

NOT INTENDED FOR PRINT PUBLICATION

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

HUNTINGTON DIVISION

OHIO VALLEY ENVIRONMENTAL
COALITION,
COAL RIVER MOUNTAIN WATCH, and
NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

CIVIL ACTION NO. 3:03-2281

WILLIAM BULEN, Colonel, District
Engineer, U. S. Army Corps of Engineers,
Huntington District, and
ROBERT B. FLOWERS, Lieutenant
General, Chief of Engineers and
Commander of the U. S. Army Corps
of Engineers,

Defendants.

ORDER

Pending before the court are the plaintiffs' Motion to Clarify the Court's August 13, 2004, Order [Docket 113], the Motion of Consol of Kentucky, Inc. to Intervene as Defendant [Docket 114], the Intervening Mining Associations' Motion for Reconsideration of the Court's August 13, 2004, Order [Docket 116], and Green Valley Coal Company's Motion for Reconsideration of the Order of August 13, 2004 [Docket 118]. For the reasons stated below, all pending motions [Dockets 113, 114, 116, 118] are **DENIED**.

I. Background

After granting summary judgment for the plaintiffs on their claim that NWP 21 was unlawful under the Clean Water Act, I ordered the United States Army Corps of Engineers (the Corps) “to suspend those authorizations for valley fills and surface impoundments on which construction has not commenced as of . . . July 8, 2004.” *See* July 8, 2004, Memorandum Opinion and Order [Docket 102] at 33. On August 13, 2004, I ruled on a number of other pending motions and supplemented my previous order, clarifying that the Corps was ordered “to suspend all existing NWP 21 authorizations for valley fills and surface impoundments in the Southern District of West Virginia on which construction had not commenced as of July 8, 2004.” *See* August 13, 2004, Order [Docket 111] at 6. On that same day, I entered a separate final judgment order, directing “that judgment be entered in favor of the plaintiffs Ohio Valley Environmental Coalition, Coal River Mountain Watch, and Natural Resources Defense Council, and that this case be dismissed and stricken from the docket.” *See* August 13, 2004, Judgment Order [Docket 112].

II. Pending Motions

Since I entered the final judgment order, the plaintiffs have moved for clarification of the August 13, 2004, order, the intervening coal associations (the intervenors) and Green Valley Coal Company (Green Valley) have moved for reconsideration, and Consol of Kentucky, Inc. (Consol) has moved to intervene as a defendant. Among other things, the motions present the parties’ widely varying interpretations of the Corps’ current intentions. According to the plaintiffs, the Corps has “refused to provide any guidance” to either the plaintiffs or the coal industry with regard to its interpretation of my prior orders. Plaintiffs’ Motion at 3. The plaintiffs fear that, in the absence of direction from the Corps or the court, coal operators will be free to interpret my language concerning

“commencement” of construction overly broadly. Consol, to the contrary, alleges on information and belief that “the Corps plans to send a notice to [Consol] soon,” and that such notice “will be based upon the Corps’ position that for purposes of both the Court’s Injunctive Order and its Supplemental Injunctive Order, commencement of construction under a NWP 21 authorization occurs only after the initiation of construction of the rock core drain for each respective fill approved under any such authorization.” Consol Memorandum [Docket 115] at 3-4. In addition, the intervenors allege on information and belief “that the Corps has mailed or will mail suspension letters to all holders of NWP 21 authorizations regardless of whether they relate to valley fills and refuse impoundments or not.” Intervenors’ Memorandum [Docket 117] at 11.

In addition to their concerns over the Corps’ potential interpretation of my orders, both the intervenors and Consol express concern over the amount of time it will take the Corps to consider individual permit applications. The intervenors allege that “the Court has practically guaranteed that the Corps’ administrators will be unable to process applications for individual permits in a timely manner, thereby forcing the closure of some operations.” Intervenors’ Memorandum at 10. More specifically, Consol argues that “even if [Consol] is able to obtain coverage for these same facilities under individual permits issued under CWA § 404 (to replace the suspended NWP 21 authorizations), that process will result in a delay of coal production at these sites that is conservatively estimated to last for approximately one year.” Consol Memorandum at 5.

