THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL COALITION, COAL RIVER MOUNTAIN WATCH, and WEST VIRGINIA HIGHLANDS CONSERVANCY,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:05-0784
UNITED STATES ARMY CORPS OF ENGINEERS; LIEUTENANT GENERAL CARL A. STROCK, Commander and Chief of Engineers, U.S. Army Corps of Engineers; COLONEL WILLIAM E. BULEN, District Engineer, U.S. Army Corps of Engineers, Huntington District;	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Dated: February 1, 2006

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P. 65, Plaintiffs respectfully move the Court for a preliminary injunction ordering the U.S. Army Corps of Engineers ("Corps") to rescind its approval for future fill activities at three large surface mines located in Kanawha, Logan and Boone counties.

Until the recent decision in OVEC v. Bulen, 2004 WL 1576726 (S.D. W. Va. July 8, 2004), the Corps permitted most large-scale surface mines in West Virginia under nationwide permit 21 (NWP 21) pursuant to §404(e) of the Clean Water Act (CWA).[1] Although the three mines at issue in this action were authorized by individual permits rather than under NWP 21, the permits here are a continuation in a different guise of the agency's past illegal actions. Plaintiffs believe that if this Court does not intervene, the Corps will continue to abuse the individual permitting process as it has in the three mines challenged here.

Accordingly, although this action currently challenges only three individual permits issued by the Corps under CWA § 404 (the Camp Branch Mine which was permitted on July 12, 2005, the Black Castle Mine which was permitted on August 23, 2005, and the Republic No. 2 mine which was permitted on December 22, 2005[2]), Plaintiffs anticipate that additional future permit challenges may become necessary if the Corps continues its unlawful practices. Work at

[1] A panel of the Court of Appeals for the Fourth Circuit reversed Judge Goodwin's decision in the OVEC nationwide permitting case. OVEC v. Bulen, 429 F.3d 493 (4th Cir. 2005). Plaintiffs have petitioned the full Court of Appeals for en banc review. Even if that Court does not grant the petition, there are many issues in the case still to be addressed by the District Court on remand. Judge Goodwin's order in the OVEC case was largely procedural; he has yet to consider the substantive issues that will be presented if the petition for en banc review is denied.

[2] Plaintiffs filed a motion today requesting leave to supplement the complaint in this case, to add claims arising from the Corps' recent issuance of a permit to Alex Energy, Inc. for mountain top removal mining valley fills at the Republic No. 2 Mine in Kanawha County. Although the Corps issued the Republic No. 2 permit on December 22, 2005, Plaintiffs did not discover its issuance until January 13, 2006, and were not able to obtain a copy of the permit from the Corps until January 19, 2006. For this reason, Plaintiffs' experts have not yet had the opportunity to review the Corps' record of decision, and the affidavits submitted with this memorandum do not address the impacts of the Republic No. 2 Mine. Plaintiffs intend to address those impacts as soon as practicable, but not later than at any hearing held for preliminary injunction in this case. In any event, the issuance of the Republic No. 2 permit demonstrates the imminence and scope of the threat to Plaintiffs' interests created by the Corps' increasing and improper use of individual permits to authorize large-scale surface coal mines in West Virginia.

the Camp Branch, Black Castle, and Republic No. 2 mines is ongoing, including timbering, land clearing, coal removal and/or stream-filling activities.

INTRODUCTION

Mountaintop removal and other large-scale surface mining is devastating the environment and communities of many counties in southern West Virginia and much of central Appalachia. The Programmatic EIS on Mountaintop Mining/Valley Fills in Appalachia ("PEIS") issued in 2005[3] confirms that valley fills are having significant, cumulative adverse environmental effects:

- Past, present, and future mining in Appalachia may cumulatively impact 1.4 million acres, or 11.5% of the study area. Id. at IV.C-1. Mining-related valley fills are expected to bury at least 2,400 miles of central Appalachian streams by 2013. Id., Appx. I at 67
- Mountaintop removal mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions. Id., App. I, pp. v, 23, 93.
- Mining impacts on the nutrient cycling function of headwaters streams "are of great concern." Id., App. I, p. 74.
- Mining impacts to habitat of interior forest bird species could have "extreme ecological significance." Id., App. I, p. 90. Mining could impact 244 terrestrial species, including, for example, 1.2 billion salamanders. Id., App. I, pp. 86, 92-93.
- The loss of the genetic diversity of these affected species has a "disproportionately large impact on the total aquatic genetic diversity of the nation." Id., App. I, p. 78.
- Valley fills are strongly associated with violations of water quality standards for selenium, a toxic metal that bioaccumulates in aquatic life. Id. at III-D.6 to III-D.7.

This case challenges the Corps' failure to acknowledge, evaluate, minimize or meaningfully consider alternatives to the devastating environmental impacts of the permits challenged here. The mining and valley fills at these three mines collectively will destroy over 2,000 acres of land and smother over seven miles of streams. Yet the Corps has neglected to examine in a meaningful way the inevitable damage that will be caused by these mines, or to develop any realistic plan for mitigating that damage.

[3] U.S. Dept. of the Interior, et al., Mountain Top Mining / Valley Fills in Appalachia PEIS (draft, May 2003; final, October 2005) (the "PEIS"), excerpts attached as Ex. 1. The Draft PEIS is available at http://www.epa.gov/region3/mtntop/eis.htm. This Draft EIS was adopted as Final in October 2005 with minor errata. See http://www.epa.gov/region3/mtntop/pdf/mtm-vf_fpeis_full-document.pdf.

The Corps' permits violate the requirement of the National Environmental Policy Act ("NEPA") and implementing regulations to analyze the environmental impacts of the permits in a comprehensive Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.3–1501.4; 33 C.F.R. § 230.7. These permits also violate § 404(b) of the CWA, which requires the Corps to follow EPA guidelines for specifying disposal sites for fill material. 33 U.S.C. § 404(b)(1). In particular, the Corps failed to demonstrate that the discharges will not "cause or contribute to significant degradation" of U.S. waters. 40 C.F.R. § 230.10(c).

Because the Plaintiffs would otherwise suffer immediate and irreparable injury to their economic, recreational, aesthetic and health interests, they request preliminary injunctive relief.

FACTUAL BACKGROUND

Valley fills associated with mountaintop removal and other surface coal mining in southern West Virginia generate among the most devastating, large-scale environmental impacts of any industrial activity in the country. The process involves blasting off entire mountaintops to reach coal seams below. Millions of tons of waste rock, dirt, and vegetation are then dumped in valleys and streams, burying wildlife and wildlife habitat and permanently destroying the streams. Valley fills degrade water quality, destroy wildlife habitat, impair biological diversity, destroy stream functions, cause forest loss and fragmentation, and leave lasting scars in place of the destroyed mountains. Moreover, the Corps acknowledges that these impacts are permanent. Already hundreds of thousands of acres of the most productive and diverse temperate hardwood forests in the world have been destroyed and well over 1,200 miles of streams have been buried in the region. Local communities have been drastically affected.

Large-scale surface mining results in extensive and permanent environmental degradation. Preparing the mine site involves "grubbing" – ripping all the trees out by the roots.

The resulting forest destruction is profound and permanent because "unlike traditional logging activities associated with management of hardwood forest, when mining occurs, the tree, stump, root, and growth medium supporting the forest are disrupted and removed in their entirety," PEIS at IV.C-1. After flying over mountaintop removal sites in southern West Virginia, former Chief Judge Haden observed that "tree growth was stunted or non-existent" on older mined areas, and that mountaintop removal mine sites "appeared stark and barren and enormously different from the original topography." Bragg v. Robertson, 54 F. Supp. 2d 635, 646 (S.D. W.Va. 1999), rev'd 248 F.3d 275 (4th Cir. 2001). He concluded that "[d]estruction of the unique topography of southern West Virginia" caused by this kind of mining and valley fill activites "cannot be regarded as anything but permanent and irreversible." Id at 646.

A. Cumulative Impacts of Surface Mining Valley Fills in the Appalachian Region

Surface mine-related valley fills have already caused significant adverse environmental impacts throughout the central Appalachian region. By 2003, valley fills had buried or directly harmed over 1,200 miles of streams in this region. PEIS, Ex. 1, App. I at 67-70. According to the Corps, mining-related valley fills are expected to destroy a total of at least 2,400 miles of central Appalachian streams by 2013. Id., App. I at 67. In fact, stream impacts from mining valley fills are even more extensive than these estimates indicate, since they do not count the extent of impacts to downstream waters that are not directly smothered by fills. PEIS, Ex. 1, App. I at iii; see also Wallace Decl. on the Black Castle Mine mitigation plan (originally submitted with Plaintiffs' Comments on the proposed permit), attached as Ex. 2.

The PEIS acknowledges that headwaters are "often largely responsible for maintaining the quality of downstream riverine processes and habitat for considerable distances." PEIS, Ex. 1 at III.C-1. Among other things, headwaters play a crucial role in buffering pollution, regulating downstream flow rates and temperature, and processing and transporting organic

matter to the downstream aquatic ecosystem. PEIS, Ex. 1, App. I at 67-80; Dr. Margaret C. Janes, letter to Ginger Mullins, Chief, USACE Regulatory Branch (Jan. 23, 2005) ("Pl. Comments on Camp Branch Mine") Ex. C to the Amended Complaint. By smothering headwaters under millions of tons of mining waste, valley fills eliminate or severely impair these natural stream functions, causing degraded water quality downstream. PEIS, Ex. 1, App. I at 67-80. Further, a 2002 EPA study found that existing valley fills are strongly associated with elevated downstream levels of chemicals potentially harmful to human health and aquatic life, including selenium, sulfate, and magnesium. See A Survey of the Water Quality of Streams in the Primary Region of Mountaintop/Valley Fill Coal Mining, 1-2 in PEIS, Ex. 1, App. D.

