

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

<b>SIERRA CLUB and</b>	)	
<b>SOUTHERN APPALACHIAN</b>	)	
<b>MOUNTAIN STEWARDS, INC.,</b>	)	Civil Action No. 2:08cv00036
	)	
Plaintiffs,	)	<b><u>REPORT AND RECOMMENDATION</u></b>
	)	
<b>v.</b>	)	
	)	BY: PAMELA MEADE SARGENT
<b>DIRK KEMPTHORNE,</b>	)	UNITED STATES MAGISTRATE JUDGE
<b>Secretary of the Interior,</b>	)	
Defendant.	)	

In this case seeking injunctive relief, the undersigned recommends that the court grant the plaintiffs’ motion for a preliminary injunction.

The plaintiffs, Sierra Club and Southern Appalachian Mountain Stewards, Inc., (“SAMS”), bring this action against the defendant, Dirk Kempthorne, the Secretary of the Interior. The plaintiffs seek an order compelling Kempthorne to issue a cessation order requiring Penn Virginia Operating Company, LLC, (“Penn Virginia”), Mountain Forest Products, Inc., (“MFP”), and any others acting in concert with them to cease removing vegetation, constructing or improving roadways or conducting any other “surface coal mining operations,” on a certain tract of land located in the Ison Rock Ridge area of Wise County, Virginia, near the town of Appalachia. The plaintiffs allege that this land is within the proposed boundaries delineated in Permit Application No. 1003841, which was filed by A&G Coal Corporation and is pending before the Virginia Department of Mines, Minerals & Energy, (“DMME”), seeking

approval to conduct surface coal mining operations.

The matter is before the court on plaintiffs' motion for a temporary restraining order. Since the Secretary has been given notice and has appeared by counsel, this court treat the plaintiffs' motion as a motion for a preliminary injunction. The matter is before the undersigned on referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b) pursuant to Standing Order dated August 29, 2006. The court heard argument on the motion for a preliminary injunction on August 1, 2008. At this argument, counsel for both parties conceded that there is little, if any, dispute in the underlying facts of the case. Rather, both parties agreed that the court's decision on the merits will turn on whether the activities at issue are "surface coal mining operations" under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 et seq., ("SMCRA"). Based on the parties' representations and arguments submitted to the court, the undersigned now submits the following report and recommended disposition.

### *I. Facts*

The Sierra Club is a national nonprofit corporation dedicated to the protection of the environment. Gary D. Bowman, Carl Ramey and Kathy Selvage are members of the Sierra Club. SAMS is a nonstock membership corporation based in Appalachia, Virginia, also dedicated to the protection of the environment. Ramey is the president of SAMS, and Bowman and Selvage are members.

On or about February 21, 2007, A&G filed Permit Application No. 1003841

with DMME.<sup>1</sup> That application remained pending as of the date of the hearing on the plaintiffs' motion for a preliminary injunction. In its sworn permit application, A&G asserted that it had the right to enter and conduct surface coal mining operations on the proposed permit area pursuant to a lease with Penn Virginia dated December 29, 2003. A&G's permit application identified "clearing and grubbing," including the removal of harvestable timber, as operations that A&G proposed to conduct "in advance of mining operations" under the requested permit. On or about June 16, 2008, Penn Virginia entered into Timber Sale Agreement with MFP, allowing MFP to harvest "all timber and trees," from a tract of land in the Ison Rock Ridge area, which includes at least part of the permit area that A&G defined in Permit Application No. 1003841. An exhibit to the Timber Sale Agreement refers to the operation as "MFP Clearcut Harvest." The Timber Sale Agreement also states that MFP "shall be responsible and liable to maintain all DMLR [DMME Division of Mined Land Reclamation] permitted areas on which [MFP] conducts any operations in compliance with all DMLR permits pertaining to such areas...."

