

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

KENTUCKIANS FOR THE )  
COMMONWEALTH, and SIERRA )  
CLUB, )

Plaintiffs, )

v. )

Civil Action No. \_\_\_\_\_

UNITED STATES ARMY CORPS OF )  
ENGINEERS, THOMAS P. BOSTICK, )  
Commander and Chief of Engineers, U.S. Army )  
Corps of Engineers, and Luke T. Leonard )  
Colonel, District Engineer, U.S. Army Corps of )  
Engineers, Louisville District, )

Defendants. )

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

**INTRODUCTION**

1. This Complaint challenges the U.S. Army Corps of Engineers' ("the Corps") failure to comply with the Clean Water Act ("CWA"), 33 U.S.C. § 1344 et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 et seq., relating to the issuance of a permit for a large surface mine in Knott and Perry counties in Kentucky. Plaintiffs challenge the Corps' July 2012 decision to issue a § 404 permit (hereinafter the "Stacy Branch Permit") to Leeco Inc. ("Leeco") to place fill material in 18,268 linear feet (over 3 miles) of streams in Stacy Branch and tributaries of Yellow Creek of Carr Creek near the community of Vicco in conjunction with the mine-through of streams and the construction of a large valley fill.

2. Plaintiffs ask the Court to (1) declare that the Corps has violated the APA, the CWA and NEPA by issuing the § 404 permit to Leeco, (2) vacate the permit, (3) enjoin the Corps from authorizing any further mining through streams, or construction of valley fills or sediment ponds in connection with this permit until it complies with the CWA and NEPA, and (4) award to Plaintiffs their costs and expenses, including reasonable attorney's fees.

### **JURISDICTION AND VENUE**

3. This action arises under NEPA, the CWA and the APA. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2202.

4. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(e)(1) because a substantial part of the events or omissions giving rise to these claims occurred in the Corps' Louisville Kentucky District Office.

### **PARTIES**

5. Defendant U.S. Army Corps of Engineers is the federal agency charged with administering § 404 of the CWA for discharge of dredged or fill material into waters of the United States. The Corps is headquartered in Washington, D.C. and has a District Office in Louisville, Kentucky, where a significant portion of the events and omissions alleged in this Complaint and giving rise to these claims occurred.

6. Defendant Lieutenant General Thomas P. Bostick is the Chief of Engineers and Commander of the U.S. Army Corps of Engineers. He is charged with the supervision and management of all Corps decisions and actions, including the issuance of the Corps permits under § 404 of the CWA.

7. Defendant Colonel Luke T. Leonard is the District Engineer for the Louisville District Office of the U.S. Army Corps of Engineers in Louisville, Kentucky. The Louisville

District Office is responsible for issuing permits for discharges of dredged and fill material into waters of the United States in Kentucky under § 404 of the CWA.

8. Plaintiff Kentuckians For The Commonwealth (“KFTC”) is a statewide citizen’s organization working to restore democratic power and a just society. KFTC works to help Kentuckians enjoy a better quality of life; to help develop communities with good jobs that do not damage Kentucky’s water, air, land, or human health; and to ensure that all Kentuckians have health care, shelter, food, education and other basic needs. KFTC works through direct action to challenge – and change – unfair political, economic and social systems. KFTC works to protect the health and wellbeing of coalfield residents in Kentucky.

9. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and approximately 5,000 members who reside in Kentucky and belong to its Cumberland Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of Earth; to practicing and promoting the responsible use of Earth’s resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out those objectives. The Sierra Club’s concerns encompass the exploration, enjoyment and protection of surface waters, mountains, and wildlife in Kentucky.

