of the U.S.*" within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]

- ☐ Waters subject to the ebb and flow of the tide.
- ☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Explain: .

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There **Are no** "*waters of the U.S.*" within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. **Waters of the U.S.**
   a. **Indicate presence of waters of U.S. in review area (check all that apply):** [1]
   - ☐ TNWs, including territorial seas
   - ☐ Wetlands adjacent to TNWs
   - ☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs
   - ☐ Non-RPWs that flow directly or indirectly into TNWs
   - ☐ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
   - ☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
   - ☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
   - ☐ Impoundments of jurisdictional waters
   - ☐ Isolated (interstate or intrastate) waters, including isolated wetlands

   b. **Identify (estimate) size of waters of the U.S. in the review area:**
   Non-wetland waters: linear feet: width (ft) and/or acres.
   Wetlands: acres.

   c. **Limits (boundaries) of jurisdiction** based on: **Pick List**
   Elevation of established OHWM (if known): .

2. **Non-regulated waters/wetlands (check if applicable):**[3]
   - ☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional. Explain: **The review area for this AJD form encompasses only the areas identified as P1 (0.84 acre), P5 (0.52 acres), D1**

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.
[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
[3] Supporting documentation is presented in Section III.F.

(213 feet), D2 (193 feet), D3 (187 feet), and D4 (83 feet). D1, D2, D3, and D4 are ditches that were created in uplands, drain only uplands, and carry less than a relatively permanent flow of water; therefore, they are not considered waters of the U.S. in accordance with the Rapanos Guidance.

P1 was created in uplands. There is no downstream connection from this area to waters of the U.S. Pursuant to the preamble to 33 CFR Part 328 (51 FR 41206 November 13, 1986), this type of water is not considered to be waters of the U.S. See preamble to 328.3 Definitions (e), which states the Corps generally does not consider the following to be waters of the U.S. : "Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (33 CFR 328.3(a))." This waterbody does not support a link to interstate or foreign commerce. It is not known to be used by interstate or foreign travelers for recreation or other purposes. It does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, and is not known to be used for industrial purposes by industries in interstate commerce. For all of these reasons, P1 does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a).

P5 was created as a permitted NPDES sediment basin (Permit number AL0079936) designed to meet Clean Water Act requirements. Pursuant to 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the U. S. See 328.3(a), "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States." Therefore, P5 is not a water of the U.S.

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SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. TNW
Identify TNW: .

Summarize rationale supporting determination: .

2. Wetland adjacent to TNW
Summarize rationale supporting conclusion that wetland is "adjacent": .

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. Characteristics of non-TNWs that flow directly or indirectly into TNW

(i) General Area Conditions:
Watershed size: **Pick List**
Drainage area: **Pick List**
Average annual rainfall: inches
Average annual snowfall: inches

(ii) Physical Characteristics:
(a) Relationship with TNW:
☐ Tributary flows directly into TNW.
☐ Tributary flows through **Pick List** tributaries before entering TNW.

Project waters are **Pick List** river miles from TNW.
Project waters are **Pick List** river miles from RPW.
Project waters are **Pick List** aerial (straight) miles from TNW.
Project waters are **Pick List** aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain: .

Identify flow route to TNW[5]: .
Tributary stream order, if known: .

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[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.
[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is: ☐ Natural
☐ Artificial (man-made). Explain: .
☐ Manipulated (man-altered). Explain: .

Tributary properties with respect to top of bank (estimate):
Average width: feet
Average depth: feet
Average side slopes: **Pick List.**

Primary tributary substrate composition (check all that apply):

☐ Silts	☐ Sands	☐ Concrete
☐ Cobbles	☐ Gravel	☐ Muck
☐ Bedrock	☐ Vegetation. Type/% cover:	
☐ Other. Explain: .		

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain: .
Presence of run/riffle/pool complexes. Explain: .
Tributary geometry: **Pick List**
Tributary gradient (approximate average slope): %

(c) Flow:
Tributary provides for: **Pick List**
Estimate average number of flow events in review area/year: **Pick List**
Describe flow regime: .
Other information on duration and volume: .