Before addressing each pending motion individually, I will merely remark that the Corps, as the administrative agency authorized by Congress to regulate discharges of dredged and fill material into the waters of the United States, is entirely capable of carrying out my unambiguous orders. Construction on particular valley fills and surface impoundments had either begun by July 8, 2004,

or it had not. Further, if the Corps' workload will increase significantly as coal operators seek individual permits, that problem is best solved by the executive branch of government. The Corps might reduce the delay to coal operators by, for example, devoting more resources and personnel to the review of individual permit applications. However the Corps chooses to address the problem, I cannot allow projects to proceed under NWP 21 when the Clean Water Act clearly requires a greater degree of scrutiny than those projects have yet received.

A. The Plaintiffs' Motion to Clarify

The plaintiffs' pending motion seeks clarification of my prior orders. Specifically, the plaintiffs contend that coal operators are giving too broad an interpretation to the language concerning "commencement" of construction. According to the plaintiffs, the coal operators are proceeding under the assumption that their NWP 21 authorizations are not to be suspended by the Corps if the coal operators have begun "grubbing" land or constructing sediment control ponds in preparation for the construction of valley fills and surface impoundments. *See* Plaintiffs' Motion at 2. The plaintiffs also allege that the Corps has not provided guidance to the mining industry on the appropriateness of this interpretation. *Id.* at 3. The plaintiffs seek clarification "that commencing construction of a valley fill includes only the commencement of construction of the valley fill itself—of discharging fill material into the footprint of the fill—and does not include preparatory steps such as sediment pond construction or grubbing." *Id.* at 6.

The plaintiffs' motion is styled as a "Motion to Clarify" and does not refer to the Federal Rules of Civil Procedure. In *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d 395 (4th Cir. 1995), the Fourth Circuit Court of Appeals reviewed the district court's denial of a motion for clarification. *Id.* at 397. The Fourth Circuit stated:

Once a final judgment has been rendered by a district court, we have stated that “[i]n cases where a party [subsequently] submits a motion . . . which is unnamed and does not refer to a specific Federal Rule of Civil Procedure, the courts have considered that motion either a Rule 59(e) motion to alter or amend a judgment, or a Rule 60(b) motion for relief from a judgment or order.”

Id. at 400 (quoting *In re Burnley*, 988 F.2d 1, 2 (4th Cir. 1992)). Because the *Donohoe* defendant had moved two months after entry of the district court’s final order, the Fourth Circuit found that the motion did not fall within the scope of Rule 59(e), and considered it instead under Rule 60(b). *Donohoe*, 57 F.3d at 400.

Here, the plaintiffs filed their Motion to Clarify within the time allowed by Rule 59(e), which states that, “Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.” Accordingly, I will consider the plaintiffs’ motion as one to alter or amend judgment pursuant to Rule 59(e). The Fourth Circuit has identified three circumstances in which a district court may grant a Rule 59(e) motion: “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). I do not find any of these circumstances present here: there has been no intervening change in controlling law; no new evidence has been presented; and “clarifying” the prior orders is not necessary to correct a clear error of law or to prevent manifest injustice. As stated above, and as the plaintiffs concede, my prior orders directing the Corps to suspend certain authorizations were not ambiguous. *See* Plaintiffs’ Motion at 1. I trust that the Corps will enforce my unambiguous orders. Accordingly, the plaintiffs’ motion is **DENIED**.