Valley fills and associated mining activities also cause fundamental changes to the terrestrial environment. Central Appalachia comprises one of the richest forests in the world, "known to have the highest regional concentration of aquatic biodiversity in the nation." PEIS, Ex. 1, App. I at 79. Valley fills and related mining activities such as grubbing transform the area into a fragmented landscape characterized by huge patches of dry grasslands. Pl. Comments on Camp Branch Mine at 7, Ex. C to the Amended Complaint; PEIS, Ex. 1, App. I at 91-92. The government has estimated that by 2013, the impacts from valley fills and associated mining activities will reach 11.5 percent of all forested habitat in the region. Id. at 50. This amounts to about 2,200 square miles – nearly the size of the state of Delaware.

Valley fills and associated surface coal mining devastate the quality of life for Plaintiffs' members and others who live and travel in southern West Virginia. See Plaintiffs members' declarations, attached as Ex. 3. These members' recreational, aesthetic, and health interests are threatened by diminished water quality, destruction of the terrain and loss of wildlife and habitat that will result from the valley fills at the mines challenged in this action. See Declarations of

Kenneth King, Regina Hendrix, Frank Unger, Patricia Sebok, Harry Sebok, Vivian Stockman, Cindy Rank, and Julian Martin, Ex. 3. Further, the permits will directly injure Plaintiffs' interest in preserving the historic and cultural resources of West Virginia. Id. In short, the Corps' failure to comply with the law when issuing these permits is already allowing environmental destruction that threatens to imminently and permanently injure Plaintiffs.

B. Impacts From the Camp Branch, Black Castle, and Republic No. 2 Mines

1. The valley fills at these mines will eliminate or permanently alter ecosystem functions of headwater streams.

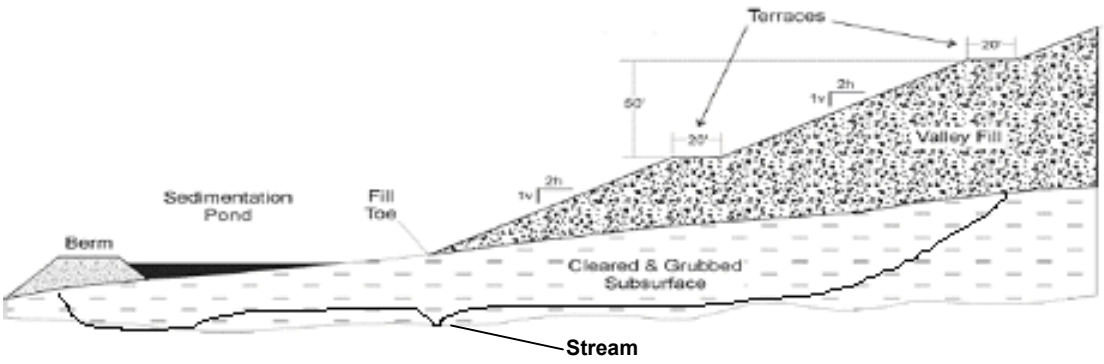
The Camp Branch Mine permit allows the permittee to permanently bury 15,059 feet (nearly three miles) of headwater streams in Logan County, West Virginia, directly impacting portions of Camp Branch and tributaries of Dingess Run and Ethel Hollow. Camp Branch Statement of Findings ("SOF") at 2, attached as Ex. 4. The Black Castle Mine permit allows valley fills that will permanently destroy 13,401 feet (over 2.5 miles) of headwater streams in Boone County, directly impacting Laurel Creek, tributaries of Laurel Creek, and Georges Branch. Black Castle SOF at 9, attached as Ex. 5. The Republic No. 2 Mine permit allows valley fills that will permanently bury 9,918 feet (nearly 2 miles) of headwater streams in Kanawha, Fayette, and Raleigh Counties, directly impacting unnamed tributaries of Cabin Creek and Long Branch of Fifteen Mile Fork. Republic No. 2 SOF at 2, attached as Ex. 12.

The Corps acknowledges that the adverse impacts from these valley fills will be permanent. Camp Branch SOF at 7, and Black Castle SOF at 7. Specifically, the valley fills will permanently alter normal water level fluctuations, circulation, and drainage patterns, and cause increased surface water runoff, among other things. Camp Branch SOF at 51 and Black Castle SOF at 59-60. The valley fills will also destroy the ecosystem functions that are currently being performed by these headwaters, including among others: hydrologic retention capacity,

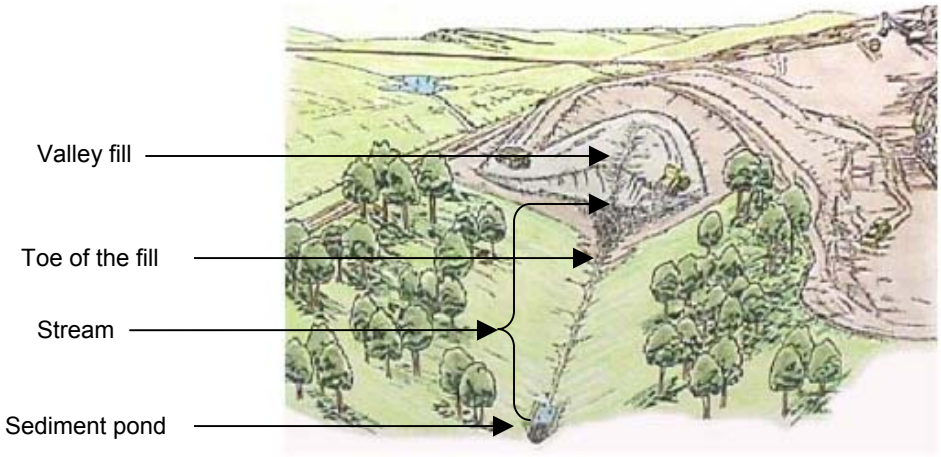
contribution to base flows, reduction of flooding, sediment retention, temperature maintenance of downstream waters, regulation of the base-level chemical composition of the overall watershed, and retention and measured export of energy and nutrients downstream. Declaration of Dr. Margaret Palmer ("Palmer Decl."), Ex. 6 at 2, 9; Declaration of Dr. J. Bruce Wallace ("Wallace Decl."), Ex. 7 at 3. The headwaters that that these fills will bury will no longer provide thermal refuge and spawning habitat for aquatic life at critical life stages, or contribute food resources to the nearby riparian and aquatic ecosystems. Black Castle SOF, 13-14; Wallace Decl., Ex. 7, 7.

2. The valley fills at these mines will release untreated pollutants directly into stream segments below the valley fills.

The valley fills will adversely affect stream segments that will be used to transport polluted water from the toes of the valley fills downstream to the outfalls of sediment ponds constructed within the affected streams. Camp Branch SOF at 15; Black Castle SOF at 9. Similar to the illustration below, the permits allow water runoff from the mined areas and valley fills to drain from the toe of the valley fill directly into the stream, to be carried to sediment ponds further downstream. There, excess silt and pollutants will be collected before the water emerges from the sediment pond and continues downstream:



Adapted from PEIS at III.K-3 (descriptive labels added).



Adapted from PEIS at III.K-4 (descriptive labels added).

These stream segments from the toes of the valley fills to the outfalls of the sediment ponds are only used to transport and store polluted runoff from the valley fills. Camp Branch SOF at 47 and Black Castle SOF at 58. According to the Corps, the polluted and untreated water discharged from the toes of the fills will contain high concentrations of silt that will "limit the quality of benthic habitat in that area of the stream." Id. Consequently, aquatic life will be eliminated or impaired in these silt-laden stream segments. Id.

3. The valley fills and associated mining activities at these mines will permanently alter or destroy wildlife habitat.

Aquatic and semi-aquatic species that cannot escape being buried under rubble will be "permanently eradicated or altered" as a result of the permitted valley fills. Camp Branch SOF at 47, Black Castle SOF at 58, Republic No. 2 SOF at 11. Likewise, in valley fills and on areas affected by the associated mining activities, terrestrial wildlife will be destroyed or displaced. Id. Even if displaced wildlife later attempt to return, permanent changes in the aquatic and terrestrial habitat will make the areas unsuitable. Id. This abrupt loss of habitat will diminish biological diversity where there presently is an abundance of wildlife, including neotropical birds, salamanders and other amphibians, unique invertebrates, and specialist terrestrial species

that depend on headwater streams for food and habitat. Id. Instead, the post-mining area will be characterized by a less biologically diverse collection of common snakes, small mammals, and birds that are tolerant of many types of environments. Camp Branch SOF at 55-56; Black Castle SOF at 67; PEIS, Ex. 1 at III.C-2 and App. I at vi; Pl. Comments on Camp Branch Mine at 8.

