IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DEFENDERS OF WILDLIFE, SIERRA CLUB, STATEWIDE ORGANIZING FOR COMMUNITY EMPOWERMENT, AND TENNESSEE CLEAN WATER NETWORK, Plaintiffs, v. SALLY JEWELL, Secretary, U.S. Department of the Interior; DAN ASHE, Director, U.S Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE; JOSEPH PIZARCHIK, Director, U.S. Office of Surface Mining, Reclamation, and Enforcement; U.S. OFFICE OF SURFACE MINING, RECLAMATION, AND ENFORCEMENT, Defendants.	)	**Civil No. _____**

COMPLAINT

Plaintiffs Defenders of Wildlife, Sierra Club, Statewide Organizing for Community eMpowerment, and Tennessee Clean Water Network allege as follows:

1. Plaintiffs bring this citizen suit against Secretary Jewell and Directors Ashe and Pizarchik and their agencies for violations of the Endangered Species Act, 16 U.S.C. § § 1531, *et seq.*, (the "ESA") resulting from the approval and regulation of surface coal mines in Tennessee.

2. Plaintiffs allege that the Defendant Secretary, Directors, and agencies have unlawfully ignored mounting evidence that high conductivity wastewater from surface coal mines harms two rare ESA-protected fish species—the threatened blackside dace and the endangered Cumberland darter. Plaintiffs have identified two Tennessee coal mines that discharge or will discharge wastewater to creeks occupied by one or both of these species.

3. Plaintiffs seek declaratory and injunctive relief, including consultation under section 7 of the ESA, to remedy the existing harm and likely future harm to these species caused by high conductivity mining wastewater.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to the ESA's citizen suit provision, 16 U.S.C. § 1540(g), the scope of review provision in the Administrative Procedure Act (the "APA"), 5 U.S.C. § 706(2), and 28 U.S.C. § 1331 governing federal question jurisdiction. This Court may issue a declaratory judgment as authorized by 28 U.S.C. § 2201 and an injunction as authorized by 28 U.S.C. § 2202. This cause of action arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531 *et seq.*, and the APA, 5 U.S.C. §§ 701 *et seq.*, and the implementing regulations authorized by these federal statutes. The challenged decisions are in full force and effect, and an actual, justiciable controversy exists between the parties.

5. Venue is proper in this Court under 28 U.S.C. §§ 1391(b)(1) and 1391(e)(1) because one Defendant, the U.S. Fish and Wildlife Service, resides in this judicial

district, and under the ESA's citizen suit provision, 16 U.S.C. § 1540(g)(3)(A), because the Service's ESA violations occur in this judicial district.

6. As required by 16 U.S.C. § 1540(g)(2)(A), Plaintiffs notified Defendants of the allegations described here by certified letter mailed on January 29, 2013, more than sixty days before initiating this lawsuit. A copy of this notice letter is attached as Exhibit A, and incorporated by reference.

PARTIES

7. Plaintiff Defenders of Wildlife is a nonprofit, science-based conservation organization headquartered in Washington, D.C. The organization is dedicated to the protection and restoration of all native wild animals and plants in their natural communities and the preservation of the habitat that they depend on. Founded in 1947, it is one of the nation's leading advocates for endangered species and has been involved in issues of ESA implementation for more than thirty years. Defenders has more than 1 million members and supporters nationwide, including over 5500 in Tennessee.

8. Plaintiff Sierra Club is a national nonprofit environmental organization dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; 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 these objectives. The Sierra Club has approximately 600,000 members, with over 6500 members living in Tennessee.

9. Plaintiff Statewide Organizing for Community eMpowerment ("SOCM") is a Tennessee nonprofit corporation. SOCM is a member-run organization that encourages

civic involvement and collective action so that the people of Tennessee have a greater voice in determining their future. The mission of SOCM is to empower Tennesseans to protect, defend, and improve the quality of life in their communities across the state. SOCM has more than 2000 members working for environmental, social, and economic justice.