10. Plaintiffs sue on behalf of their organizations and their members. Plaintiffs’ members have suffered, and will continue to suffer, injuries to their aesthetic, recreational, and environmental and/or economic interests, as well as the health of themselves, their families and communities, by Defendants’ past and threatened future authorizations of stream filling and disturbances related to mining activities in Kentucky pursuant to individual § 404 permits, including the Stacy Branch Permit. As has happened with past permits, the Stacy Branch Permit

would make drastic changes to the landscape, destroy large sections of forest, permanently bury over 3 miles of streams, and, as a direct and foreseeable result of these activities, pollute downstream waters, harming aquatic life and the local communities that use and enjoy the affected streams. Harm arising from Defendants' permitting activities extends well beyond the permit boundary. Mounting scientific evidence shows that people living near large mountaintop removal mines, such as the mine approved in the Stacy Branch Permit, have an increased chance of developing birth defects and other serious health problems and of dying from chronic conditions such as cancer. Plaintiffs' members live near, recreate in, use, and enjoy the natural and human environment in or near these areas, by visiting the affected areas on foot or by viewing the areas while walking or driving nearby or during recreational flights in the area. Their use and enjoyment of these areas will be diminished by these mining activities, and Plaintiffs currently suffer harm from their concern about being no longer able to enjoy the recreational and aesthetic values that the affected streams, mountains, and wildlife now give them. Further, Plaintiffs' members, their families, and communities suffer health problems that are correlated with living in the vicinity of mountaintop removal mining or suffer stress and worry from their reasonable concern of suffering such health problems if the Stacy Branch permit is allowed to proceed. Plaintiffs' members are concerned that increased mining in this area will increase the prevalence and severity of these health problems for them and their families. In short, Plaintiffs have an interest in the ecological viability of the watersheds affected by the Stacy Branch Permit and in maintaining the overall health and integrity of those watersheds and the communities where they live.

11. For example, one of Plaintiffs' members lives within a ½ mile of the operation permitted by the Stacy Branch Permit. From his home, he can already here vehicles on the mine

site, and as mining progresses the active area will come closer to his own property. This member has relatives who live even closer to the operation, at the foot of the mine site. He is familiar with studies from Michael Hendryx and others linking negative human health outcomes with mountaintop removal mining. He is worried because some of this family members, who live nearby, have suffered from problems such as birth defects and heart disease, which are the focus of some of these studies. This member is sufficiently concerned about the health studies that he intends to move from his current home if the mine operation continues.

12. In addition to those injuries mentioned above, Plaintiffs and their members have experienced harm to their procedural rights under the CWA and NEPA, which entitle Plaintiffs to comment on the assessment of environmental impacts of the Corps' decision to authorize harm to streams associated with the Stacy Branch permit, and to comment on the adequacy of proposed activities to mitigate harm from the proposed permit. These procedural rights are closely connected to Plaintiffs' members' concrete recreational and aesthetic interests and health and welfare, which are harmed by the proposed Stacy Branch Permit.

### **STATUTORY AND REGULATORY BACKGROUND**

13. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the CWA prohibits the discharge of any pollutant, including spoil and other dredged or fill material, into navigable waters unless authorized by a permit. *Id.*, § 1311, 1344. One such permit is a permit under § 404 of the CWA.

14. The CWA authorizes the Secretary of the Army to issue permits, under certain circumstances, "for the discharge of dredged or fill material into the navigable waters at

specified disposal sites.” Id. § 1344(a). The Secretary of the Army acts through the Chief of Engineers of the U.S. Army Corps of Engineers. Id. § 1344(d); 33 C.F.R. § 323.6(a).

15. As required by § 404 of the CWA and in conjunction with the Corps, EPA has developed regulations, known as the 404(b) Guidelines, governing discharges of dredged or fill material. 40 C.F.R. § 230.2(a). Under regulations promulgated by the Corps, a § 404 permit “will be denied if the discharge that would be authorized by any such permit would not comply with” the Guidelines. 33 C.F.R. § 320.4(a).

16. Under the Guidelines, no permit shall be issued that “will cause or contribute to significant degradation of the waters of the United States.” 40 C.F.R. § 230.10(c).

17. Findings regarding significant degradation must be based on several factual determinations, including a determination about “the nature and degree of the effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms.” Id., § 230.11(e).

