



TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION

KNOXVILLE ENVIRONMENTAL FIELD OFFICE
DIVISION OF MINERAL & GEOLOGIC RESOURCES
MINING SECTION
3711 MIDDLEBROOK PIKE
KNOXVILLE, TENNESSEE 37921-6538

April 30, 2024

Mr. Johnny Asher, Managing Member
3380 Cedar Fork Road
Tazewell, TN 38789

RE: Issuance of Aquatic Resource Alteration Permit/401 Certification
Hurricane Creek Mining, LLC
Mine 2 – SMCRA 3341
ARAP # NR23MS.010
Claiborne County

Dear Mr. Asher:

In accordance with the provisions of The Tennessee Water Quality Control Act (*Tennessee Code Annotated, Sections 69-3-101 et seq.*) and *Chapter 0400-40-01* of the rules of the Tennessee Board of Water Quality, Oil and Gas the enclosed permit is hereby issued. The continuance and/or reissuance of this permit are contingent upon your meeting the conditions and requirements as stated therein.

On September 14, 2023, the Division received your complete application requesting certification of the United States Army Corps of Engineers' (USACE) 404 permit. In accordance with the provisions of *40 C.F.R. §121.6* the USACE will notify the Division of a reasonable period of time for the state to provide, deny or waive Section 401 certification of the USACE permit. In accordance with the provisions of *40 C.F.R. §121.2* the enclosed permit serves as the federal Section 401 water quality certification that after review of the information provided that the activity will be conducted in a manner that will not violate applicable water quality standards.

For federal agency employees and permit holders, the 401 Water Quality Certification Justifications and Citations related to the procedural requirements of §121.7(d) can be found at <https://www.tn.gov/environment/permit-permits/water-permits/1/aquatic-resource-alteration-permit--arap-.html>. A paper copy of the certifications and justifications can also be obtained by contacting water.permits@tn.gov or calling (615) 532-0359.

Mr. Johnny Asher, Managing Member
Hurricane Creek Mining, LLC
April 30, 2024
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Please be advised that a petition for permit appeal may be filed, pursuant to *T.C.A. Section 69-3-105, subsection (i)*, by the permit applicant or by any aggrieved person who participated in the public comment period or gave testimony at a formal public hearing whose appeal is based upon any of the issues that were provided to the commissioner in writing during the public comment period or in testimony at a formal public hearing on the permit application.

Additionally, for those permits for which the Department gives public notice of a draft permit, any permit applicant or aggrieved person may base a permit appeal on any material change to conditions in the final permit from those in the draft, unless the material change has been subject to additional opportunity for public comment.

TDEC will accept appeals submitted electronically. If you wish to file an appeal, you may do so by e-mailing the appeal and any attachments to TDEC.Appeals@tn.gov. If you file an appeal electronically, you do not have to send a paper copy. Electronic filing is encouraged, but not required.

Any petition for permit appeal under this subsection (i) shall be filed with the technical secretary of the Board of Water Quality, Oil and Gas within thirty (30) days after public notice of the commissioner's decision to issue or deny the permit. copy of the filing should also be sent to TDEC's Office of General Counsel. The mailing addresses follow:

April Grippo
Acting Technical Secretary
Board of Water Quality, Oil and Gas
William R. Snodgrass TN Tower
312 Rosa L. Parks Avenue, 12th Fl
Nashville, TN 37243-1102

Jenny L. Howard, General Counsel
Office of General Counsel
William R. Snodgrass TN Tower
312 Rosa L. Parks Avenue, 2nd Fl
Nashville, TN 37243-1102

If you have any questions concerning this correspondence, contact [Choose an item..](#)

Sincerely,



for Bryan Epperson
Director
Division of Mineral & Geologic Resources

BWE: DPL: DRM

Enclosures

cc: ARAP Permit File



ARAP NR23MS.010
New

Authorization for discharge of fill and alterations of waters under the Aquatic Resource Alteration Permit (ARAP)/§401 Certification Program

Issued By

Tennessee Department of Environment and Conservation
Division of Mineral & Geologic Resources, Mining Section
3711 Middlebrook Pike
Knoxville, Tennessee 37921-6538

Under authority of the *Tennessee Water Quality Control Act of 1977 (T.C.A. 69-3-101 et seq.)* and pursuant to §401 of *The Clean Water Act (33 U.S.C. 1341)*

Discharger: **Hurricane Creek Mining, LLC**

is authorized to conduct alterations to waters of the state:

located in **Claiborne** County at latitude **36.5383**, longitude **-83.8467**

waters to be affected consist of **Stream Crossings & Wetland Alterations**

within the following subwatersheds identified as: **Valley Creek and Tackett Creek**

in accordance with monitoring requirements and other conditions set forth herein.

