No. 12-2217

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HURON MOUNTAIN CLUB

Plaintiff-Appellant

v.

UNITED STATES ARMY CORPS OF ENGINEERS; MICHAEL C. DEROSIER; UNITED STATES DEPARTMENT OF INTERIOR; KEN SALAZAR; UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE; KENNECOTT EAGLE MINERALS COMPANY

Defendants-Appellees

On Appeal from the United States District Court
for the Western District of Michigan
Docket No. 2:12-cv-00197-RHB
The Honorable Robert Holmes Bell

APPELLEE KENNECOTT EAGLE MINERALS COMPANY'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Defendant-Appellee Kennecott Eagle Minerals Company makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Answer: Yes, Kennecott Eagle Minerals Company is now Rio Tinto Eagle Mine LLC, and Rio Tinto plc is the ultimate parent company of Rio Tinto Eagle Mine LLC.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

Answer: Yes, Rio Tinto plc has a financial interest in the outcome of this litigation to the extent that it is the ultimate parent company of Rio Tinto Eagle Mine LLC. Rio Tinto plc is traded via American Depository Receipts on the New York Stock Exchange.

Dated: January 30, 2013

s/ Daniel P. Ettinger

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STATEMENT REQUESTING ORAL ARGUMENT

Appellant Huron Mountain Club (the "Club") alleges Administrative Procedures Act ("APA") claims against the U.S. Army Corps of Engineers (the "Corps"), other federal defendants, and Kennecott Eagle Minerals Company ("Kennecott"), and argues that the district court abused its discretion in denying the Club a preliminary injunction to halt underground mine construction by Kennecott that has been ongoing since September 2011 and require the Corps to force Kennecott to apply for and obtain permits under the Clean Water Act ("CWA") and the Rivers and Harbors Act ("RHA"). But the Club spends the majority of its brief avoiding (1) the simple APA issue presented by its lawsuit: whether the APA allows judicial review of alleged failures of the Corps to make permit decisions under the RHA and CWA when, as here, there is no permit application to decide, and (2) the real issue on appeal: whether the district court abused its discretion in denying a preliminary injunction. Kennecott believes that the opportunity to respond at argument will assist the Court in resolving these core issues. Accordingly, Kennecott requests oral argument.

JURISDICTIONAL STATEMENT

The district court lacked subject matter jurisdiction under the APA and the Mandamus and Venue Act because the Club cannot establish a mandatory duty requiring the agency to assert permitting authority in the absence of a permit application. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1127 (6th Cir. 1996); *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987); *Nelson v. United States*, 107 F. App'x 469, 471 (6th Cir. 2004). *But see McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 406, n.9 (6th Cir. 2006).[1] But if the district court had subject matter jurisdiction, then this Court would otherwise have jurisdiction to hear this appeal under 28 U.S.C. § 1292.

[1] Similarly, the court did not have jurisdiction under the Declaratory Judgment Act because it is not an independent source of jurisdiction. *E.g.*, *Davis v. United States*, 499 F.3d 590, 594 (6th Cir. 2007).

STATEMENT OF ISSUES FOR REVIEW

1. Should the Club's claims be dismissed for lack of subject matter jurisdiction or for failure to state a claim upon which relief may be granted?

2. Did the district court abuse its discretion in determining that the Club failed to carry its heavy burden of making the clear showing required to justify the extraordinary and drastic remedy of a preliminary injunction?

INTRODUCTION

This legal action is the Club's ninth attempt since 2006 (in the fourth different forum) to stop Kennecott's underground mine in the Upper Peninsula. These actions include a 42-day Michigan Department of Environmental Quality ("MDEQ") administrative contested case hearing in 2008, where the Club litigated and lost its argument that the mine will harm the environment. That decision was subsequently affirmed by the Ingham County Circuit Court. This is the Club's fourth attempt to seek "emergency" injunctive relief to stop Kennecott's mine, and its second attempt to enjoin underground construction. The Club's earlier attempts failed, including its first attempt to block underground construction in September 2011. The district could rejected this attempt too because the Club could not establish any of the elements necessary to obtain a preliminary injunction. This Court should affirm.

STATEMENT OF THE CASE

The Club filed this APA lawsuit in May 2012, seeking to enjoin Kennecott from constructing and operating its mine. It alleged that the entirety of the Salmon Trout River ("STR") is "navigable" under the RHA and CWA, and that Kennecott's mining activity will affect its navigability. The Club claimed that Kennecott therefore needs RHA and CWA permits for its mining activities. And, it argued, those permits require the Corps to subject Kennecott's mine to pre-permit review and consultation under the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and the Endangered Species Act ("ESA"). The Club filed a preliminary injunction motion asking the district court to order the Corps to assert permitting authority under the RHA and CWA and prohibit Kennecott from continuing its underground mine construction—which began in September 2011—until it applied for and obtained RHA and CWA permits. The court allowed extensive briefing and held oral argument on June 6, 2012.

On July 25, 2012, the district court denied the Club's preliminary injunction motion, determining that the Club did not carry its heavy burden of showing that a preliminary injunction was warranted. The court held that the Club did not have a likelihood of success on its claims for several reasons. Specifically, the court held that the Club's APA claims were not likely to succeed because the Corps does not have a mandatory duty to exercise permitting authority under the RHA and CWA

in the absence of a permit application, and because the Corps' enforcement decisions are committed to agency discretion and therefore not subject to judicial review. (R.48, Op., PageID 1634-41, 1651.) The court also held that, even if the Club had an APA claim, the Club was not likely to succeed on the merits because the federal government's CWA permitting authority has been transferred to the State of Michigan (*id*. at PageID 1641-43), and because Kennecott's activities are not subject to the RHA or CWA (*id*. at PageID 1643-51). Finally, the court held that the Club was not likely to succeed on its claims against Kennecott under the All Writs Act or the court's inherent powers. (*Id*. at PageID 1651-52.)

The district court also held that the Club failed to carry its burden with respect to each of the other elements necessary to support a preliminary injunction. With respect to irreparable harm, the court found that the Club did not show that it was likely to suffer irreparable injury from the lack of NEPA, NHPA, and ESA review, especially in light of the extensive review of Kennecott's mine since 2006. (*Id*. at PageID 1654-55.) The court concluded that "[t]he timing of this action suggests an obstructive motive, rather than a sincere belief that [the Club] is being irreparably harmed by Kennecott's failure to comply with federal law." (*Id*. at PageID 1655.) With respect to the balance of the harms and the public interest, the court found that an injunction would cause substantial harm to both Kennecott and the local community, and that Kennecott's interests and the public's interest in

aiding a struggling local economy and preventing job loss outweighed any interest in requiring RHA and CWA permits under the Club's unprecedented theory. (*Id.* at PageID 1656-57.)

Because the Club has failed to state a claim under the APA and the equities weigh strongly against the Club, the district court did not abuse its discretion in denying the Club's motion.

STATEMENT OF FACTS

I. Kennecott began constructing its mine in 2010, and has been working underground since September 2011.

Kennecott's mine is located in Michigamme Township, Marquette County, Michigan, in an area of the Township long zoned for mineral extraction and timber production.[2] *In re Permits Issued to Kennecott Eagle Minerals Co.*, Nos. GW1810162, MP-01-2007, 2010 WL 276664, at *2 (Mich. Dep't Envtl. Quality Jan. 24, 2010). Kennecott began construction of its surface facilities in April

[2] The Club, Kennecott, and MDEQ have already litigated the alleged river and wetland impacts underlying the Club's claims. Kennecott submitted a "thumb drive" containing the entire 58,000 page MDEQ contested case administrative record to the district court. The index to that Administrative Record was attached to Kennecott's brief in opposition to the Club's preliminary injunction motion. (R.15-1 Index, PageID 590-627.) References to the administrative record documents on the thumb drive were cited as a tab number followed by the appropriate page reference (*e.g.*, "Tab 680, 05281-05282"). The facts in this brief are supported by that record, as further discussed in Kennecott's state circuit court appeal brief. (R.23-3, Resp. to Pet'rs' Br., PageID 1069-97.)

2010—that work is largely complete. (R.16, Aerial Photos, PageID 643-47.) Kennecott's underground operation entails construction of a decline from the mine portal at its surface facilities west through bedrock to the ore body. This work started in September 2011 and is ongoing.[3] (R.15-3, Burley Decl. ¶ 5, PageID 635-36.) At the time that the Club initiated this action, Kennecott had drilled almost one-thousand linear meters of the decline and related infrastructure. (*Id.*)

Kennecott will not begin mining the ore body before 2014. (*Id.*) Once mining, Kennecott will utilize a "long hole stope" method to extract the ore, working from the bottom of the ore body to the top. (R.48, Op., PageID 1628.) This method avoids creation of large, unsupported voids in the mine, and allows Kennecott to contemporaneously reclaim the mine by tightly backfilling mined areas with cemented rock and waste rock as it moves up the ore body. (*See id.*; R.15-1, Tab 680, 052600-01, Apx. 79-80.) Kennecott's backfill method is well established in the industry. (R.15-1, Tab 683, 053249, 053260, Apx. 88-89; R.15-1, Tab 686, 053718-20, Apx. 102-04); *Kennecott*, 2010 WL 276664, at *52. Mining will begin approximately 1,000 feet below the surface, and progress to about 350 feet below the surface. (R.48, Op., PageID 1628.) Multiple experts have concluded that the mine's crown pillar (*i.e.*, roof) would "definitely be

[3] At the time that the Club initiated this action in May 2012, Kennecott had invested $331 million on the project—$114 million just since the beginning of underground construction. (R.15-3, Burley Decl. ¶ 7, PageID 636.)

stable." (R.15-1, Tab 359, 026488, Apx. 55; Tab 673, 050839-40, 050857-59, 050983-84, Apx. 67-71, 74-75; Tab 684, 053351, Apx. 93; Tab 685, 053661-62, Apx. 97-98.) Mining will take place over 8½ to 9 years. Kennecott will then completely reclaim the site to pre-mine conditions. (R.15-1, Tab 681, 052640, Apx. 84; *e.g.*, R.19-3, Part 632 Permit, PageID 713 (Conditions F4, F6).)

II. The portion of the STR above the Eagle ore body is not navigable.

The Eagle ore body lies far beneath part of a small creek and wetlands that comprise a portion of the drainage area for the headwaters of one branch of the STR. (R.48, Op., PageID 1628, 1647.) North of this headwaters area (downstream of the mine site), the waters pick up flow from venting groundwater to eventually form the "main branch" of the Salmon Trout River. *Kennecott*, 2010 WL 276664, at *22, *99. The river is more accurately described as a "stream" throughout its approximately 22-mile course to Lake Superior. As is clear from these recent pictures—the picture on the left near the ore body and the other nearly one mile downstream—these swampy headwaters cannot support the transport of goods by vessel and any recreational boating is difficult at best. (R.48, Op., PageID 1647; R.19-2, Wiitala Decl. ¶¶ 4-6, PageID 703-06.)

For these reasons, among others, the upper reaches of the STR are not "navigable" for purposes of the RHA and CWA Section 404(g). Indeed, the Corps has determined that only the mouth of the river where it meets Lake Superior is "navigable" for purposes of RHA jurisdiction. (*See* R.19-4, Navigable Waters of U.S., PageID 765.)

III. The mine has already undergone extensive state and federal environmental permit review.

A. Kennecott's state permits govern Kennecott's mining activities and ensure environmental protection.

In 2004, Kennecott and other stakeholders, including Club members and other mine opponents such as the National Wildlife Federation ("NWF"), the Sierra Club, and Keweenaw Bay Indian Community ("KBIC"), participated in development of a statute and rules regulating non-ferrous metallic mineral mining in Michigan—"Part 632" of the Michigan Natural Resources and Environmental Protection Act ("NREPA"), Mich. Comp. Laws §§ 324.63201-.63223.

Part 632 established a permitting program for non-ferrous metallic mineral mines like Kennecott's. Under Part 632, permit applicants must conduct a comprehensive Environmental Impact Assessment ("EIA"). *Id.* § 324.63205(2)(b). In addition, Part 632 requires that the applicant "list all other state and federal permits that are anticipated to be required" for the project. *Id.* § 324.63205(2)(f). The obvious purpose of this requirement is to ensure that both government regulators and the public can review a proposed project to ensure that regulatory requirements are not missed.

In February 2006, Kennecott filed applications for permits, including an air pollution control permit and groundwater discharge permit under Parts 55 and 31 of NREPA, respectively. Kennecott also filed its Part 632 Mine Permit Application ("MPA"). The MPA was over 10,000 pages and included dozens of reports and studies. (R.48, Op., PageID 1628.) The MPA detailed Kennecott's underground mining plan, including its size, method, and location. (*See, e.g.*, R.15-1, Tab 123, MPA Table of Contents, 007430-37, Apx. 35-42; R.15-1, Tab 125, Mine Schematic, 007478, Apx. 45-46.) It also included an EIA that contained detailed investigations, assessments, and modeling of potential impacts of mining on the STR, the headwaters area, and adjacent wetlands. (*See* R.15-1, Tab 134, EIA Table of Contents, 009588-92, Apx. 47-51; *see generally* R.15-1, Tabs 134-154, 009585-017569.) And the MPA included a list of state and federal permits that

Kennecott anticipated needing for the project. (R.15-1, MPA Tab 123, 007445-46, Apx. 43-44.) Because no aspect of mine operations involved the discharge of any dredged or fill material in, or any discernible impact on, wetlands or the STR, Kennecott concluded that it did not need wetlands or river-related permits. *See id*. MDEQ agreed. *Kennecott*, 2010 WL 276664, at *148.

The Club extensively participated in the exhaustive two year review of the MPA, submitting comments on the MPA and MDEQ's proposed permit. The Club teamed with NWF and KBIC to submit a detailed package of combined comments on the project. They commented extensively that the mine would adversely impact the STR and adjacent wetlands, and argued that the project needed additional permits under Part 303 of NREPA (the Michigan Wetland Protection Act)[4] and Part 301 of NREPA (Michigan's Inland Lakes and Streams Act, an analogue to the federal RHA). (R.20-1, Comments, PageID 806-23, 826-30.) They further contended that the mine would "violate other federal laws and trigger additional federal permit requirements," dedicating an entire section of their comments to the topic. (*Id*.) But they never contended that the project required an RHA Section 10 or CWA Section 404 permit until the Club filed this lawsuit years later, belying their

[4] Michigan is one of only two states that has assumed CWA Section 404 wetlands permitting authority from the Corps. Part 303 serves as the basis of this authority. With limited exceptions, obtaining a state Part 303 wetlands permit satisfies Section 404—no additional federal wetlands permit is needed.

new theory that obtaining such permits are now "absolute preconditions" to constructing and operating the mine. (R.1, Compl. ¶ 114, PageID 23.)

On December 17, 2007, MDEQ issued Kennecott a Part 632 Mining permit, a Part 55 Air Pollution Control permit, and a Part 31 Groundwater Discharge permit. In February 2008, the Michigan Department of Natural Resources ("MDNR") approved a lease for the mine's surface facilities, completing all of the state authorizations needed to build and operate the mine. As discussed further below, the Club unsuccessfully challenged all of these authorizations.

B. Kennecott's mine has already been subject to federal environmental review.

EPA authorized certain aspects of Kennecott's mine "by rule" (*i.e.*, no individual permit required) under the federal Safe Drinking Water Act's ("SDWA") Underground Injection Control ("UIC") program. In 2006, NWF and KBIC wrote to EPA, demanding that the agency take the unusual step of requiring Kennecott to apply for an individual UIC permit. (R.20-2, KBIC/NWF Letters to EPA, PageID 835-42, 845-77.) EPA acceded to this request and told Kennecott that it needed to submit an individual permit application. Kennecott submitted its application to

EPA in April 2007, thereby triggering Endangered Species Act ("ESA") and National Historic Preservation Act ("NHPA") review.[5]

For three years, EPA engaged in ESA and NHPA consultation and review with other agencies and interested tribes.[6] The ESA process concluded with a letter from USFWS to EPA in October 2009, concurring with EPA that the mine is "unlikely to adversely affect" any endangered species. (R.20-3, USFWS Letters to EPA, PageID 882-86.) And Kennecott's comprehensive NHPA assessment concluded that there were no sites eligible for listing in the National Register of Historic Places in the project area, including the rock outcrop now referred to as "Eagle Rock."[7] (R.22-3, NHPA Report, PageID 1001.)

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[5] The UIC program is exempt from performing NEPA review under a functional equivalence analysis. *W. Neb. Resources Council v. EPA*, 943 F.2d 867, 871-72 (8th Cir. 1991).

[6] The EPA websites for Kennecott's project, which include a timeline and key documents, can be viewed at: http://goo.gl/j1u47 and http://goo.gl/ooSd1.

[7] To address KBIC's concerns about potential impacts of mine operations on the outcrop, Kennecott's surface use lease with the state explicitly prohibits disturbance of the rock outcrop. (R.15-1, Tab 111, 007145, Apx. 27.) And Kennecott's mining permit mandates that it "construct the mine portal such that it enters bedrock below the ground surface on the west side of the rock outcrop." (R.19-3, Part 632 Permit, PageID 721 (Special Condition E3).) Kennecott constructed the mine portal in late 2011 in compliance with that permit requirement. Kennecott continues to provide tribal members reasonable access to the outcrop. (R.15.4, Burley Decl. ¶¶ 16-17, PageID 639.)