18. The Corps’ analysis of significant degradation must also take into account and prevent “effects contributing to significant degradation considered individually or collectively,” which include: “[s]ignificantly adverse effects of the discharge of pollutants on human health or welfare . . . .” 40 C.F.R. § 230.10(c)(1); see also id. §§ 230.50-54 (potential effects on human use characteristics).

19. In EPA’s most recent guidance, issued upon review of past and pending Appalachian coal mining permits and the impact they have had in the region, the agency found that “possible human health impacts from coal mining activities have also been documented, including peer-reviewed public health literature that has preliminarily identified associations

between increases in surface coal mining activities and increasing rates of cancer, birth defects, and other health problems in Appalachian communities.”

20. Many of these studies were specifically identified by EPA in its analysis of a § 404 permit which EPA prohibited and withdrew for the Mingo Logan Coal Company for the Spruce No. 1 Mine, pursuant to CWA § 404(c). The legal effect of that determination is currently in litigation. But EPA there concluded as a factual matter that a “growing body of research suggests that health disparities are not uniformly distributed across the Appalachian region, but instead are concentrated in areas where surface coal mining activity takes place.”

21. Under the Guidelines, the Corps must adopt practical alternatives to avoid environmental impacts of the discharge. 40 C.F.R. § 230.10(a). It must also take “appropriate and practicable steps” to “minimize potential adverse impacts of the discharge on the aquatic ecosystem.” *Id.*, 230.10(d).

22. Under the Guidelines, “[n]o discharge of dredged or fill material shall be permitted if it . . . [c]auses or contributes . . . to violations of any State water quality standard.” 40 C.F.R. § 230.10(b).

23. In addition to the specific considerations under the Guidelines, the Corps must complete a public interest review before issuing any permit and determine that issuance serves the public interest. 40 C.F.R. § 320.4. The public interest review must include the project’s effects on the “needs and welfare of the people” and, according to EPA, should include a consideration of the permit’s impacts to human health. 33 C.F.R. § 320.4(a).

24. The purpose of NEPA is, in part, to “promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321.

25. NEPA requires Federal agencies to prepare a detailed environmental impact statement (EIS) addressing “the environmental impact of” all “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This includes “[t]he degree to which the proposed action affects public health and safety.” 40 C.F.R. § 1508.27.

26. Under NEPA, the Corps must analyze all reasonably foreseeable direct, indirect, and cumulative effects of the proposed action. 40 C.F.R. § 1508.8. The Corps must evaluate “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7).

27. The Corps’ scope of analysis for analyzing impacts of a project under NEPA should be the same scope used for analyzing benefits and alternatives. 33 C.F.R. § 325 App. B 7(b).

28. NEPA requires that the Corps “insure the . . . scientific integrity of the discussions and analyses” in an EIA and “make explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.” 40 C.F.R. § 1502.24.

29. In evaluating the “intensity” of an impact, which is one of the factors considered in deciding whether the impact is significant and requires an EIS, the Corps must take into account “[t]he degree to which the proposed action affects public health or safety,” “the degree to which the effects on the quality of the human environment are likely to be highly controversial,” “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique and unknown risks,.” and “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b). “Significance exists if it is reasonable to anticipate a cumulatively significant



impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” *Id.* § 1508.27(b)(7).

30. The APA allows judicial review of final actions by administrative agencies such as the Corps and EPA. A court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

### **FACTS CONCERNING THE STACY BRANCH PERMIT**

31. On April 17, 2007, the Corps issued public notice of its proposed issuance of an individual § 404 permit to Leeco to allow disturbance to 22,194 linear feet of streams in the Carr Creek and Yellow Creek watersheds. The notice proposed to allow the construction of 6 valley fills and 6 sediment control ponds on the site.

32. Plaintiffs submitted timely comments in April 2007, within the applicable comment period. These comments criticized the proposed action because, among other concerns, the company failed to adequately explore all practicable alternatives and the mine would result in a significant degradation of water quality.

