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):

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: CELRH-OR-F, West Fork Surface Mine, 2007-822-OHR- RR VF2, ("VF-2 Area - 1st LH Drainway of 1st RH Drainway of W.F. Twelvepole Creek Upstream of Messenger Branch"), Ephemeral.

Mark Taylor 6/30/08

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: WV County/parish/borough:MINGO COUNTY City: DINGESS

Center coordinates of site (lat/long in degree decimal format): Lat. 37.85314° Pick List, Long. -82.14860° Pick List.

Universal Transverse Mercator:

Name of nearest waterbody: WEST FORK TWELVEPOLE CREEK

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: TWELVEPOLE CREEK

Name of watershed or Hydrologic Unit Code (HUC): 5090102

- ☒ 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: 4-22-08
- ☒ Field Determination. Date(s): 12-6-07

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There Are "*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 "*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: 300 linear feet of NRPW: and/or acres. (pond)
   Wetlands: 0 acres.

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

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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).

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: **Drainway between Stations 3+00 and 4+50 (above Relevant Reach VF2) is a partially vegetated, rock-filled area (filled in 1989) that has no OHWM and no evidence of surface flow. Pond exists at Stations 4+50 to 6+00 (with ponded water) but observed no evidence of surface or consolidated subsurface outflow (with no nexus to a RPW). Drainway above pond also contains large rock and vegetation, with no OHWM and no flow.**

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: 513,000 **acres for Twelvepole Creek**
   Drainage area: 53 **acres**
   Average annual rainfall: 44-45 inches
   Average annual snowfall: 20-30 inches

   (ii) **Physical Characteristics:**
   (a) Relationship with TNW:

[3] Supporting documentation is presented in Section III.F.
[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.

☐ Tributary flows directly into TNW.
☒ Tributary flows through 1 tributaries before entering TNW.

Project waters are 30 (or more) river miles from TNW. (54 miles)
Project waters are 1 (or less) river miles from RPW.
Project waters are 30 (or more) aerial (straight) miles from TNW.
Project waters are 1 (or less) aerial (straight) miles from RPW.
Project waters cross or serve as state boundaries. Explain: .

Identify flow route to TNW[5]: **Flows thru subsurface rock underdrain to West Fork Twelvepole Creek, to Twelvepole Creek.**
Tributary stream order, if known: 1st order.

(b) General Tributary Characteristics (check all that apply):
Tributary is: ☐ Natural
☐ Artificial (man-made). Explain: .
☒ Manipulated (man-altered). Explain: Probably relocated.

Tributary properties with respect to top of bank (estimate):
Average width: 3.5 feet
Average depth: 1.5 feet
Average side slopes: [redacted].

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: Stable.
Presence of run/riffle/pool complexes. Explain: Virtually no natural in-stream structure.
Tributary geometry: [redacted]
Tributary gradient (approximate average slope): 2.5 %

(c) Flow:
Tributary provides for: [redacted]
Estimate average number of flow events in review area/year: [redacted]
Describe flow regime: Most of channel only flows during major flow event due to old fill material.
Other information on duration and volume: .

Surface flow is: [redacted]. Characteristics: .

Subsurface flow: [redacted]. 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):	

[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.
[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.

☐ 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:
- ☐ oil or scum line along shore objects
- ☐ fine shell or debris deposits (foreshore)
- ☐ physical markings/characteristics
- ☐ tidal gauges
- ☐ other (list):

☒ Mean High Water Mark indicated by:
- ☐ survey to available datum;
- ☐ physical markings;
- ☐ vegetation lines/changes in vegetation types.

(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: .

(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:0 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: [redacted]. Explain: .

Surface flow is: [redacted]

Characteristics: .

Subsurface flow: [redacted]. 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 [redacted] river miles from TNW.

Project waters are [redacted] aerial (straight) miles from TNW.

Flow is from: [redacted].

Estimate approximate location of wetland as within the [redacted] 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: .

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[7] Ibid.

(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: [redacted]

   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: Only 300 linear feet of stream meets the definition of waters of the U.S. under 33CFR 328. This relevant reach has no surface water connection to the nearest RPW (likely flowing through a subsurface rock core drain under the existing fill area) and therefore would be expected to have minimal capacity to transport organics to the RPW. The reach has minimal habitat structure or water (except during stormwater flow). The reach is 54 miles from the nearest TNW (Twelvepole Creek, at forks of East and West Forks of Twelvepole Creek).

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.

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[8]See Footnote # 3.

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: .