This permit shall become effective on: **1 May 2024**

This permit shall expire on: **30 April 2029**

Issuance date: **30 April 2024**

A handwritten signature in blue ink, appearing to read "D. Epperson", is written over a horizontal line.

for Bryan Epperson
Director
Division of Mineral & Geologic Resources

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RATIONALE

RATIONALE R-1

Part I

A. AQUATIC RESOURCE ALTERATION PERMIT REQUIREMENTS

During the period beginning with the effective date of this permit and lasting through the expiration date of this permit, the permittee is authorized to conduct the alterations to state jurisdictional waters associated with the activities indicated in the approved plans, area maps and supporting documentation. This permit covers stream and wetland alterations associated with Hurricane Creek Mining, LLC Mine 2 and is limited to only those alterations specified in the approved plans.

1. Special Conditions:

- a. This permit may serve as §401 certification for activities that meet the conditions of a United States Army Corps of Engineers (USACE) Permit.
- b. Activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, cannot be authorized.
- c. Wet weather conveyances will be constructed such that they are stable and do not cause an excessive release of sediment that affects downstream hydrologic features (streams, wetlands, etc.). Constructed wet weather conveyances may be stabilized by vegetative cover (grass-lining), appropriately sized rock or riprap. Other best management practices (BMPs) and methods of channel stabilization for the wet weather conveyances may be utilized as dictated by site conditions (i.e. grade, soil characteristics, availability of natural material, etc.) of the reclaimed area.
- d. Native rock, stone, large woody debris (4" diameter x 3' length) or logs should be stockpiled and used to construct and restore stream channels and to provide bank stabilization or aquatic habitat enhancement structures when available on the project site. Appropriately sized riprap materials may be used judiciously in high gradient areas or the outside bank of meanders when naturally occurring materials of sufficient size and characteristics are not available on site to stabilize the reconstructed stream channel.
- e. Temporary or permanent soil stabilization shall be accomplished after final grading or other earth work. Permanent stabilization with perennial vegetation or other permanently stable, non-eroding surfaces shall replace any temporary measures as soon as practicable.
- f. A copy of the permit shall be provided to each contractor for each specific project with a copy of the site plans. Each contractor should be familiar and comply with all terms and conditions of the permit.
- g. Minor modifications to the approved plans necessary to accommodate site conditions may be authorized provided the changes do not result in new or expanded alterations to waters, or additional dredge or fill of waters. The applicant shall notify the Division prior to any modification of the approved plans necessary to accommodate site

conditions. Such modifications shall not be implemented until the Division has reviewed the changes to determine that they are consistent with the activities authorized in the permit or that additional permit action or public notice is required.

2. General Conditions:

- a. The amount of fill, stream channel and bank modifications, or other impacts associated with the activity shall be limited to the minimum necessary to accomplish the project purpose. The permittee shall utilize the least impactful practicable method of construction.
- b. All activities must be accomplished in conformance with the approved plans, specifications, data, and other information submitted in support of the ARAP application (form CN-1091) (except where no application is required as specified below) and the limitations, requirements, and conditions set forth herein. Failure to comply with the terms and conditions of this permit is a violation of the Act.
- c. Activities, either individually or cumulatively, that may result in an appreciable permanent loss of resource values to streams or wetlands are not covered. This permit shall not be used incrementally to combine with other activities resulting in a net loss of water resource values.
- d. Clearing, grubbing, and other disturbance to riparian vegetation shall be kept at the minimum necessary for slope construction and equipment operations. Unnecessary native riparian vegetation removal, including tree removal, is prohibited. Native riparian vegetation must be reestablished in all areas of disturbance outside of any permanent authorized structures after work is completed. Coverage under this permit does not serve to waive any local riparian buffer protection requirement, and permittees are responsible for obtaining any necessary local approval.
- e. This activity may not result in the permanent disruption to the movement of fish or other aquatic life upon project completion.
- f. Blasting within 50 feet of any jurisdictional stream or wetland is prohibited.
- g. Activities that directly impact wetlands, or impair surface water flow into or out of any wetland areas are not covered.
- h. Activities located in a component of the National Wild and Scenic River System or waters designated as Outstanding National Resource Waters are not covered.
- i. Activities occurring in known or likely habitat of state or federally listed threatened, endangered, deemed in need of management, or species of special concern may not be authorized without prior coordination with the Tennessee Wildlife Resources Agency (TWRA) and TDEC Division of Natural Areas (DNA) to determine if any special

conditions are required to avoid and/or minimize harm to the listed species or their habitat. Adverse effects to federally listed threatened and endangered species are not authorized by this permit. Permittee is responsible for obtaining prior authorization from the United States Fish and Wildlife Service (USFWS) as required by Section 7 or Section 10 under the Endangered Species Act.

