

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): 11-6-2012 AMR/JBS

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: Huntington District, Millseat-Wolfpen Study Area JD, LRH-2011-148-TUG

- LRH-2011-148-TUG-NC-3-RR6-1-Non-Jurisdictional
- LRH-2011-148-TUG-NC-2-RR6-2-Non-Jurisdictional
- LRH-2011-148-TUG-NC-1-RR6-3-Non-Jurisdictional
- LRH-2011-148-TUG-IW-8-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 012-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 013B-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-7-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 013A-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 024-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 010-Millseat-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-6-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 026-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 025-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-5-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-4-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 014-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 013-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-10-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-9-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-3-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-2-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 010-Wolfpen-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-Pond 003-Open Water-Non-Jurisdictional
- LRH-2011-148-TUG-IW-1-Open Water-Non-Jurisdictional

C. PROJECT LOCATION AND BACKGROUND INFORMATION:

State: West Virginia County/parish/borough: Mingo City: Edgerton
Center coordinates of site (lat/long in degree decimal format): Lat. 37.5856° **N**, Long. 82.08139° **W**.
Universal Transverse Mercator:

Name of nearest waterbody: Grapevine Creek

Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Tug Fork River

Name of watershed or Hydrologic Unit Code (HUC): 05070201

- 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: 31 October 2012
- Field Determination. Date(s): 23 March 2011

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 waters² (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: **Not Applicable.**

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 Study Area includes the watersheds of Millseat Branch, Wolfpen Fork and two (2) unnamed tributaries of Grapevine Creek, and pre-law and SMCRA approved surface and underground coal mining activities have altered the surface and groundwater hydrology of these watersheds. The applicant, Central Appalachia Mining (CAM) requested a Preliminary Jurisdictional Determination (PJD) to identify potential waters of the U.S. present within the Study Area. However, due to the past and present coal mining activities, stream and open water resources that are either not connected to a potential water of the U.S. or they are a component of a wastewater treatment system required by an active CWA Section 402 (NPDES) permit were identified during the field review on March 23, 2011. To document the non-jurisdictional resources, 10 Approved Jurisdictional Determination (AJD) areas were established within the Study Area. This form documents non-jurisdictional resources within the 10 AJD areas and includes:**

Three (3) stream reaches, RR6-1, RR6-2 and RR6-3, within the Millseat Branch watershed that exhibit a defined bed, bank and ordinary high water marks (OHWMs). However, a surface connection to Millseat Branch could not be identified for all three (3) stream reaches. These streams exhibit ephemeral flow and drain into an abandoned railroad bed. When the railroad was operational in the Millseat Branch watershed, it is likely that a culvert carried surface drainage from these streams; however, the culvert could not be identified during the field review. Therefore, these streams were determined to be non-jurisdictional waters and are not subject to regulation under CWA Section 404. Total stream length is 1,195 feet.

Ten (10) open water/ponds, five (5) within the Millseat Branch watershed (IW-4, IW-5, IW-6, IW-7 and IW-8) and five (5) within the Wolfpen Fork watershed (IW-1, IW-2, IW-3, IW-9 and IW-10) that do not exhibit a surface connection to a potential water of the U.S. Therefore, each open water/pond was determined to be an isolated water. Per *United States v. Wilson*, 133 F. 3d 251 (4th Cir. 1997) these waters are non-jurisdictional and are not subject to CWA Section 404 regulation. Therefore, isolated water coordination was not required with US EPA. Total open water/pond area is 1.66 acres.

Eleven (11) open water/ponds have been constructed to satisfy the requirements of two (2) CWA Section 402 (NPDES) permits issued by the WVDEP, and have a total surface area of 1.55 acres. Six (6) open water/ponds (Pond 010-Millseat, Pond 013A, Pond 013B, Pond 024, Pond 025 and Pond 026) have been constructed in uplands within the Millseat Branch watershed and function as components of a wastewater treatment system to satisfy the requirements of NPDES permit WV0060801. Four (4) open water/ponds (Pond 003, Pond 010-Wolfpen, Pond 013 and Pond 014) have been constructed in uplands within the Wolfpen Fork watershed and function as components of a wastewater treatment system to satisfy the requirements NPDES permit WV1004727. Therefore, Pond 010-Millseat, Pond 010-Wolfpen, Pond 013, Pond 013A, Pond 013B, Pond 014, Pond 024, Pond 025 and Pond 026 are exempt from CWA Section 404 regulation.