In an affidavit dated July 19, 2008, Bowman, who lives in the Ison Rock Ridge area stated that early on the morning of July 11, 2008, he heard machinery operating directly behind his house. Bowman discovered MFP employees cutting and clearing

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<sup>1</sup>Under Virginia's federally approved version of SMCRA, the Virginia Surface Mining Control and Reclamation Act of 1979, ("VSMCRA"), Virginia has "exclusive jurisdiction over the regulation" of surface coal mining and reclamation within its borders. *See* 30 U.S.C.A. § 1253(a) (West 2007). The parties concede that Virginia's statutory definition of "coal surface mining operations," found at Virginia Code Annotated § 45.1-229, is the same as the SMCRA definition of "surface coal mining operations," found at 30 U.S.C. § 1291(28). This exclusive state regulatory jurisdiction, however, does not preclude the filing of "citizen suits" such as this one in federal court under 30 U.S.C. § 1270. *See Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231, 236-37 (4<sup>th</sup> Cir. 1997).

the forest within 20 feet of his property line, using a bulldozer, two cutters and two haulers. Bowman alleges that he received no advance notice of these operations. Bowman also discovered that more than a dozen large rocks the size of watermelons had fallen onto his property from the area of MFP's operations.<sup>2</sup> MFP employees subsequently removed the rocks from Bowman's yard and threw them into the weeds outside of his property line. Subsequent to that time, MFP has bulldozed a road across the ridge behind Bowman's house and has piled dirt and brush along the steep downslope side. Bowman alleges that MFP is not selectively cutting down and removing only commercially viable timber, but is clear-cutting the area, hauling some trees out, while leaving other felled trees and brush in piles on the ground. The haul road that MFP is constructing is approximately 60 feet above Bowman's home on an extremely steep incline.

While MFP has left in place a 20-foot tree barrier between its operations and Bowman's property, Bowman is skeptical that such a barrier will prevent rock slides that might severely injure or even kill him, his wife or his dogs. In particular, Bowman references an August 20, 2004, incident in which a three-year-old child was killed while asleep in a bedroom when a boulder from a strip mine operated by A&G rolled down a hillside and crashed into his family's Wise County home below. On July 18, 2008, MFP began clear-cutting higher up on Ison Rock Ridge, causing Bowman even greater concern for his family's safety because any rocks or other debris falling from higher up on the steep slope will fall a greater distance and pick up greater speed. Bowman stated that he further fears that MFP's operations will

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<sup>2</sup>Bowman's affidavit states that these rocks were discovered on July 12, 2008. However, at the August 1, 2008, hearing, plaintiffs' counsel corrected this date to July 11, 2008.

damage his garden and the watershed in which his property lies. Bowman stated in his affidavit that part of the produce from his garden is used by his own family, part is sold to a local farmers market and part is donated to charity. On July 21, 2008, Sierra Club and SAMS, on behalf of Bowman and other of its members, filed a request for federal inspection and enforcement with the Secretary at the Big Stone Gap, Virginia, Area Office of the Office of Surface Mining Reclamation and Enforcement, (“OSM”). OSM promptly ordered and conducted such a federal inspection, but OSM did not take any enforcement action because it concluded that “the alleged disturbances are related to logging and are not being conducted[] by[,] or on behalf of, a coal mining operation.”

Ramey and Selvage also filed affidavits on July 19 and July 20, 2008, respectively. In his affidavit, Ramey, the president of SAMS, and a member of the Sierra Club, stated that he lived approximately one-half mile from the Ison Rock Ridge. He further stated that workers of MFP were cutting down all of the trees, not just the ones that could be sold on the commercial market. He stated that the trees and vegetation not hauled away are being left to rot on the ground. Ramey stated that he enjoyed viewing the mountains and forested areas of Wise County and that the clear-cutting would scar the landscape and impair his ability to enjoy his viewing of the area. Ramey stated that he also enjoyed hunting and viewing the area wildlife, and he stated that clear-cutting would contribute to harming wildlife by destroying food sources and habitat. Ramey expressed his concern for the health and safety of the residents living near the ridge because the cutting and hauling activities could dislodge and cause rocks and debris to tumble down the mountain. Ramey also expressed concern about the increased risk of erosion and flooding resulting from destroying the

trees and brush that stabilize the ridge.

