

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 United States' Motion to File Out of Time [Docket 58] and six motions to file briefs in excess of page limitations [Docket 48, 53, 59, 90, 94, and 97]. For reasons appearing to the court, these motions are hereby **GRANTED**.

Also pending are the United States' Motion to Exclude All Testimony and Other Evidence Related to Matters Subject to Judicial Review on the Administrative Record [Docket 46] and Motion to Strike Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction and to Hold in Abeyance Plaintiffs' Motion for Summary Judgment [Docket 47]. These motions, which concerned

the April 12, 2004, hearing on the plaintiffs' motion for a preliminary injunction, are hereby **DENIED AS MOOT**.

Also pending is Green Valley Coal Company's Response in Opposition to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment [Docket 93]. Green Valley adopted and incorporated by reference the arguments contained in the Intervening Mining Associations' Cross-Motion for Summary Judgment [Docket 91]. That motion having been denied in this court's Memorandum Opinion and Order of July 8, 2004 [Docket 102], Green Valley's Cross Motion for Summary Judgment [Docket 93] is hereby **DENIED**.

Also pending are the Plaintiffs' Motion to Amend the Court's July 8, 2004 Order and for Leave to File a Supplemental Complaint [Docket 103] and the Intervening Mining Associations' Motion to Supplement Response in Opposition to Plaintiffs' Motion [Docket 109]. For the reasons stated below, the Plaintiffs' Motion [Docket 103] is hereby **GRANTED IN PART** and **DENIED IN PART**, and the Intervening Mining Associations' Motion to Supplement Response [Docket 109] is **GRANTED**.

I. Background

This lawsuit was filed on October 23, 2003. An Amended Complaint was filed on January 21, 2004. On April 5, 2004, the plaintiffs moved the court for a temporary restraining order and/or preliminary injunction requiring the Army Corps of Engineers (the Corps) to revoke or suspend its March 25, 2004, authorization to Green Valley Coal Company (Green Valley) to fill in portions of a stream pursuant to Nationwide Permit 21.

On April 26, 2004, after hearings and briefing by the parties, I granted the plaintiffs' motion in part and enjoined the Corps from authorizing Green Valley to proceed with its so-called Revision

5. *See Ohio Valley Environmental Coalition v. Bulen*, 315 F. Supp. 2d 821 (S.D. W. Va. 2004). Revision 5 itself would have affected only 431 feet of an unnamed tributary of Blue Branch. *Id.* at 823. The plan to mitigate the effects of Revision 5, however, required the diversion of approximately 8,000 feet of Blue Branch. *Id.* at 828-89. I found that the diversion of Blue Branch would have influenced the Corps' decision on whether to grant an individual permit for IBR 9, and that the plaintiffs had therefore made a strong showing that the segmentation of Revision 5 from IBR 9 was unlawful. *Id.* at 830-31.

Shortly after filing their Green Valley motion, the plaintiffs moved for summary judgment on all of their claims. In the memorandum in support of their motion, the plaintiffs identified twelve NWP 21 authorizations issued since March 2002.¹ *See* Plaintiffs' Memorandum In Support of Their Motion for a Preliminary Injunction and/or Summary Judgment on All of Their Claims [Docket 44] at 4-9. The plaintiffs requested that the court "prohibit only new or expanded fills at the eleven other mining operations challenged by Plaintiffs that had not been begun as of April 9, 2004 . . ." *Id.* at 66. After extensive briefing by all parties, I found that the Corps' issuance of NWP 21 was incompatible with the language, structure, and legislative history of the Clean Water Act, and I accordingly ordered the Corps to suspend the eleven challenged authorizations for all valley fills and surface impoundments on which construction had not commenced as of July 8, 2004. *See* July 8, 2004, Memorandum Opinion and Order [Docket 102].

The pending motion by the plaintiffs asks the court "to clarify that the Corps is permanently enjoined from authorizing Green Valley to proceed with Revision 5 under NWP 21." *See* Plaintiffs' Motion [Docket 103] at 2. Green Valley has responded by arguing that the court's July 8, 2004,

¹ One of the authorizations later ceased to be at issue.

order does not apply to Revision 5 because construction on Revision 5 had already begun as of that date. *See* Green Valley Coal Company's Response [Docket 104]. Further, according to Green Valley, "[a] revised mitigation plan for Revision 5 which is wholly independent of IBR 9 has been submitted and, on information and belief, is acceptable to the Corps." *Id.* at 3. Similarly, the United States alleges that, "Since the preliminary injunction, Green Valley has submitted a revised mitigation plan to the Corps to address the Court's concern regarding segmentation." United States' Opposition to Plaintiffs' Motion [Docket 108]. No party asserts that the Corps has actually authorized Green Valley to proceed with Revision 5 under NWP 21.

