IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KENTUCKIANS FOR THE COMMONWEALTH and SIERRA CLUB,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:12-cv-00682
UNITED STATES ARMY CORPS OF ENGINEERS, THOMAS P. BOSTICK, Commander and Chief of Engineers, U.S. Army Corps of Engineers, and Luke T. Leonard, Colonel, District Engineer, U.S. Army Corps of Engineers, Louisville District,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

Plaintiffs Kentuckians for the Commonwealth and Sierra Club respectfully submit this memorandum in support of their Emergency Motion for an Injunction Pending Appeal under Federal Rule of Civil Procedure 62(c). Plaintiffs have filed a Notice of Appeal (Doc. No. 72) from this Court's August 23, 2013, Memorandum Opinion (Doc. No. 70) and Order and Judgment (Doc. No. 71). Under Federal Rule of Appellate Procedure 8, Plaintiffs cannot obtain emergency relief from the Court of Appeals until this Court denies relief pending appeal or fails to afford the relief requested. Plaintiffs respectfully request decision on this Emergency Motion within three days or, in the alternative, a temporary injunction pending decision. If the Court is inclined to deny the Emergency Motion, Plaintiffs respectfully request that it do so without waiting for a response from Defendants.

Leeco has represented to Plaintiffs that it intends to begin dredge and fill activities (specifically, construction of a foundation for the lower part of the planned valley fill) as soon as possible upon completion of timber clearing. To maintain the status quo ante and prevent irreparable harm, Plaintiffs request an injunction directing the U.S. Army Corps of Engineers to suspend Leeco's § 404 permit and prohibiting Leeco from dredging or filling waters of the United States during the pendency of Plaintiffs' appeal. As we explain below, the relevant factors all weigh in favor of granting the injunction.

In this action, Plaintiffs challenge the Corps' July 26, 2012, decision to issue a § 404 permit under the Clean Water Act, 33 U.S.C. § 1344, to Leeco for the Stacy Branch surface coal mine. Plaintiffs allege that the Corps violated the National Environmental Policy Act, 42 U.S.C. § 4321, and the Clean Water Act by failing to consider evidence of risk to public health from coal mining activities. Plaintiffs further allege that the Corps violated several binding regulations in concluding that the destruction of streams at the mine site will not significantly degrade waters of the United States. In the Memorandum Opinion of August 23, the Court rejected all of these claims, denied Plaintiffs' motions for summary judgment, and granted Defendants' motions for summary judgment in part. (Doc. No. 70.) There is now no legal impediment to Leeco conducting dredge and fill activities in over three miles of streams pursuant to its § 404 permit, including mining through those streams and disposing of mining waste in them. Those actions threaten irreparable injury to the environment and to Plaintiffs.

I. STANDARD FOR GRANTING INJUNCTION PENDING APPEAL

Rule 62(c) authorizes this Court to grant an injunction pending appeal. The four factors that govern an injunction pending appeal are the same factors governing preliminary injunctions and stays pending appeal: 1) the likelihood that the party seeking the injunction will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed

absent an injunction; 3) the prospect that others will be harmed if the court grants the injunction; and 4) the public interest in granting the injunction. *Service Emps. Int'l Union Local 1 v. Husted,* 698 F.3d 341, 343 (6th Cir. 2012), reh'g denied (Dec. 5, 2012); *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

In the context of requests for relief pending appeal, and unlike requests for a preliminary injunction, "[t]hese factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Griepentrog*, 945 F.2d at 153; *accord Serv. Employees,* 698 F.3d at 343. "[T]he success on the merits which must be demonstrated is inversely proportional to the harm." *Grutter v. Bollinger*, 247 F.3d 631, 632-33 (6th Cir. 2001) (citing *Griepentrog*, 945 F.2d at153-54). If a movant "demonstrates irreparable harm that decidedly outweighs any potential harm to the [defendant] if a stay is granted," it will suffice to show that there are "serious questions going to the merits." *Id*. While movants must show "[m]ore than a possibility of success," *id*., the Court "is not required to find that ultimate success by the movant is a mathematical probability, and indeed,… may grant a stay even though its own approach may be contrary to movant's view of the merits." *Washington Metro. Area Transit Comm'n*, 559 F.2d at 843–844 (explaining that district court need not make "a prediction that it has rendered an erroneous decision" before granting injunction pending appeal); *Liberty Nat. Life Ins. Co. v. Huddleston*, 90-5598, 1990 WL 10009101 (6th Cir. May 2, 1990) ("serious legal question" standard applies to motion for stay pending appeal); *Eubanks v. Wilkinson*, CIV.A. C82-0360-L(A), 1988 WL 167265 (W.D. Ky. Dec. 8, 1988) (applying "serious legal question" standard).