The Corps claims that each of the permits challenged in this case will cause "no long-term unacceptable impacts to the wildlife ecosystem since the project proposes a specific reclamation and planting plan to achieve the post mining land use of forestland." Camp Branch SOF at 57 and Black Castle SOF at 69 (same); see also Republic No. 2 SOF at 28. However, this claim runs contrary to studies showing that reclaimed mine sites cannot be expected to return to a similar forest habitat for decades, possibly for over a century. See PEIS, Ex. 1, App. I at 93. Indeed, directly contrary to the Corps' conclusion, the U.S. Fish and Wildlife Service ("USFWS") has concluded that, "given the documented lack of suitability of previously reclaimed areas . . . and the success of other past reclamation efforts . . . the destruction of habitat is considered permanent." See USFWS, Biological Opinion on the Black Castle and Laxare East Mines (BiOp), 73 (February 18, 2005)[4] (internal citations omitted and emphasis added).

4. The Camp Branch Mine will impair the integrity of the Battle of Blair Mountain site, a nationally and locally significant historic site.

The Camp Branch Mine is expected to adversely affect the historic site of the Battle of Blair Mountain, which is eligible and has been nominated for inclusion in the National Register of Historic Places pursuant to the National Historic Preservation Act, 16 U.S.C. § 470 et seq.

[4] Prior to issuing the Black Castle Mine permit the Corps consulted with the USFWS concerning the effects of that mine and the adjacent Laxare East Mine on endangered Indiana bats. The agencies concluded that the projects would cause the extermination of a colony of maternal Indiana bats and their offspring. BiOp at 82. The USFWS then released a Biological Opinion with a finding of "no jeopardy." BiOp at 106. On March 8, 2005, the Plaintiffs timely delivered a 60-day notice of intent to sue regarding the initial BiOp pursuant to the ESA, 16 U.S.C. § 1540(g)(2). However, the Biological Opinion is not at issue in this suit. Since the initial Biological Opinion was issued, additional Indiana bats were found in the study area, prompting the Corps to reinitiate consultation on October 6, 2005.

See Camp Branch SOF at 89-91. The Battle of Blair Mountain is a significant part of the cultural, political and economic history of West Virginia and the nation, and is one of the most important events that shaped national labor history. Id.; Dec. of Kenneth King at ¶ 9; Dec. of Frank Unger at ¶ 5-7. The natural topography of the site was a key feature of the Battle and is therefore critical to preserving the site's historical significance. Id. ¶ 5-6. The Corps has recognized that "the natural environment played [an] extremely important role in the staging of the Battle of Blair Mountain." According to the Corps, "[t]hese water courses offered strategic natural passage up and over the ridge"). USACE, Adverse Effect Documentation for Camp Branch Mine at 3 (April 11, 2005). The Corps also has acknowledged that the Camp Branch mine will have adverse impacts on the site, including adverse viewshed impacts. Id. at 3.

OVEC member Kenneth King, and Frank Unger, a professional preservationist and West Virginia Highlands Conservancy member, anticipate that the Camp Branch Mine will adversely impact the integrity of the historic site by demolishing mountain ridges and thereby destroying the viewshed, and potentially by destroying trenches and artifacts from the Battle of Blair Mountain. Ex. 3, King Decl., ¶¶ 9-12; Unger Decl., ¶¶ 5-7. Under the NHPA, adverse effects to a potentially designated site occur when an activity "would diminish the integrity of the property's location… or association," or would bring about a "change of the character of the property's use or of physical features … that contribute to its historic significance." 36 C.F.R. § 800.5(a)(1) and (2). However, without a full analysis of potential impacts in an EIS, the Corps concluded that there would be no adverse effects on this historic site. Camp Branch SOF, 90-91.

C. Past, Present, and Future Impacts in the Region as Presented by the Corps

The Corps downplays or ignores the environmental impacts of mining and other activities in the areas where the Camp Branch and Black Castle mines are located, by (1) arbitrarily limiting the scope of its analysis to small portions of the affected watersheds, (2) excluding

reclaimed mine areas from the calculation of impacts, and (3) artificially limiting its analysis of foreseeable future mines to a fraction of the permitted acreage.

The Corps' Environmental Assessment ("EA") is limited arbitrarily to the small sub-watersheds where the mines are located. For example, the Corps limits its analyses to the Dingess Run sub-watershed (Camp Branch SOF at 68), and the Laurel Creek sub-watershed (Black Castle SOF at 82), respectively. However, the streams impacted by the Camp Branch and Black Castle mines flow directly into other waterways, specifically the Upper Guyandotte River (Camp Branch Mine) and the Coal River (Black Castle Mine). See maps of the locations at Ex. 10. Consequently, these mines affect water quality not only in the sub-watersheds to which the Corps restricts its analysis, but also in the larger watersheds of which they are a part.

The information provided by the Corps also arbitrarily excludes reclaimed mines from the calculation of total impacts, with no basis or explanation for this choice. Camp Branch SOF at 69; id. at 73 (listing future reclaimed mine lands as "undisturbed" and excluding such lands from figures for total future impacts). For Black Castle Mine, the Corps counts as past and present impacts only those areas classified as "mining and transitional areas" or "barren land/mining construction," Black Castle SOF at 87-88, thereby excluding reclaimed mines.

Moreover, for its estimate of future impacts at the Black Castle Mine, the Corps counts only impacts that will occur "at any one time." Black Castle SOF at 91. In other words, the Corps counts only a snapshot consisting of the maximum acreage that will be mined on one site at one time. See id. at 92. By doing so the Corps excludes 65% of the permitted acres from its analysis merely because those areas will not be mined "at any one time," but will be mined and reclaimed in phases. Id. at 88 ("Maximum Disturbed Area was calculated as 35% of the total acres"). The Corps offers no explanation for this choice. See Black Castle SOF at 87-92.

However, although the Corps has significantly restricted the scope of its analysis of the impacts from these fills, the Corps' information cannot conceal the enormous effect of past, present, and future adverse impacts on the watersheds affected by these mines. Additional data from the WVDEP discussed in the next section reveal the true extent of the cumulative impacts of valley fills on headwater streams in the Coal River and Upper Guyandotte watersheds.

Dingess Run Sub-Watershed. The Camp Branch SOF provides data collected from the mining companies regarding past, existing, and future impacts to the Dingess Run sub-watershed where the Camp Branch Mine is located. The Corps states that past surface and underground mining, logging, and gas exploration and transmission have affected 2,150 acres or 14.18 % of the sub-watershed.[5] Camp Branch SOF at 69. This does not include "reclaimed" mines, which the Corps does not include in the total but instead lists as "undisturbed." Id. When reclaimed mines are included in the total, the total impact rises to 3,650 acres or 24.07% of the Dingess Run sub-watershed. Id. In addition, the information provided by the Corps states that present impacts from those activities (including reclaimed mine areas) total 3,241 acres, id. at 69, and "reasonably foreseeable future impacts" (including reclaimed mine areas) total 5,749 acres, id. at 73. Thus, according to these figures, past, present, and reasonably foreseeable future impacts to the Dingess Run sub-watershed total 12,640 acres or 83.38% of the Dingess Run sub-watershed. Yet, in response to Plaintiffs' comments on the proposed Camp Branch Mine permit, the Corps implausibly states that "[i]f a [Corps] permit is issued for the proposed project, the Dingess Run watershed would remain approximately 69 percent forested. It is difficult to discern how a watershed that would remain approximately 69 percent forested would experience significant

[5] The Corps' description of these impacts contains numerous mathematical errors that, in some cases, result in inconsistencies ranging from 200 to over 1,000 acres. Black Castle Mine SOF at 69 and 91. These errors make it virtually impossible to rely upon the Corps' data for an accurate description of impacts.

degradation…." Camp Branch SOF at 123. Apparently, therefore, although full re-growth is not expected to occur for decades, the Corps considers reclaimed mined areas to be "forested."

Laurel Creek Sub-Watershed. According to the Corps, past and present surface and underground mining, gas well construction, logging, road construction, gas pipeline and residential development have impacted 1,864.77 acres or 5.24% of the total land area in the Laurel Creek sub-watershed where the Black Castle Mine is located. Black Castle SOF at 88. The Corps anticipates that "projected reasonably foreseeable future mining impacts," including the Black Castle Mine, would affect an additional 6,915.98 acres or 19.43% of the watershed. Id. Thus, by adding the Corps' data on past, present, and "reasonably foreseeable" future impacts, surface mines and other environmental impacts will adversely affect a grand total of 24.67% of the Laurel Creek sub-watershed. While future disturbances by timber operations, gas lines and gas wells are also anticipated, the Corps did not include these in its analysis of cumulative impacts. Black Castle SOF at 92.

Republic No. 2 Mine. For the Republic No. 2 Mine the Corps arbitrarily limits its analysis of past, present and future impacts to the three-mile radius around the site. Republic No. 2 SOF at 15. The Corps offers no explanation or analysis to justify this arbitrary limitation. Id. According to the Corps, 51% of this three-mile radius has been impacted by mining activities and an additional 17% will be impacted by anticipated future mines, resulting in total cumulative impacts on 68% of the limited area for which the Corps provides information.