Surface flow is: **Pick List.** Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .
☐ Dye (or other) test performed: .

Tributary has (check all that apply):
☐ Bed and banks
☐ OHWM[6] (check all indicators that apply):

☐ clear, natural line impressed on the bank	☐ the presence of litter and debris
☐ changes in the character of soil	☐ destruction of terrestrial vegetation
☐ shelving	☐ the presence of wrack line
☐ vegetation matted down, bent, or absent	☐ sediment sorting
☐ leaf litter disturbed or washed away	☐ scour
☐ sediment deposition	☐ multiple observed or predicted flow events
☐ water staining	☐ abrupt change in plant community
☐ other (list):	

☐ Discontinuous OHWM.[7] Explain: .

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):

☐ High Tide Line indicated by:	☐ Mean High Water Mark indicated by:
☐ oil or scum line along shore objects	☐ survey to available datum;
☐ fine shell or debris deposits (foreshore)	☐ physical markings;
☐ physical markings/characteristics	☐ vegetation lines/changes in vegetation types.
☐ tidal gauges	
☐ other (list):	

(iii) Chemical Characteristics:
Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).
Explain: .
Identify specific pollutants, if known: .

[6]A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.
[7]Ibid.

(iv) Biological Characteristics. Channel supports (check all that apply):

☐ Riparian corridor. Characteristics (type, average width): .
☐ Wetland fringe. Characteristics: .
☐ Habitat for:
  ☐ Federally Listed species. Explain findings: .
  ☐ Fish/spawn areas. Explain findings: .
  ☐ Other environmentally-sensitive species. Explain findings: .
  ☐ Aquatic/wildlife diversity. Explain findings: .

2. Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW

(i) Physical Characteristics:

(a) General Wetland Characteristics:
Properties:
Wetland size: acres
Wetland type. Explain: .
Wetland quality. Explain: .
Project wetlands cross or serve as state boundaries. Explain: .

(b) General Flow Relationship with Non-TNW:
Flow is: **Pick List**. Explain: .

Surface flow is**: Pick List**
Characteristics: .

Subsurface flow: **Pick List**. Explain findings: .
☐ Dye (or other) test performed: .

(c) Wetland Adjacency Determination with Non-TNW:
☐ Directly abutting
☐ Not directly abutting
  ☐ Discrete wetland hydrologic connection. Explain: .
  ☐ Ecological connection. Explain: .
  ☐ Separated by berm/barrier. Explain: .

(d) Proximity (Relationship) to TNW
Project wetlands are **Pick List** river miles from TNW.
Project waters are **Pick List** aerial (straight) miles from TNW.
Flow is from: **Pick List.**
Estimate approximate location of wetland as within the **Pick List** floodplain.

(ii) Chemical Characteristics:

Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain: .
Identify specific pollutants, if known: .

(iii) Biological Characteristics. Wetland supports (check all that apply):

☐ Riparian buffer. Characteristics (type, average width): .
☐ Vegetation type/percent cover. Explain: .
☐ Habitat for:
  ☐ Federally Listed species. Explain findings: .
  ☐ Fish/spawn areas. Explain findings: .
  ☐ Other environmentally-sensitive species. Explain findings: .
  ☐ Aquatic/wildlife diversity. Explain findings: .

3. Characteristics of all wetlands adjacent to the tributary (if any)

All wetland(s) being considered in the cumulative analysis: **Pick List**
Approximately ( ) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

Summarize overall biological, chemical and physical functions being performed: .

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D: .

2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D: .

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
   - ☐ TNWs: linear feet width (ft), Or, acres.
   - ☐ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**
   - ☐ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial: .
   - ☐ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally: .

Provide estimates for jurisdictional waters in the review area (check all that apply):
☐ Tributary waters: linear feet width (ft).
☐ Other non-wetland waters: acres.
Identify type(s) of waters: .

