

MEMORANDUM FOR RECORD

SUBJECT: Department of the Army Permit SAM-2012-01210-CMS, Black Creek Mine, Global Met Coal Corporation

Proposed Action: Suspension of Department of the Army (DA) Permit SAM-2012-01210-CMS, Black Creek Mine

Permittee: Global Met Coal Corporation
Attention: Mr. Tony Cousins
Post Office Box 352
Mt. Olive, Alabama 35117

Background

On December 19, 2014, the U.S. Army Corps of Engineers (USACE) Mobile District issued a standard permit to Global Met Coal Corporation (GMCC) authorizing the discharge of fill material into 3,840 linear feet (lf) of intermittent stream, 5,920 lf of ephemeral stream, and 0.72 acre of wetlands incidental to surface coal mining activities. The project is located near Kimberly, Jefferson County, Alabama (33.752037, -86.889374).

On July 28, 2015, the USACE received a 60-day notice of intent (NOI) to file a lawsuit on claims the District failed to comply with the requirements of Section 7 of the Endangered Species Act (ESA) for the Black Creek Mine DA permit. The NOI, which was submitted by the Southern Environmental Law Center on behalf of the Black Warrior Riverkeeper, Inc. and Defenders of Wildlife, specifically mentions the plicate rocksnail (*Leptoxis plicata*), which was found during a species survey conducted by GMCC's consultant in the Locust Fork adjacent to the project site. The NOI indicates that the USACE's "no effect" determination was not appropriate.

On September 23, 2015, a USACE Project Manager spoke with a permit manager with the Alabama Surface Mining Commission (ASMC), who confirmed that the mining permit has not been issued for this project and work has not begun at the site. The reason for the delay in issuing the mining permit is that GMCC is required to re-coordinate with the Agencies due to the length of time since the last coordination. If the permit has not been issued and it has been three years since the last coordination, the ASMC requires new coordination by the applicant.

On September 23, 2015, USACE Regulatory staff spoke with representatives from the United States Fish and Wildlife Service (USFWS) to discuss the possibility of re-evaluating the USACE effects determination, and possibly entering into consultation with their Agency for this project. The USFWS stated they do not consult on a finalized action, which is the final permit in this situation. The USFWS stated that the permit would need to be suspended in order for them to consult. It was also noted during the

conversation with the USFWS that the northern-long eared bat (*Myotis septentrionalis*) has been listed as threatened since this permit was issued (listing date April 2, 2015), and that this would be an additional species to consider in our effects determination if the decision is made to suspend the permit.

Considerations for Suspension

§325.7 (a) General. This section, in part, identifies specific factors to be considered by the district engineer (DE) when initiating action to modify, suspend or revoke a permit in the interest of the public. Among the factors to be considered are:

- the extent of the permittee's compliance with the terms and conditions of the permit;
- whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions;
- any significant objections to the authorized activity which were not earlier considered;
- revisions to applicable statutory and/or regulatory authorities; and
- the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit.

The extent of the permittee's compliance with the terms and conditions of the permit: Work has not begun at the site; therefore, the permittee is in compliance with the terms and conditions of the permit.

Change in circumstances and adequacy or need for permit conditions: There has not been a change in circumstances to require additional permit conditions.

Significant objections to the authorized activity which were not earlier considered: The Black Warrior Riverkeeper submitted a comment letter during the public notice comment period. This comment letter suggested that consultation with the USFWS regarding the plicate rocksnail, as well as six mussel species, would be prudent.

On July 28, 2015, the USACE received a 60-day notice of intent (NOI) to file a lawsuit on claims the USACE failed to comply with the requirements of Section 7 of the ESA for the Black Creek Mine DA permit. The NOI, which was submitted by the Southern Environmental Law Center on behalf of the Black Warrior Riverkeeper, Inc. and Defenders of Wildlife, specifically mentions the plicate rocksnail (*Leptoxis plicata*), which was found during a species survey conducted by GMCC's consultant in the Locust Fork adjacent to the project site. The NOI indicates that the USACE's "no effect" determination for listed species was not an appropriate conclusion.

Revisions to applicable statutory and/or regulatory authorities: None.

SUBJECT: DA Permit SAM-2012-01210-CMS


Extent to which modification, suspension, or other action would adversely affect permittee's plans, investments and actions: The ASMC permit has not been issued, and according to GMCC, their consultant will be performing habitat surveys for the northern-long eared bat at the request of the ASMC. Because the permittee is having additional studies conducted and the ASMC permit is not issued, mining cannot commence. Suspension of this permit should not adversely impact the permittee's overall investment because work cannot commence without the ASMC permit.

Public Interest Determination and Recommendation

Title 33 CFR Part 325.7(c) states that the DE may suspend a permit after a written determination has been prepared, which finds that the immediate suspension would be in the public interest. The DE must advise the permittee in writing that the permit has been suspended and the reasons. The DE must advise the permittee that he may request a meeting with the DE and/or a public hearing to present information on this matter within 10 days of receipt of the notice of suspension.

The USACE has considered the comments in the NOI and the Black Warrior Riverkeeper response to the Public Notice. In light of these comments as well as conversations with USFWS representatives, the USACE has reviewed the "no effect" determination and believes a "may affect, not likely to adversely affect" determination would be more appropriate for the plicate rocksnail, requiring initiation of informal consultation with USFWS. The USACE will also re-consider the effects determination regarding other listed species that may potentially inhabit the area, and their critical habitat, as well as the recently listed northern-long eared bat.

I have reviewed the overall public interest concerning this DA permit, and have determined that the permit should be suspended in accordance with 33 CFR Part 325.7(c) so that additional considerations of the effects to threatened and/or endangered species and their critical habitat can be further reviewed.


for Jon J. Chytka
Colonel, Corps of Engineers
District Commander

Staffing/Concurrence/Nonconcurrence:

Chief: Litteken CL Concur: X Nonconcur _____ Date 10/29/15
N. Branch Chief: Johnson dy Concur: X Nonconcur _____ Date 10/29/15
OC: Landry RL Concur: X Nonconcur _____ Date 10/29/15