33. In October 2010, EPA submitted comments to the Corps expressing “significant concerns that the project, as proposed does not comply with the 404(b)(1) Guidelines” and informed the Corps of concerns that the project could have a disproportionate impact on surrounding low-income communities.

34. EPA sent the Corps a more comprehensive letter in December 2010.

35. The Corps issued a revised notice of authorization for the project on August 5, 2011. The project proposed in that notice was substantially different from that proposed originally. The reconfigured project would impact 18,268 linear feet of stream on Stacy Branch

and Yellow Creek of Carr Creek. This reconfigured project proposes a single large valley fill as well as the mine-through of several streams.

36. Neither the original notice nor the August 5, 2011 notice addressed the likely human health effects of the project.

37. Based on the information in the revised notice, Plaintiffs submitted timely comments to the Corps in August 2011. These comments included citations to and descriptions of several studies that showed coal mining is strongly correlated with serious health problems in people living near coal mines. The comments further explained to the Corps that it was inappropriate to use the Eastern Kentucky Stream Assessment Protocol (“EKSAP”) as a method for assessing stream function, and thus for evaluating stream impacts, for calculating the amount of mitigation needed to offset the permanent destruction of filled streams, and for assessing the success or failure of mitigation projects.

38. Plaintiffs followed their initial letter with two additional letters dated November 11, 2011 and August 17, 2012. These letters provided further details concerning impacts to human health and the inadequacy of the EKSAP.

39. The Corps concluded that the impacts of the project would be insignificant and therefore that no Environmental Impact Statement was required. Consequently, the Corps issued a “finding of no significant impact” (“FONSI”).

40. The Corps FONSI was based on a “scope of review” of impacts limited to the streams to be filled and the adjacent riparian areas. The benefits and alternatives analyses, however, encompassed the entire mining operation.

41. The Corps also concluded that the project would not cause significant degradation of waters of the United States and otherwise satisfied the § 404(b)(1) Guidelines under the CWA

42. The Corps' decision document recognizes that EPA "has advised . . . of water quality aspects that should be examined and considered" and agrees that they must be considered "in accordance with regulations."

43. The Corps issued the proposed permit to Leeco on July 26, 2012. The approved project was not substantially different than that proposed in the August 5, 2011 notice.

*A. The Corps Did Not Adequately Consider or Address Concerns Related to Potential Human Health Impacts of the Stacy Branch Permit.*

44. EPA informed the Corps, in October 2010, "We are also concerned that the proposed project may have significant human health impacts on the surrounding communities, all of which are low-income communities. These potential human health effects are not addressed in the cumulative impacts assessment, ("CIA"), and we believe additional analyses concerning the potential for disproportionately high adverse effects on low-income populations in the area would be appropriate."

45. In December 2010, EPA recognized that the Corps had completed an environmental justice analysis but reiterated its concerns about potential health effects that would disproportionately impact low-income communities in the area.

46. Plaintiffs provided extensive comments to the Corps detailing the growing body of scientific evidence indicating significant public health impacts of surface coal mining. In their August 2011 comments, Plaintiffs informed the Corps that "[v]arious studies have shown that coal mining has significant impacts on the health of those living in the coal fields." Quoting a landmark study from the January 8, 2010 issue of the journal *Science*, Plaintiffs explained: "Adult hospitalizations for chronic pulmonary disorders and hypertension are elevated as a

function of county-level coal production, as are rates of mortality; lung cancer; and chronic heart, lung and kidney disease.” Plaintiffs described a study which found “[c]oal mining is significantly associated with ecological disintegrity and higher cancer mortality” and that “cancer clusters . . . corresponded to areas of high coal mining intensity.” Another study quoted by Plaintiffs concluded that health-related quality of life disparities, even within the coal mining regions of Appalachia, were concentrated in mountaintop mining areas, as opposed to areas where other forms of mining predominate. The disparities persisted even after controlling for socio-economic risk factors. Plaintiffs pointed out that EPA shared their concerns, quoting the agency’s internal staff guidance, which states, “[p]ossible human health impacts from coal mining activities have also been documented, including peer-reviewed public health literature that has preliminarily identified associations between increases in surface coal mining activities and increasing rates of cancer, birth defects, and other health problems in Appalachian communities.”