The pending motion by the plaintiffs also requests permission to file a supplemental complaint that would bring six additional NWP 21 authorizations into this lawsuit. According to the plaintiffs, "These six authorizations are illegal for the same reason that this Court found the eleven earlier authorizations to be illegal." Plaintiffs' Motion at 3. These authorizations were unknown to the plaintiffs when they filed their Amended Complaint on January 21, 2004. On March 15, 2004, however, the Corps informed the plaintiffs of three of the authorizations pursuant to a Freedom of Information Act request. The plaintiffs were not informed of the other three authorizations until June and July 2004. The United States and the defendant intervenors argue that the plaintiffs' motion to supplement their complaint should be denied because of the plaintiffs' delay in bringing the motion and the hardship it will cause the mining industry.

II. Analysis

One aspect of my July 8, 2004, Memorandum Opinion and Injunctive Order should be abundantly clear: NWP 21 is unlawful. As I stated in that order, "[b]y combining features of both individual and general permitting in NWP 21, the Corps allows an activity with the potential to have

significant effects on the environment to be permitted without being subject to public notice and comment or the other procedural hurdles to authorization pursuant to Section 404(a) [of the Clean Water Act].” 2004 WL 1576726 at *13 (S.D. W. Va. 2004). In finding NWP 21 unlawful, however, I was not unmindful of the effect that my ruling might have on the mining industry. The Intervening Mining Associations had argued that applying for individual permits “could take over a year, and cause substantial disruption at many of the already permitted facilities, resulting in layoffs, coal supply contract problems and uncompensable overhead costs for idling expensive equipment.” Intervening Mining Associations’ Response to Plaintiffs’ Motion for Summary Judgment [Docket 92] at 3-4. Even the plaintiffs acknowledged that “freezing all fill placement at the twelve existing mining operations might create significant adverse effects on the mining industry.” Plaintiffs’ Memorandum in Support of Their Motion for Preliminary Injunction [Docket 44] at 66.

I enjoined only those projects that had not commenced as of July 8, 2004, to provide relief to the plaintiffs and also preserve the mining industry’s ability to operate in the Southern District of West Virginia while applying for individual permits pursuant to Section 404(a) of the Clean Water Act. This approach complies with the Fourth Circuit’s mandate that “an injunction should be carefully addressed to the circumstances of the case.” *Kentuckians for the Commonwealth v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003) (quoting *Virginia Soc’y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001)). At the time, I was not aware of other specific NWP 21 authorizations that had been issued but pursuant to which construction had not begun, or I would have ordered the Corps to suspend those authorizations as well.

The plaintiffs have now informed the court that there are six NWP 21 authorizations that will slip through a crack in my July 8, 2004, Order because they were issued prior to that date but were

not identified in the Amended Complaint or the plaintiffs' motion for summary judgment. I am reluctant to revisit my prior Order to address these additional authorizations. The plaintiffs were aware of at least three of these authorizations prior to filing their motion for summary judgment, and they have not offered an explanation as to why these three authorizations were not brought to the court's attention then. The injunction I ordered on July 8, 2004, is essentially the relief the plaintiffs requested. A reasonable ruling here might be to deny the plaintiffs' motion to supplement their complaint and leave it to them to file another lawsuit.

Two factors dissuade me from taking that approach. First, as the Fourth Circuit held in *Franks v. v. Ross*, 313 F.3d 184 (4th Cir. 2002), "requiring [a] plaintiff to go through the needless formality and expense of instituting a new action when events occurring after the original filing indicated he had a right to relief[is] inconsistent with the philosophy of the federal rules." *Id.* at 198 (quoting 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1505 (2d ed. 1990)). Second, I am not inclined to allow discharges into waters of the United States pursuant to unlawful permits merely because those permits were either authorized, revealed to the plaintiffs, or brought to the court's attention sometime after the plaintiffs filed their Amended Complaint. To fashion an injunction that carefully addresses the circumstances of this case, I find it necessary to supplement my prior order. The Corps is hereby **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. The plaintiffs' motion to amend their complaint is **DENIED AS MOOT**.

I must now address the plaintiffs' request that the court "clarify that the Corps is permanently enjoined from authorizing Green Valley to proceed with Revision 5 under NWP 21." Green Valley's

Revision 5 is different from the other authorizations challenged in this lawsuit. Even if NWP 21 had been lawfully issued by the Corps, Revision 5 would have been unlawful. There has never been, in other words, a legitimate NWP 21 authorization of Revision 5. Green Valley's attempt to revise the Revision 5 mitigation plan to comply with NWP 21 is an application for a new authorization. I have clearly enjoined the Corps from issuing authorizations pursuant to NWP 21 in the Southern District of West Virginia. Accordingly, the Corps may not authorize Revision 5. This aspect of the plaintiffs' motion is **GRANTED**.

The mining intervenors have also moved to supplement their response to the plaintiffs' motion by submitting the affidavit of Danny Cox. That motion is hereby **GRANTED**.

III. Conclusion

For the reasons stated above, I hereby **GRANT IN PART** and **DENY IN PART** the Plaintiffs' Motion to Amend the Court's July 8, 2004 Order and for Leave to File a Supplemental Complaint [Docket 103], and **GRANT** the Intervening Mining Associations' Motion to Supplement Response in Opposition to Plaintiffs' Motion [Docket 109].

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 13, 2004

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

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