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: Only 300 linear feet of ephemeral stream meets the definition of waters of the U.S. under 33CFR 328. This relevant reach has no surface water connection to the nearest RPW (likely flowing through a subsurface rock core drain under the existing fill area) and therefore would be expected to have minimal capacity to transport organics to the RPW. The reach has minimal habitat structure and is 54 miles from the nearest TNW (Twelvepole Creek, at forks of East and West Forks of Twelvepole Creek).
- ☐ Other: (explain, if not covered above): .

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): **300**linear feet, **1.5** width (ft).
- ☒ Lakes/ponds: acres.
- ☒ Other non-wetland waters: acres. List type of aquatic resource: .
- ☒ Wetlands: acres.

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[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.***

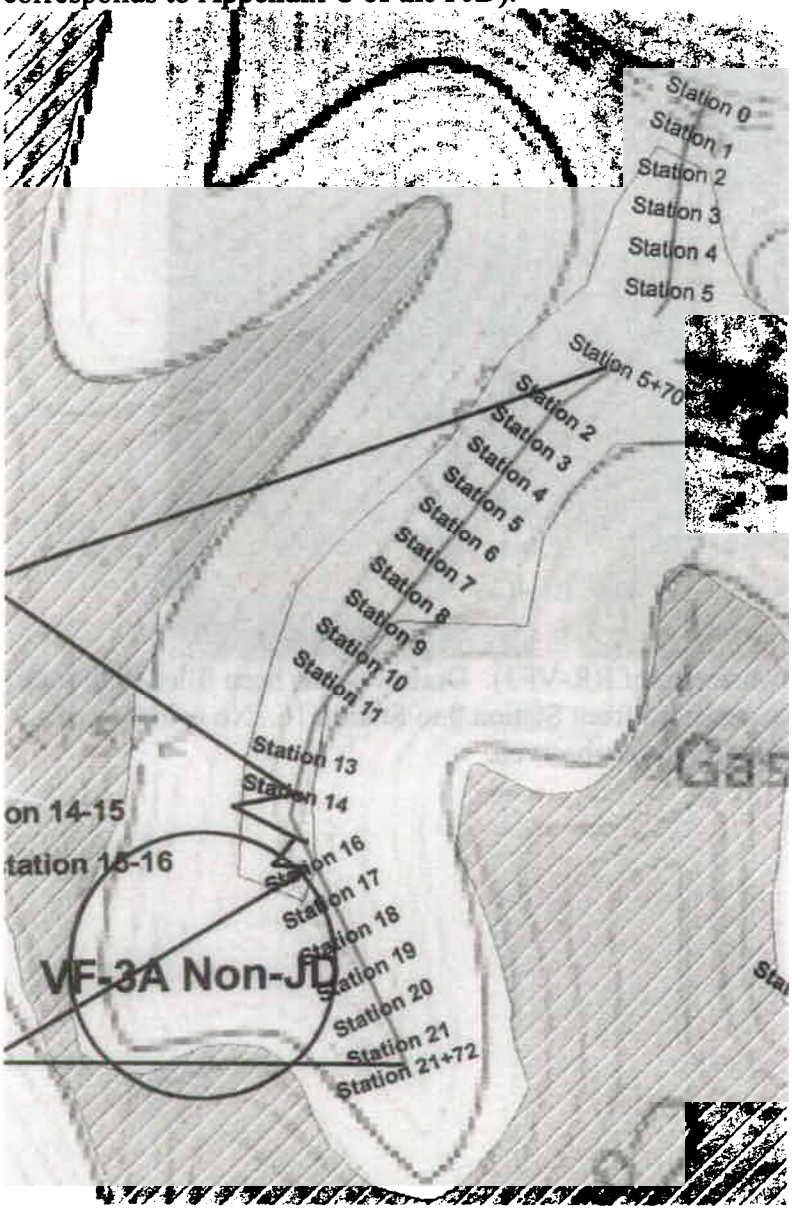
SECTION IV: DATA SOURCES.

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:Prelim.JD dtd 11 Sep 07.
- ☒ 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:
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation: .
- ☒ National wetlands inventory map(s). Cite name: .
- ☐ State/Local wetland inventory map(s): .
- ☐ FEMA/FIRM maps: .
- ☐ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- ☒ Photographs: ☐ Aerial (Name & Date): .
  or ☒ Other (Name & Date):12-6-07.
- ☐ 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: Drainway between Station 3+00 and 4+50 was filled with large rock in/around 1989. Pond exists at Station 4+50 to 6+00, but has no surface water nexus or consolidated subsurface nexus to Relevant Reach VF2 and therefore is a non-jurisdictional water. No bed, bank or OHWM exists above the pond.