Selvage, the vice president of SAMS and a member of the Sierra Club, stated in her affidavit that she drove a few times monthly in the area below Ison Rock Ridge to visit friends. Selvage, like Bowman and Ramey, stated that the trees are not being selectively cut, but all of the trees are being chopped down, some of which are simply left on the ground. Selvage expressed her fear that the clear-cutting threatens the safety and well-being of her friends who live nearby, citing the possibility of rock slides. She further expressed her concern that the clear-cutting would destroy woodland habitat and food sources. Selvage stated that she feared that the animals that flee the clear-cutting would increase competition for resources in the forested areas to which they migrate, potentially having an adverse impact on flora and fauna, thereby harming her husband's recreational and aesthetic enjoyment of wildlife in the region. Selvage also stated that the deforestation of Ison Rock Ridge will harm her aesthetic enjoyment of the scenery. Based on her personal observation of other steep slope areas where clear cutting has occurred, Selvage stated that denuding the forest on Ison Rock Ridge would intensify the erosion and flooding of the valley floor when normal and excessive rains fall.

## *II. Analysis*

The plaintiffs have filed this suit pursuant to 30 U.S.C. § 1270, the "citizens suit" provision, of the SMCRA seeking an order compelling the Secretary to issue a cessation order requiring Penn Virginia, MFP and any others acting in concert with them to cease conducting "surface coal mining operations" with the proposed

boundaries delineated in Permit Application No. 1003841. *See* 30 U.S.C.A. §1270(a). As stated above, the parties concede that the court's decision on the merits will turn on whether the activities at issue fall within the definition of "surface coal mining operations" under the SMCRA. The issue currently before the court, however, is whether to issue a preliminary injunction preserving the status quo while the parties and the court have an opportunity to further develop and consider the merits of the case.

In deciding whether the issuance of a preliminary injunction is appropriate, the Fourth Circuit has held that the court must employ a "hardship balancing test." *See Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 811-12 (4<sup>th</sup> Cir. 1991); *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4<sup>th</sup> Cir. 1977). In *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4<sup>th</sup> Cir. 1991), the Fourth Circuit stated as follows: "[t]he standard for preliminary injunctions is established in this Circuit by *Blackwelder* ... [which] clarified that a hardship balancing test applies to determine the granting or denial of a preliminary injunction." (Citations omitted). Specifically, the court must consider the following four factors: 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 preliminary injunction is granted; 3) the likelihood that the plaintiff will succeed on the merits; and 4) the public interest. *See Direx Israel*, 952 F.2d at 812 (citation omitted). Moreover, it is the "[p]laintiff [who] bears the burden of establishing that each of these factors supports granting the injunction." *Direx Israel*, 952 F.2d at 812 (quoting *Technical Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7<sup>th</sup> Cir. 1984); *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (4<sup>th</sup> Cir. 1983)). The plaintiff must make

a clear showing of the likelihood of irreparable harm if the desired preliminary injunction is not granted. *See Direx Israel*, 952 F.2d at 812. Moreover, the required irreparable harm must be “neither remote nor speculative, but actual and imminent.” *Direx Israel*, 952 F.2d at 812 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)); *see ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) (holding that establishing a risk of irreparable harm is not sufficient, but plaintiff has the burden of proving a “clear showing of immediate irreparable injury”).