- j. Work shall not commence until the permittee has obtained all necessary authorizations pursuant to applicable provisions of section 10 of The Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, section 26a of The Tennessee Valley Authority Act, section 402 of the Clean Water Act (including, but not limited to, an NPDES permit for construction stormwater), or any other federal, state, or local laws.
- k. Backfill activities must be accomplished in the least impactful manner possible that stabilizes the streambed and banks to prevent erosion. The completed activities may not disrupt or impound stream flow.
- l. The use of monofilament-type erosion control netting or blanket is prohibited in the stream channel, stream banks, or any disturbed riparian areas within 30 feet of top of bank.
- m. This permit does not authorize impacts to cultural, historic, or archaeological features or sites.
- n. This permit does not authorize access to public or private property. Arrangements concerning the use of public or private property shall be made with the landowner. The permittee is responsible for obtaining any additional permitting or maintenance agreements with other government or public agencies or lands.
- o. Where practicable, all activities shall be accomplished in the dry. All surface water flowing towards this work shall be diverted using cofferdams and/or berms constructed of sandbags, clean rock (containing no fines or soils), steel sheeting, or other non-erodible, non-toxic material. All such diversion materials shall be removed upon completion of the work. Any disturbance to the stream bed or banks must be restored to its original condition. As approved after Division review, activities may be conducted in the flowing water if working in the dry will likely cause additional degradation. Any work conducted in the flowing water must be for a short duration and with minimal impact and conform to the Division-approved methodology.
- p. All activities must be carried out in such a manner as will prevent violations of water quality criteria as stated in TDEC Rule Chapter 0400-40-03, or impairment of the uses of waters of the state as designated by Rule Chapter 0400-40-04.
- q. Erosion prevention and sediment control measures must be in place and functional before any earth moving operations begin and shall be designed according to the department's Erosion and Sediment Control Handbook (<http://tnepsc.org/handbook.asp>). Permanent vegetative stabilization using native species of all disturbed areas in or near the stream

channel must be initiated within 14 days of project completion (see also Landscaping with Natives at tneppc.org). Nonnative, non-invasive annuals may be used as cover crops until native species can be established.

- r. Temporary stream crossings shall be limited to one point in the construction area and erosion control measures shall be utilized where stream bank vegetation is disturbed. Stream beds shall not be used as linear transportation routes for mechanized equipment, rather, the stream channel may be crossed perpendicularly with equipment provided no additional fill or excavation is necessary.

**For citations see Permit Rationale, Section VI. NEW PERMIT CONDITIONS*

B. MITIGATION AND MONITORING REQUIREMENTS

1. Required Mitigation Activities

Hurricane Creek Mining, LLC activities are designed to avoid and minimize new impacts to water features and aquatic habitat. New disturbance in these water features are restricted to those necessary to conduct the proposed activities without significant degradation or offset by compensatory mitigation to attain de minimis degradation.

- a. The proposed stream crossings provide access to the mining area while assuring that new stream and riparian disturbance is avoided and minimized consistent with the Tennessee Code Annotated 69-3-108(f)(1), “Responsible Miners Act”. Crossings are to be removed and a stable channel/ford constructed post mining. Therefore, no compensatory mitigation in addition to the stream rehabilitation activities is required for the proposed activities. Rehabilitation shall occur in the manner specified in the approved plans to reconstruct stream channels for the features indicated in the approved plans.
- b. Crossings shall be inspected monthly, maintained, and replaced as necessary to prevent the impoundment of the stream, bank erosion, headcutting or other conditions that contribute to the exceedance of a narrative water quality criteria.
- c. The 2.34 acres of wetlands to be affected by the proposed mining are incidental to pre-SMCRA mining related activities. Due to the location and conditions in which these features formed they are considered of low resource value. Therefore, 2.5 compensatory mitigation credits were purchased from the Tennessee Wildlife Federation - Tennessee Mitigation Fund to offset any wetland losses.

2. Required Monitoring Activities

Monitoring of the stream and wetland alterations shall consist of the following items:

- a. A visual inspection of each crossing shall be conducted once per month until a stable channel is constructed post mining. A Reporting Checklist has been provided with the Aquatic Resource Alteration Permit (ARAP). This checklist must be completed

monthly to document visual inspections. A completed copy of the checklist with supporting photographs is to be provided to the Department annually.

- b. The permittee shall document on the Reporting Checklist the date each wetland is initially altered, filled, and reclaimed.

3. Submission of Monitoring Results

- a. The permittee shall submit a copy of the Reporting Checklist and any supporting photographs annually for the term of the permit.
- b. All monitoring shall include the results from any ecological performance standards required under an associated United States Army Corps of Engineers (USACE) permit. This information shall be provided to the Division within 30 days of submittal to the USACE.
- c. An electronic copy of any monitoring reports and supporting information shall be provided to the Division of Mineral & Geologic Resource-Mining Section at TDEC.Mining@tn.gov.
- d. The annual monitoring report shall be due by January 30 following each monitoring year. The first Monitoring report is due **January 30, 2025**.

PART II

A. GENERAL PROVISIONS

1. Duty to Reapply

Permittee is not authorized to conduct alterations to state jurisdictional waters after the expiration date of this permit. In order to receive authorization to discharge fill or otherwise alter waters beyond the expiration date, the permittee shall submit such information and forms as are required to the Director no later than 90 days prior to the expiration date.

2. Right of Entry

The permittee shall allow the Director, the Regional Administrator of the U.S. Environmental Protection Agency, or their authorized representatives, upon the presentation of credentials to:

- a. Enter upon the permittee's premises where an effluent source is located or where records are required to be kept under the terms and conditions of this permit, and copy these records;
- b. Inspect any monitoring equipment or method or any collection, treatment, pollution management, or discharge facilities required under this permit.

3. Availability of Reports

Except for data determined to be confidential under *Section 308 of The Federal Clean Water Act of 1977*, as amended, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the Knoxville Environmental Field Office or online by entering the referenced ARAP number in the permits search tab in the Department's public dataviewer available at the following link [https://dataviewers.tdec.tn.gov/dataviewers/f?p=2005:1:15593188571445:::.](https://dataviewers.tdec.tn.gov/dataviewers/f?p=2005:1:15593188571445:::)

4. Proper Operation and Maintenance

Proper operation and maintenance shall be implemented at this site to control and minimize pollutants from entering jurisdictional waters. The permittee shall visually inspect the ARAP area BMPs or other treatment devices established to control storm water discharges associated with the alterations.

5. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal right, nor any infringement of federal, state, or local laws or regulations.

6. Severability

The provisions of this permit are severable. If any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, then the application of such provision to other circumstances and to the remainder of this permit shall not be affected thereby.

7. Other Information

If the permittee becomes aware that he failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application, or in a report to the Director, then the permittee shall promptly submit such facts or information.

8. Best Management Practices (BMPs)

The permittee shall utilize Best Management Practices to prevent or minimize erosion and the contribution of suspended solids and sediment to surface waters and/or adjacent properties. Such practice(s) shall be implemented to reduce the impacts caused by disturbances created by the installation of culverts, the construction of haulroads, access roads, spoil storage, and stockpile areas, and other related activities.

Best Management Practices (BMPs) include, but are not limited to, rapid grading, mulching, and revegetation of disturbed areas, straw bales, sediment traps and swells, vegetative buffer zones, erosion control structures, and rock check dams. BMPs are used in conjunction with effluent limitation guidelines as supplemental or auxiliary erosion control measures and are not to be considered as substitutes for monitoring requirements of point source discharges.

Additional information regarding acceptable practices may be found in the **Tennessee Erosion and Sediment Control Handbook**, most recent revision, which is available from the Division.

B. CHANGES AFFECTING THE PERMIT

1. Planned Changes

The permittee shall give notice to the Director as soon as possible of any planned changes that will result in change of the physical characteristics, additions or deletions of the activities authorized in the permit.

2. Transfer of Ownership

Individual permits are not transferable to any person except after notice to the commissioner, as specified below.

- a. The permittee notifies the Commissioner of the proposed transfer at least thirty (30) days in advance of the proposed transfer date;
- b. The notice includes a written agreement between the existing and new permittee containing a specified date for transfer of the permit responsibility, coverage, and liability between them;
- c. The permittee must provide the following information to the commissioner in their formal notice of intent to transfer ownership:
 - (1) The permit number of the subject permit;
 - (2) The effective date of the proposed transfer;
 - (3) The name and address of the transferor;
 - (4) The name and address of the transferee;
 - (5) The names of the responsible parties for both the transferor and transferee;
 - (6) A statement that the transferee assumes responsibility for the subject permit;
 - (7) A statement that the transferor relinquishes responsibility for the subject permit;
 - (8) The signatures of the responsible parties for both the transferor and transferee pursuant to the signatory requirements of this part; and
 - (9) A statement regarding any proposed modifications to the facility, its operations, or any other changes, which might affect the permit, limits and conditions contained in the permit.

3. Change of Mailing Address

The permittee shall promptly provide to the Director written notice of any change of mailing address. In the absence of such notice, the original address of the permittee will be assumed to be correct.

C. NON-COMPLIANCE

1. Effect of Non-Compliance

All alterations to waters shall be consistent with the terms and conditions of this permit. Any permit non-compliance constitutes a violation of applicable state and federal laws and is grounds for enforcement action, permit termination, permit modification, or denial of permit reissuance.

2. Reporting of Non-Compliance

a. 24-Hour Reporting

In the case of any non-compliance which could cause a threat to the public drinking water supplies, or any other discharge which could constitute a threat to human health or the environment, a required notice of non-compliance shall be provided to the Division of Mineral & Geologic Resources within twenty-four (24) hours from the time the permittee becomes aware of the circumstances.

Telephone No. (865) 594-6035
Fax No. (865) 594-6105
Email: TDEC.Mining@tn.gov

Additionally, written submission shall be provided within five (5) days of the time the permittee becomes aware of the circumstances unless the Director on a case-by-case basis waives this requirement. The permittee shall provide the Director with the following information:

- (1) A description of the cause of non-compliance;
- (2) The period of non-compliance, including exact dates and times, or, if not corrected, the anticipated time non-compliance is expected to continue; and
- (3) The steps being taken to monitor, reduce, eliminate, and prevent recurrence of the non-compliance.

This written notice shall not be considered as excusing or justifying the failure to comply with the permit conditions. The details may be incorporated by reference to the written five (5) day notification.

3. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact to the waters of Tennessee resulting from non-compliance with this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the non-compliance. In an enforcement action, it shall not be a defense for the permittee that it

would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

D. LIABILITIES

1. Civil and Criminal Liability

Nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for non-compliance. Notwithstanding this permit, the permittee shall remain liable for any damages sustained by the state of Tennessee including, but not limited to, fish kills and losses of aquatic life and/or wildlife, as a result of the discharge of fill to any surface waters. Additionally, notwithstanding this permit, it shall be the responsibility of the permittee to conduct its alteration activities in a manner such that public or private nuisances or health hazards will not be created.

2. Liability under State Law

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable state law or *The Federal Clean Water Act of 1977*, as amended.

3. Liability to Obtain Required Permits

It is a violation of this permit to fail to obtain a permit or permit coverage for any activity that requires a permit under *The Tennessee Water Quality Control Act of 1977*.

PART III

A. GENERAL REQUIREMENTS

Prior to the creation of any disturbed area within the projected area of operation, and prior to changes, corrections, modifications, or adjustments in the location of any affected feature, an Engineering Plan shall be submitted to and approved by the Division of Mineral & Geologic Resources.

No mining activity shall be conducted within the projected area of operation unless the detailed Engineering Plan for the specific area of operation or disturbance has been approved in advance. The Engineering Plan shall include those documents, maps, drawings, and other materials as required by the Division.

B. ANTIDEGRADATION STATEMENT

Pursuant to the *Rules of the Tennessee Department of Environment and Conservation, Chapter 0400-40-03-.06*, titled "Tennessee Antidegradation Statement," and in consideration of the Department's directive in attaining the greatest degree of protection for water resources, the permittee shall further be required, pursuant to the terms and conditions of this permit, to comply with the conditions and schedules of compliance required to implement applicable water quality standards, to comply with a State Water Quality Plan or other state or federal laws or regulations.

C. DEFINITIONS

1. "Access Road/Haul Road" is any road constructed, maintained, or used by the operator of a mining facility primarily for the purpose of transporting raw materials, equipment, manufactured products, waste material, or by-products, and is located within the affected area.
2. "Activity" means any and all work or acts associated with the performance, or carrying out of a project or a plan, or construction of a structure.
3. "Adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the State by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands".
4. "Aquatic Resource Alteration Permit" or "ARAP" means a permit pursuant to T.C.A. § 69-3-108 of the Act, which authorizes the alteration of properties of waters of the State which result from activities other than discharges of wastewater through a pipe, ditch or other conveyance.
5. "Best Management Practices (BMPs)" means a schedule of activities, prohibition of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the State. BMP's include methods, measures, practices, and design and performance standards.

6. “*Certification*” means an Aquatic Resource Alteration Permit under the Tennessee Water Quality Control Act which certifies, either unconditionally or through imposition of terms under which the activity must be carried out, that the activity will comply with applicable provisions of §§ 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act and Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation and the Act.
7. “*Channelization*” means the alteration of stream channels including but not limited to straightening, widening, or enlarging.
8. “*Clean Water Act*” or “*Act*” means the *Federal Clean Water Act of 1977* (formerly referred to as *The Federal Water Pollution Control Act* or *The Federal Water Pollution Control Act Amendments of 1972*), as amended.
9. “*Commissioner*” means the Commissioner of the Tennessee Department of Environment and Conservation or the Commissioner’s duly authorized representative.
10. “*Constructed Wetland*” means intentionally designed, built and operated on previously nonwetland sites for the primary purpose of wastewater treatment or retention; such wetlands are not created to provide mitigation for adverse impacts or other wetlands.
11. “*Controlled surface mine drainage*” means any surface mine drainage that is pumped or siphoned from the active mining area.
12. “*Cumulative impacts*” means the impact on resource values which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.
13. “*Debris*” means woody materials, trash, flotsam, dislodged vegetation, and other potentially mobile materials which may, when located within a stream channel, contribute to flow blockage. This does not include gravel, sand, soil or its constituents such as silt, clay or other sediments.
14. “*Ditch*” means a man-made excavation for the purpose of conveying water. Ditches do not include streams, modified streams or canals.
15. “*Director*” means the Regional Administrator or the State Director, as the context requires or an authorized representative.
16. “*Division*” means the Division of Mineral & Geologic Resources.
17. “*Emergency*” means a situation where life or substantive improvements to real property is in immediate danger.
18. “*Existing conditions*” means the biological, chemical, bacteriological, radiological, and physical conditions of a stream or wetland at the time the project is proposed by a quantitative assessment tool or other defensible scientific method as approved or determined by the Division.
19. “*Mine*” shall mean an area of land, surface or underground, actively mined for the production of a natural resource. Such areas shall also include any adjacent land, the uses of which is incidental to any such activities; all lands affected by the construction of new roads or the improvement or use of existing roads, except maintained public roads, to gain access to the site of such activities and for haulage; excavations, workings, impoundments,

dams, dumps, stockpiles, overburden piles, holes or depressions, repair areas, storage areas, and other areas upon which are sited structures, or other property or materials on the surface, resulting from or incidental to such activities.