II. ARGUMENT

Plaintiffs meet the requirements for an injunction pending appeal based on a balancing of the foregoing four factors.

A. Likelihood of Success on the Merits

Plaintiffs respectfully submit that their appeal is likely to succeed on the merits. Even if the Court disagrees, it should grant Plaintiffs' motion because there are at least "serious questions going to the merits," which is sufficient in these circumstances. *Grutter*, 247 F.3d. at 633.

Plaintiffs are likely to succeed on their claim that NEPA required the Corps to consider evidence of risks to public health. The Court ruled that this claim turned on whether the Corps has an obligation to consider the effects of "the mining project as a whole." (Doc. No. 70 at 19.) The Court then followed *Ohio Valley Environmental Coalition v. Aracoma Coal Company*, 556 F.3d 177, 189-90 (4th Cir. 2009), in concluding that the Corps does not have this obligation because the agency that administers the Surface Mining Control and Reclamation Act (SMCRA), here a Kentucky state agency has primary control and responsibility for the mine. The Sixth Circuit is likely to rule differently, for three reasons. First, Plaintiffs' claim in this case does not depend on the premise that the Corps must consider the whole mining operation. In this case the dredge and fill activities the Corps authorized *in jurisdictional streams* are mining activities. Because mining activities are "a specific activity requiring a [Corps] permit," the Corps must consider their possible effect on health regardless of whether it must consider the effects of the entire operation. 33 C.F.R. pt. 325, App. B, § 7(b)(1). Second, the Sixth Circuit is likely to disagree that the jurisdiction of a state agency administering SMCRA limits the Corps' NEPA obligations. SMCRA says explicitly that it does not limit or displace NEPA, as the Sixth Circuit recognized in *Save Our Cumberland Mountains v. Kempthorne*. 453 F.3d 334, 343 (6th Cir.

2006) (discussing 30 U.S.C. § 1292(a)). And neither the statute nor that case makes any distinctions based on whether the agency administering SMCRA is a state agency or a federal agency. Thus, the Sixth Circuit is unlikely to agree that SMCRA limits the Corps' NEPA obligations. Third, NEPA's plain text makes clear that the jurisdiction of a state agency cannot limit the Corps' NEPA obligations. 42 U.S.C. § 4332(D) ("[Analysis conducted by a state agency or official] shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under [NEPA.]"). The Sixth Circuit is likely to give effect to this statutory text, which the Court did not address.

If the Court disagrees about the likely outcome of Plaintiffs' appeal, Plaintiffs respectfully submit that SMCRA's savings clause, the Sixth Circuit's decision in *Save Our Cumberland Mountains*, and NEPA's plain text at least raise serious questions about whether the Corps must consider evidence of public health risks from mining activities it authorizes under § 404.

Plaintiffs are also likely to succeed in their challenge to the Corps' determination that off-site mitigation has an 80-percent likelihood of success. The Corps relies on its 80-percent prediction to justify the conclusion that new and enhanced streams will offset all harm to waters from the mine. The prediction is arbitrary and capricious in violation of the Administrative Procedure Act and the Clean Water Act because nothing whatsoever in the record supports it. The Court approved the 80-percent prediction because "the number comes from [the Corps'] use of the [Eastern Kentucky Stream Assessment Protocol]." (Doc. No. 70 at 27.) But the 80-percent prediction does not "come from" the Protocol; it is an *input* into the Protocol. Nothing in the record indicates where the Corps got this number. Plaintiffs' challenge to the 80-percent

prediction is therefore likely to succeed. At the very least, there is a serious question whether the Corps has adequately supported the 80-percent prediction.