If the plaintiff makes a clear showing of irreparable injury, the court next must balance the likelihood of irreparable harm to the plaintiff resulting from the failure to grant the interim relief against the likelihood of harm to the defendant resulting from the grant of such relief. *See Direx Israel*, 952 F.2d at 812 (citing *Blackwelder*, 550 F.2d at 195). If the balancing of these two factors “tips decidedly” in favor of the plaintiff, a preliminary injunction will be granted if “the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.” *Rum Creek*, 926 F.2d at 359 *as quoted in Direx Israel*, 952 F.2d at 812-13. Moreover, as the balance tips away from the plaintiff, a stronger showing on the merits is required. *See Rum Creek*, 926 F.2d at 359. When the hardship balance does not tip decidedly or significantly in favor of the plaintiff, a probability, not a mere possibility, of success of the ultimate trial on the merits is required to establish likelihood of success on the merits. *See Direx Israel*, 952 F.2d at 813 (citing 2 McCarthy on Trademarks and Unfair Competition, § 30.16, 485-86 (2d ed. 1980)). This implies that the plaintiff must have a very clear and strong case. *See Direx Israel*, 952 F.2d at 812.

1. *Irreparable Harm to Plaintiff Without Preliminary Injunction*

The plaintiffs have presented evidence, by way of the affidavit of Bowman, to make the necessary showing of the imminent, irreparable harm. Specifically, Bowman has submitted photographs showing large rocks that have fallen onto his property as a result of the operations being conducted by MFP or on its behalf. In his affidavit, Bowman stated that he discovered more than a dozen rocks the size of watermelons on his property after MFP began clear-cutting trees on the steep slope behind his residence. Clearly, if any such rock struck Bowman or his wife, the injury would be severe and irreparable.

Also, plaintiffs argue that, if the activities complained of are, indeed, “surface coal mining operations” within the meaning of the SMCRA, the Secretary has determined that such activities constitute a condition or practice that can reasonably be expected to cause significant imminent environmental harm to land, air or water resources. Specifically, the plaintiffs allege that MFP, or others, are conducting surface coal mining operations without a valid permit, as required by the SMCRA. The Secretary’s own regulations state:

Surface coal mining operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant imminent environmental harm to land, air or water resources. ...

30 C.F.R. § 843.11(a)(2) (2008).

For these reasons, I find that the plaintiffs have made a clear showing of great

risk of irreparable harm that is “neither remote nor speculative, but actual and imminent.” See *Tucker Anthony Realty Corp.*, 888 F.2d at 975 as quoted in *Direx Israel*, 952 F.2d at 812.

## *II. Balancing of Harm to the Plaintiff Versus Harm to the Defendant*

The plaintiffs, through their request for a preliminary injunction, seek only to preserve the status quo at Ison Rock Ridge at this time. The issuance of a preliminary injunction would offer only *temporary* relief, which, if the court decided should not continue permanently because the operations being conducted are, in fact, not “surface coal mining operations,” the court could simply dissolve. The plaintiffs argue that ordering the cessation of the timbering operations now underway on this property would do no more than compel those companies to move on to other projects while the case is being decided on the merits. Furthermore, the Secretary concedes that if indeed “surface coal mining operations” are being conducted on this property without a permit, the Secretary must, pursuant to 30 U.S.C. § 1271(a)(2), issue a cessation order. Therefore, the Secretary can suffer no harm by being ordered to take action that he is mandated by statute to take. Furthermore, the Secretary has made no argument that he would be harmed by the entry of a preliminary injunction preserving the status quo. Therefore, I find that the likelihood of harm to the defendant from granting temporary injunctive relief is slight to none. I further find that the likelihood of harm to the plaintiffs if such relief is not granted greatly outweighs that to the defendant, tipping the balance of harm decidedly in favor of the plaintiffs.