47. Plaintiffs’ November 11, 2011 comment letter described another more recent study. That study concluded: “The prevalence rate ratio (PRR) for any birth defect was significantly higher in mountaintop mining areas compared to non-mining areas. . . after controlling for covariates. Rates were significantly higher in mountaintop mining areas for six of seven types of defects: circulatory, respiratory, central nervous system, musculoskeletal, gastrointestinal, urogenital, and ‘other.’” Plaintiffs requested that the Corps consider these effects in light of environmental justice concerns.

48. Plaintiffs again updated the Corps on the body of literature showing that surface mining impacts human health through an August 2012 comment letter. That comment letter quoted extensively from a study demonstrating the correlation between poor health, proximity to

coal mines, and amount of coal produced, and described scientific evidence that residence in a mining area in West Virginia “posed an independent risk of low birth weight.” The letter pointed the Corps to additional studies showing health disparities in coal mining areas for cancer mortality and cardiovascular disease morbidity even after controlling for covariates of smoking, poverty, education, age, sex, race, and other socio-economic factors. This letter also pointed to possible causal mechanisms to explain the health effects.

49. Even without Plaintiffs’ comments, the Corps would have been aware of the evidence linking coal mining, and particularly large scale surface mining, with human health disparities. Dozens of articles on these issues were published regionally and some of the research was reported by the national media, including CNN, and even popular press, such as Rolling Stone.

50. The Corps did not perform any human health analysis or reach any human health conclusions in its decision document.

51. The factual background section of the decision document includes a paraphrased summary of the permit applicant’s views on Plaintiffs’ comments, but no discussion at all of the Corps’ views or any analysis by the Corps. The applicant’s response to EPA’s letter did not address potential human health effects of the project. The applicant’s response to Plaintiffs’ comments criticized those comments for failing to specifically identify studies (although they were clearly cited), and for failing to prove causation, and stated that the applicant did not have data to examine biological mechanisms by which mountaintop mining might lead to birth defects. The applicant’s response did not deny or disprove the existence of a significant number of scientific studies showing a link between the type of mining project that the Stacy Branch permit would authorize and adverse human health impacts.

52. The Corps did include in its decision document a section entitled “Environmental Justice.” That section found that “[a]ccording to the 2000 census data, the percent of persons living below the poverty level are as follows: State of Kentucky 15.8%, Knott County 31.1%, Perry County 29.1%, and a 1.5-mile radius study area 40.6%.” The environmental justice analysis did not consider the potential health effects of the proposed action on the disproportionately low-income population of Knott and Perry counties and those living in close proximity to the proposed project.

B. *The Corps Inappropriately Relied on a Flawed Stream Assessment Protocol to Evaluate Stream Function and Calculate Mitigation Measures.*

53. In its October 2010 letter the EPA stated, “[w]e believe proposed mitigation is likely insufficient to adequately compensate for the proposed impacts because of apparent inaccuracies in assessing existing streams and ‘temporary’ impacts that seem to be long-term.” The December 2010 letter expanded upon these concerns explaining, “[m]itigation requirements calculated for this project are based on the applicant’s stream assessments performed using the Eastern Kentucky Stream Assessment Protocol (EKSAP). EPA has concerns regarding the EKSAP Ecological Integrity Index (EII) scores, and in particular the Rapid Bioassessment Protocol (RBP) component . . . .”

54. Plaintiffs expressed concerns about the adequacy of EKSAP for assessing stream function, calculating mitigation requirements, and assessing the success of such mitigation measures in their August 2011 comments. Plaintiffs’ main concern was that EKSAP did not consider stream function: “[EKSAP is not an assessment designed to evaluate ecological functions yet . . . stream functions are to be destroyed by the mining activities. Surprisingly, the mitigation plan indicates these functions will be replaced. . . . However, if functions aren’t measured as part of the assessment [it] is impossible to know what needs restoring and to what

level.” Plaintiffs then went on to detail other problems of the stream assessment and mitigation for this project, most notably that no biological samples were collected and that EKSAP, as used in the permit application, was based entirely on habitat evaluations which are unreliable as a substitute for a functional analysis.

55. Plaintiffs noted in their comments to the Corps that, as a result of the Corps’ use of EKSAP to evaluate streams and calculate mitigation measures, the proposed mitigation measures through an in-lieu fee payment and off-site mitigation would not mitigate the significant degradation downstream from the dredge and fill activities.

56. The streams mined-through and buried by the fill will be significantly degraded. The Corps relied upon mitigation measures to offset this degradation and arrive at its FONSI.

57. The Corps decision document explains that EKSAP, along with the U.S. EPA’s Bioassessment Protocol and the Kentucky Division of Water’s Macroinvertebrate Indexs were used to derive an Ecological Integrity Index (“EII”). This EII was then multiplied by the proposed length of streams to be impacted to come up with an estimate of functional capacity known as Ecological Integrity Units (“EIUs”). Mitigation measures were then assessed based on this same process to account for the lost EIUs. The Corps assigned costs to each EIU and multiplied that cost by the number EIUs lost to come up with the amount of in-lieu fees required.

57. The Corps failed to explain how EKSAP and other assessment protocols that do not measure stream function could be relied upon to assess the functions lost, to calculate EIIs and EIUs, and to assign mitigation measures necessary to mitigate stream degradation.

58. The Corps failed to explain how it calculated a cost per EIU and how in-lieu fee payments would mitigate stream degradation.

59. By ignoring the flaws in EKSAP, and inappropriately relying on faulty formula for assessing the function of streams to be lost and mitigation measures necessary to offset those losses, the Corps failed to address EPA and Plaintiffs' concerns that mitigation measures would prove insufficient to compensate for the impacts of the project.

**COUNT 1: The Corps Failed to Take the Required "Hard Look" At Environmental Impacts under NEPA.**

60. The Corps' failure to perform an Environmental Impact Statement on the Stacy Branch Permit violated NEPA and is arbitrary and capricious because the Corps failed to take a hard look at the environmental impacts of the project in the following respects:

- a. The Corps has no reasoned basis or substantial evidence to conclude that the human health effects of the proposed surface mine will be individually or cumulatively insignificant;
- b. The Corps has no reasoned basis or substantial evidence to conclude that the project will not result in disproportionate harm to a low-income population;
- c. The Corps has no reasoned basis or substantial evidence to conclude that EKSAP is an appropriate tool for assessing the condition of streams or calculating mitigation measures;
- d. The Corps based its evaluation of stream condition and mitigation measures on an unscientific method without providing a reasoned basis or substantial evidence that the method was defective;
- e. The Corps has no reasoned basis or substantial evidence to conclude that mitigation measures will offset the expected impacts from the project;



- f. The Corps has no reasoned basis or substantial evidence for concluding that the proposed project will not cause or contribute to violations of state water quality standards;
- g. The Corps has no reasoned basis or substantial evidence to conclude that the project will not result in significant degradation of the environment;
- h. Because the project will have significant water quality and human health impacts, an EA is insufficient and an EIS is required.

61. These violations of NEPA and the APA by the Corps threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

**COUNT TWO: The Corps Did Not Consider or Prevent Adverse Effects on Human Health and Welfare as Required by the CWA § 404(b)(1) Guidelines.**

62. The Guidelines require the Corps to consider and prevent significant adverse effects of the proposed discharge on human health and welfare.