20. "*National Pollutant Discharge Elimination System (NPDES)*" means the Federal Environmental Protection Agency's (EPA) national program for issuing, modifying, revoking and reissuing, terminating, monitoring, and enforcing water quality permits. The term includes an "approved state program."
21. "Reclamation Area" means the surface area of a coal mine which has been returned to required contour and on which revegetation (specifically, seeding or planting) work has commenced. (*40 CFR Part 434.11 (k) (1)*).
22. "*Regional Administrator*" means the Administrator for the Environmental Protection Agency or his authorized representative.
23. "*Tennessee Water Quality Control Act of 1977*," as amended, *TCA 69-3-101 et seq.*, is the act that sets forth the guidelines and procedures for the abatement and prevention of pollution to the waters of the state. The act enables the state of Tennessee to qualify for full participation in the NPDES permit program.
24. "*Waters*" means any and all water, public and private, on or beneath the surface of the ground, which are contained within, flow through, or border upon Tennessee or any portion thereof except those bodies of water confined to and retained within the limits of private property in single ownership which do not combine or effect a junction with natural surface or underground waters. The term "waters" also includes tributary streams, drainways, and conveyances that enter or drain into any and all water, public or private, on or beneath surface of the ground, which are contained within, flow through, or border upon Tennessee or any portion thereof except those bodies of water confined to and retained within the limits of private property in single ownerships which do not combine or effect a junction with natural surface or underground waters.

**RATIONALE
DRAFT**

**Aquatic Resource Alteration Permit
(ARAP)/§401 Certification**

**Hurricane Creek Mining, LLC
ARAP NR23MS.010
Clairfield, Claiborne County, Tennessee**

*Permit Writer: Dan Murray
October 2, 2023*

I. APPLICANT

Mr. Johnny Asher, Managing Member
Hurricane Creek Mining, LLC
3380 Cedar Fork Road
Tazewell, TN 38789

Contact: Johnny Asher, Managing Member

Facility Address: Valley Creek Road, Clairfield, TN

LOCATION: Mine 2
Claiborne County, TN
Latitude: 36.5383, **Longitude:** -83.8467

PROPOSED ALTERATIONS: Stream and Wetland

II. PERMIT STATUS

ARAP NR23MS.010 draft Click or tap to enter a date.

ARAP NR23MS.010 effective Click or tap to enter a date.

ARAP NR23MS.010 expires Click or tap to enter a date.

Application for New Permit Received August 14, 2023

III. FACILITY AND RECEIVING WATERS

Hurricane Creek Mining, LLC proposes stream and wetland alteration activities associated with Mine 2 in Campbell County, Tennessee. The designated uses for these waters are fish and aquatic life, livestock watering and wildlife, recreation, and irrigation. See *Rules of the Tennessee Department of Environment and Conservation, Chapter 0400-40-04*. The streams considered for alteration are not listed as impaired on the 2022 303(d) *List of Impaired Waters*.

IV. APPLICATION TYPE AND BACKGROUND INFORMATION

Hurricane Creek Mining, LLC has applied for a new Individual Aquatic Resource Alteration Permit. This permit is for minor road crossings associated with the proposed NPDES permit and Section 401 certification of activities, including wetland alterations, previously authorized under U.S. Army Corps of Engineers (USACE) LRN-2009-00479 transferred to Hurricane Creek Mining, LLC. The proposed activities were previously authorized under ARAP NR13MS.008 which was only partially implemented and has been terminated. In preparation for a new ARAP application Hurricane Creek Mining, LLC conducted a hydrologic determination for the site identifying all state jurisdictional waters within the permit area requiring authorization of an ARAP prior to altering. During this evaluation a small wetland feature was identified with no surface connection to other waters that was less than 0.1 acres. The feature exhibited characteristics consistent with a small bench pond.

The proposed activity is in Claiborne County and would include the installation of 21 crossings on 8 streams, and 3 wet weather conveyances, as well as 2.34 acres of wetland alterations. The wet weather conveyances are considered jurisdictional waters of the U.S. under LRN-2009-00479. Mitigation credits were previously purchased to offset the proposed wetland impacts by the previous permitted facility and have been transferred to Hurricane Creek Mining, LLC. The effected streams have been previously altered by pre-SMCRA surface mining and have channels that range from relatively stable to severely degraded geomorphologically.

The applicant's proposed activities would include the removal of all culverts post mining and the establishment of rocked stable channels during reclamation phase II bond release of the SMCRA permit. Based on the existing condition of the waters to be altered, avoidance, minimization, and mitigation of impacts the Division has made a final determination that the proposed activity will not result in significant degradation or an appreciable permanent loss of resource values.

V. ALTERNATIVES ANALYSIS

Hurricane Creek Mining, LLC considered alternatives to proposed stream alterations in developing the submitted ARAP plan. The alternatives considered were evaluated for practicability and impacts on water quality.

Alternative I – The first alternative considered was to avoid (skip) all stream and wetland alterations. Complete avoidance of water features is impracticable for mining operations to effectively recover the coal resource and obtain enough material by re-mining for site reclamation.