D. Impacts of Existing Surface Mine Permits on Land Cover and Headwater Stream Length Within the Upper Guyandotte and Coal River Watersheds

The streams impacted by the Camp Branch and Black Castle valley fills flow directly into two major rivers. See Ex. 10 for maps of each watershed. Consequently, at the very least, the runoff from these mines will affect water quality in the Upper Guyandotte River watershed

(Camp Branch Mine) and the Coal River watershed (Black Castle Mine). See Palmer Decl., Ex. 6 at 2. The streams to be impacted by the valley fills are primarily headwater streams that feed entire watersheds and "play disproportionate roles in nutrient processing and supporting biodiversity." Id. However, the Corps provides no information regarding the effects of the valley fills on these major watersheds. Likewise, the Corps includes no data on the specific impacts on headwater streams, but instead treats all streams as equal regardless of their different ecosystem functions.

To assess these impacts not addressed by the Corps, Plaintiffs obtained an analysis of surface mine permit data, which is available to the public through the WVDEP on its website at www.wvdep.org. See Dec. of Sara Watterson, Ex. 9. The permit data was derived by WVDEP from permit maps for existing and pending WVDEP surface mine permits, using Geographic Information System (GIS) technology. Id. Using the WVDEP data, a GIS analyst calculated the acres covered by surface mine permits in the Upper Guyandotte and Coal River watersheds:

Watershed	**Acres in the watershed**	**Acres covered by permits**	**% of the watershed covered by permits**
Upper Guyandotte watershed	600,936	39,203	6.5%
Dingess Run sub-watershed	20,208	3,085	15.3%
Coal River watershed	570,713	63,326	11.1%
Laurel Creek sub-watershed	31,519	6,409	20.3%

See Dec. of Sara Watterson, Ex. 9, ¶¶ 8.B.i.-iv.

Plaintiffs' analyst then combined the permit data with data provided by the West Virginia GIS Data Clearinghouse to calculate both 1) total stream length and 2) total first order stream length covered by surface mine and valley fill permits.[6] First- through third-order streams are considered "headwater" streams. The results of the analysis are as follows:

[6] "The first-order stream segments are those that do not themselves have tributaries. For this project, these were identified as the portions of streams from their origin to a confluence with another segment." Dec. of Sara Watterson, Ex. 9 ¶ 8.C.i.

Watershed	% of total watershed stream length covered by surface mine permits, including valley fill areas	% of first order stream length covered by surface mine permits, including valley fills
Upper Guyandotte watershed	7%	8%
Dingess Run sub-watershed	16%	15%
Coal River watershed	9%	12%
Laurel Creek sub-watershed	18%	27%

See Dec. of Sara Watterson, Ex. 9, ¶¶ 7.B.i.-iv.

Headwater streams are vital to normal stream functioning. Palmer Decl. at 2, Wallace Decl. at 17. Plaintiffs' analysis shows that the Camp Branch, Black Castle, and Republic No. 2 mines and other mining activities permitted by the Corps will destroy a significant portion of first-order headwater streams in several major southern West Virginia watersheds. The Corps' analysis has completely ignored these impacts.

E. The Compensatory Mitigation Plans

The Corps issued each of the permits for the Camp Branch, Black Castle, and Republic No. 2 mines with an Environmental Assessment ("EA") and Finding of No Significant Impact ("FONSI"). The FONSIs were based on the Corps' conclusion that the Compensatory Mitigation Plans ("CMPs") provide sufficient mitigation to negate any significant adverse environmental impacts generated by the Camp Branch and Black Castle Mines. See Camp Branch SOF at 87, 93, 100; Black Castle SOF at 139; Republic No. 2 SOF at 27-28.

Camp Branch Mine. The Corps claims that the impacts of the valley fills at the Camp Branch Mine will be mitigated by "creating" man-made streams in channels previously used to drain mine waste. Camp Branch SOF at 8, 12-14, and 146-148. Specifically, the mitigation plan purports "to create: approximately 16,512 linear feet of intermittent streams and 2,974 linear feet of ephemeral streams in the Ethel Hollow watershed at the Camp Branch Surface Mine; approximately 1,485 linear feet of ephemeral streams in the Camp Branch watershed at the

Camp Branch Surface Mine; and 24,375 linear feet of intermittent streams in the Ethel Hollow watershed at Anna Branch and Anna Branch No. 2 Surface Mines." Camp Branch SOF at 8-9. The plan also aims to mitigate impacts caused by constructing and operating drainage channels and sediment ponds, by restoring the affected streams "back to their pre-mining conditions." Id.

Commenting negatively on this mitigation plan, the West Virginia Department of Natural Resources ("WVDNR") Wildlife Resources Section stated:

> The [compensatory mitigation plan] for this project asks the regulatory agencies to accept low quality water conveyance structures, which are required in their mining permit, as a replacement for stream channels. These structures are designed for the purpose of sediment transport or drainage control and do not resemble the geometry of a natural stream channel. The placement of habitat structures into these ditches will not make them function as streams . . . . We believe that this permit should not be issued until the applicant can provide a mitigation plan that more adequately compensates for the impacts to the aquatic resources.

Letter from Curtis I. Taylor, Chief, WVDNR Wildlife Resources Section, to Kenneth Politan, WVDEP Office of Mining and Reclamation, 1-2 (Feb. 23, 2005) (emphasis added).

Black Castle Mine. The Black Castle Mine CMP proposes to mitigate impacts caused by valley fills at that mine by "improving" and "enhancing" approximately 18,000 linear feet (3.4 miles) of Laurel Creek. The Corps claims that this will be accomplished by stabilizing stream banks with boulders, woody debris, or vegetation, and by placing boulders and logs into the channels. Black Castle SOF at 13-15. The mitigation plan also purports to restore 7,590 feet (1.4 miles) of streams affected by sediment pond construction, sediment transport, and mined-through streams. Black Castle SOF at 9. Finally, the mitigation plan claims that portions of the George Branch and unnamed tributaries of Laurel Creek will be improved by "placement of overburden associated with the construction of Valley Fills 3, 4, and 6." Black Castle SOF at 9. In other words, the mitigation plan claims that the valley fills will actually improve water quality by burying the affected streams – asserting that the fills will reduce the effects of acid mine

drainage caused by previous mining operations. Id. The Corps fails to consider or acknowledge that the mining company is already legally obligated to eliminate the acid mine drainage before its surface mining bond is released.

Commenting negatively on the proposed Black Castle Mine permit, WVDNR stated, "[g]iven our [West Virginia State] legislative mandate to protect and conserve "all species of wildlife, we find ourselves unable to agree that currently proposed restoration/compensatory actions can or will ever be able to adequately mitigate for the enormous level of impact resulting from these surface mining techniques." Letter from Curtis I. Taylor, Chief, WVDNR Wildlife Resources Section, to Ginger Mullins, Chief, Regulatory Branch USACE, 2 (Aug. 10, 2004).

Republic No. 2 Mine. The Republic No. 2 permit provides off-site mitigation, consisting of purported restoration and enhancement of a portion of Long Branch. This plan appears to suffer many of the same defects described above, among others.

ARGUMENT

I. STANDARD OF REVIEW

Plaintiffs respectfully request a preliminary injunction to prevent irreparable harm to their members. It is this Court's longstanding practice to employ a balancing test in determining whether a preliminary injunction should be granted. Pursuant to Blackwelder Furn. Co. v. Seilig Mfg. Co., Inc., 550 F.2d 189 (4th Cir. 1977), in evaluating a motion for preliminary injunction, a court should consider (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the injunction is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest. Scotts Corp. v. United Indust. Corp., 315 F.3d 264, 271 (4th Cir. 2002) (citing Blackwelder Furn.). "The likelihood of irreparable harm to the plaintiff is the first factor that a court should consider." Safety Kleen, Inc. v. Wyche, 274 F.3d 846, 858-9 (4th Cir. 2001). If, after balancing

the likelihood of the harm to the plaintiff against the likelihood of harm to the defendant, the balance tips decidedly in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised a "substantial question" on the merits. Id.

II. THE PLAINTIFFS WILL SUFFER IMMEDIATE AND ONGOING IRREPARABLE HARM AS A RESULT OF THE STREAM FILLING ACTIVITIES AUTHORIZED BY THE CORPS' PERMITS

The activities at the mines at issue in this action are causing ongoing irreparable harm. Moreover, the Corps' continuing practice of permitting mines that violate NEPA and the CWA threatens more imminent and irreparable harm to Plaintiffs' members' interests. Presently at Camp Branch Mine, the mining company has completed construction of two sediment ponds and begun filling two corresponding valley fills. See Dec. of Dr. Margaret Janes, Ex. 8. At Black Castle Mine, the company has begun filling one valley fill, and is beginning construction of a second pond in preparation for another valley fill. Id. Construction of the sediment ponds and valley fills is destroying streams and habitat. At Republic No. 2 Mine, at least 50 acres of the site have been disturbed. WVDEP permit search at http://www.dep.state.wv.us/ (Jan. 27, 2006).

Destructive mining and valley fill activity are ongoing at the Camp Branch, Black Castle and Republic No. 2 mine sites. Id. and Dec. of Dr. Margaret Janes, Ex. 8. If the permits for these mines are allowed to remain in force in violation of applicable law, the harm to the Plaintiffs caused by the destruction and degradation of streams and aquatic habitat resulting from these valley fills will be both imminent and irreparable. Sierra Club v. U.S. Army Corps of Eng'rs, 399 F. Supp. 2d 1335, 1348 (M.D. Fla., 2005) ("dredging and filling of wetlands" is "irreparable harm"). When environmental injury "is sufficiently likely… the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). Moreover, Plaintiffs' injuries cannot be redressed by monetary compensation. "[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). In light of the imminent and irreversible harm that will result without an injunction halting any further valley fill-related activities at the mines challenged here, the public interest would be best served by preserving the status quo until the Court is able to rule on the merits.