10. Plaintiff Tennessee Clean Water Network ("TCWN") is a Tennessee nonprofit corporation with its principal office in Knoxville, Tennessee. TCWN was organized to advocate for strong policies and programs that result in more effective protection and restoration of Tennessee waters; to educate organizations, decision-makers, and the public about important water resource issues; and to ensure the protection and restoration of Tennessee's waters. TCWN empowers Tennesseans to exercise their right to clean water and healthy communities by fostering civic engagement, building partnerships, and advancing and, when necessary, enforcing water policy for a sustainable future. TCWN has 600 members in Tennessee.

11. Each Plaintiff is a membership organization. Each brings this action on its own institutional behalf and on behalf of its members who live, work, and/or recreate in and near the Zeb Mountain and Davis Creek Mine Area 5 surface coal mines. Their members' recreational, aesthetic, health, scientific, spiritual, and/or property interests are injured by the violations of the ESA alleged below. More specifically, their interests in using, visiting, and enjoying the creeks downstream of the Zeb Mountain and Davis Creek mines are injured when polluted mining wastewater harms blackside dace and Cumberland darter and, in general, the health of the creek ecosystem. These injuries are

fairly traceable to the alleged violations and will likely be redressed by a favorable resolution of this case.

12. Defendant Sally Jewell is the Secretary of the U.S. Department of the Interior, the federal agency that oversees the U.S. Fish and Wildlife Service and the U.S. Office of Surface Mining, Reclamation, and Enforcement. Secretary Jewell is named here in her official capacity.

13. Defendant U.S. Fish and Wildlife Service (the "Service") is the federal agency charged with administration of the ESA and is the consulting agency when federal actions may affect listed terrestrial or freshwater species. The Service oversees ESA issues regarding surface coal mining in Tennessee from its Cookeville, Tennessee Field Office.

14. Defendant Dan Ashe is the Director of the Service based in Washington, D.C., and is named here in his official capacity.

15. Defendant U.S. Office of Surface Mining, Reclamation, and Enforcement ("OSM") is the federal agency charged with administration of the Surface Mining, Reclamation, and Control Act of 1977, 30 U.S.C. § 1201 *et seq.*, ("SMCRA"). OSM administers the SMCRA permitting program for surface coal mines in Tennessee from its Knoxville, Tennessee Field Office.

16. Defendant Joseph Pizarchik is the Director of OSM based in Washington, D.C., and is named here in his official capacity.

17. Each Plaintiff and each Defendant is a "person" within the meaning of 16 U.S.C. § 1540(g)(1) and 5 U.S.C. § 702.

STATUTORY AND REGULATORY FRAMEWORK

18. Section 7(a)(2) of the ESA requires that each federal agency "shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). To fulfill this obligation, federal agencies must consult with the Service whenever their actions "may affect" listed terrestrial or freshwater species or critical habitat for those species. 50 C.F.R. § 402.14(a).

19. An action will "jeopardize the continued existence of" a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

20. During consultation, the Service "shall use the best scientific and commercial data available" to evaluate the impacts of the proposed action on listed species or critical habitat and to provide its "biological opinion" whether, as a result of those impacts, the action will result in jeopardy or adverse modification. 16 U.S.C. § 1536(a)(2) & (b)(3); 50 C.F.R. § 402.14(g).

21. The action agency must also "use the best scientific and commercial data available" under section 7. 16 U.S.C. § 1536(a)(2).

22. If the Service determines that the action is likely to jeopardize the continued existence of the listed species or result in adverse modification of critical habitat, it "shall

suggest those reasonable and prudent alternatives which [it] believes" would not result in jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3).

23. But if the Service concludes that the action is not likely to result in jeopardy or adverse modification, it must provide a written authorization for the action's impacts to listed species. This authorization—known as an incidental "take" statement—must (1) "specif[y] the impact of such incidental taking on the species," (2) "specif[y] those reasonable and prudent measures that [it] considers necessary or appropriate to minimize such impact," and (3) "set[ ] forth terms and conditions . . . that must be complied with by the Federal agency or applicant (if any), or both . . . ." 16 U.S.C. § 1536(b)(4); *see also* 50 C.F.R. § 402.14(i).

24. The Service's and the action agency's duty to insure against jeopardy is ongoing, and they must reinitiate consultation: (a) "[i]f the amount or extent of taking specified in the incidental take statement is exceeded," (b) "[i]f new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," (c) "[i]f the identified action is subsequently modified in manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion," or (d) "[i]f a new species is listed or critical habitat designated that may be affected" by the action. 50 C.F.R. § 402.16.

FACTS

25. The blackside dace (*Chrosomus cumberlandensis*) is a rare freshwater minnow native to small tributaries in the upper Cumberland River system in Kentucky and

Tennessee. At the time of its formal description in 1975, the species was thought to have been extirpated from at least fifty-two streams.

26. Identifying coal mining as one of the principal threats to its survival, the Service listed the blackside dace as threatened under the ESA in 1987.

27. In July 1994, the Tennessee Wildlife Resources Agency documented a previously unknown blackside dace population with an "extremely high density" of fish in Lick Fork at Zeb Mountain in Campbell County, Tennessee. Later that year, that agency confirmed the continued existence of a known blackside dace population in the headwaters of Davis Creek, also in Campbell County.

28. In 1995, OSM initiated formal consultation with the Service under section 7 of the ESA for all SMCRA permitting programs, state or federal, nationwide. A year later, the Service issued a biological opinion that purported to "address[] all present and future Federally listed and proposed species and designated or proposed critical habitats that may be affected by" SMCRA-regulated surface coal mining throughout the nation.

29. The 1996 biological opinion concluded that surface coal mines regulated by "properly implemented" SMCRA programs "are not likely to jeopardize the continued existence of listed or proposed species" or "result in the destruction or adverse modification of designated or proposed critical habitats."

30. The 1996 biological opinion purported to provide authorization for the take of any listed species affected by SMCRA-regulated mining operations. It assigned "an unquantifiable level of take" to surface coal mining operations and authorized "the unavoidable taking of some individuals" of any listed species affected by surface coal

mining. According to the Service, "the likelihood and extent of incidental take" of all listed species by surface coal mining would be minimized by a "planning and coordination process" between state and federal agencies. The 1996 biological opinion required OSM to "develop species-specific measures to minimize anticipated incidental take."

31. After it was issued, the 1996 biological opinion and take authorization applied to surface coal mines in Tennessee impacting blackside dace. But the opinion did not identify a mechanism to determine what an acceptable level of take would be for the species, either at specific mine sites or throughout the three Tennessee counties where coal mining and blackside dace populations occur. OSM and the Service did not attempt to make this determination.

32. In 2003, OSM issued SMCRA permit 3116 to the Robert Clear Coal Corporation for the Zeb Mountain surface coal mine in Campbell and Scott Counties, Tennessee. The mine has numerous wastewater outfalls to creeks containing blackside dace populations—Lick Fork, Little Elk Creek, and Capuchin Creek—or their tributaries.

33. OSM relied on the 1996 biological opinion and take authorization when it issued the SMCRA permit for the Zeb Mountain mine.

34. The Zeb Mountain mine has been in near continuous operation since 2003. National Coal Corporation took over the mine in 2004 under successor-in-interest permit 3154.

35. Conductivity—a measurement of the capacity of water to carry an electrical charge—is a reliable indicator of the concentration of mineral ions in water and, therefore, its salinity.

36. Before the Zeb Mountain mine commenced operations, conductivity in the upstream reach of Lick Fork measured 234 µS/cm. Conductivity in Dan Branch and Drew Branch, tributaries of Lick Fork, measured 184 µS/cm and 111 µS/cm, respectively. Conductivity in Capuchin Creek measured 157 µS/cm. Conductivity in Little Elk Creek measured 181 µS/cm.

37. Beginning in 2005, a series of empirical studies and anecdotal evidence submitted to and, in some cases, collected by the Service suggested that blackside dace cannot maintain healthy, sustaining populations at instream conductivities above 240 µS/cm. The fish are visibly distressed when conductivity reaches 500 µS/cm.

38. Following these studies, biologists in the Service quickly recognized the importance of the 240 µS/cm conductivity limit for blackside dace recovery. In January 2007, the agency observed that the "maintenance of conductivity at a level that is suitable for use by blackside dace is *crucial to the species' recovery*."

39. In March 2007, blackside dace researchers Black and Mattingly submitted a final report to the Service which discussed the results of stream surveys within the historical range of the blackside dace undertaken in 2005 and 2006. They observed that a "discouraging theme in blackside dace population surveys has been the extirpation of blackside dace or decline in abundance noted by researchers for many streams." Based on their work and other published survey data, Black and Mattingly concluded that the

species persists largely in isolated remnant populations (*i.e.*, less than 10 individuals observed during surveys) that are vulnerable to extirpation.

40. Also in 2007, the Service began corresponding with consultants for Davis Creek Energy, LLC about a proposed surface coal mine in the Davis Creek watershed in Campbell County, Tennessee, known as "Davis Creek Mine Area 5."

41. In April 2008, the Tennessee Wildlife Resources Agency reported that coal mining contributed to the likely extirpation of blackside dace from Straight Creek in Tennessee. Conductivity ranged from 910 µS/cm to 950 µS/cm at the agency's three fish sampling sites in Straight Creek.

42. In June 2008, OSM renewed SMCRA permit 3154 for the Zeb Mountain mine. The Service did not comment on the mine's blackside dace protection measures and did not identify conductivity, or the 240 µS/cm conductivity threshold, as matters to be addressed in the renewal.

43. OSM relied on the 1996 biological opinion and take authorization when it renewed the SMCRA permit for the Zeb Mountain mine.

44. In 2008 and 2009, the empirical data documenting a correlation between high conductivity and adverse effects on freshwater fish continued to grow. Surveys by Thomas and by the Service determined that streams containing 89% of populations of the Kentucky arrow darter—a fish in the same genus as the Cumberland darter—had conductivities less than 200 µS/cm. Only a single population was known to occur where conductivity exceeded 250 µS/cm.

45. Surface coal mines in Tennessee, including the Zeb Mountain mine, routinely discharge wastewater with conductivities two to three and, in some cases, many times greater than 240 µS/cm. As a result, instream conductivity below surface mine outfalls frequently exceed this threshold.

46. In February 2009, the Service reported to OSM that it had approved protection measures for the proposed Davis Creek Mine Area 5 through coordination with representatives of the mining company. But the Service's correspondence with OSM and with the applicant's representatives never mentioned conductivity, or the 240 µS/cm conductivity threshold.

47. The next month, in March 2009, OSM and the Service jointly issued the species-specific measures for blackside dace that the 1996 biological opinion required. The agencies stated that the guidelines were "developed using the most current scientific research regarding the blackside dace."

48. The 2009 blackside dace guidelines did not mention the 240 µS/cm conductivity limit, address measures to reduce conductivity, or impose an express, numeric limit on the conductivity of mining wastewater. Instead, they include compliance with NPDES permits issued by the State of Tennessee as one of the "protection measures" that a mine operator "may select" and provide that quarterly water quality monitoring (including conductivity) "should" be conducted where the blackside dace are "found to be present and could be impacted by the proposed mining operation."

49. Tennessee's NPDES permits for surface coal mines do not impose a numeric limit for the conductivity of wastewater discharges. Tennessee's water quality criteria

include narrative standards for protection of fish and aquatic life, but in practice the State does not enforce these standards in a manner that protects blackside dace from high conductivity mining wastewater. Instead, the Tennessee Department of Environment and Conservation has taken the position that it is preempted by the ESA from addressing impacts on threatened and endangered species when issuing NPDES permits. The most recent Tennessee NPDES permits for the Zeb Mountain mine and Davis Creek Mine Area 5 require macroinvertebrate monitoring if the conductivity of wastewater discharges exceeds 500 µS/cm, more than double the limit for blackside dace. Several macroinvertebrate studies using Tennessee protocols have found compliance with the state's biological integrity criteria despite instream conductivities measuring well above 240 µS/cm, demonstrating that these surveys are not an adequate surrogate for dace protection.

50. Later in 2009, biologists in the Service prepared a draft five-year review of the status of blackside dace, which concluded that "[c]urrent regulatory mechanisms have been inadequate to prevent" adverse impacts to blackside dace caused by elevated stream conductivity and the recovery potential of the species was "low." The agency observed that range-wide, the species had disappeared from at least twenty-four streams since 1960.

51. In March 2010, the Field Supervisor of the Service's Cookeville, Tennessee field office identified the 240 µS/cm conductivity limit for blackside dace as the best available information for the species.

52. In a research proposal to the Kentucky Field Supervisor in July 2010, Service scientists sought to investigate conductivity's "mechanisms of toxicity" for blackside dace and Kentucky arrow darter. As justification for the proposed research, the scientists observed that "the magnitude, severity, and scope of [elevated stream conductivity] threats are high" and "extirpations are imminent" for blackside dace and Kentucky arrow darter.

53. In March 2011, the U.S. Environmental Protection Agency recommended a conductivity benchmark of 300 µS/cm as necessary to "prevent extirpation of 95% of invertebrate genera" in central Appalachian streams. EPA calculated this benchmark using a macroinvertebrate data set from West Virginia. EPA validated its West Virginia results using similar data from eastern Kentucky streams, including streams in a significant portion of the blackside dace's and Cumberland darter's range. The Kentucky data set produced a conductivity benchmark of 282 µS/cm. While slightly higher than 240 µS/cm, these benchmarks are well below the conductivity of most mining wastewater.

54. In August 2011, the Service listed the Cumberland darter (*Etheostoma susanae*)—another rare freshwater fish native to small tributaries in the upper Cumberland River system—as endangered. The Service identified elevated conductivity caused by coal mining as a significant threat to the darter, referencing the earlier blackside dace studies and the 240 µS/cm limit.

55. The range of the Cumberland darter is even more restricted than that of the blackside dace. It occurs in "sparse, fragmented, and isolated" populations in thirteen

streams, which, like dace populations, are vulnerable to extirpation. The Cumberland darter was likely extirpated from nine other streams prior to its listing.

56. The Service and OSM have not issued species specific guidelines for the Cumberland darter.

57. In August 2011, the Tennessee Wildlife Resources Agency confirmed the presence of blackside dace in Davis Creek upstream from the confluence with Sandlick Branch, which also contains a known population of dace.

58. In January 2012, OSM issued SMCRA permit 3218 for Davis Creek Mine Area 5. At the same time, the State of Tennessee issued a NPDES permit for the Davis Creek mine. Neither permit contains a numeric limit for the conductivity of wastewater discharges.

59. SMCRA permit 3218 authorizes wastewater outfalls from Mine Area 5 to Davis Creek and its tributaries upstream of the documented blackside dace population.

60. OSM relied on the 1996 biological opinion and take authorization when it issued the SMCRA permit for the Davis Creek mine.

61. In September 2012, the State of Tennessee renewed the NPDES permit for the Zeb Mountain mine. It did not contain a numeric limit for conductivity.

62. In October 2012, the Service designated critical habitat for the Cumberland darter in Capuchin Creek downstream of the Zeb Mountain mine.

63. Also in October 2012, conductivity in the upstream reach of Lick Fork measured 509 µS/cm. Conductivity in Dan Branch and Drew Branch, tributaries of Lick Fork,

measured 863 µS/cm and 555 µS/cm, respectively. Conductivity in Capuchin Creek measured 357 µS/cm. Conductivity in Little Elk Creek measured 670 µS/cm.

64. In a 2012 presentation, the State of Tennessee rejected EPA's calculation of a 300 µS/cm benchmark for conductivity in central Appalachian streams as inapplicable in Tennessee. According to the State, its own studies "indicate[] that if sufficient samples could be collected to derive a [Tennessee] benchmark it would be significantly higher than 300 µS/cm."

FIRST CLAIM FOR RELIEF

Violations of section 7(a)(2) of the ESA and the APA by OSM regarding the Zeb Mountain mine

65. Plaintiffs incorporate all of the above allegations here by reference.

66. OSM made affirmative, discretionary decisions when it issued and renewed the SMCRA permit for the Zeb Mountain mine.

67. OSM's decisions to issue and renew the SMCRA permit for the Zeb Mountain mine are ongoing.

68. High conductivity wastewater discharges from the Zeb Mountain mine "may affect" threatened blackside dace, endangered Cumberland darters, and critical habitat.

69. OSM has failed to initiate and complete consultation with the Service regarding the effects of the Zeb Mountain mine on blackside dace, Cumberland darter, and critical habitat. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

70. OSM has ignored the "best scientific and commercial data available" indicating that blackside dace and Cumberland darter are intolerant of high instream conductivity caused by surface coal mining. 16 U.S.C. § 1536(a)(2).

71. OSM's continued reliance on the 1996 biological opinion for the Zeb Mountain mine is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

72. OSM has failed to insure that the SMCRA permit for the Zeb Mountain mine is not likely to jeopardize blackside dace and Cumberland darter or result in destruction or adverse modification of critical habitat. *See* 16 U.S.C. § 1536(a)(2).

73. Therefore, OSM is in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706, in connection with the SMCRA permit for the Zeb Mountain surface coal mine. Its violations are subject to judicial review. *See* 16 U.S.C. § 1540(g); 5 U.S.C. § 701, *et seq*.

SECOND CLAIM FOR RELIEF

Violations of section 7(a)(2) of the ESA and the APA by OSM and the Service regarding the Zeb Mountain mine

74. Plaintiffs incorporate all of the above allegations here by reference.

75. OSM has discretionary control over the Zeb Mountain mine. *See, e.g.*, 30 U.S.C. § 1271.

76. OSM and the Service have failed to reinitiate and complete consultation for the Zeb Mountain mine to address population declines and extirpations exceeding the "amount or extent" of the authorized take for blackside dace and Cumberland darter; new information indicating adverse effects for these species caused by conductivity above 240

µS/cm; the listing of the Cumberland darter in 2011; and designation of critical habitat for the Cumberland darter in 2012.

77. Therefore, OSM and the Service are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706, in connection with the SMCRA permit for the Zeb Mountain surface coal mine. Their violations are subject to judicial review. *See* 16 U.S.C. § 1540(g); 5 U.S.C. § 701, *et seq*.

THIRD CLAIM FOR RELIEF

Violations of section 7(a)(2) of the ESA and the APA by OSM regarding Davis Creek Mine Area 5

78. Plaintiffs incorporate all of the above allegations here by reference.

79. OSM made an affirmative, discretionary decision when it issued the SMCRA permit for Davis Creek Mine Area 5.

80. OSM's decision to issue the SMCRA permit for Davis Creek Mine Area 5 is ongoing.

81. High conductivity wastewater discharges from Davis Creek Mine Area 5 "may affect" threatened blackside dace.

82. OSM has failed to initiate and complete consultation with the Service regarding the effects of Davis Creek Mine Area 5 on blackside dace. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

83. OSM has ignored the "best scientific and commercial data available" indicating that blackside dace are intolerant of high stream conductivity caused by surface coal mining. 16 U.S.C. § 1536(a)(2).

84. OSM's continued reliance on the 1996 biological opinion for Davis Creek Mine Area 5 is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

85. OSM has failed to insure that the SMCRA permit for Davis Creek Mine Area 5 is not likely to jeopardize blackside dace. *See* 16 U.S.C. § 1536(a)(2).

86. Therefore, OSM is in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706, in connection with the SMCRA permit for the Davis Creek Mine Area 5. Its violations are subject to judicial review. *See* 16 U.S.C. § 1540(g); 5 U.S.C. § 701, *et seq*.

FOURTH CLAIM FOR RELIEF

Violations of section 7(a)(2) of the ESA and the APA by OSM and the Service regarding Davis Creek Mine Area 5

87. Plaintiffs incorporate all of the above allegations here by reference.

88. OSM has discretionary control over Davis Creek Mine Area 5. *See, e.g.*, 30 U.S.C. § 1271.

89. OSM and the Service have failed to reinitiate and complete consultation for Davis Creek Mine Area 5 to address blackside dace population declines and extirpations exceeding the "amount or extent" of the authorized take and new information indicating adverse effects for blackside dace caused by conductivity above 240 µS/cm.

90. Therefore, OSM is in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706, in connection with the SMCRA permit for Davis Creek Mine Area 5. Its violations are subject to judicial review. *See* 16 U.S.C. § 1540(g); 5 U.S.C. § 701, *et seq*.

FIFTH CLAIM FOR RELIEF

Violations of section 7(a)(2) of the ESA and the APA by OSM and the Service regarding the 2009 Blackside Dace Guidelines

91. OSM and the Service made an affirmative, discretionary decision when they issued "Coal Mining in Tennessee, Minimum Guidelines for the Development of Protection and Enhancement Plans for Blackside Dace (*Phoxinus cumberlandensis*)" in 2009.

92. OSM and the Service's decision to issue the 2009 guidelines are ongoing.

93. OSM and the Service's decision to issue the 2009 guidelines "may affect" blackside dace at the Zeb Mountain mine, the Davis Creek mine, and other surface coal mines in Tennessee.

94. Both OSM and the Service failed to initiate and complete consultation under section 7(a)(2) before issuing the 2009 guidelines. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

95. In issuing the guidelines, OSM and the Service ignored the "best scientific and commercial data available" indicating that blackside dace are intolerant of high conductivity caused by surface coal mining. 16 U.S.C. § 1536(a)(2).

96. OSM and the Service's reliance in the guidelines on enforcement of state water quality standards by the State of Tennessee to protect blackside dace is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

RELIEF REQUESTED

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

A. Declare that OSM and the Service have violated, and continue to violate, the Endangered Species Act and the Administrative Procedure Act.

B. Vacate SMCRA permit 3154 for the Zeb Mountain mine and SMCRA permit 3218 for Davis Creek Mine Area 5.

C. Order that any reissuance of SMCRA permit 3154 and SMCRA permit 3218 must comply with section 7 of the Endangered Species Act.

D. Vacate the 1996 biological opinion as applied in Tennessee.

E. Order OSM to initiate, and OSM and the Service to complete, consultation under section 7(a)(2) of the Endangered Species Act for the impacts of the Zeb Mountain mine on blackside dace, Cumberland darter, and critical habitat.

F. Order OSM to initiate, and OSM and the Service to complete, consultation under section 7(a)(2) of the Endangered Species Act for the impacts of Davis Creek Mine Area 5 on blackside dace.

G. Order OSM and the Service to initiate and complete consultation under section 7(a)(2) of the Endangered Species Act for the 2009 blackside dace guidelines.

H. Order OSM and the Service to prepare species-specific guidelines for the Cumberland darter and consult on those guidelines under section 7(a)(2) of the Endangered Species Act.

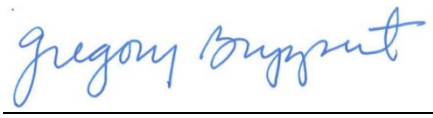
I. Issue an injunction prohibiting discharge of high conductivity wastewater from the Zeb Mountain mine.

J. Issue an injunction prohibiting discharge of high conductivity wastewater from Davis Creek Mine Area 5.

K. Award Plaintiffs their costs (including reasonable attorney and expert witness fees and other litigation expenses) as authorized by 16 U.S.C. § 1540(g).

L. Award such other relief as the Court deems just and appropriate.

Respectfully submitted on May 16, 2013.



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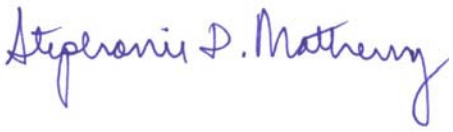

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