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**
☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional waters within the review area (check all that apply):
☐ Tributary waters: linear feet width (ft).
☐ Other non-wetland waters: acres.
Identify type(s) of waters: **.**

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**
☐ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
☐ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: **.**

☐ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: .

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**
☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**
☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.[9]**
As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.
☐ Demonstrate that impoundment was created from "waters of the U.S.," or
☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]
☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.
☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
☐ which are or could be used for industrial purposes by industries in interstate commerce.
☐ Interstate isolated waters. Explain: .
☐ Other factors. Explain: .

Identify water body and summarize rationale supporting determination: .

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[8]See Footnote # 3.
[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.
[10] Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.*

Provide estimates for jurisdictional waters in the review area (check all that apply):
☐ Tributary waters: linear feet width (ft).
☐ Other non-wetland waters: acres.
Identify type(s) of waters: .
☐ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):
☐ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
☒ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
☐ Prior to the Jan 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
☐ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain: .
☒ Other: (explain, if not covered above): **D1, D2, D3, and D4 are ditches that were created in uplands, drain only uplands, and carry less than a relatively permanent flow of water; therefore, they are not considered waters of the U.S. in accordance with the Rapanos Guidance.**

P1 was created in uplands. There is no downstream connection from this area to waters of the U.S. Pursuant to the preamble to 33 CFR Part 328 (51 FR 41206 November 13, 1986), this type of water is not considered to be waters of the U.S. See preamble to 328.3 Definitions (e), which states the Corps generally does not consider the following to be waters of the U.S. : "Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States (33 CFR 328.3(a))." This waterbody does not support a link to interstate or foreign commerce. It is not known to be used by interstate or foreign travelers for recreation or other purposes. It does not produce fish or shellfish that could be taken and sold in interstate or foreign commerce, and is not known to be used for industrial purposes by industries in interstate commerce. For all of these reasons, P1 does not meet the definition of waters of the U.S. as defined by 33 CFR Part 328.3(a).

P5 was created as a permitted NPDES sediment basin (Permit number AL0079936) designed to meet Clean Water Act requirements. Pursuant to 33 CFR Part 328 (51 FR 41206 November 13, 1986) these types of waters are not considered to be waters of the U. S. See 328.3(a), "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.".

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):
☐ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
☐ Lakes/ponds: acres.
☐ Other non-wetland waters: acres. List type of aquatic resource: .
☐ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):
☐ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
☐ Lakes/ponds: acres.
☐ Other non-wetland waters: acres. List type of aquatic resource: .
☐ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):
☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant:Figures in Wilbanks Engineering revised submittal dated April 16, 2019: location map, HUC map, USGS topo map, aerial map, FEMA flood map, NWI map, NRCS soil survey map, JD aerial map, wetland detail maps,JD quad map, JD topo map, JD aerial.
☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
☒ Office concurs with data sheets/delineation report.
☐ Office does not concur with data sheets/delineation report.
☐ Data sheets prepared by the Corps: .
☐ Corps navigable waters' study: .

- ☒ U.S. Geological Survey Hydrologic Atlas: .
  - ☐ USGS NHD data.
  - ☒ USGS 8 and 12 digit HUC maps.
- ☒ U.S. Geological Survey map(s). Cite scale & quad name:1:24,000, Goodspring, AL.
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation:NRCS websoil survey.
- ☒ National wetlands inventory map(s). Cite name:UFWS NWI map.
- ☐ State/Local wetland inventory map(s): .
- ☒ FEMA/FIRM maps:01127C0485E & 01127C0481E..
- ☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- ☒ Photographs: ☒ Aerial (Name & Date):Google Earth 4/3/18.
  or ☒ Other (Name & Date):site photos from agent: 10/30/18 and 12/19/18.
- ☐ Previous determination(s). File no. and date of response letter: .
- ☐ Applicable/supporting case law: .
- ☐ Applicable/supporting scientific literature: .
- ☐ Other information (please specify): .