III. PLAINTIFFS SHOW A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Corps' Issuance of the Permits Without Preparing an EIS Violates NEPA.

The Corps' decision not to prepare a separate EIS for the Camp Branch Mine, Black Castle Mine, and Republic No. 2 Mine is arbitrary and capricious and violates NEPA. Courts in this and other Circuits have required an EIS for projects that were expected to have a fraction of the impacts of those contemplated by the permits challenged in this case.[7] Indeed, it is difficult to imagine projects that would require an EIS if these do not. Remarkably, despite the broad and devastating impacts that large scale surface mining has on the region's environment, Plaintiffs know of only one mine (Arch's Spruce Mine) in West Virginia for which the Corps has required an EIS. If the Corps does not require an EIS for activities with such far-reaching impacts as those at the Camp Branch, Black Castle and Republic No. 2 mines, what kinds of activities would require an EIS?

NEPA requires federal agencies to prepare a detailed environmental impact statement ("EIS") analyzing the environmental impacts of every major Federal action significantly

[7] See Arlington Coalition on Transport. v.Volpe, 458 F.2d 1323, 1327 (4th Cir. 1972), cert. denied, 409 U.S. 1000 (1972) (Construction of a highway segment that would affect approximately 15 acres of parkland); Coalition for Responsible Reg. Dev. v. Coleman, 555 F.2d 398, 403 (4th Cir. 1977) (construction of a bridge over a river within a 10-acre parkland), and Ely v. Velde, 451 F.2d 1130, 1134 (4th Cir. 1971) (construction of a prison facility involving four buildings, a guardtower, and a fence). See also Friends of the Earth v. U.S. Army Corps of Eng'rs, 109 F. Supp. 2d 30, 39 n.10 (D.C.C. 2000) (stating that the possible intake of larvae and eggs by three floating casino barges "would appear to be an important environmental impact for analysis"). In comparison, each of the projects

affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Council on Environmental Quality ("CEQ") has promulgated regulations implementing NEPA that are binding on all federal agencies, including the Corps. 40 C.F.R. 1500.3; Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 354 (1989). To determine whether or not to prepare an EIS in connection with an individual permit under CWA section 404, the Corps prepares an Environmental Assessment ("EA"). 40 C.F.R. §§ 1501.3–1501.4; 33 C.F.R. § 230.7. As required by CEQ, an EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If an EIS is prepared, it must include an analysis of direct and indirect environmental "effects" of the proposed action, including "cumulative" impacts and "cumulative actions." Id. §§ 1502.16, 1508.8, 1508.25(a)(2). "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." Id. § 1508.27(b)(7).

In reviewing the agency's decision to issue a FONSI rather than perform an EIS, the Court's inquiry is twofold. First, the Court "must determine whether the agency took a 'hard look' at the project's effects." Wilds v. South Carolina Dept. of Transp., 2001 WL 492299, 6 (4th Cir. 2001). "[A]n agency takes a sufficient 'hard look' when it obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny and responds to all legitimate concerns that are raised." Id. (internal quotation omitted). At the very least, a hard look requires a "thorough investigation into the environmental impacts of an agency's action and a candid acknowledgment of the risks that those impacts entail." Nat'l Audubon Soc'y v. Dept. of Navy, 422 F.3d 174, 185 (4th Cir. 2005). Second, the Court must determine whether, in refusing to prepare an EIS, "the decision was arbitrary or capricious."

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here at issue will permanently and fundamentally alter hundreds of acres of wildlife habitat, and permanently smother two to three miles of valleys and streams.

Wilds, 2001 WL 492299 at 5. Agency action is arbitrary and capricious if the agency fails to consider an important aspect of the problem or fails to explain the connection between the facts and the decision. See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto Ins., 463 U.S. 29, 43 (1983). "An agency's refusal to prepare an [EIS] is arbitrary and capricious if its action might have a significant environmental impact." State of North Carolina. v. FAA, 957 F.2d 1125, 1131 (4th Cir. 1992) (emphasis added). [8]

1. The Corps failed to carefully consider the environmental impacts of the mining and valley fill activities at the mines challenged here.

Each of the mines challenged in this suit will cause enormous impacts that the Corps has failed to acknowledge or otherwise address. The three mining projects here at issue will impact areas ranging from 521 acres at the Black Castle Mine, to 728 acres at the Republic No. 2 Mine, and 915.9 acres at the Camp Branch Mine.[9] Black Castle Mine SOF at 82, Republic No. 2 SOF at 16, Camp Branch Mine SOF at 70. The existing trees on these sites will be ripped out of the ground by their roots; then entire mountaintops will be blasted apart with powerful explosives and carried away; finally, the resulting "overburden" will be trucked away to nearby hollows, where it will bury from two to three miles of streams at each site. These activities will turn unique temperate forest habitat into broad patches of barren grassland the size of Central Park. These areas will not return to their previous forested state for decades, perhaps a century. PEIS, Ex. 1, App. I at 93. Yet the Corps has refused to acknowledge that any of these activities might result in significant environmental impacts.

The Corps' EAs are characterized by a striking absence of discussion or analysis of the environmental impacts of the valley fills. Instead, the EAs offer only a formulaic recitation of

[8] See also 40 C.F.R. § 1508.3 ("Affecting means will or may have an effect on.")
[9] By way of comparison, the entire campus of Southern Charleston University covers 300 acres, www.csuniv.edu/version3/aboutus.asp, and Central Park in Manhattan covers 843 acres, www.centralparknyc.org.

the proposed mining activities, the length of the streams that will be buried, and the number of acres that will be cleared. Further, although the Corps' FONSI relies almost exclusively on the permittees' mitigation plans, it does not explain how the proposed mitigation will minimize those ecological losses to insignificance.

The Corps' description of the environmental impacts of the mining activities is perfunctory at best. For example, the Corps lists linear feet of expected "permanent impacts" and "temporary impacts," without describing the significance of those impacts. Camp Branch SOF at 65-66, Black Castle Mine SOF at 7, Republic No. 2 SOF at 2. The Corps makes only general statements about environmental impacts, for example, "[a]dverse impacts associated with valley fill construction are considered permanent in nature," Camp Branch SOF at 7; "[t]he proposed mining activity would result in disturbances to the Dingess Run watershed," id. at 49; and the valley fills and drainage control structures will "alter the circulation and drainage patterns of the proposed site," id at 50. See also Black Castle SOF at 7, 77-81, 118. However, the Corps fails to describe the effect or significance of these impacts on the affected aquatic and terrestrial ecosystems, particularly the effect of permanently destroying several miles of streams.

Significantly, the Corps fails to disclose that by permanently burying the streams, the valley fills the Corps permitted will permanently destroy or alter ecosystem functions that are presently provided by those streams. See Dec. of Dr. Margaret A. Palmer, Ex. 6 at 1, 8 (Dec. 24, 2005). Ecosystem functions of healthy streams allow them to provide services like water purification, removal of excess nutrients and sediments, and productivity and reproduction of invertebrates and fish. Id. at 4-5. The valley fills and associated mining activities at the Camp Branch and Black Castle mines will "fundamentally and permanently alter the hydrologic and sediment regimes" that control ecological functioning not only in the stream segments directly

impacted but also downstream. Id. at 2, 8. As a result, the stream functions that will be lost at those mines include temperature regulation, nutrient processing, water purification, decomposition of organic matter, flood protection, and biological production. Id. at 2. The Corps neither identifies nor analyzes the significance of this loss of stream functions. Id.

Instead of assessing existing stream functions, the EAs merely attempt to assess existing stream structure and "condition." In particular, the Corps purports only to assess the "pre-existing conditions in the watershed" for each of the mines using the Rapid Bioassessment Protocol developed by the EPA. Camp Branch SOF at 9 and Black Castle SOF at 10. That protocol measures aspects of stream structure such as "bankfull width" and "mean depth." Camp Branch SOF at 9-11 and Black Castle SOF at 9-11. Id. In contrast, a stream's ecosystem functions are determined by hydrologic interactions, that is, interactions between groundwater and surface water that are influenced by flow directions and rates. Palmer Decl., Ex. 6 at 4. Functions include metabolism, nutrient processing, organic matter decomposition, and productivity and reproduction of invertebrates and fish – features that by their very nature cannot be evaluated with a measuring stick or visual inspection. Id. at 4; Wallace Decl., Ex. 7 at 3. This distinction means that stream functions cannot be measured by systems designed to measure stream structure. Indeed, EPA emphasizes that "[t] hese protocols measure the structure of headwater streams and do not directly measure the ecosystem function." Development of Rapid Functional Assessment Methods for Headwater Streams, at http://www.epa.gov/eerd/functional.htm (emphasis added). In fact, "[n]o data or evidence of functioning created streams is provided in the documents." Dec. of Dr. Palmer, Ex. 6 at 4, 10. Consequently, neither the permittee nor the Corps has performed an analysis of the stream functions that will be destroyed by the Camp Branch and Black Castle mines valley fills. This

failure is fatal to the Corps' permits.