Finally, Plaintiffs are likely to succeed on their claim that the permit was required to impose more than five years of monitoring. The Corps must require more than five years of monitoring for aquatic resources with "slow development rates." 33 C.F.R. § 332.6(b). Here it is undisputed that the projects covered by this permit will not mature for thirty years. Nevertheless, the Court "[found] nothing in the record that allow[ed] it to conclude that this project does, in fact, involve an aquatic resource with a slow development rate." (Doc. No. 70 at 29.) Because the record indicates unambiguously that this mitigation project has a slow development rate, Plaintiffs respectfully submit that this claim is likely to succeed on the merits. At the very least, there is a serious question whether thirty years is a "slow development rate" requiring more than five years of monitoring.

B. The Environment Will be Irreparably Harmed and Harm to Human Health Is Likely Absent an Injunction Pending Appeal

There is near certainty that Plaintiffs will suffer irreparable injury due to permanent harm to the environment if an injunction pending appeal is not granted. Counsel for Leeco has represented to Plaintiffs that Leeco intends to undertake activities that will cause harm to tributaries of Stacy Branch as soon as possible upon completion of timber clearing; specifically, construction of a foundation for the lower part of the planned valley fill. In addition, under the Court's ruling there is no legal impediment to Leeco conducting other harmful activities in over three miles of streams that are tributaries to Stacy Branch and Yellow Creek pursuant to the § 404 permit, including mining through those streams and disposing of mining waste in them. (Doc. No. 70 at 2-3, 37 (describing permitted activities, denying Pls.' motions for summary judgment).) Thus, absent an injunction, Leeco's mining and stream-filling activities under the §

404 permit will create noise, emit dust, and cause permanent harm to streams that Plaintiffs' members live, work, and recreate in or near. (Doc. No. 70 at 14-15.) The Court already concluded that Plaintiffs' members would be harmed by these activities.

The destruction of streams by mining through them and burying them with mining waste is permanent and irreparable. "[T]here is no adequate remedy at law to compensate the public for the harm caused by the disposal of fill material into waters of the United States or in wetlands." *U.S. v. Malibu Beach, Inc.*, 711 F. Supp. 1301, 1313 (D.N.J. 1989). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987); *see also Envtl. Def. Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1183 (6th Cir. 1972) (finding irreparable harm where construction activities at issue would "permanently defac[e] the natural environment").

In addition to the environmental damage that will occur, there is a high likelihood that the dredge and fill activities now authorized will cause a serious public health risk. In their submissions to the Court Plaintiffs provided over twenty studies showing human health impacts are strongly correlated with large scale surface mining like that planned by Leeco. Pls.' Ex. C through H Doc. 21-3 to 21-8; Pls.' Ex. M, Doc. 21-13. The Court did not make any findings casting doubt on the substance or reliability of these studies. Indeed, neither Leeco nor the United States even attempted to refute these findings in their briefs. They could not. No peer-reviewed article contradicts this extensive and growing body of literature.

C. The Harm to Plaintiffs Absent an Injunction Greatly Outweighs Any Harm to Federal Defendants or Leeco From an Injunction

As a federal district court has found in a challenge to a § 404 permit in West Virginia: "Money can be earned, lost, and earned again; a valley once filled is gone." *Ohio Valley Envtl.*

Coal. v. U.S. Army Corps of Eng'rs, 528 F. Supp. 2d 625, 632 (S.D.W. Va. 2007). The court there found that "on balance the harms to be suffered by the plaintiffs by the denial of this motion outweigh the harms to be suffered by the defendants by the grant of this motion." *Id*. Here there is added weight to that side of the scale because the environmental degradation poses serious and well-documented risks to public health.