B. ADDITIONAL COMMENTS TO SUPPORT JD: .

NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Mays Mining, Inc.	File Number: SAM-2009-00470-CTM	Date: 5/31/19
Attached is:		See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
	PERMIT DENIAL	C
X	APPROVED JURISDICTIONAL DETERMINATION	D
X	PRELIMINARY JURISDICTIONAL DETERMINATION	E

SECTION I - The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at http://www.usace.army.mil/CECW/Pages/reg_materials.aspx or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit.

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- OBJECT: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Your objections must be received by the district engineer within 60 days of the date of this notice, or you will forfeit your right to appeal the permit in the future. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.
- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C: PERMIT DENIAL: You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

D: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information.

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice, means that you accept the approved JD in its entirety, and waive all rights to appeal the approved JD.
- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: PRELIMINARY JURISDICTIONAL DETERMINATION: You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also you may provide new information for further consideration by the Corps to reevaluate the JD.

SECTION II - REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

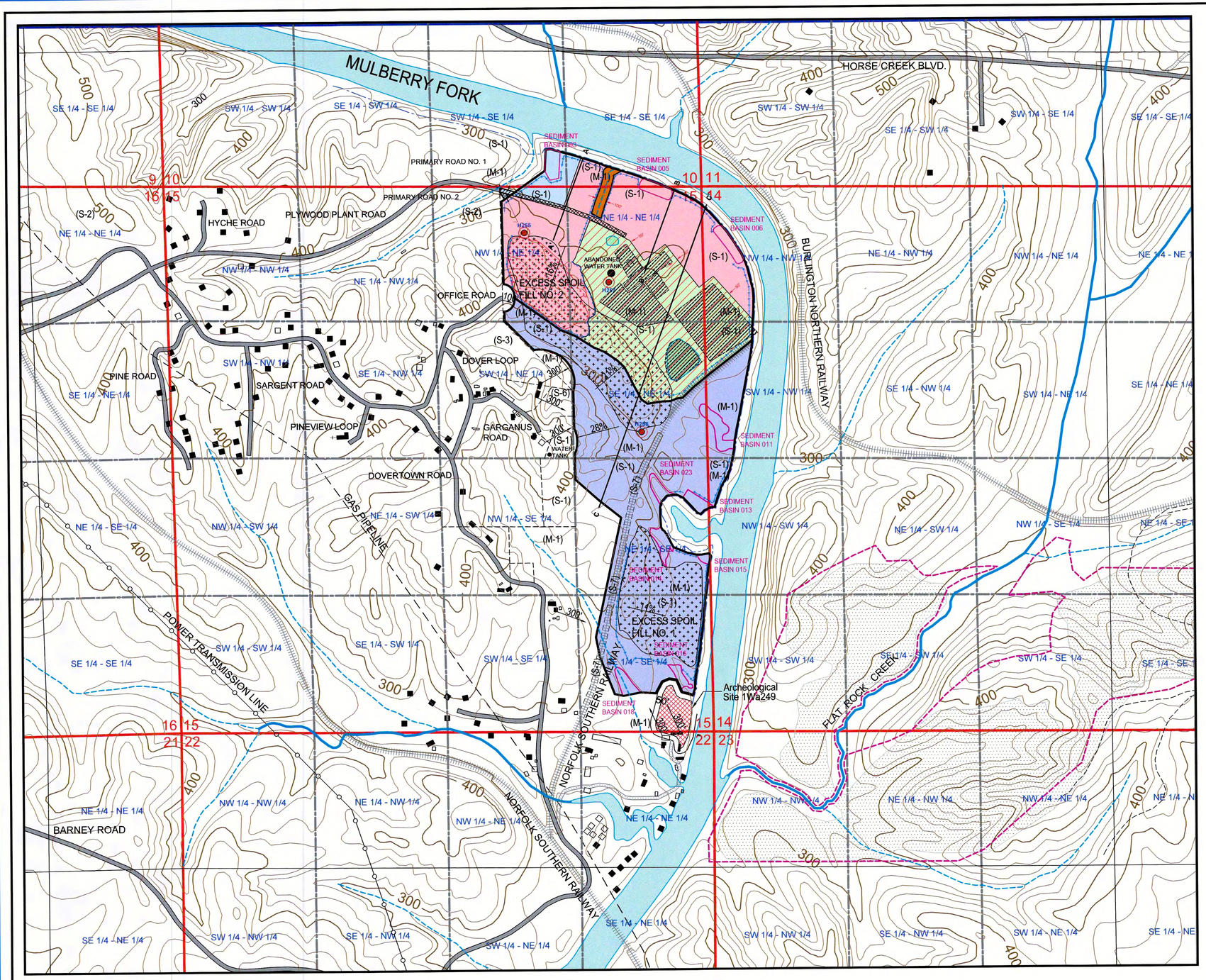
POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision and/or the appeal process you may contact: USACE Mobile District – Birmingham Field Office 218 Summit Parkway, Suite 222 Homewood, Alabama 35209	If you only have questions regarding the appeal process you may also contact: Jason Steele Administrative Appeals Review Officer 60 Forsyth Street, SW (Room 9M10) Atlanta, GA 30303-8801 404-562-5137

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15 day notice of any site investigation, and will have the opportunity to participate in all site investigations.

_____ Signature of appellant or agent.	Date:	Telephone number:

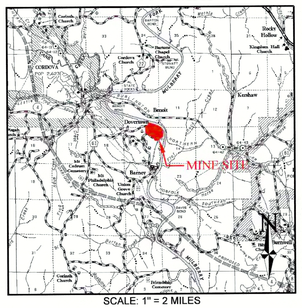
Attachment B



MAP LEGEND

PERMIT BOUNDARY
SECTION LINE
QUARTER QUARTER LINE
OWNERSHIP LINE OTHER THAN QUARTER QUARTER LINE
SURFACE CONTOUR (MAJOR)
SURFACE CONTOUR (MINOR)
PUBLIC ROAD
PRIMARY ROAD
ANCILLARY ROAD
SEDIMENT BASIN
PERENNIAL / INTERMITTENT STREAM
P-3858
EXCESS SPOIL FILL
PRIVATE ROAD
ABANDONED PLYWOOD PLANT
SETBACK
POWER TRANSMISSION LINE
PREVIOUSLY DISTURBED AREA
GAS LINE
■ OCCUPIED BUILDING
□ OUTBUILDING, BARN, SHED, ECT.
◉ GROUNDWATER MONITORING STATION
A——A' RECLAMATION CROSS SECTION
EXISTING IMPOUNDED WATER
DIVERSION DITCH/BERM
100' STREAM BUFFER ZONE
DRAINAGE COURSE
ARCHAEOLOGICAL SITE
RAILWAY
STREAM AVOIDANCE ZONE

VICINITY MAP



SCALE: 1" = 2 MILES

POST R-2 BONDING LEGEND

INCREMENT NO. 1 🟥	
MINING AREA	34.0 ACRES
EXCESS SPOIL FILL NO. 2	10.0 ACRES
SEDIMENT BASINS 005 & 006, DRAINAGE COURSES & DIVERSIONS	2.0 ACRES
OFFICE, EQUIPMENT STORAGE, STOCKPILE AREA & ACCESS	INC. 6
TOTAL BONDED AREA	46.0 ACRES

INCREMENT NO. 2 🟩	
MINING AREA	42.0 ACRES
OFFICE, EQUIPMENT STORAGE, STOCKPILE AREA & ACCESS	INC. 6
TOTAL BONDED AREA	42.0 ACRES

INCREMENT NO. 6 🟦	
SEDIMENT BASIN 003	1.0 ACRES
PRIMARY ROADS	0.25 ACRES
OFFICE, EQUIPMENT STORAGE, STOCKPILE AREA	4.0 ACRES
TOTAL BONDED AREA	5.0 ACRES
TOTAL PERMIT AREA	93.0 ACRES