In addition to destroying the ecosystem functions of the buried streams, the valley fills will destroy forest and remove wildlife habitat for aquatic and terrestrial species. Id. Yet the Corps cavalierly dismisses these losses, asserting baldly that "[n]o long-term unacceptable impacts would be expected to the wildlife ecosystem…." Camp Branch SOF at 57 and Black Castle SOF at 68 (same). This conclusory finding is not supported by the record.

2. The Corps' decision to issue the Camp Branch, Black Castle, and Republic No. 2 permits without preparing an Environmental Impact Statement for each permit is not justified by the proposed Compensatory Mitigation Plans.

The Corps attempts to justify its failure to address the ecosystem impacts of the valley fills for each of the permits by claiming that "[t]he CMP would be expected to provide sufficient compensatory mitigation to offset stream functions lost as a result of the proposed project." Camp Branch SOF, Ex. 4 at 87 and Black Castle SOF, Ex. 5 at 111 (same); Republic No. 2 SOF at 27-28 (stating that the CMP "offsets unavoidable impacts"). However, the Corps provides no explanation of the manner in which the CMPs would, in fact, "offset" lost stream functions.

Moreover, this approach is unlawful. When the Corps issues an EA and FONSI based on mitigation measures, it must provide "substantial evidence to support the efficacy" of the proposed mitigation. See Nat'l Audubon Soc'y v. Hoffman, 132 F.3d 7, 17 (2d Cir. 1997). Issuance of an EA and FONSI based on mitigation measures is arbitrary and capricious if the Corps "merely recites the offsetting mitigation measures without analyzing how those mitigation measures will actually reduce or offset the significant impacts to acceptable levels." O'Reilly v. U.S. Army Corps of Eng'rs, 2004 WL 1794531 (E.D. La. Aug. 10, 2004).[10] Moreover, "the

[10] See also Stein v. Barton, 740 F. Supp. 743, 754 (D. Alaska 1990) ("[W]here an agency's decision to proceed with a project is based on unconsidered, irrational, or inadequately explained assumptions about the efficacy of mitigation measures, the decision must be set aside as 'arbitrary and capricious'"); Wyoming Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F. Supp.2d 1232, 1252 (D. Wyo. 2005) ("This Court cannot rely solely on a permit condition

sufficiency of the mitigation measures… [is] necessarily dependent on an adequate assessment of environmental impact." Nat'l Audubon Soc'y, 422 F.3d at 200.

Here, because the Corps failed to identify or analyze the ecosystem functions that will be destroyed by the valley fills, the agency cannot ensure that mitigation will offset those losses. Thus, as discussed in detail below, the Corps' decision to issue FONSIs based on the proposed mitigation for the mines at issue in this action is unsupported, arbitrary, and capricious.

Camp Branch Mine. To mitigate the valley fills at the Camp Branch Mine, the Corps claims that the CMP will "create" streams out of former drainage control ditches. Camp Branch SOF at 8. However, the Corps has provided no evidence to support its claim that a functioning stream can be "created" merely by creating a channel through which water might flow. Indeed, no such support exists. See Palmer Decl., Ex. 6 at 3 ("there is not a single study in the peer reviewed scientific literature that evaluated the functional effectiveness of building streams de novo. The very concept of creating a stream that has comparable levels of ecological functioning to natural channels remains untested.") (Emphasis in original).

Black Castle Mine. To mitigate the valley fills at the Black Castle Mine, the Black Castle CMP proposes to "enhance approximately 18,000 feet (10.2 acres) of Laurel Creek." Black Castle SOF at 9. However, the Corps offers no scientific support for its notion that the effects of permanently burying headwater streams can be offset merely by "enhancing" downstream, off-site stream segments that have already been adversely impacted by past mining-related activities. Id. at 9. In addition, because the fills potentially will neutralize stream segments previously affected by acid mine drainage, the Corps gives the plan mitigation credit for "cleaning" the water of acid. Id. at 107. However, the Corps fails to explain how these

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that mandates a 1:1 [wetlands] replacement ratio when no other evidence supports a finding that such a ratio is even possible").

potential benefits offset the other adverse impacts that will be caused by permanently burying the affected streams. Id., Wallace Decl., Ex. 7 at 2.

Republic No. 2 Mine. To mitigate the valley fills at the Republic No. 2 Mine, the permittee proposes off-site mitigation, consisting of purported restoration and enhancement on a segment of Long Branch, downstream of proposed "Fill 3." Republic No. 2 SOF at 3. This restoration segment is located in a different sub-watershed from where the proposed Fills 1 and 2 associated with this project are located. Id. Yet the Corps provides no explanation how the damages from all three fills will be mitigated by improvements in streams that are off-site and located in a different sub-watershed from two of those fills. Id.

Even assuming it were somehow possible to effectively mitigate the ecosystem losses caused by the valley fills, the CMPs provided for the mines are fatally flawed. The CMPs were developed using a "stream habitat unit (SHU) procedure to quantify habitat." Camp Branch SOF at 8 and Black Castle SOF at 9. This "SHU" procedure is based upon a methodology developed by the Corps' Norfolk District, which clearly states that it is applicable only to the Piedmont physiographic region, while the Camp Branch and Black Castle mines are located in the Appalachian physiographic region. Id. at 7, 11. See also Wallace Decl. at 2, 8. The Corps' approval of this procedure is, by itself, arbitrary and capricious, because the streams in these two different regions have highly divergent hydrological regimes. Id. For example, according to the EPA, watersheds in the Appalachian Plateau Province generally have higher seasonal variability, and lower sustained low flows, among other differences. EPA, Nat'l Exposure Research. Lab., Comparisons of Hydrologic Responses at Different Watershed Scales, at http://www.epa.gov/nerl/research/2004/g4-4.html (Jan. 13, 2006). Nonetheless, the Corps approved the Piedmont region SHU approach without providing any evidence of its scientific

validity, and without evidence of its efficacy in the Appalachian region. See Wallace Decl., Ex. 7 at 2. This decision was arbitrary, capricious, and unexplained.

Furthermore, the mitigation plans focus on stream structure rather than function. Palmer Decl., Ex. 6 at 7 and 11. These plans attempt to recreate the shape of a natural stream, without ensuring that the "created" streams are capable of supporting life. To illustrate, the SHU procedure measures "existing channel characteristics" in terms of width and depth, counts the macroinvertebrate organisms present in the streams, and assigns "physical habitat" scores ranging from optimal to suboptimal based on these measures. Camp Branch SOF at 10. However, to properly assess the damage caused by the valley fills and, if possible, to offset that damage, "[m]easurements of functional attributes on the streams prior to their burying would be needed to determine what level the created streams should conform to if they can be created at all." Palmer Decl., Ex. 6 at 11 (emphasis added). Here, "there is no mention of such measurements" in the record for either the Camp Branch or Black Castle Mine. Id. at 4 (emphasis in original); see also id. at 10. Thus, even if it was possible to mitigate for permanent loss of streams by "creating" streams or "enhancing" damaged downstream segments, the Corps' approach focused on stream structure is both misplaced and inadequate.

3. The Corps failed to analyze the cumulative impacts of the valley fills.

Clearly the Corps' permits will cause individually significant environmental impacts that require an EIS at each of the Camp Branch, Black Castle, and Republic No. 2 mines. However, even if the individual impacts of each of these mines were insignificant, the permits allow significant cumulative environmental impacts when added to other past, present and reasonably foreseeable future activities in the region. These include adverse impacts on water quality, forest fragmentation, and biological diversity in the affected watersheds and throughout the southern Appalachian region. These cumulative impacts require an EIS for each of the permits.

NEPA regulations provide that "[s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. § 1508.27(b)(7). "Cumulative impact," in turn, is defined as that "which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Thus, NEPA "requires that the Corps consider whether a project's environmental effects may be cumulatively significant in conjunction with other environmental conditions that are reasonably foreseeable, even if they are not significant by themselves." Roanoke River Basin Ass'n. v. Hudson, 940 F.2d 58, 64 (4th Cir. 1991).

The Corps provides a brief listing of past, present, and foreseeable future mining activities in the sub-watersheds where the Camp Branch Mine and Black Castle Mine are located. See Black Castle SOF at 76-92; Camp Branch SOF at 67-73. See also Sec. I.C., supra. However, the Corps fails to assess the cumulative impacts of these activities upon the ecosystem. Id. Instead, the Corps merely recites the mining, mitigation, and reclamation plans for these other mines, culminating with the conclusory statement that "no unacceptable cumulative impacts would be expected to occur." Black Castle SOF at 93; Camp Branch SOF at 76 (same). The Corps fails to provide any data or analysis to support this bald conclusion. Moreover, this conclusion flatly contradicts EPA's separate evaluation of the Camp Branch Mine permit, which concludes that "aquatic resources have been significantly impacted by mining in Southern West Virginia and the cumulative impact of this loss on a watershed scale should be addressed in both the NEPA and [CWA] § 404(b)(1) analysis." Camp Branch SOF at 108.