SECTION 3. Proposed Valley Fill 3 area: "VF-3A – 1st RH Drainage Way of the 1st RH Drainage Way of Twelvepole Creek" (**Relevant Reach # VF3**): This relevant reach begins above the existing valley fill (as described in Section 2 above). See map below (which corresponds to Appendix C of the PJD).



A dry rock-filled drainway, with no OHWM, was observed from Station 0 to 8+50. An old pond basin was observed from Stations 8+50 to 10, presently filled and vegetated and with no OHWM. A rock-filled drainway was observed from Station 10 to Station 13. Above Station 13, no large rock fill material was observed but the area had no clear OHWM until about Station 16. No flow or puddling observed from Station 16+00 on up.

Photo 7: Area of proposed VF-3 (downstream of RR-VF3). Drainway has been filled with rock. No streambed or OHWM or flow was observed from Station 0 to Station 16. No evidence of surface flow or consolidated subsurface flow was observed.

Photo 8 (upstream of Photo 7): Photo shows an old pond area between Stations 8+50 and 10 (immediately downstream of Relevant Reach #VF 3): The consultant provided wetland datasheets for two plots within the easily observed boundary of hydrophytic plants. [Refer to consultant's document "*Area of Interest within Proposed Valley Fill No3 Sample Sites 1-5*" dated 19 June 2008). Each datasheet concluded hydrophytic plants and hydric soils (gleyed), but concluded no hydrology. The datasheet showed "N/A for hydrology indicators. However, the datasheets recorded saturated soils to 5.5" and 7" and ground saturation from 5.5 to 7 inches from the surface.

As found during the USACE site visit, the area is an old pond originally constructed in the drainway, with an embankment and excavated basin. The area presently collects surface (and likely groundwater) from the watershed above it. The embankment still exists and still provides the physical ability to impound water in order to saturate or inundate the soil. The flow path out of the embankment (a rock-filled discharge drainway) shows no indication of surface flow. Following the USACE 1987 Wetland Determination Handbook (paragraph 65), this is an "Atypical" situation. Wetland hydrology was not present prior to this alteration.

As per the USACE 1987 Wetland Delineation Handbook:

- Paragraph 46: "The term "wetland hydrology" encompasses all hydrologic characteristics of areas that are periodically inundated or have soils saturated to the surface at some time during the growing season. Areas with evident characteristics of wetland hydrology are those where the presence of water has an overriding influence on characteristics of vegetation and soils due to anaerobic and reducing conditions, respectively."
- Parapraph 65: "Any portion of the area having a positive wetland hydrology indicator has wetland hydrology."
- Paragraph 49.b.(2) states: "For soil saturation to affect vegetation, it must occur within a major portion of the root zone (usually within 12 inches of the surface) of the prevalent vegetation."

Considering the above, this area has wetland hydrology, hydrophytic vegetation, and hydric soil, and is therefore considered a wetland per the USACE 1987 Wetland Delineation Manual. However, the wetland area is 850 feet from the subsurface rock toedrain, has no observed OHWM or surface flow, and has no consolidated subsurface connection to the subsurface rock toedrain. Therefore, this area is an isolated wetland. As per current guidance and decision rendered by the 4th Circuit Court of Appeals in US v Wilson, isolated wetlands will not receive consideration as a jurisdictional water based on any connection to interstate commerce. Therefore, it is determined this wetland is non-jurisdictional under the CWA.

Photo 9: Photo shows VF 3 area at about Station 13 immediately downstream of RR-VF3. No rock fill material was observed, but no clear OHWM was observed until about Station 16. Some snowmelt was occurring.

Relevant Reach VF3 begins at Station 16+00 as a narrow bed and OHWM. This reach continued to Station 21+45 to the upper end of the OHWM. Minor trickle or wetness was observed in some portions of the channel due to snowmelt and morning rain, but no water in the majority of the stream. No evidence of groundwater outflow was seen. This relevant reach is 545 linear feet long and entirely ephemeral in nature. This reach is separated from any nexus to a jurisdictional stream by 1,600 feet of upland area (from the beginning of the existing rock core drain to Station 16+00) and has no surface or consolidated subsurface water connection (no nexus) to the nearest jurisdictional stream. Therefore, this is a **non-jurisdictional water feature. See JD Form** next page. This determination does NOT require USEPA concurrence.