In March 2010, Kennecott withdrew its permit application because it had re-designed its treated water infiltration system ("TWIS") such that a UIC permit was no longer necessary. In July 2010, EPA concurred that no permit was needed.

IV. The Club has unsuccessfully pursued numerous legal challenges against Kennecott's mine.

Over the past seven years, the Club has been involved in numerous legal actions aimed at blocking Kennecott's mine. This is the fourth time that the Club has moved for "emergency" injunctive relief to prevent Kennecott's project.[8] The Club has lost every single legal challenge to Kennecott's mine.

The Club's primary legal challenge was the administrative contested case challenge to Kennecott's Part 632 mining permit and Part 31 groundwater discharge permit, filed in December 2007.[9] (R.22-4, Pet., PageID 1012-22.) The hearing was the longest contested case hearing in MDEQ's history. The ALJ heard 42 days of testimony from 60 witnesses (creating an 8,000-page transcript). *Kennecott*, 2010 WL 276664, at *18. Approximately 500 exhibits were introduced

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[8] These motions included a challenge to prevent MDEQ from even reviewing Kennecott's MPA based on the notion that it was somehow not "administratively complete," *Keweenaw Bay Indian Cmty. v. State Office of Hr'gs*, No. 272220 (Mich. Ct. App. Sept. 14, 2006), and an interlocutory appeal seeking to indefinitely delay the hearing so the Club could engage in far-reaching discovery (which the ALJ had denied), *Keweenaw Bay Indian Cmty. v. State Office of Hr'gs*, 08-546-AA (Mich Cir. Ct. May 6, 2008).

[9] Petitioners also appealed MDEQ's decision to grant Kennecott a Part 55 air permit, but the Circuit Court affirmed. *Keweenaw Bay Indian Cmty. v. Mich Dep't of Envtl. Quality*, No. 07-1824-AA (Mich. Cir. Ct. Nov. 10, 2008).

during the proceeding. *Id*. The ALJ and the parties even traveled to the mine area and, at the Club's insistence, to the Club's property, for a 2-day site visit.[10] *Id*. at *19.

At the hearing, the Club fully litigated the same issues that underlie its claims here: whether bedrock groundwater inflows to the mine workings could "drawdown" the water table in the glacial aquifer overlying the bedrock, altering wetlands near the ore body and diminishing the STR. *Kennecott*, 2010 WL 276664, at *35; (R.22-4, Pet., ¶¶ 2, 8, PageID 1014-16). In fact, the Club argued and litigated the issue of whether Kennecott needed permits under the state equivalents to Section 10 of the RHA and Section 404 of the CWA—Parts 301 (governing inland lakes and streams) and 303 (governing wetlands) of NREPA respectively. *Kennecott*, 2010 WL 276664, at *35; (R.22-4, Pet., ¶¶ 16-20, 21-26, PageID 1018-19). Seventeen witnesses presented testimony bearing on these issues, comprising over 4,000 pages of transcript.

The overwhelming weight of evidence in this record established that:

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[10] While all of this was going on before MDEQ, the Club launched yet another unsuccessful lawsuit in Circuit Court, challenging MDNR's decision to enter into a Surface Use Lease with Kennecott for its surface facilities. (R.22-5, Claim of Appeal & Compl., PageID 1024-35); *Nat'l Wildlife Fed'n v. Dep't of Natural Res.*, No. 08-263-AA (Mich. Cir. Ct. Mar. 3, 2009) (R.23-1, Op. & Order, PageID 1049-61); *Nat'l Wildlife Fed'n v. Dep't of Natural Res.*, No. 293779, 2011 WL 1004525 (Mich. Ct. App. Mar. 22, 2011) (R.23-2, Op., PageID 1064-67)).

- the wetlands overlying the ore body will not be adversely affected by mine operations. (*See, e.g.*, R.15-1, Tab 367, 026839-43, Apx. 56-60; Tab 673, 050867-68, Apx. 72-73; Tab 693, 055117-24, Apx. 108-115); *Kennecott*, 2010 WL 276664, at *98-102.

- there would be, at most, the potential for de minimis decrease in stream flow immediately downstream of the ore body, and that further downstream flows would actually increase because of additional purified groundwater from the TWIS; further, any potential impacts are rapidly attenuated downstream because the STR is a "gaining stream." (*See, e.g.*, R.15-1, Tab 693, 055137-38, 055141-44, Apx. 116-121; Tab 369, 026864, Apx. 62; Tab 373, 026868, Apx. 63; Tab 367, 026860, Apx. 61); *Kennecott*, 2010 WL 276664, at *99.

- Kennecott's 87.5 meter crown pillar (i.e. the rock comprising the "mine roof"), even without the tight backfill that Kennecott plans to use, will be stable and will not subside.[11] (R.15-1, Tab 359, 026488, Apx. 55; Tab 673, 050839-40, 050857-59, 050983-84, Apx. 67-71, 74-75; Tab 684, 053351, Apx. 93; Tab 685, 053661-62, Apx. 97-98); *Kennecott*, 2010 WL 276664, at *38, *49, *52.

On August 18, 2009, the ALJ issued a 177-page Proposal for Decision. *Kennecott*, 2010 WL 276664, at *17-149. On all of the factual issues related to alleged impacts on wetlands and the flow of the STR, the ALJ conclusively ruled in favor of Kennecott and MDEQ, finding that there would be no adverse effects. *Id*. at *22, *49-53, *78-80, *85-102. The ALJ also concluded as a matter of law that Kennecott did not need permits under Parts 301 or 303 of NREPA:

- "[B]ecause the alleged diminishment will not involve physical alteration of the STR below the ordinary high water mark, it will not require a Part 301 Permit. MAC R 281.811(e)."