### *III. Likelihood of Success on the Merits*

When, as here, the court finds that the balancing “tips decidedly” in favor of the plaintiff, a preliminary injunction will be granted if “the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.” *Rum Creek*, 926 F.2d at 359 *as quoted in Direx Israel*, 952 F.2d at 812. I find that the plaintiffs have done just that. The parties agree that the Secretary has a nondiscretionary duty to issue a cessation order upon a showing that an entity is conducting surface coal mining operations without a valid permit. It is undisputed that no permit for surface coal mining operations has been issued with regard to this property. Both sides also agree that the surface coal mining permit application for this property is currently pending before DMME. Both parties further agree that the only dispute to be resolved in this case is whether the activities being performed by MFP, or on its behalf, constitute “surface coal mining operations.” The term “surface coal mining operations” is defined in the SMCRA as “activities conducted on the surface of lands in connection with a surface coal mine ....” 30 U.S.C.A. § 1291(28) (West 2007); *see also* VA. CODE ANN. § 45.1-229 (Repl. Vol. 2002).

A&G, on the face of its permit application, stated that “[c]learing and grubbing operations will be conducted in advance of mining operations. Economically harvestable timber will be removed as a separate operation.” The undisputed evidence also shows that A&G’s application for a permit to conduct surface coal mining operations on this property was filed prior to the commencement of the activities at

issue. The plaintiffs argue that because the application has been filed, and because the application seeks permission to clear vegetation and harvest timber in advance of mining operations, the court should find that the activities occurring are, as a matter of law, “in connection with” a surface coal mine.

At the August 1 hearing, the Secretary conceded that, as recognized in the preamble to the regulations promulgated in 1979, logging and site preparation “in anticipation of mining” would clearly fall within the definition of “surface coal mining operations.” *See* Surface Coal Mining And Reclamation Operations, 44 Fed. Reg. 14902, 14914 (March 13, 1979). The Secretary asserted, however, that the determination was made that the activity in this case was not “surface coal mining operations” because it was not being conducted by or on behalf of a coal mining operation. The Secretary, nonetheless, conceded that “the line between site preparation in anticipation of mining coal and independent work is sometimes difficult to draw....” 44 Fed. Reg. at 14914.

Furthermore, both parties have conceded that the issue before the court appears to be one of first impression, in that neither party, nor the court, has found any case addressing whether logging or vegetation clearing activities occurring on property after an application for a surface coal mining permit has been filed for the property should be considered as “activities conducted ... in connection with a surface coal mine.” That being the case, I find that the plaintiffs have raised serious questions going to the merits of the case to justify more deliberate investigation.

*IV. Public Interest*

In this case, the public interest has actually been embodied in the SMCRA by Congress itself. Specifically, the purpose of the SMCRA, as stated by Congress, is “to protect society and the environment from the adverse effects of surface coal mining operations” and to “assure the rights of surface landowners ... are fully protected from such operations.” 30 U.S.C. § 1201(a)-(b). Thus, the public interest clearly is served by the issuance of a preliminary injunction to ensure that the very intent of Congress is carried out and that operations are not being conducted in violation of the SMCRA.

**PROPOSED FINDINGS OF FACTS AND  
CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations.

1. A great likelihood of irreparable harm to the plaintiffs exists if the court denies their motion for a preliminary injunction;
2. Little to no likelihood of irreparable harm will occur to the Secretary if the court grants the motion for a preliminary injunction;
3. The plaintiffs have raised serious questions as to whether MFP, or others acting in concert with them, are conducting “surface coal mining operations” without a permit on this property; and
4. The public interest will be furthered by the entry of a preliminary injunction protecting the status quo until the court may render a determination on the

merits.

### **RECOMMENDED DISPOSITION**

The undersigned recommends that the court grant a preliminary injunction ordering the Secretary to issue a cessation order preventing Penn Virginia, MFP, or any other entity from clear-cutting or engaging in any other surface coal mining operations on the property within the proposed boundaries delineated in Permit Application No. 1003841 until further order of this court.

### **Notice To Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636 (b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file written objections to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in the matter to the

Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 2<sup>nd</sup> day of August 2008.

/s/ *Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE