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June 16, 2022

Kathy Love, Director  
Alabama Surface Mining Commission  
P. O. Box 2390  
Jasper, AL 35502-2390  
Re: No. 5 Mine | ASMC Permit P-3957 Renewal Application

*Via Electronic Mail Only at* [comments@asmc.alabama.gov](mailto:comments@asmc.alabama.gov)

Dear Director Love:

Thank you for the opportunity to comment on the Alabama Surface Mining Commission's ("ASMC") proposed permit revision R-5 for No. 5 Mine (ASMC Permit P-3957). We write on behalf of Black Warrior Riverkeeper, a nonprofit organization dedicated to protecting and restoring the Black Warrior River and its tributaries. No. 5 Mine discharges wastewater from surface coal mining activities into the Mulberry Fork of the Black Warrior River just upstream of a primary Birmingham Water Works Board ("BWWB") drinking water intake. This location is also just above documented locations of the federally threatened flattened musk turtle and possibly the endangered Black Warrior waterdog. R-5, if approved, will allow mining of a contaminated former industrial site located next to the river.

For the reasons stated below, we ask you to deny the application for revision. The permittee and the ASMC have yet to demonstrate that surface mining can safely take place at this site without materially disturbing the hydrologic balance outside of the permit area. *See* Ala. Admin. Code r. 880-X-8E-.06 (g). Moreover, based upon the available record, "the proposed operation may proximately result in contamination, diminution or interruption of ... [a] surface source of water within the proposed permit or adjacent areas" used for public drinking water, considered a "legitimate purpose" under ASMC regulations. *See* Ala. Admin. Code r. 880-X-8E-.06 (f)(3)(iii). The record demonstrates that the operation could adversely affect not only "important water quality parameters of local impact," but also "surface-water availability" at the Mulberry Fork drinking water intake. Ala. Admin. Code r. 880-X-8E-.06(f)(3)(iv)(B) and (D). Finally, authorizing R-5 will contribute additional dangerous pollutants to the Mulberry Fork, exacerbating the mine's negative effects on the flattened musk turtle and Black Warrior waterdog, two federally protected species which are at grave risk of extinction.

### *Source Water Protection Area Encroachment*

This section of the Mulberry Fork has state-established Clean Water Act use classifications of Fish & Wildlife and Public Water Supply. We have pointed out before that the proposed mine site encroaches significantly upon the Mulberry Fork Source Water Protection Area (“SWPA”) established by the BWWB and the Alabama Department of Environmental Management (“ADEM”). The Birmingham Water Works Board’s 2013 Source Water Assessment identifies the [Source Water Protection Area](#) along the Mulberry Fork and its tributaries fifteen miles upstream and a quarter mile downstream of the Mulberry Intake. This area includes a 500 foot buffer along the river and its main tributaries. Both the ASMC and ADEM have issued permits that completely ignore this important information, which was put together to protect one of the largest municipal drinking water sources in the entire state. Preservation and protection of drinking water sources now, and for future generations, should be of the highest priority for state regulatory agencies.

Detailed letters on this mine, previously submitted by the BWWB and Riverkeeper to the ASMC, incorporate extensive data about the impacts of No. 5 Mine on the public water source and aquatic resources. We incorporate those letters by reference. *See* BWWB’s May 24, 2022 ASMC Comments; Riverkeeper’s March 21, 2019 ASMC Comments; Riverkeeper’s January 3, 2011 NPDES Permit Comments; Riverkeeper’s November 10, 2017 NPDES Permit Comments; BWWB’s November 10, 2017 NPDES Permit Comments. *See also* June 16, 2021 Notice of Intent to Sue by Black Warrior Riverkeeper and the Center for Biological Diversity; November 16, 2021 Supplemental Notice of Intent to Sue by Black Warrior Riverkeeper and the Center for Biological Diversity.

Among other things, the information in these letters show that permitting coal mine operations so close to a public drinking water source should not happen. According to the BWWB, “the margin for error is razor thin” due to “the proximity of the mine to the drinking water intake.” BWWB’s November 10, 2017 NPDES Permit Comments at 2. Polluted mine runoff from No. 5 Mine travels to the drinking water intake in a matter of hours after leaving the mine site. *Id.* Despite their shared regulatory responsibility, in past permit reviews neither the ASMC nor ADEM properly addressed all of the potential impacts of this mine on source drinking water. We urge the ASMC to do so before considering another revision of this permit. Critically, R-5 will allow the operator to excavate and mine in the brownfield area of the site, which could lead to the release of dangerous pollutants into the river.

### *Continuing Litigation Over Prior Permits*

The notice of revision fails to mention the years of litigation over this permit or discuss the serious technical issues that prompted that litigation.<sup>1</sup> These issues should be made part of the public participation process and considered as a part of the revision process. No. 5 Mine discharges to the Mulberry Fork only 5.5 miles upstream of a primary drinking water intake which serves

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<sup>1</sup> The BWWB is currently appealing P-3957, asserting that it is void, and has asked for a stay of the permit until the appeal is resolved.

approximately 200,000 Birmingham-area residents daily. According to the BWWB, No. 5 “has the potential to adversely impact the Birmingham area drinking water,” and will “negatively impact the drinking water supply.” See BWWB’s August 9, 2011 ASMC Permit Comments. The BWWB observes that past ASMC permit applications (just like R-5) did not adequately consider the drinking water use and was “wholly inadequate to protect the Board and its customers from the many pollutants commonly associated with mining activities.” *Id.* If the mine leads to greater demands on treatment operations or increased treatment costs, these costs will be paid by consumers, not the mine. The social and economic impact associated with the degradation or contamination of the water source for 200,000 people more than outweighs any economic “benefit” of the mine. Instead of putting the treatment burden on ratepayers, it is incumbent upon the ASMC to ensure fully protective permits are crafted. That has not occurred in the past. Now permitting is at a critical juncture, as R-5, if issued, will open up the contaminated portion of the site for mining.

R-5 proposes to mine around the former site of an industrial plywood manufacturing plant that was in operation from 1969 to 1980. That site included a processing plant as well as a former electrical control station, maintenance shop, boiler house, and sewage lagoon, all potential sources of increased pollutants. The plant most likely used phenolic formaldehyde resin glue, which leaves behind phenols. During testing, formaldehyde and phenols were identified in soil and groundwater at the site, as well as in the Mulberry Fork upstream and downstream of the mine site.

#### *Environmental Contamination from Plywood Plant*

Like the BWWB, we are concerned that the discharge of phenols disturbed by surface mining activities will cause taste and odor problems in the drinking water drawn from the Mulberry Intake. With the site in its present, undisturbed condition, phenols were sampled as high as 4.3 µg/L in groundwater and 3.1 µg/L in surface water, some forty years after manufacturing ceased.<sup>2</sup> While these amounts of phenol at the site in an undisturbed condition may not cause taste and odor problems in the drinking water, once the site is disturbed for surface mining these concentrations will likely increase. Currently, the BWWB can only treat a maximum of 1.1 µg/L of phenol in water withdrawn at the Mulberry Intake.

The limited data available for No. 5 Mine is from an undisturbed site. There is no data about and no understanding of what the risks may be if the site is extensively disturbed for surface mining under R-5. Mining will remove soil from depths of 25 to 100 feet.<sup>3</sup> Once that occurs, contaminants at deeper levels (such as phenol) will be exposed to rain and runoff, which could cause the concentration of these contaminants to increase. During litigation, the BWWB pointed out that the trap efficiency of the sediment basins at the proposed mine is only 93%, which means large quantities

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<sup>2</sup> The water quality standard for phenol is 10,284 µg/L, but the standards for taste and odor treatability problems with phenol are much lower.

<sup>3</sup> The technical information about how site disturbance may increase the concentrations of phenol and other pollutants in the mine’s discharges is taken from the BWWB’s reply Brief in Support of Remand to Agency (Doc. 106 filed May 13, 2016).

of sediment and other pollutants will be leaving the mine site during rain events, traveling 5.6 miles downriver to the drinking water intake.

In 2007 the BWWB shut down the Mulberry Intake for several months because of a discharge of bromide at levels of 50 parts per billion from a chemical facility over 90 miles upstream from the Mulberry Intake. Here, phenol has been documented on a site much closer to the intake and it is known to affect drinking water. The ASMC has a duty to ensure that No. 5 Mine, with its unique site features, will not materially damage the hydrologic balance outside the permit area and harm the drinking water of 200,000 people. There is no indication in the revision application or the ASMC permit file that the operator or the ASMC has addressed this critical point.

*The Special Overburden Handling Plan is Inadequate*

R-5 will authorize the operator to mine in a contaminated brownfield site. We agree with the BWWB that the preliminary investigation performed by Spectrum Environmental Services as a part of the required “Special Overburden Handling Plan” for this phase of the mine is technically flawed and not protective. Spectrum used the wrong USEPA Regional Screening Level (RSL) for both formaldehyde and phenol in soil and groundwater to analyze contamination at the site.<sup>4</sup> According to ADEM’s Alabama Risk-based Corrective Action Guidance, Spectrum should have used residential RSLs, and not industrial. Where, as here, a site does not have covenants which restrict the use of land solely to industrial use, residential RSLs must be applied. Here, Spectrum used the more lenient industrial screening levels. However, when compared to the proper residential RSLs, the formaldehyde and phenol levels detected in the soil and groundwater samples at the site exceed the applicable residential RSLs. In these circumstances, the ASMC should prohibit all mining in the footprint of the plant. The ASMC should also require additional groundwater and soil sampling and testing to adequately characterize the site not only for formaldehyde and phenol, but also VOCs, SVOCs and inorganics in the soil and groundwater. Only then can the ASMC make a sound decision about whether and to what extent the additional mining addressed by R-5 is even possible. That testing must include an assessment of whether the formaldehyde and phenol detected could affect the taste and odor of the BWWB’s drinking water.

It is the ASMC’s duty to “ensure that each application provides to the State Regulatory Authority a complete and accurate description of the environmental resources that may be impacted or affected by proposed surface mining activities” and to issue the Permit only if it properly concludes that its issuance will not materially damage the hydrologic balance outside the permit area. *See* Ala. Admin. Code 880-X-8E-.02; Ala. Admins Code 880-X-8E-.06(1)(g). Because the Commission has not required Mays to develop this data, they cannot identify the affected environmental resources or calculate a complete or accurate description of No. 5 Mine’s impacts on the hydrologic balance beyond the permit area. Without this data, the ASMC cannot approve R-5.

We also agree with the BWWB that it is dangerous to locate the Special Overburden Remediation Area and containment basin 006 next to the stream buffer area. Any breach or overflow in this area will

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<sup>4</sup> The fact that the contractor performing the investigation and developing the Special Overburden Handling Plan did not apply the correct RSLs undermines confidence in both the investigation and the plan.

go directly through the drainage of Stream S-5 and into the Mulberry Fork. If R-5 is authorized, the ASMC must require the operator to locate this area upland and well back from the river and its tributaries. The absence of any contingency plan to prevent reasonably foreseeable contamination here further undermines confidence in the Special Overburden Handling Plan.

The Special Overburden Handling Plan also lacks detail and specifications about when cover must be applied to the contaminated spoil pile; what cover will be applied to stop saturation and runoff on the spoil pile during rainfall; how the cover will be placed and anchored; what kind of monitoring will be required to evaluate the efficacy of the cover; and what remedial measures must be employed if there is erosion, runoff or a spill. With respect to basin 006, there is no information about storage capacity or a contingency plan to remove contaminated water if the basin becomes full. There are no BMPs or procedures specified to address materials management or the prevention of erosion and runoff. The setback for the storage of excess fill depicted in the report map is not adequate nor does the Plan offer information about storage quantity, what will happen with excess material and how the contaminated overburden and other excess material will be stored, removed and transported.

The Circuit Court of Jefferson County reversed and remanded this permit to the ASMC not once, but twice, for the ASMC's failure to address similar issues. On October 28, 2016, the court sent the permit back to the ASMC because the Commission failed to present any experiential data, studies or testimony about the mining of brownfield sites. Final Order on Appeal (Doc. 114) at 4. The ASMC also failed to incorporate any affirmative precautionary measures in the permit to avoid or eliminate potential environmental impacts from mining the brownfield portion of the site. *Id.* The ASMC similarly failed to require testing of the brownfield soil in the permit or impose conditions that would require soil excavated from the brownfield site to be disposed of in a landfill, rather than returned to the site. *Id.*

Despite the detailed instructions included in the Final Order, the ASMC failed to heed these instructions when they reissued the permit May 21, 2018. Upon motion by the BWWB, the court again remanded the permit back to the ASMC for their failure to adequately address the issues identified by the court's earlier ruling. *See* November 2, 2018 Order (Doc. 166) at 2-3. "With these concerns unresolved, the Commission's decision to allow mining on the brownfield portions of this site is unreasonable, unlawful and unsupported by the clear preponderance of the evidence." *Id.* at 2 (citing Ala. Code § 9-16-79(6)). Unfortunately, we believe many of these concerns remain unaddressed in the current Special Overburden Handling Plan. The ASMC must delay mining until the operator can adequately characterize the site to determine whether mining can even occur in R-5, then submit a *detailed* Special Overburden Handling Plan. Although we are highly skeptical that mining can safely take place in a brownfield upstream of a drinking water intake and sensitive species, if R-5 is approved, the ASMC must require in the revision that the deficiencies outlined here are corrected.

#### *Mays Mining's Compliance Record at No. 5 Mine Further Undermines Confidence*

R-5 contemplates a very sophisticated mining operation in a contaminated brownfield site. Mining of this nature would be a challenge for even the most technically proficient, well-resourced operator. Unfortunately, Mays is neither.

Black Warrior Riverkeeper has documented evidence of active runoff from the mine site into the Mulberry Fork on numerous occasions.<sup>5</sup> That evidence and the operator's compliance record at the site demonstrate that Mays is ill suited to run this kind of operation. Developing and properly executing the mining plan is key to protecting the environment from the usual pollutants released by surface mining; here, since Mays will be mining an old brownfield site the importance of those measures increases exponentially. On November 3, 2020, the ASMC issued Mays a Notice of Violation (NOV) for its failure to maintain sediment control measures and silt fencing along the permit boundary. On February 1, 2021, the ASMC again issued Mays an NOV for its failure to maintain sediment control measures and silt fencing along the permit boundary. On June 1, 2021, the ASMC cited Mays for its failure to construct and properly maintain the mine's excess spoil pile in accordance with the design plan and ASMC regulation. On August 18, 2021 the ASMC again cited Mays for its failure to follow the operations plan. On October 14, 2021 the ASMC cited Mays for conducting surface coal mining operations outside of the permitted and bonded area. On October 27, 2021 the ASMC issued Mays yet another NOV for its failure to maintain sediment control measures and silt fencing along a mining road. On December 14, 2021, the ASMC cited Mays for a failure to show Yellowhammer Energy as a subcontractor and failure to comply with a permit condition. On February 16, 2022, the ASMC issued an NOV for Mays failure to submit required surface and groundwater data for the fourth quarter.

These violations are not incidental or isolated. They strongly predict that Mays will be unable to implement the very plans and procedures that are supposed to make mining the brownfield site possible. (Again, we disagree with the proposition that the site can be mined safely.)

Perhaps these lapses are largely technical and operational, but they also may have a financial component as well. A review of Walker County Circuit Court records shows a number of pending legal actions against Mays Mining, including a default judgment entered March 28, 2022 for failure to pay \$25,287.35 in fuel costs. Judgments like this call into question whether Mays has the financial resources to mine R-5.

#### *Bonding for R-5 Must be Adequate to Reclaim, Remediate the Site*

Neither the ASMC permit file nor the application for R-5 contains any information about how R-5, if approved, will be bonded. There is a requirement for a "detailed estimate of effect of proposed revision on reclamation costs" in the application for R-5, but there is a "Note" that the "ASMC will calculate additional reclamation bond required." Mays Mining, Inc. Application for Permit Revision (No. 5 Mine, P-3957, Revision R-5).

Given the enhanced risk of mining the brownfield area, it is essential that the ASMC calculate an appropriate performance bond that will include enough money to address the legacy environmental contamination exposed by mining. Currently, the total bond posted by Mays is \$458,382, which may be adequate to reclaim Increment 1 but would not begin to capture the ASMC's cost of reclaiming the brownfield portion of the site represented by R-5. For example, it took hundreds of thousands of dollars,

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<sup>5</sup> See June 16, 2021 Notice of Intent to Sue by Black Warrior Riverkeeper and the Center for Biological Diversity; November 16, 2021 Supplemental Notice of Intent to Sue by Black Warrior Riverkeeper and the Center for Biological Diversity.

including a \$1 million plus grant from EPA, to clean up Willamette Industries Sweet Home (Oregon) plywood mill.<sup>6</sup> Although that mill had issues with arsenic and PCB contamination as well as formaldehyde, it offers an object lesson about how expensive it can be to properly characterize and remediate one of these old sites. The ASMC must take care that the Commission, as well as taxpayers and local communities, are not left with huge unfunded costs to remediate the site if Mays defaults.

#### *Lack of a Valid ASMC Permit*

“A *valid* permit, issued pursuant to an approved regulatory program, shall carry with it the right of successive renewal, within the approved boundaries of the existing permit, upon expiration of the term of the permit.” Ala. Admin. Code r. 880-X-8M-.07. However, No. 5 Mine does not have a “valid permit” to mine the brownfield portion of the site. As discussed above, the BWWB is currently challenging that permit. If the BWWB prevails, there is no permit at all. With no “valid permit,” No. 5 Mine should not be afforded a presumption of renewal. Instead, the ASMC should take this opportunity to conduct a rigorous study of the site, more akin to an initial permit application and decision, to determine whether the renewal of the permit complies with ASMC regulations and is in the public interest.

#### *Mine “May Affect” the Endangered Black Warrior Waterdog and the Threatened Flattened Musk Turtle*

By law, the ASMC must provide for the coordination of review and issuance of its surface mining permits with the applicable requirements of the Endangered Species Act (“ESA”). *See* Ala. Admin. Code r. 880-X-8A. The threatened flattened musk turtle (*Sternotherus depressus*) and the endangered Black Warrior waterdog (*Necturus alabamensis*) have been identified immediately downstream of the proposed mine. As you know, the U.S. Fish & Wildlife Service (“Service”) recommended that “detailed surveys” for the turtle and waterdog be performed at the No. 5 Mine site because of “known records” of these species in the area. *Id.* Despite this fact, we believe that the ASMC has failed to coordinate a proper review under the ESA to determine whether No. 5 Mine may affect the waterdog or the flattened musk turtle. Polluted water, sediment, heavy metals and now phenols and other pollutants from the mine’s discharges would have a negative impact on their habitat, on the food they eat, and on water quality. For waterdogs and flattened musk turtles to survive, they need good water quality and habitat that is not obscured or buried by siltation. We note that Mays has had a number of NOVs for failure to maintain sediment control measures, which are the very things that are contributing to the extirpation of these species.

Mining in R-5 will only increase the negative effects of No. 5 Mine on the flattened musk turtle and Black Warrior waterdog. The continuance of mining activities without necessary conservation

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<sup>6</sup> [https://www.deq.state.or.us/lq/ECSI/ecsidetailfull.asp?seqnbr=347#siteinfo\\_](https://www.deq.state.or.us/lq/ECSI/ecsidetailfull.asp?seqnbr=347#siteinfo_) [https://lebanon-express.com/news/local/govt-and-politics/money-pit-county-sweet-home-want-to-offload-ex-mill-site-but-it-wont-come/article\\_7230b5db-4937-5c7c-aeef-c4c654e32faa.html](https://lebanon-express.com/news/local/govt-and-politics/money-pit-county-sweet-home-want-to-offload-ex-mill-site-but-it-wont-come/article_7230b5db-4937-5c7c-aeef-c4c654e32faa.html).

measures will have clear and lasting adverse impacts on the flattened musk turtle and waterdog's downstream habitat and the survival and recovery of the species. Although a 2020 programmatic biological opinion contemplates such species, in the past we have asserted that OSMRE, Secretary of Interior, and the ASMC have failed to comply with that opinion to ensure that Mays Mine No. 5 will not jeopardize the continued existence of the flattened musk turtle (and also the Black Warrior waterdog) in violation of Section 7(a)(2) of the ESA.