[11] With the backfill, collapse or plug failure is physically impossible; even if the entire weight of the mine's crown pillar could somehow drop onto the tightly cemented rock backfill, it would drop only an inch. (R.15-1, Tab 683, 053260, Apx. 89.)

- "Part 303 requires a person to obtain a permit before the person dredges, fills, or develops a wetland, or drains surface water from a wetland. At most Kennecott will draw groundwater from the site. It will not dredge, fill, or develop a wetland, and it will not drain surface water from a wetland. Accordingly, Kennecott's mining operations do not require a Part 303 permit."

Id. at *148. Significantly, the Club never appealed those Part 301 and Part 303 determinations. They are final.

On January 14, 2010, MDEQ issued a Final Decision and Order granting Kennecott its Part 632 mining permit and Part 31 groundwater discharge permit, and ruling that the permits are fully protective of the environment. *Id*. at *13, *16. In fact, Kennecott's Part 632 permit protects surface waters and wetlands as robustly, if not more so, than RHA Section 10 or CWA Section 404 because it includes strict wetlands, groundwater, and stream monitoring requirements designed for early detection of potential impacts so they can be prevented or mitigated. *Id*. at *29.

The Club and other petitioners appealed MDEQ's permit decisions to Circuit Court. At oral argument in June 2011, Petitioners extensively argued the merits of their claims regarding impacts on wetlands and the flow of the STR. At that time, Kennecott indicated that it intended to begin underground construction of its mine portal and decline as early as mid-September 2011.

In late August 2011, the Club and other petitioners filed another emergency stay motion—this one to enjoin the very same underground construction that is the

subject of the motion underlying this appeal. The environmental harms that Petitioners alleged are the same as those alleged here: that the mine roof will collapse, thus polluting and impacting the flow of the STR and other surface waters. (R.24-3, Pet'rs' Stay Br. 2, 11-13, 18, PageID 1193-97.) Indeed, they warned that the need for immediate injunctive relief was dire, actually comparing Kennecott's mine to the BP oil rig disaster and the Fukushima nuclear plant tragedy. (*Id.* at PageID 1193.)

On September 14, 2011, the Ingham County Circuit Court denied the stay, finding that Petitioners were unlikely to succeed on the merits; no irreparable harm would result from Kennecott's underground construction work; and "clearly there would be a significant harm to the public . . . . [and] it's in the public's best interest at this time to allow them to reap the economic benefits of the project." (R.24-4, Stay Tr., PageID 1201-04; R.24-5, Br. Opp'n Mot. Stay, PageID 1206-41.) On the crown pillar issue, the court specifically ruled that "there has been testimony from various experts on this issue, but the DEQ's two hired experts, Sainsbury and Blake, testified, in effect, that the thickness of 87.5 meters was . . . . appropriate, and they considered it safe and in line with industry standards. And the ALJ accepted that opinion and found in the same manner." (R.24-4, Stay Tr., PageID 1201.)

Importantly, the Club and the other Petitioners did not appeal the denial of their stay motion to the Michigan Court of Appeals. And Kennecott began its underground construction on September 18, 2011, well over a year ago. (R.15-3, Burley Decl. ¶ 5, PageID 635.)

On November 21, 2011, the Circuit Court issued a 107-page opinion affirming MDEQ's decision to grant Kennecott's Part 632 permit.[12] *Nat'l Wildlife Fed'n v. Mich Dep't of Envtl. Quality*, No. 11-123-AA (Nov. 21, 2011) (R.25-1, Op., PageID 1244-1351). The Club and the other Petitioners filed applications for leave to appeal with the Michigan Court of Appeals. Those applications were granted and the appeals are currently briefed and awaiting argument.

Against this backdrop, the Club inexplicably waited until May 2012 to bring its novel theories in support of yet another claim for emergency injunctive relief. On July 25, 2012, the district court held that the Club could not meet its burden under any of the preliminary injunction factors. Belying the notion that the Club will suffer imminent and irreparable harm absent an injunction, the Club waited almost the full 60 days to file this interlocutory appeal seeking to overturn the district court's decision.

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[12] On January 11, 2012, the Circuit Court issued a 73-page opinion affirming MDEQ's decision to grant Kennecott's Part 31 permit. *Nat'l Wildlife Fed'n v. Mich Dep't of Envtl. Quality*, No. 11-158-AA (Mich. Cir. Ct. Jan. 11, 2012).

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying a preliminary injunction. After years of state and federal review and numerous legal challenges, the Club seeks to compel the Corps to require Kennecott to obtain RHA and CWA permits that it has not applied for, and to conduct pre-permit reviews under NEPA, NHPA, and ESA. The obvious goal of the Club's lawsuit is to delay Kennecott's project.

The district court outlined numerous reasons why the Club is not likely to succeed on the merits, the most obvious being that the Club cannot state a claim under the APA because the Corps has no mandatory duty to assert permitting authority absent a permit application. Indeed, for that reason, the district court did not have subject matter jurisdiction. Beyond that, the district court discussed several reasons why the Club is not likely to succeed on its argument that Kennecott's activities are governed by RHA Section 10 and CWA Section 404 in the first instance.

The Club also fails under the other equitable factors. The district court correctly surmised that the timing of the Club's lawsuit "suggests an obstructive motive, rather than a sincere belief that [it] is being irreparably harmed by Kennecott's failure to comply with federal law." (R.48, Op., PageID 1655.) The Club filed its preliminary injunction motion knowing that Kennecott had been

constructing its mine for over two years, and that its underground work had been ongoing for over seven months. The Club had exhaustively litigated every aspect of Kennecott's project for over six years, and it could have brought these claims at any point. Instead, it waited while Kennecott invested hundreds of millions of dollars into a project that has already created hundreds of jobs and infused significant capital into the local community. The Club does not even challenge the evidence of harm from an injunction, instead arguing that it just does not matter and that the Club's claimed procedural injury overrides everything else.