Alternative II – The second alternative considered was to minimize all stream alterations with crossings. Wetland alterations would be offset by reconstructing wetlands during site reclamation. This would result in a temporal loss of wetland resource and involve the modification of treatment structures or constructing wetlands in inappropriate locations reducing the long-term effectiveness of the mitigation.

Alternative III – The third alternative considered was to minimize all stream alterations with crossings. Wetland alterations would be offset by reconstructing wetlands off site to mitigate loss. This would require obtaining land and establishing appropriate easements wetlands in the appropriate watersheds.

Alternative IV – is the preferred alternative. This alternative minimizes stream impacts and limits stream alterations to minor, culverted crossings that must be removed and a stable rock channel across the reclaimed bench constructed during phase II reclamation. Wetland alterations would be offset by using the existing mitigation credits purchased for the specified alterations by a previous permittee for the U.S. Army Corps of Engineers (USACE) permit, LRN-2009-00479. The USACE permit has been transferred to Hurricane Creek Mining LLC.

Based on the review of available information, the Division has made a preliminary determination that the preferred alternative is the least environmentally impactful practicable alternative.

VI. NEW PERMIT CONDITIONS

1. Special Conditions:

Special Conditions are established in the permit specific to the site and activities proposed. These conditions stipulate activities which may be required or prohibited in the permit. In the case of certain projects multiple state and federal agencies exhibit regulatory or oversight authority over activities that have the potential to affect the ARAP §401 Certification. These agencies may require additional measures to protect water quality, species of concern (e.g. threatened or endangered) or features of archeological significance.

- a. This permit may serve as §401 certification for activities that meet the conditions of a United States Army Corps of Engineers (USACE) Permit.

(TDEC Rules Chapter 0400-40-07-.01(3), Aquatic Resource Alteration) - This is required by the Division rule cited that an ARAP will serve as the §401 certification when a 404 permit is required. As the state has not certified all USACE Nationwide

Permits (NWP) this condition authorizes this ARAP to serve as certification for the actions specified in an appropriate NWP or USACE individual permit.

- b. Activities that result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, cannot be authorized.

(TDEC Rules Chapters 0400-40-07-.03(3) and 0400-40-07-.04(6)(a), Aquatic Resource Alteration) – This condition assures that there is not an appreciable permanent loss of resource values. This condition excludes activities that would cause greater than de minimis degradation to “waters” that fully meet state water quality criteria. This condition is a measure to assure compliance with the Division’s Antidegradation Policy.

- c. Wet weather conveyances will be constructed such that they are stable and do not cause an excessive release of sediment that affects downstream hydrologic features (streams, wetlands, etc.). Constructed wet weather conveyances may be stabilized by vegetative cover (grass-lining), appropriately sized rock or riprap. Other best management practices (BMPs) and methods of channel stabilization for the wet weather conveyances may be utilized as dictated by site conditions (i.e. grade, soil characteristics, availability of natural material, etc.) of the reclaimed area.

(T.C.A. 69-3-108) - This is implicit in Tennessee’s Water Quality Control Act and is reiterated that activities in wet weather conveyances do not adversely impact “waters” downstream.

- d. Native rock, stone, large woody debris (4” diameter x 3’ length) or logs should be stockpiled and used to construct and restore stream channels and to provide bank stabilization or aquatic habitat enhancement structures when available on the project site. Appropriately sized riprap materials may be used judiciously in high gradient areas or the outside bank of meanders when naturally occurring materials of sufficient size and characteristics are not available on site to stabilize the reconstructed stream channel.

(TDEC Rules Chapter 0400-40-07, Aquatic Resource Alteration & TDEC Rule Chapter 0400-40-03, General Water Quality Criteria) – When practicable, the Division prefers the use of the materials indicated. However, due to site conditions the permittee may use limestone or riprap to provide stability and to maintain or improve aquatic habitat.

- e. Temporary or permanent soil stabilization shall be accomplished after final grading or other earth work. Permanent stabilization with perennial vegetation or other permanently stable, non-eroding surfaces shall replace any temporary measures as soon as practicable.

(TDEC Rules Chapter 0400-40-07-.04(6)(a), Aquatic Resource Alteration) – This condition is in place to maintain water quality by reducing the loss of sediment from surface disturbance to any associated waters.

- f. A copy of the permit shall be provided to each contractor for each specific project with a copy of the site plans. Each contractor should be familiar and comply with all terms and conditions of the permit.

(TDEC Rules Chapter 0400-40-07-.04(6)(c), Aquatic Resource Alteration) – This condition assures that each contractor should be aware of any permit conditions the state has deemed necessary to protect water quality while conducting the authorized activities.

- g. Minor modifications to the approved plans necessary to accommodate site conditions may be authorized provided the changes do not result in new or expanded alterations to waters, or additional dredge or fill of waters. The applicant shall notify the Division prior to any modification of the approved plans necessary to accommodate site conditions. Such modifications shall not be implemented until the Division has reviewed the changes to determine that they are consistent with the activities authorized in the permit or that additional permit action or public notice is required.