Pond 012 is an in-stream open water/pond located within RR1-3, A Millseat Branch. It functions as a wastewater treatment system component associated with NPDES permit WV0060801 and is exempt from CWA Section 404 regulation. However, upon removal and reclamation of the wastewater treatment system, and/or if any portion of Pond 012 no longer functions as a wastewater treatment system, the Corps would assert jurisdiction over RR1-3. As such, the placement of fill material below the ordinary high water mark (OHWM) would be regulated under CWA Section 404.

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.

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 waterbody⁴ 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 TNW⁵: .

Tributary stream order, if known: .

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
 OHWM⁶ (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:

⁶A 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.

⁷Ibid.

(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-RPWs⁸ 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 jurisdictional. 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: .

⁸See Footnote # 3.

⁹To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.

¹⁰Prior 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): **The Study Area includes the watersheds of Millseat Branch, Wolfpen Fork and two (2) unnamed tributaries of Grapevine Creek, and pre-law and SMCRA approved surface and underground coal mining activities have altered the surface and groundwater hydrology of these watersheds. However, due to the past and present coal mining activities, stream and open water resources that are either not connected to a potential water of the U.S. or they are a component of a wastewater treatment system required by an active CWA Section 402 (NPDES) permit were identified during the field review on March 23, 2011. To document the non-jurisdictional resources, 10 Approved Jurisdictional Determination (AJD) areas were established within the Study Area. This form documents non-jurisdictional resources within the 10 AJD areas and includes:**

Three (3) stream reaches, RR6-1, RR6-2 and RR6-3, within the Millseat Branch watershed that exhibit a defined bed, bank and ordinary high water marks (OHWMs). However, a surface connection to Millseat Branch could not be identified for all three (3) stream reaches. These streams exhibit ephemeral flow and drain into an abandoned railroad bed. When the railroad was operational in the Millseat Branch watershed, it is likely that a culvert carried surface drainage from these streams; however, the culvert could not be identified during the field review. Therefore, these streams were determined to be non-jurisdictional waters and are not subject to regulation under CWA Section 404. Total stream length is 1,195 feet.

Ten (10) open water/ponds, five (5) within the Millseat Branch watershed (IW-4, IW-5, IW-6, IW-7 and IW-8) and five (5) within the Wolfpen Fork watershed (IW-1, IW-2, IW-3, IW-9 and IW-10) that do not exhibit a surface connection to a potential water of the U.S. Therefore, each open water/pond was determined to be an isolated water. Per United States v. Wilson, 133 F. 3d 251 (4th Cir. 1997) these waters are non-jurisdictional and are not subject to CWA Section 404 regulation. Therefore, isolated water coordination was not required with US EPA. Total open water/pond area is 1.66 acres.

Eleven (11) open water/ponds have been constructed to satisfy the requirements of two (2) CWA Section 402 (NPDES) permits issued by the WVDEP, and have a total surface area of 1.55 acres. Six (6) open water/ponds (Pond 010-Millseat, Pond 013A, Pond 013B, Pond 024, Pond 025 and Pond 026) have been constructed in uplands within the Millseat Branch watershed and function as components of a wastewater treatment system to satisfy the requirements of NPDES permit WV0060801. Four (4) open water/ponds (Pond 003, Pond 010-Wolfpen, Pond 013 and Pond 014) have been constructed in uplands within the Wolfpen Fork watershed and function as components of a wastewater treatment system to satisfy the requirements NPDES permit WV1004727. Therefore, Pond 010-Millseat, Pond 010-Wolfpen, Pond 013, Pond 013A, Pond 013B, Pond 014, Pond 024, Pond 025 and Pond 026 are exempt from CWA Section 404 regulation

Pond 012 is an in-stream open water/pond located within RR1-3, A Millseat Branch. It functions as a wastewater treatment system component associated with NPDES permit WV0060801 and is exempt from CWA Section 404 regulation. However, upon removal and reclamation of the wastewater treatment system, and/or if any portion of Pond 012 no longer functions as a wastewater treatment system, the Corps would assert jurisdiction over RR1-3. As such, the placement of fill material below the ordinary high water mark (OHWM) would be regulated under CWA Section 404.

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: .