Given these circumstances, the district court did not abuse its discretion by denying the Club's preliminary injunction motion.

ARGUMENT

A preliminary injunction is an "extraordinary and drastic remedy" that "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion" with respect to each of the following four elements: (1) substantial likelihood of success on the merits; (2) likelihood of irreparable injury if the preliminary injunction does not issue; (3) absence of harm to others; and (4) service of the public interest. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

A district court's denial of a preliminary injunction can be overturned only for an abuse of discretion. *Leary v. Daeschner*, 228 F.3d 729, 736, 739 (6th Cir. 2000). The standard of review is "highly deferential," and the district court's decision is overturned only in the "rarest of cases." *Id.* "The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997).

In this case, the district court held that the Club did not make a clear showing with respect to any of the four elements necessary to support a preliminary injunction. (R.48, Op., PageID 1657-58.) The Club has not shown that the court's determination was an abuse of discretion.

I. The Club cannot prevail on the merits.

The district court properly held that the Club failed to demonstrate a likelihood of success on the merits for multiple reasons. (*Id*. at PageID 1641.) That failure is itself "usually fatal" to a preliminary injunction motion. *Abney v. Amgen, Inc.*, 443 F.3d 540, 547 (6th Cir. 2006); *see also Mason & Dixon Lines Inc. v. Steudle*, 683 F.3d 289, 297 (6th Cir. 2012). And even a cursory consideration of the merits shows that the district court did not abuse its discretion in denying the Club's motion. *See Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (6th Cir.

1968) ("On appeal, we do not consider the merits of the case further than necessary to determine whether the District Judge abused his discretion in denying the motion for preliminary injunction.").

The Club has failed to state a claim under the APA. Even if it could state an APA claim, the Club's theories about why Kennecott's activities are subject to the RHA and CWA are admittedly novel (Appellant's Br. 9), and the district court properly held that they were not likely to succeed. (*Id.* at PageID 1641, 1649, 1651.)

A. The Club does not have an APA claim.

1. The Club has failed to state a cognizable "failure to act" claim under the APA.

The Club's APA claims against the Corps are not cognizable.[13] Under the APA, a court may compel agency action only if an agency unlawfully withholds or

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[13] APA claims are available only against federal agencies. *E.g.*, *Reg'l Mgmt. Corp. v. Legal Servs. Corp.*, 186 F.3d 457, 462 (4th Cir. 1999). Kennecott is not an agency. Therefore, the Club has no claim and no avenue for injunctive relief against Kennecott. The All Writs Act and the district court's inherent power to issue an injunction are also unavailable here. They are available only in aid of jurisdiction to ensure that the court retains the power to bring litigation to a natural conclusion. *See Baze v. Parker*, 632 F.3d 338, 345 (6th Cir. 2011); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1110 (11th Cir. 2004); *Florida Med. Ass'n v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 202 (5th Cir. 1979). Kennecott is not threatening the district court's jurisdiction—the Club has not pointed to any ongoing proceeding or past order or judgment the integrity of which is being threatened by Kennecott. And even if the All Writs Act and inherent authority of the district court were available, the district court did not abuse its discretion in refusing to enjoin Kennecott's conduct. *See Pennsylvania Bureau of*

unreasonably delays otherwise required agency action. 5 U.S.C. § 706(1). The APA narrowly limits judicial review of agency inaction. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-65 (2004). The Supreme Court has held that APA review is available only for agency failure to take a (1) discrete action that (2) is "legally required." *Id.* at 62-63. The second limitation "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65; 5 U.S.C. § 701(a)(2) (precluding judicial review of agency action that is "committed to agency discretion by law"). Both *Norton* limitations preclude the Club's APA claims here.

a. The Club does not complain of discrete agency action, but about how the Corps has chosen to administer its permitting and enforcement programs.

The Club's APA claims are not based on a discrete failure to act. The Club alleges that the Corps' "failure to administer the RHA and CWA permitting programs related to Kennecott's unauthorized Permit-dependent work constitutes agency 'inaction' or action 'unlawfully withheld'." (R.1, Compl. ¶ 189, PageID 36; Appellant's Br. 41.) In other words, the Club argues that the district court must compel the Corps to administer the RHA and CWA permitting programs to canvas its jurisdiction to actively seek out persons who might be engaged in conduct

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Correction v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985); *In re Dublin Sec., Inc.*, 133 F.3d 377, 380-81 (6th Cir. 1997); *California Energy Comm'n v. Johnson*, 767 F.2d 631 (9th Cir. 1985).

requiring a permit, force those persons to apply for them, and then make permit decisions on those applications. But complaints about how an agency has chosen to administer its program under Congressionally delegated authority are not actionable under the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891-93 (1990); *ACLU v. NSA*, 493 F.3d 644, 678 (6th Cir. 2007); *Gillis v. U.S. Dep't of Health and Human Servs.*, 759 F.2d 565, 575-76 (6th Cir. 1985). Even if an agency's conduct or administration of its program results in violations of law, "respondent cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891; *see ACLU*, 493 F.3d at 678-79.

The APA is not the vehicle by which the Club may challenge the Corps' administration of the RHA and CWA permitting programs. If the Club is unhappy with the fact that the Corps is not actively identifying persons who, in the Club's view, lack permits, and forcing those persons to apply for permits, then its remedy lies with Corps program administrators or Congress, not the courts.

b. The Corps has no mandatory duty to assert permitting authority over Kennecott and force it to apply for and obtain RHA and CWA permits.

Even if the Club was complaining about a discrete agency act, its APA claims would still fail because the Corps is not legally required to assert permitting authority over Kennecott under the RHA and CWA. As the district court held:

> In the absence of an obligation to act, the agency's failure to act does not constitute final agency action subject to judicial review. Because Kennecott has not submitted an RHA section 10 or a CWA section 404 permit application, the Corps has no mandatory permitting obligation that is subject to review under the APA.

(R.48, Op., PageID 1637.) The district court did not err in so holding.

Section 10 of the RHA requires persons who engage in certain conduct to obtain a permit from the Corps before engaging in that conduct. 33 U.S.C. § 403; 33 C.F.R. § 320.2(b); 33 C.F.R. § 322.5. The CWA similarly requires persons to get a permit from the Corps before engaging in regulated conduct. 33 U.S.C. §§ 1311, 1344(a); 33 C.F.R. §§ 323.3(a), .6(a). The RHA and CWA leave it to the discretion of the Corps (or in some circumstances, EPA) to find violations (*i.e.*, a person engaging in regulated conduct without a permit) and take enforcement action. 33 U.S.C. § 406; 33 U.S.C. § 1319; *see also Sierra Club v. Whitman*, 268 F.3d 898, 901-03 (9th Cir. 2001).

The RHA and CWA do not require the Corps to assert permitting authority where a person has not applied for a permit. These statutes require the Corps to be available to regulated parties, to process applications received, to provide notice and opportunity for comment on permit applications, and to add necessary conditions to permits issued upon application. *See* 33 C.F.R. Parts 320, 322, 325. But they do not contain any language that requires the Corps to seek out and identify persons engaging in regulated conduct, and then order those persons to apply for

permits. *See Amigos Bravos v. EPA*, 324 F.3d 1166, 1173-74 (10th Cir. 2003) (explaining that even in the enforcement context, there is no obligation on an agency to issue a permit); *Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1223 (S.D. Cal. 2011) (holding that even federal agencies have no obligation to apply for a permit when engaging in regulated conduct); *In re Carlota Copper Co*., 11 E.A.D. 692, 714 (E.A.B. 2004) ("The EPA simply does not have a mandatory duty, on its own initiative and in the absence of a permit application, to issue a permit to an illegal discharger.").

The Club has not cited a single case, or any other authority, that supports its argument that the Corps has a duty to assert permitting authority over a person who has not applied for a permit simply because the person may be engaging in regulated conduct. The Corps' obligation to make a permit decision is triggered by an application: an individual chooses to apply for a permit from the agency, and that application initiates subsequent agency obligations. This point is made clear by the cases cited by the Club below (which are notably absent from its appeal brief). In each of those cases, an APA claim was available because Corps obligations had been triggered by an application. *Marathon Oil Co. v. Lujan*, 937 F.2d 498 (10th Cir. 1991); *Vieux Carre Prop. Owners v. Brown*, 875 F.2d 453, 461 (5th Cir. 1989); *Norton Constr. Co. v. U.S. Army Corps of Eng'rs*, No. 1:03-cv-02257, 2006 WL 3526789 (N.D. Ohio Dec. 6, 2006).

The fact that the Corps' permitting obligations are triggered only upon receipt of a permit application does not mean, however, that a person can avoid compliance with the RHA and CWA by not applying for a permit. If the government determines that a person has violated the RHA or CWA by, for example, undertaking regulated activity without a permit, then it can, in its discretion, take enforcement action against that person to compel compliance. 33 U.S.C. § 406; 33 U.S.C. § 411; *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985). Moreover, if the government chooses not to enforce against a violator, a citizen may bring suit under the enforcement provisions of the CWA (after going through the required procedural hurdles, which the Club has not done here). 33 U.S.C. § 1365(a)(1).

In this case, because no permit application has been filed, no agency obligations have been triggered, and the district court did not err in concluding that there is no claim for relief under the APA.

2. The Club really seeks an order requiring the Corps to take enforcement action which is within the Corps' unreviewable discretion.

The district court properly held that to the extent that the Club "is requesting the Court to order the Corps to enforce what [the Club] believes are the requirements of RHA § 10 and CWA § 404," that request "falls squarely within the discretionary and enforcement actions of the Agency that this Court has no power to order under the express terms of the APA." (R.48, Op., PageID 1638.)

Despite the Club's repeated attempts to characterize its claim as something other than enforcement action,[14] there is simply no way for the Club to avoid the fact that it seeks an order requiring the Corps to enforce the RHA and CWA against Kennecott. There are only two possibilities with respect to challenges to Corps action in cases like this: (1) the Corps receives a permit application and processes that application, which processing and final decision are subject to APA review, *Marathon Oil*, 937 F.2d at 499-500; or (2) the Corps decides whether to enforce against a party for engaging in regulated conduct without a permit, which enforcement decision is beyond APA review, *Harmon Cove Condo. Ass'n Inc., v. Marsh*, 815 F.2d 949, 952 (3d Cir. 1987). There is no third possibility. Specifically, and as discussed above, there is no APA claim to require an agency to make a permit decision in the absence of a permit application. If anything, this case involves the second type of challenge to Corps action.[15]

But the Corps' decision of whether to enforce the RHA and CWA against Kennecott falls squarely within its unreviewable enforcement discretion. As

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[14] The Club suggests, for example, that its claims are somehow claims to require the Corps to make a "jurisdictional determination" and "institute proceedings." (Appellant's Br. 42-43.)