B. Consol's Motion to Intervene as Defendant

The Fourth Circuit has stated that applicants to intervene as of right, pursuant to Fed. R. Civ. P. 24(a), must meet all four of the following requirements: “(1) the application to intervene must be timely; (2) the applicant must have an interest in the subject matter of the underlying action; (3) the denial of the motion to intervene would impair or impede the applicant’s ability to protect its interest; and (4) the applicant’s interest is not adequately represented by the existing parties to the litigation.” *Houston Gen. Ins. Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999). Timeliness is a “cardinal consideration.” *Id.* “Although entry of final judgment is not an absolute bar to filing a motion to intervene, the authorities note that: ‘There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing will be required of the applicant.’” *Id.* at 840 (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*: Civil 2d § 1916, at 444-45 (West 1986)).

Consol’s motion to intervene as a defendant was filed after entry of a final judgment and Consol has not made the strong showing necessary to overcome the presumption that its motion is untimely. Consol’s argument is essentially the same as the intervenors’ previously-rejected argument that those coal companies holding NWP 21 permits were necessary and indispensable parties to this lawsuit under Fed. R. Civ. P. 19. I rejected that argument for two reasons: first, because permit holders’ interests could not affect the determination of the lawfulness of NWP 21; and second, because the current intervenors were capable of representing the absent coal companies’ interests. *See* July 8, 2004, Memorandum Opinion and Injunctive Order [Docket 102] at 22-23. For the same reasons, Consol’s motion to intervene is **DENIED**.

C. The Intervenor's Motion for Reconsideration

The intervenors timely move for reconsideration of my August 13, 2004, order pursuant to Fed. R. Civ. P. 59. It appears that they are seeking “to correct a clear error of law or prevent manifest injustice.” *Pac. Ins. Co.*, 148 F.3d at 403. The intervenors allege that the order grants broader relief than that requested by the plaintiffs, that the plaintiffs have not established standing to challenge all existing NWP 21 authorizations, and that the order “unfairly and retroactively punishes coal operators that were outside the scope of the lawsuit and were operating in compliance with the law.” Intervenor Memorandum at 3-4.

In addressing the intervenors' motion, I find it necessary to emphasize for the third time now that NWP 21 is unlawful. It is true that NWP 21 permit holders were operating pursuant to what they thought were lawful authorizations, but NWP 21 itself was never lawful. As I noted previously, the District of Columbia Circuit Court of Appeals has stated that, “when a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). Ordering the suspension of all NWP 21 permits everywhere would have been appropriate under that standard. I limited the injunction in this case to the Southern District of West Virginia, however, to comply with the holding of the Fourth Circuit Court of Appeals that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003).

The plaintiffs here demonstrated that they “visit, live near, recreate near, drive by and/or fly over areas of the state that are visibly harmed by valley fills, surface impoundments, and related surface mining activities” in West Virginia. To provide “complete relief” to the plaintiffs in the context of this lawsuit, I found it necessary to order the Corps to comply with the Clean Water Act in the Southern District of West Virginia. As of July 8, 2004, anyone with an interest in coal mining in the Southern District was on notice that NWP 21 does not comply with the Clean Water Act and that the Corps was ordered to suspend NWP 21 authorizations. The exception I made for particular projects on which construction had begun by that date was merely that—an exception. Proponents of other projects may now apply for individual permits. Accordingly, the intervenors’ motion for reconsideration is **DENIED**.

D. Green Valley’s Motion for Reconsideration

Green Valley has also timely moved for reconsideration pursuant to Fed. R. Civ. P. 59. The motion alleges that Green Valley took all necessary steps prior to July 8, 2004, to secure an NWP 21 authorization from the Corps for its Revision 5, and that the Corps had all but authorized the project. The only remaining step was “the final ministerial action of tendering the verification to Green Valley.” Green Valley Memorandum at 3. For the reasons stated in my order of August 13, 2004, Green Valley’s Motion for Reconsideration is **DENIED**.

III. Conclusion

For the reasons stated above, all pending motions [Dockets 113, 114, 116, 118] are **DENIED**.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party and **DIRECTS** the Clerk to post this unpublished opinion at <http://www.wvsc.uscourts.gov>.

ENTER: August 31, 2004

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

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