NEPA requires federal agencies to evaluate cumulative impacts. See Nat'l Audubon Soc'y v. Navy, 422 F.3d at 196-198, (citing Kleppe v. Sierra Club, 427 U.S. 390, 410)

("cumulative or synergistic environmental impact upon a region" by several proposed actions "must be considered together"); and Natural Resources Defense Council v. Hodel, 865 F.2d 288, 297-300 (D.C. Cir. 1988) (finding agency in violation of NEPA after failing to evaluate cumulative impacts). Under the CEQ regulations, "effects" that must be analyzed include "cumulative impacts," defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §§ 1508.7, 1508.8. This requirement applies here, where the areas affected by the Camp Branch, Black Castle and Republic No. 2 mines have been dramatically affected by previous mining, and where the Corps is permitting numerous additional mines annually. In fact, in addition to the many existing mines in the watersheds affected by these two mines, the Corps has permitted at least 113 valley fills at 30 new surface mines in West Virginia since July 2004. See Aff. of Margaret Janes at 2. Under these circumstances, the Fourth Circuit has made clear that NEPA imposes a strict duty to consider the cumulative impacts of new activities. Nat'l Audubon Soc'y, 422 F.3d at 198 (NEPA requires a full investigation of both "the impacts of [the agency's] actions in isolation" and "in combination with others").

The Corps justifies avoiding analysis of the cumulative impacts of the mines at issue by claiming that potential impacts will be "offset" by the company's mitigation plans ("CMPs"). See Black Castle SOF at 105, 139 ("[t]he project would result in adverse environmental impacts; however, the applicant's proposed CMP and reclamation plan would be expected to result in overall aquatic resource benefits and ultimately reduce past cumulative impacts by improving overall water quality…."); Camp Branch SOF at 87, 93 ("The CMP would be expected to provide sufficient compensatory mitigation to offset stream functions lost as a result of the

proposed project") and id. at 84, 100 ("No unacceptable impacts to the wildlife ecosystem would be anticipated to occur because the site proposes a combination of specific reclamation and planting plans…"). However, looking behind these bald assurances, the Corps has failed to provide evidence that the CMPs will, in fact, offset any potential cumulative impacts.

"It is settled law that NEPA requires agencies to discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated." Robertson v. Methow Valley Citizens Council, 490 U.S. 350, 352 (1989). The Corps utterly fails to satisfy this requirement. Neither the Camp Branch nor Black Castle EAs provide anything resembling a discussion that ensures that the environmental consequences of the proposed mitigation have been fairly evaluated.[11] Palmer Decl., Ex. 6; Wallace Decl., Ex. 7. However, without "substantial evidence of the efficacy" of the mitigation plans, the Corps is left with no basis for its refusal to analyze the cumulative impacts of the Camp Branch and Black Castle mines in combination with past, present, and future activities. Nat'l Audubon Soc'y, 132 F.3d at 17 (2nd Cir. 1997). Consequently, the permits violate NEPA.

Finally, even if this Court concludes that the Corps is not required by NEPA to prepare an EIS for these three mining permits, the Corps must be required to rescind the permits while it prepares revised EAs for each of the Camp Branch, Black Castle, and Republic No. 2 mines that include the kind of analysis required by the CEQ. As explained in detail in the preceding discussion, the EAs are missing the kind of evidence and analysis needed for the Corps to determine whether an EIS or a FONSI is appropriate. None of the EAs provides either data or analysis in support of the unverified assertion that "no unacceptable cumulative impacts would

[11] Although the Plaintiffs have not yet had the opportunity to examine the full administrative record for the Republic No. 2 Mine permit, a review of the Statement of Findings issued with the permit indicates that it suffers many of the same defects associated with the other two mines challenged in this suit.

be expected to occur." Black Castle SOF, 93; Camp Branch SOF, 76; Republic No. 2 SOF, 18. The EAs do not provide scientific evidence or other bases to support the assertion that mitigation and reclamation will reduce any impacts to insignificance. Moreover, the EAs abjectly fail to describe adequately the environmental impacts of the proposed actions. Therefore, at the very least, the Corps must prepare new EAs for each mine, and cannot allow work at these mines to go forward until it prepares and publishes those EAs. See Amer. Oceans Campaign v. Daley, 183 F. Supp. 2d 1, 17-21 (D.D.C. 2000) (enjoining action pending revision of inadequate EAs).

B. The Corps' Permits Do Not Comply With the Section 404(b)(1) Guidelines, and Therefore Violate Section 404 of the Clean Water Act.

Under certain circumstances, CWA § 404 authorizes the Corps to issue permits for the discharge of dredged or fill material into specified disposal sites. 33 U.S.C. § 1344(a). The Corps has adopted regulations to guide its compliance with § 404 of the Clean Water Act, commonly referred to as the "Section 404(b)(1) Guidelines," set forth at 40 C.F.R. § 230.1 et seq. The Corps is legally required to follow these Guidelines.[12]

The Section 404(b)(1) Guidelines set forth specific restrictions on discharges into U.S. waters and require the Corps to engage in a detailed analysis concerning the potential impacts of discharges and the manner in which those impacts might be avoided or minimized. See Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F. 3d 1152, 1187 (10th Cir. 2002); B&B P'ship v. U.S., 1997 WL 787145 at *6 (4th Cir. 1997) (approving Corps denial of 404 permit based on analysis of cumulative impacts of eliminating a headwater stream). A "fundamental precept" of the Guidelines is that "dredged or fill material should not be discharged into the aquatic

[12] CWA § 404(b) mandates that "each disposal site shall be specified . . . through the application of guidelines developed by [EPA], in conjunction with the [Corps]…." The Corps' regulations adopt the § 404(b)(1) Guidelines, 40 C.F.R. § 230.2(a), and state that "a permit will be denied if the discharge that would be authorized by such a permit would not comply with the 404(b)(1) guidelines." 33 C.F.R. § 323.6. Thus, the § 404(b)(1) Guidelines are binding upon the Corps. See B&B Partnership v. U.S., 1997 WL 787145 at *5 (4th Cir. 1997); James City County, Virginia v. EPA, 12 F. 3d 1330, 1333 (4th Cir. 1993).

ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." 40 C.F.R. § 230.1(c). The Corps has made no such showing here; accordingly, its permits allowing the valley fills at the three mine sites violate the Guidelines and section 404 of the CWA.

1. The Corps has failed to determine whether the valley fills will cause or contribute to significant degradation of the waters of the United States

Under the Guidelines, no discharges of dredged or fill material shall be permitted if discharges cause or contribute to significant degradation of U.S. waters. Id. § 230.10(c).[13] The Corps has failed to analyze properly the effects of the fills. In order to decide whether discharges will cause or contribute to significant degradation of the affected streams, the Guidelines require the Corps to determine "the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms." 40 C.F.R. § 230.11(e) (emphasis added). The Corps has failed to do so. Indeed, the Corps entirely failed to analyze the effects of the valley fills on stream ecosystem functions. Palmer Decl., Ex. 6, 3-4. See supra, sec. III.A.1 – A.2. In addition, the Corps has failed to determine the cumulative effects of burying streams upon the aquatic ecosystem downstream from the fills, in violation of Id. § 230.11(g). See supra, sec. III.A.3.

2. The valley fills will cause significant degradation to "special aquatic sites"

The valley fills will bury riffle and pool complexes, which are defined under the

[13] Effects contributing to significant degradation considered individually or collectively include: significant adverse effects on human health or welfare, significant adverse effects on aquatic life and other water dependent wildlife; significant adverse effects on aquatic ecosystem diversity, productivity, and stability; and significant adverse effects on recreational, aesthetic, and economic values. Id. § 230.10(c). Findings regarding significant degradation must be based upon "appropriate factual determinations, evaluations and tests," "with special emphasis on the persistence and permanence of the effects." Id. § 230.10(c).

§ 404(b)(1) Guidelines as "special aquatic sites."[14] Republic No. 2 SOF at 12; Dec. of Dr. Ben M. Stout, III, Ex. 11 at 2. Riffle and pool complexes are almost always present in headwater streams in the area of the mines at issue in this action, and are expected to be present in the stream segments proposed to be filled. Id. at 3.

As "special aquatic sites," riffle and pool complexes are protected by stringent restrictions on discharges of fill material into such sites. In particular, significant adverse effects on riffle and pool complexes, considered individually or collectively, are presumptively considered to contribute to significant degradation of waters of the United States. 40 C.F.R. § 230.10(c)(1). Further, practicable alternatives that do not involve burying riffles and pools are "presumed to be available, unless clearly demonstrated otherwise," id. § 230.10(a)(3), and such alternatives are "presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." Id. Therefore, the Corps must show that there are no available alternatives that do not involve filling riffle and pool complexes, or that those alternatives somehow cause greater adverse impacts to the aquatic ecosystem. Id.

The Corps entirely failed to analyze riffles and pools at the Camp Branch and Black Castle mines. The Corps' claim that "it is reasonable to expect the proposed project will not impact riffle and pool complexes," is a conclusory assertion that lacks supporting data and analysis. Camp Branch SOF at 70 and Black Castle SOF at 58. It is also contrary to the conclusion of Dr. Stout that the streams to be filled are expected to contain riffle and pool complexes. See Stout Dec., Ex. 10, 2-3. While the Corps asserts that no riffle and pool complexes were "observed during the jurisdictional waters of the US delineation for this proposed project," Camp Branch SOF at 70 and Black Castle SOF at 58, the Corps does not

[14] Riffles are characterized by "a rough flow, a turbulent surface, and high dissolved oxygen levels in the water," while pools are deeper areas associated with riffles. These areas are recognized as "particularly valuable habitat for

indicate which streams were observed or who observed them. There is certainly no indication that any persons who observed the streams are qualified to identify riffle and pool complexes. Indeed, the Camp Branch mitigation plan directly contradicts the Corps' finding, stating that "[t]he goal of this on-site mitigation is to construct jurisdictional waters that mimics [sic] the riffle-pool sequences of natural waters." Camp Branch Mine CMP, 31 (Dec. 7, 2004). If the valley fills will not impact riffles and pools, why would any mitigation be needed to "mimic" them? These conclusory and contradictory assertions cannot substitute for the detailed factual determinations required under the 404(b)(1) Guidelines for special aquatic sites.