The Corps will not be seriously or permanently harmed by an injunction, since the Corps has already issued the § 404 permit. At most it may incur additional processing requirements. Leeco, for its part, will experience only a temporary delay in reaping economic benefits from the Stacy Branch Mine. *See id*. However, that is a purely economic harm, which by its nature is not irreparable. "[E]conomic loss does not constitute irreparable harm, in and of itself." *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987), *citing Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D. C. Cir. 1985).

When environmental injury "is sufficiently likely… the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. Because the destruction of the streams is nearly certain here, in the absence of an injunction pending appeal, the balance of harms favors the issuance of an injunction to protect the environment, Plaintiffs' interests in the environment, and the health of Kentuckians living near the proposed Stacy Branch Mine. *Id*.

D. The Public Interest Weighs Heavily in Favor of Granting an Injunction

An injunction would serve the interests of the public by preserving current environmental conditions in waters of the United States, and by ensuring that the Corps' § 404 permit fulfills the vital public-interest goals of the Clean Water Act and NEPA. Congress's view of the public interest, expressed when it enacted these foundational environmental statutes, is entitled to significant weight in this Court's examination of the public interest. "Congress's determination

in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest." *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior,* 588 F.3d 718, 728 (9th Cir. 2009). The Clean Water Act was adopted with the Congressional objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—including the "national goal that the discharge of pollutants into the navigable waters be *eliminated* by 1985." 33 U.S.C. § 1251(a)(1) (emphasis added). Both of these Congressionally articulated public interests support enjoining Leeco's destructive activities pending appeal.

In addition, "the possibility of mootness must be balanced against the second and third factors of the criteria for injunctive relief." *Boyd v. United States*, CIV. 01-472-JMH, 2002 WL 31986872 (E.D. Ky. Dec. 24, 2002). In this case, Plaintiffs' ability to obtain relief on appeal may be rendered moot if the cause of their injuries – permanent harm to streams and health risks posed by Leeco's activities under the § 404 permit – are allowed to go forward before the Sixth Circuit has an opportunity to rule on the merits.

Conclusion

For the reasons discussed above, the Court should grant Plaintiffs' Emergency Motion for an Injunction Pending Appeal. If the Court is unable to grant or deny the Emergency Motion within three days, Plaintiffs respectfully request an emergency temporary injunction prohibiting dredge and fill activities while the Court considers whether to grant Plaintiffs' motion. *See* Order*, Ohio Valley Environmental Coalition, Inc., et al. v. United States Army Corps of Engineers, et al.*, 3:11-cv-0149, 841 F. Supp. 2d 968 (S.D. W. Va. 2012) (attached as Exhibit A) (staying mining activities pending decision on a motion for injunction pending appeal); *River*

Fields, Inc. v. Peters, 3:08-CV-264-S, 2009 WL 2406250 (W.D. Ky. Aug. 3, 2009) (granting plaintiff temporary stay pending decision of Court of Appeals on request for stay pending appeal).

DATED: August 30, 2013

Respectfully submitted,

/s/ Neil Gormley

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CERTIFICATE OF SERVICE

I, Neil Gormley, hereby certify that on August 30, 2013, I electronically filed the foregoing **Plaintiffs' Memorandum in Support of Emergency Motion for an Injunction Pending Appeal** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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/s/ Neil Gormley
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF WEST VIRGINIA

HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL
COALITION, INC., et al.,

Plaintiffs,

v. CIVIL ACTION NO. 3:11-0149

UNITED STATES ARMY CORPS
OF ENGINEERS, et al.,

Defendants.

ORDER

Today the Court heard argument regarding Plaintiffs' Motion for an Injunction Pending Appeal, and an Emergency Injunction Pending a Ruling on this Motion. For reasons stated during this hearing, the Court **EXTENDS** the stay of any mining activities under the 404(b) permit in this case until decision is made by the Court regarding Plaintiffs' motion. The Court **DIRECTS** the Clerk to send a copy of this written Order to counsel of record and any unrepresented parties.

ENTER: August 23, 2012

ROBERT C. CHAMBERS
UNITED STATES DISTRICT JUDGE