OWNERSHIP LEGEND

SURFACE OWNERSHIP
(S-1) J&JA PROPERTIES, LLC
(S-2) ALAWEST
(S-3) W H & TOMMIE JEAN CORDELL
(S-6) MICHAEL BENTON GURGANUS, QUENA MEARS, KAY GURGANUS, AND JOHN S. MEARS
(S-7) NORFOLK SOUTHERN RAILWAY RIGHT-OF-WAY

MINERAL OWNERSHIP
(M-1) CORDOVA INDUSTRIAL DEVELOPMENT BOARD

NATURE OF REVISION R-2

🟦 1) DELETE 85.0 UNDISTURBED ACRES FROM INCREMENT NO. 1 CONSISTING OF 53.0 MINING ACRES, 4.0 ACRES BEING SEDIMENT BASINS 011, 013, 014, 015, 016, 018, AND 023, AND 28.0 ACRES BEING ALL OF EXCESS SPOIL FILL NO. 1 AND PART OF EXCESS SPOIL FILL NO. 2.
2) ADD INCREMENT NO. 2 TO PERMIT.
▨ 3) TRANSFER 42.0 MINING ACRES FROM INCREMENT NO. 1 TO INCREMENT NO. 2.
🟥 4) MODIFY EXCESS SPOIL FILL NO. 2, PROVIDE DETAILED DESIGN PLANS AND UPDATE PART III-B-4.
🟧 5) ADD AVOIDANCE AREA TO INCREMENT NO. 1.
▨ 6) ADD EXTENTS OF THE ABANDONED PLYWOOD PLANT TO THE PERMIT MAP.
▩ 7) ADD AN ANCILLARY ROAD TO THE PERMIT MAP AND UPDATE PART III-B-5.
8) MODIFY SEDIMENT BASIN 003 PHASE 2, 005 AND 006 DETAILED DESIGN PLANS.
9) UPDATE THE OPERATIONS PLAN.
10) UPDATE THE GENERAL PLAN.
11) UPDATE THE HYDROLOGIC MONITORING PLAN.

I HEREBY CERTIFY THIS MAP TO BE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

PROFESSIONAL ENGINEER
DATE

INCREMENT COLOR CODE

🟥 INCREMENT NO. 1
🟩 INCREMENT NO. 2
🟦 INCREMENT NO. 6

WILBANKS ENGINEERING
& ENVIRONMENTAL SOLUTIONS, LLC
4117 SKYLINE DR., WARRIOR, AL 35180 (205) 412-3373

0 500 1000 Feet

CONTOUR INTERVAL: 20 FT.
SECTION 10, 14 & 15, TOWNSHIP 15 SOUTH, RANGE 6 WEST,
ALL IN WALKER COUNTY, AL
BASE MAP: GOODSPRINGS & CORDOVA USGS QUADRANGLE
COORDINATE SYSTEM: NAD83 AL STATE PLANE, WEST ZONE

N W E S

NOTES

1. NO BUILDINGS WITHIN 1,000' OF PERMIT AREA OTHER THAN SHOWN.
2. LAND HOOK CONVEYS SURFACE AND MINERAL OWNERSHIP.
3. SURFACE AND MINERAL OWNERSHIP BY FORTY EXCEPT WHERE NOTED OTHERWISE.
4. LOCATION OF COAL AND TOPSOIL STOCKPILES ARE SUBJECT TO CHANGE.
5. NO CITY OR TOWN LIMITS EXIST WITHIN 1,000' OF PERMIT AREA OTHER THAN SHOWN.
6. THE CITY OF CORDOVA POLICE JURISDICTION ENCOMPASSES THE ENTIRE PERMIT AREA.
7. NO TOPSOIL STOCKPILES SHOWN DUE TO TOPSOIL VARIANCE REQUEST.
8. ALL SECTION AND QUARTER-QUARTER LINES DRAWN FROM ACTUAL SECTION CLOSURES.

PERMIT MAP
MAYS MINING, INC.
NO. 5 MINE, P-3957, REVISION R-2

APPROVED BY:	DATE:	SCALE:	SHEET:
Z.B.W.	8/14/19	1" = 500'	1 OF 1