For mining projects such as those challenged here, which the Corps concedes are not water dependent (see, e.g., Camp Branch SOF at 23), the Guidelines presume that a practicable alternative to water discharges into special aquatic sites exists, and there must be a clear demonstration that such an alternative does not exist. 40 C.F.R. § 230.10(a)(3); see Utahns for Better Transp., 305 F. 3d at 1163. But the Corps has not required the permit applicants to "clearly demonstrate" that practicable alternatives were not available. Instead, the decision documents merely recite that the applicant "examined numerous alternatives to avoid all impacts to waters of the United States and determined them to be impracticable based on cost effectiveness, and technical feasibility." See, e.g., Camp Branch SOF at 87.[15]

For the Republic No. 2 Mine, the Corps acknowledges that "there will be a loss of riffle and pool complexes as a result of the permanent placement of fill material." Republic No. 2 SOF at 12. However, the Corps failed to demonstrate that alternatives to filling riffles and pools are unavailable or would cause greater ecological damage. Id. at 8-9, 12. Instead, the Corps

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fish and wildlife," 40 C.F.R. §§ 230.40, 230.45.

[15] The Corps must deny a permit if it lacks "sufficient information" to determine whether the proposed discharge complies with the Guidelines. 40 C.F.R. § 230.12(a)(3)(iv); see Utahns for Better Transp., 305 F. 3d at 1187. The

simply asserts that, "the only practicable areas for disposal were within valleys/hollows located on-site." Id. at 9. This bare assertion likewise falls short of the requirement that the Corps "clearly demonstrate" that there is no alternative to filling the sites. 40 C.F.R. § 230.10(a)(3).

3. The Corps has failed to minimize the adverse effects of the fills

Alternatively, the Guidelines require the Corps to ensure that "appropriate and practicable steps have been taken which will minimize adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). As discussed above, the Corps failed to analyze the effects of the fills on stream functions. Palmer Decl., Ex. 6, 3-4. See supra, sec. III.A.1 – A.2. Moreover, it accepted without analysis the applicants' representations that other alternatives were not feasible or cost-effective. See, e.g. Camp Branch SOF at 87. As a result, the Corps failed to ensure that the applicants use mining methods that minimize the impacts of fills.

In short, because the Corps failed to identify the significant adverse impacts of the fills on the affected ecosystems, and failed to take all appropriate steps to find alternatives to or minimize those adverse impacts, its finding that the valley fills will not cause or contribute to significant degradation of the waters of the United States within the meaning of the Section 404(b)(1) Guidelines is unsupported, arbitrary and capricious and contrary to the CWA.

4. The permits authorize discharges that are beyond the Corps' permitting authority, and that contravene the applicable statute and regulations.

The activities authorized by the challenged permits will cause pollutants to flow from the downstream end of the valley fill (the "toe" of the fill) into the stream below, and then into the sediment pond into which the stream flows.[16] Camp Branch SOF at 142, Black Castle SOF at

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paucity of the Corps' statements as to the "demonstration" by the applicants on alternatives supports a denial of the permits on this separate ground.

[16] These waters are tributaries and impoundments of tributaries, and thus constitute waters of the United States protected by the Clean Water Act. *See* 40 C.F.R. § 122.2.

226, Republic No. 2 SOF at 2. See supra, 7-8 (illustrations). These discharges are beyond the Corps' permitting authority, and violate applicable water quality regulations.

Permitting Beyond Corps Authority. The Act provides that "the discharge of any pollutant by any person shall be unlawful," except as authorized pursuant to other enumerated sections of the Act. 33 U.S.C. § 1311(a). The Corps is authorized to issue permits allowing exceptions to this prohibition, but only for the discharge of "dredged or fill material." § 404(a). The discharges from the toe of the fill into the stream and impoundment below are not discharges of dredged material. Nor are the discharged pollutants "fill material," because the discharges from the toes of the fills are sediment-laden liquid discharges that do not (i) replace waters with dry land or (ii) change the bottom elevation of the stream. See 33 C.F.R. § 323.2(e).

The Corps admits that its permits will allow pollutants to enter the stream segments between the toe of the valley fills and the outfall of sediment ponds. See Camp Branch SOF at 142, Black Castle SOF at 226, Republic No. 2 SOF at 2. Because these discharges qualify neither as dredged material nor fill material, the Corps' attempt to authorize them must be struck down as beyond the Corps' permitting authority. See, e.g., State of Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001) ("if there is no statute conferring authority, a federal agency has none").

Violation of Federal Regulations: § 402. Permits for discharge of pollutants other than dredged or fill material can be issued under CWA § 402 by EPA or a delegated state. Here, the section 402 permitting agency – specifically, WVDEP – has not purported to issue such a permit. Nor could it, because such a permit would violate applicable federal regulations under § 402.

Federal Effluent Limitations. First, the discharges into the downstream waters violate applicable effluent limitations for sediments. Each NPDES permit must comply with technology based effluent limitations and standards. 40 C.F.R. § 122.44(a). The polluted water discharged

from the toes of the fills is untreated and characterized by high concentrations of silt. See Camp Branch SOF at 47 and Black Castle SOF at 58. Thus, in stark contravention of § 402, these discharges violate effluent limitations and standards set forth in 40 C.F.R. § 434.35 for total suspended solids, settleable solids, and other pollutants in discharges from the coal mining point source category. Further, because this polluted water leaches untreated through the valley fills and into the sediment ponds, it is highly likely that the discharges will also exceed numeric criteria for pH, iron, aluminum, selenium, and/or manganese. Wallace Decl., Ex. 7 at 4.

Federal Regulation Requiring Compliance With Water Quality Standards. Second, each NPDES permit issued under § 402 must comply with and must not cause or contribute to violations of state water quality standards, including state narrative criteria for water quality. 40 C.F.R. § 122.44(d). Because the stream segments immediately downstream of the fills are used only to transport and store polluted runoff from the valley fills, the discharges from the toes of the fills violate the narrative criterion prohibiting designating waters for the use of waste assimilation and transport, Id. § 131.10(a); 46 C.S.R. 1-6.1.a. Because the discharges from the toes of the fills consist of sediment-laden liquid, they will also violate the narrative criterion limiting bottom deposits, color, and settleable and suspended solids, 46 C.S.R. §§ 1-3.2.a, 1-3.2.b, 1-3.2.f. Accordingly, the State has not and could not issue a § 402 permit for the discharge from the toes of the fills to downstream waters. Moreover, because the discharges from the permitted valley fills will cause or contribute to violations of water quality standards downstream of the fills, they violate § 402 of the Act and implementing regulations.

In short, the discharges into downstream waters are beyond the Corps' permitting authority, and in any event violate applicable federal regulations.

Violation of Federal Regulations: § 404. As the previous discussion demonstrates, the Corps lacks authority to permit the discharge of pollutants from the toe of the valley fills into the streams segments and sediment impoundments below. However, even assuming arguendo that the Corps did have authority under § 404 to permit such discharges, these discharges would still violate the state narrative and numeric water quality criteria discussed above, in violation of the prohibition in the § 404(b)(1) Guidelines against permitting any fill that would cause or contribute to violations of applicable state water quality standards. 40 C.F.R. § 230.10(b)(1).

IV. CONCLUSION

In sum, the permits challenged here show that the Corps is authorizing the permanent destruction of much of southern West Virginia with little more than a wink and a nod at its duties under the law. Whatever the Corps' reason for failing to discharge its duties, the permits at issue here violate the law and threaten to cause imminent adverse environmental impacts that will result in permanent and irreparable harm to Plaintiffs if an injunction does not issue.

For these reasons, Plaintiffs respectfully request that the Court: (1) issue a declaratory judgment that the Camp Branch, Black Castle, and Republic No. 2 mine permits violate the CWA and NEPA; (2) issue an injunction requiring the Corps to rescind its authorization of any future discharges of fill material at these mining sites until the Corps demonstrates that such discharges comply with § 404 of the CWA; (3) issue an injunction requiring the Corps to rescind its authorization of any future discharges of fill material at these mines until it prepares an EIS for each mine in compliance with NEPA; (4) declare that the Corps lacks jurisdiction to permit discharges from the toes of fills to the outfalls of sediment control ponds; and (5) enjoin the Corps from authorizing future discharges of sediment-laden water into the waters between the toes of valley fills and outfalls of sediment ponds. Finally, Plaintiffs request that the Court impose no more than a nominal bond that the Court deems proper under Fed. R. Civ. P. 65(c).

Plaintiffs respectfully request a hearing on this motion at the earliest date that comports with the Court's docket.

Respectfully submitted,

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