(TDEC Rules Chapter 0400-40-07-.04(4)(a), Aquatic Resource Alteration) – The rule authorizes such modifications, and this condition informs the permittee on notification requirements

2. General Conditions:

General Conditions are permit requirements established common to most sites and activities requesting Coverage under an ARAP §401 Certification. These specify specific activities which may be required or prohibited in the permit. For federal agency employees and permit holders, the 401 Water Quality Certification Justifications and Citations related to the procedural requirements of §121.7(d) can be found at <https://www.tn.gov/environment/permit-permits/water-permits1/aquatic-resource-alteration-permit--arap-.html>.

(T.C.A. 69-3-108 and TDEC Rules Chapter 0400-40-07, Aquatic Resource Alteration)

VII. STATE OF TENNESSEE ANTIDegradATION POLICY

Tennessee's Antidegradation Statement is found in Rule 0400-40-03-.06. It is the purpose of Tennessee's standards to fully protect existing uses of all surface waters as established under the Act.

The Department has preliminarily determined that 8 streams, and 3 wet weather conveyances, as well as 2.34 acres of wetland alterations have available parameters. Accordingly, an activity that would cause degradation of habitat above the level of *de minimis* will only be authorized if the applicant has demonstrated to the Department that there are no practicable alternatives to prevent or lessen degradation associated with the proposed activity and the degradation is necessary to accommodate important economic or social development in the area and will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the

Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

The Department has made a preliminary determination that the proposed activity will result in only *de minimis* degradation. As explained in the Mitigation section below, the impact will not result in an appreciable permanent loss of resource values and has mitigation sufficient to offset any wetland loss associated with the proposed activities.

Accordingly, no demonstration of economic or social necessity or demonstration of a lack of practicable alternatives is required by the Antidegradation Statement. Moreover, the proposed activities will not violate water quality criteria because the proposed activity will result in no net loss of resource values.

As discussed in the Mitigation section below, the proposed activities will not violate water quality criteria because the proposed activity will result in no net loss of resource values.

The Department has listed Hurricane Creek, Spruce Lick Branch, and Tackett Creek as Exceptional Tennessee Waters due to either high biological diversity or as providing habitat for Blackside Dace.

Accordingly, an activity that would cause degradation of habitat above the level of *de minimis* will only be authorized if the applicant has demonstrated to the Department that there are no practicable alternatives to prevent or lessen degradation associated with the proposed activity, and the degradation is necessary to accommodate important economic or social development in the area and will not violate the water quality criteria for uses existing in the receiving waters. If one or more practicable alternatives is identified, the Department shall only find that a lowering is necessary if those alternative(s) are selected for implementation.

In addition, if the Department determines, after this public comment period, that more than *de minimis* degradation is necessary to accommodate important economic or social development in the area, the Department will issue a Notice of Determination of Economic or Social Necessity. Within 30 days after this notice, any affected intergovernmental coordination agency or affected third person may petition the Board for a declaratory order.

The Department has made a preliminary determination that the proposed activity will result in only *de minimis* degradation. As explained in the Mitigation section below, the impact will not result in an appreciable permanent loss of resource values.

Accordingly, no demonstration of economic or social necessity or a lack of practicable alternatives is required pursuant to the Antidegradation Statement. Moreover, the proposed activities will not violate water quality criteria because the proposed activity will result in no overall net loss of resource values.

VIII. MITIGATION AND MONITORING REQUIREMENTS

A. Required Mitigation Activities

Hurricane Creek Mining, LLC is avoiding and minimizing new alterations to water features to the extent practicable. New disturbance in these water features are restricted to those necessary to conduct the proposed activities without significant degradation or offset by compensatory mitigation to attain de minimis degradation.

1. The proposed stream crossings provide access to the mining area while assuring that new stream and riparian disturbance is avoided and minimized consistent with the Tennessee Code Annotated 69-3-108(f)(1), "Responsible Miners Act". Crossings are to be removed and a stable channel/ford constructed post mining. Therefore, no compensatory mitigation in addition to the stream rehabilitation activities is required for the proposed activities. Rehabilitation shall occur in the manner specified in the approved plans to reconstruct stream channels for the features indicated in the approved plans.
2. The 2.34 acres of wetlands to be affected by the proposed mining are incidental to pre-SMCRA mining related activities. Due to the location and conditions in which these features formed they are considered of low resource value. Therefore, 2.5 compensatory mitigation credits were purchased from the Tennessee Wildlife Federation - Tennessee Mitigation Fund to offset any losses.

B. Required Monitoring Activities

Hurricane Creek Mining, LLC will submit annually to the Division a copy of Reporting Checklist documenting the status of each road crossing and wetland feature associated with the project. Termination of the ARAP is contingent on the establishment of stable stream channels after culvert removal during phase II bond release.

The existing wetlands are incidental to pre-SMCRA surface mining and mitigation has been obtained from wetlands credits purchased from a third party, Tennessee Wildlife Federation. Monitoring of the wetlands consist of documenting the fill and reclamation of each feature on the Reporting Checklist provided to the permittee.

IX. PERMIT DURATION

The permit will be issued for a five (5) year term.