63. Scientific evidence shows that large scale surface mines such as the one authorized by the Stacy Branch Permit are positively correlated with increased incidence of several serious health problems. Some of these studies link these health problems directly to decreased water quality. These studies indicate that the filling and mining of streams authorized by the Stacy Branch Permit is likely to have a negative effect on residents of surrounding communities. The Corps cannot rationally conclude that the issuance of this permit will not harm human health and welfare without at least seriously considering these studies and the scientific evidence they present.

64. The Corps declined to consider the effects of the Stacy Branch Permit on human health in any meaningful manner.

65. The Corps' decision that the project was nonetheless lawful was arbitrary, capricious, and contrary to law.

66. These violations of the CWA and the APA by the Corps threaten Plaintiffs with irreparable injury for which there is no adequate remedy at law.

**COUNT THREE: The Corps Failed to Consider the Needs and Welfare of the People**

67. Before issuing any permit, the Corps must complete a public interest review considering the safety, needs, and welfare of the people and determine that the permit serves the public interest. 40 C.F.R. § 320.4. .

68. Substantial scientific evidence suggests that the § 404 permit issued to Leeco for the Stacy Branch project would harm human health and welfare.

69. The Corps refused to consider or address any potential human health impacts of the Stacy Branch Permit.

70. The Corps decision that the project was nonetheless lawful and in the public interest was arbitrary, capricious, and contrary to law.

71. These violations of the CWA, NEPA and the APA by the Corps threaten Plaintiffs' with irreparable injury for which they have no adequate remedy at law.

**COUNT FOUR: The Corps Violated the CWA 404(b)(1) Guidelines by Issuing a Permit That Will Cause or Contribute to Violations of Water Quality Standards and Significant Degradation of Waters of the United States.**

72. The § 404(b)(1) Guidelines provide that no discharge of fill material into waters of the United States shall be permitted if it would cause or contribute to a violation of state water quality standards. 40 C.F.R. § 230.10(b)(1).

73. The Guidelines further provide that no discharge of dredged or fill material shall be permitted if it would cause or contribute to significant degradation of waters of the United States. *Id.* § 230.10(c).

74. The Corps has an obligation to consider water quality concerns independently, as required by these cited Guidelines, and must resolve and prevent all such concerns brought to the Corps' attention by EPA. 40 C.F.R. § 320.4(d). EPA brought water quality concerns to the Corps' attention by letter and informed the Corps that the proposed mitigation measures likely would not offset the expected impacts of the operation.

75. Scientific evidence shows that mining on this site will result in loss of stream function that will not be restored through the proposed mitigation measures.

76. Even after mitigation the project will result in the significant degradation of high quality waters in and around the permit area.

77. The Corps' determination that the project was nonetheless lawful was arbitrary, capricious, and contrary to law. There is no scientific basis supporting the conclusion that the work authorized by the Stacy Branch Permit will not cause or contribute to violations of applicable water quality standards.

78. These violations of the CWA, NEPA, and the APA by the Corps threaten Plaintiffs with irreparable injury for which they have no adequate remedy at law.

### **RELIEF**

WHEREFORE, Plaintiffs request that the Court grant the following relief:

79. Declare that the Corps issuance of the Stacy Branch Permit is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law in violation of the APA, CWA, and NEPA.

80. Declare the Corps' failure to complete an EIS for the Stacy Branch Permit violates NEPA and is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law in violation of NEPA and the APA.

81. Declare that by failing to consider impacts of the project on human health and welfare, the Corps violated the CWA.

82. Declare that by failing to adequately consider water quality impacts and ensure that dredged and fill material will not result in significant degradation or violations of state water quality standards, the Corps violated the CWA.

83. Vacate the Stacy Branch Permit.

84. Enjoin the Corps from authorizing further discharges of mining rock, dirt or other fill material at the proposed project site unless and until the Corps complies with the CWA and NEPA.

85. Award Plaintiffs their costs and expenses, including reasonable attorney's fees and expert witness fees, as authorized by 28 U.S.C. § 2412(d)(2)(A).

86. Grant Plaintiffs such other and further relief as this Court deems appropriate.

/s/ Stephen A. Sanders

Stephen A. Sanders

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