The 2020 BiOp sets forth procedural requirements for the U.S. Fish & Wildlife Service and terms and conditions that State regulatory authorities like the ASMC must follow.<sup>7</sup> To authorize coal-mining activities that may cause incidental take of endangered species (like No. 5 Mine), State regulatory authorities must “engage the Service in review and comment on proposed” permits “in accordance with the SMCRA Coordination Process.”<sup>8</sup> The SMCRA Coordination Process requires the State regulatory authority to describe: the action under consideration; the areas to be disturbed; the specific area that may be affected including “both the proposed permit area and the adjacent area”; any listed or proposed species or designated critical habitat that may be affected; how the operator will minimize disturbance and adverse impacts and comply with the ESA during mining and reclamation; how the applicant will avoid or minimize adverse impacts on listed species via a Protection and Enhancement Plan (PEP); and how the applicant will enhance fish, wildlife and related environmental values.<sup>9</sup> Importantly, the Service evaluates coal mines on a “project-specific basis” and must quantify “the amount and extent of incidental take anticipated.”<sup>10</sup> The 2020 BiOp covers both newly issued and previously issued permits.<sup>11</sup> Thus, when addressing impacts to endangered species like the flattened musk turtle and Black Warrior waterdog, OSMRE and ASMC must comply with the more protective terms and conditions set forth in the 2020 BiOp to ensure that authorized actions do not jeopardize the continued existence of the species.

As set forth above, SMCRA and the 2020 BiOp and Incidental Take Statement require OSMRE in coordination with ASMC to develop and implement site- and species-specific measures, or PEPs, to minimize impacts to species at a specific mine site and require operators to comply with those measures. Here, if R-5 is to be issued, OSMRE and the ASMC must develop adequate measures to minimize impacts to the flattened musk turtle and Black Warrior waterdog. They must ensure that R5 does not result in the jeopardy to the flattened musk turtle and the Black Warrior waterdog.

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<sup>7</sup> 1996 SMCRA BiOp at 82.

<sup>8</sup> *Id.* at 84.

<sup>9</sup> *Id.* at Appendix A, 2 (citing 30 C.F.R. §§ 780.16(b) and 784.21(b)).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 63, 74, 80, 83.



In the past, the operator has never been required to develop or implement a PEP at No. 5 Mine. 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. Now those impacts could be magnified by the addition of toxic pollutants from the brownfield portion of the mine.

With the documented presence of the flattened musk turtle and the Black Warrior waterdog, R-5 must include a requirement that the permittee seek additional consultation with the U.S. Fish & Wildlife Service before disturbing the area. This is important not only to determine whether the disturbance of the brownfield for mining "may affect" these species but also to develop a PEP to mitigate the impacts of any mining on a brownfield site.

### *Conclusion*


We assume that the determination of whether to approve or deny a significant revision is the same as a permit renewal: the burden of proof is on the opponents of renewal. *See* Ala. Admin. Code r. 880-X-8M-.07(3)(b). However, based upon the existing record, the ASMC cannot ensure that the surface mining authorized by R-5 will be conducted in compliance with applicable law and regulation, Ala. Admin. Code r. 880-X-8M-.03(b), or that the mine's operations will not materially disturb the hydrologic balance outside the permit area, Ala. Admin. Code 880-X-8E-.06(1)(g). Because the requested revision "substantially jeopardizes" No. 5 Mine's "continuing ability to comply with the Act and the regulatory program on existing permit areas," the ASMC must deny the permit revision. *See* Ala. Admin. Code r. 880-X-8M-.07 (3)(a)(3). Riverkeeper and its members are persons having an interest which is or may be adversely affected by the decision to grant the revision. *See* Ala. Admin. Code r. 880-X-8K-.05(3)(a)(3). We request a public hearing to be held in close proximity to the proposed mine after normal business hours in order to accommodate the numerous hard-working individuals who wish to weigh in on the proposed revision. We further request that this hearing include ASMC staff familiar with the application and informed representatives of Mays Mining who can respond to substantive questions about the revision and the proposed operation.

Thank you for your consideration of our comments. Please do not hesitate to contact us if you have any questions or if you require any additional information. We look forward to receiving a response to our comments and our request for a public hearing.

For the River,



Nelson Brooke  
Riverkeeper



John Kinney  
Enforcement Coordinator



Eva Dillard  
Staff Attorney

cc: Richard B. O'Dell, Director  
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