JURISDICTIONAL DETERMINATION Revised 8/13/04
U.S. Army Corps of Engineers

DISTRICT OFFICE: **Huntington District**
FILE NUMBER: **200401191**

PROJECT LOCATION INFORMATION:
State: WV
County: Mingo
Center coordinates of site (latitude/longitude): 37 45 '08"/82 17'26"
Approximate size of area (parcel) reviewed, including uplands: Unknown acres.
Name of nearest waterway: Miller Creek
Name of watershed: Miller Creek

JURISDICTIONAL DETERMINATION
Completed: Desktop determination ☒ Date: September 20, 2004
Site visit(s) ☐ Date(s):

Jurisdictional Determination (JD):

☐ Preliminary JD - Based on available information, ☐ *there appear to be* (or) ☐ *there appear to be no* "waters of the United States" and/or "navigable waters of the United States" on the project site. A preliminary JD is not appealable (Reference 33 CFR part 331).

☒ Approved JD – An approved JD is an appealable action (Reference 33 CFR part 331).
Check all that apply:

☐ *There are* "navigable waters of the United States" (as defined by 33 CFR part 329 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: _____.

☒ *There are* "waters of the United States" (as defined by 33 CFR part 328 and associated guidance) within the reviewed area. Approximate size of jurisdictional area: approximately 21,655 linear feet (6.8 acres) of intermittent/perennial stream channels and 6,239 linear feet (1.7 acres) of ephemeral stream channels exist within the proposed project area. The attached table details the extent of jurisdictional waters of the U.S. within the study area.

☐ *There are "isolated, non-navigable, intra-state* waters or wetlands" within the reviewed area.
☐ Decision supported by SWANCC/Migratory Bird Rule Information Sheet for Determination of No Jurisdiction.

BASIS OF JURISDICTIONAL DETERMINATION:

A. Waters defined under 33 CFR part 329 as "navigable waters of the United States":
☐ The presence of waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.

B. Waters defined under 33 CFR part 328.3(a) as "waters of the United States":
☐ (1) The presence of waters, which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.
☐ (2) The presence of interstate waters including interstate wetlands[1].
☐ (3) The presence of other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate commerce including any such waters (check all that apply):
☐ (i) which are or could be used by interstate or foreign travelers for recreational or other purposes.
☐ (ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
☐ (iii) which are or could be used for industrial purposes by industries in interstate commerce.
☐ (4) Impoundments of waters otherwise defined as waters of the US.
☒ (5) The presence of a tributary to a water identified in (1) – (4) above.
☐ (6) The presence of territorial seas.
☐ (7) The presence of wetlands adjacent[2] to other waters of the US, except for those wetlands adjacent to other wetlands.

Rationale for the Basis of Jurisdictional Determination (applies to any boxes checked above). *If the jurisdictional water or wetland is not itself a navigable water of the United States, describe connection(s) to the downstream navigable waters. If B(1) or B(3) is used as the Basis of Jurisdiction, document navigability and/or interstate commerce connection (i.e., discuss site conditions, including why the waterbody is navigable and/or how the destruction of the waterbody could affect interstate or foreign commerce). If B(2, 4, 5 or 6) is used as the Basis of Jurisdiction, document the rationale used to make the determination. If B(7) is used as the Basis of Jurisdiction, document the rationale used to make adjacency determination:* The unnamed tributaries of Miller Creek within the proposed project area flow into Miller Creek, a perennial stream. Miller Creek flows into Tug Fork, a navigable (Section 10) water of the U.S.

Lateral Extent of Jurisdiction: (Reference: 33 CFR parts 328 and 329)

- [x] Ordinary High Water Mark indicated by:
  - [x] clear, natural line impressed on the bank
  - [x] the presence of litter and debris
  - [ ] changes in the character of soil
  - [x] destruction of terrestrial vegetation
  - [ ] shelving
  - [ ] other:
- [x] High Tide Line indicated by:
  - [ ] oil or scum line along shore objects
  - [ ] fine shell or debris deposits (foreshore)
  - [ ] physical markings/characteristics
  - [ ] tidal gages
  - [ ] other:

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

- [x] Wetland boundaries, as shown on the attached wetland delineation map and/or in a delineation report prepared by:

Basis For Not Asserting Jurisdiction:

- [x] The reviewed area consists entirely of uplands.
- [x] Unable to confirm the presence of waters in 33 CFR part 328(a)(1, 2, or 4-7).
- [x] Headquarters declined to approve jurisdiction on the basis of 33 CFR part 328.3(a)(3).
- [x] The Corps has made a case-specific determination that the following waters present on the site are not Waters of the United States:
  - [ ] Waste treatment systems, including treatment ponds or lagoons, pursuant to 33 CFR part 328.3.
  - [ ] Artificially irrigated areas, which would revert to upland if the irrigation ceased.
  - [ ] Artificial lakes and ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
  - [ ] Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
  - [ ] Water-filled 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 found at 33 CFR 328.3(a).
  - [ ] Isolated, intrastate wetland with no nexus to interstate commerce.
  - [ ] Prior converted cropland, as determined by the Natural Resources Conservation Service. Explain rationale:
  - [ ] Non-tidal drainage or irrigation ditches excavated on dry land. Explain rationale:
  - [ ] Other (explain):

DATA REVIEWED FOR JURSIDICTIONAL DETERMINATION (mark all that apply):

- [x] Maps, plans, plots or plat submitted by or on behalf of the applicant.
- [x] Data sheets prepared/submitted by or on behalf of the applicant.
- [x] This office concurs with the stream delineation report, dated August 2004 prepared by (company): Alliance Consulting, Inc.
  - [ ] This office does not concur with the delineation report, dated _____, prepared by (company):
- [x] Data sheets prepared by the Corps.
- [x] Corps' navigable waters' studies:
- [x] U.S. Geological Survey Hydrologic Atlas:
- [x] U.S. Geological Survey 7.5 Minute Topographic maps:
- [x] U.S. Geological Survey 7.5 Minute Historic quadrangles:
- [x] U.S. Geological Survey 15 Minute Historic quadrangles:
- [x] USDA Natural Resources Conservation Service Soil Survey:
- [x] National wetlands inventory maps:
- [x] State/Local wetland inventory maps:
- [x] FEMA/FIRM maps (Map Name & Date):
- [x] 100-year Floodplain Elevation is: (NGVD)
- [x] Aerial Photographs (Name & Date):
- [x] Other photographs (Date): August 2004
- [x] Advanced Identification Wetland maps:
- [x] Site visit/determination conducted on:
- [x] Applicable/supporting case law:
- [x] Other information (please specify):

Prepared by: Teresa Spagna **Date:** Sept. 20, 2004
Approved by: [signature] **Date:** 9-20-04

[1]Wetlands are identified and delineated using the methods and criteria established in the Corps Wetland Delineation Manual (87 Manual) (i.e., occurrence of hydrophytic vegetation, hydric soils and wetland hydrology).

[2]The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, and the like are also adjacent.