[15] As the district court noted, if the Club "is not suggesting that the Corps has a mandatory duty to investigate and to demand permits, it is unclear how [the Club] contends the Corp should administer the programs, unless [the Club] is requesting the Court to order the Corps to enforce what [the Club] believes are the requirements of RHA § 10 and CWA § 404." (R.48, Op. PageID 1638.)

discussed above, courts do not have authority under the APA to review agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). The Supreme Court has held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985) (noting that agency action is committed to agency discretion by law if the statute does not provide a "meaningful standard against which to judge the agency's exercise of discretion"). Courts have repeatedly applied this logic to bar judicial review of claims against the federal government for failure to enforce the RHA and CWA.[16] *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1014-15 (9th Cir. 2007); *Sierra Club v. Whitman*, 268 F.3d 898 (9th Cir. 2001); *Dubois v. Thomas*, 820 F.2d 943, 947-49 (8th Cir. 1987); *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 87-88 (2d Cir. 1972); *Harmon Cove Condo. Ass'n Inc., v. Marsh*, 815 F.2d 949, 952 (3d Cir. 1987); *City of Olmstead Falls v. U.S. Envtl. Protection Agency*, 233 F. Supp. 2d 890, 904 (N.D. Ohio 2002).

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[16] The Corps' own enforcement regulations under the RHA recognize that discretion: "Nothing contained in this part shall establish a non-discretionary duty on the part of district engineers nor shall deviation from these [enforcement] procedures give rise to a private right of action against a district supervisor." 33 C.F.R. § 326.1.

The Club cites a footnote in *Heckler* to advance the proposition that an agency's decision to forego regulation based solely on its belief that it lacks jurisdiction to do so falls outside the purview of cases committing enforcement action to agency discretion. (Appellant's Br. 41-44 (citing *Heckler*, 470 U.S. at 833 n.4).) The Club apparently contends that an agency's decision that it lacks the power to act is reviewable, even if its decision on whether and how to use that power is not. But *Heckler* is an enforcement case, and the Supreme Court expressly took no position on whether an agency decision that it lacked the power to enforce is reviewable. And in any event, the hypothetical scenario referenced in the *Heckler* footnote is inapposite to the situation presented here. The Corps did not "institute proceedings" against Kennecott (*i.e.*, assert its permitting authority) because Kennecott did not submit a permit application to the Corps. In the absence of a permit application, there is no "jurisdiction requiring permitting," as the Club contends. (*See* Appellant's Br. 43-44.) The Corps' only decision in that instance is whether to exercise its enforcement authority, which is discretionary.[17]

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[17] Even the cases cited by the Club make it clear that Corps permitting obligations and associated jurisdictional determinations arise only upon receipt of an application, or upon a Corps decision to undertake enforcement action. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1015, 1016 (M.D. Tenn. 2005) (discussing duties that arose after receipt of an application); *Nat'l Wildlife Fed'n v. Hanson*, 623 F. Supp. 1539, 1541-42 (E.D.N.C. 1985), *aff'd* 859 F.2d 313 (4th Cir. 1988) (same); *see also Nat'l Ass'n of Home Builders v. EPA*, 731 F. Supp. 2d 50, 55-56 (D.D.C. 2010) (holding that judicial review was not available until

The Club apparently finds the Corps' discretionary enforcement authority unsatisfactory or insufficient. The Club seeks an order that would trigger permitting obligations for the Corps, not just a regulated party, whenever a regulated party engages in regulated conduct anywhere in the Corps' jurisdiction. But in a world in which the Corps is forced to make a permit decision—rather than decide whether to take an enforcement action—whenever a person engages in what is arguably regulated conduct without a permit in what is arguably a jurisdictional water under the CWA or RHA, whither the Corps' enforcement authority? If the Club obtained the relief that it seeks, then permit decisions and APA review of those decisions would supplant the Corps' enforcement authority.

In this case, no permit application has been submitted; the Corps cannot make a permit decision without a permit application; and the Corps' decision to take action with respect to a person acting without a permit is an enforcement decision vested in the Corps' discretion. It is, therefore, impossible for the Club to prevail on its APA claims.[18]

"the EPA or the Corps decides to bring an enforcement action, or the corps issues an adverse permitting decision"). The Corps' contingent permitting obligations, which are triggered by receipt of a permit application, are wholly distinguishable from an agency's absolute obligation to promulgate regulations pursuant to a non-contingent statutory directive. For that reason, *Estate of Smith v. Heckler*, 747 F.2d 583, 585 (10th Cir. 1984), cited by the Club, is inapposite.

[18] The Club's alternative basis for relief against the Corps is unavailing. Like the APA, the Mandamus and Venue Act provides jurisdiction only when a govern-

3. This Court lacks subject matter jurisdiction because there is no final agency action and therefore no APA claim.

Because the Club does not have an APA claim, this Court lacks subject matter jurisdiction. Final agency action and an agency's mandatory duty to act are not only merits issues—they are jurisdictional requirements under the APA. A court lacks subject matter jurisdiction to hear claims that do not fall within the APA's scope of agency action subject to judicial review. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1127 (6th Cir. 1996). *But see McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 406, n.9 (6th Cir. 2006) (explaining that the law of the circuit under *Madison-Hughes* is that the APA is jurisdictional, but noting in dicta that whether the merits question is actually a matter of subject matter jurisdiction is "not at all clear"). Accordingly, for the same reasons that the Club has failed to show that it has an APA claim against the Corps, it has failed to show that the district court had subject matter jurisdiction.

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ment defendant has failed to perform a nondiscretionary duty. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *Buchanan v. Apfel*, 249 F.3d 485 (6th Cir. 2001); *Your Home Visiting Nurse Servs., Inc. v. Sec'y of Health & Human Servs.*, 132 F.3d 1135 (6th Cir. 1997); *Maczko*, 814 F.2d at 310; *White v. U.S. Gen. Serv. Admin.*, 343 F.2d 444 (9th Cir. 1965). The Club does not base its claim on a nondiscretionary duty of the Corps. Accordingly, the Club is not entitled to relief under the APA or the Mandamus Act.

B. The Club's claims also fail because Kennecott's activities are not subject to the RHA or CWA.

1. Kennecott's activities are not subject to the RHA.

Even if the Club had APA claims in these circumstances, those claims would still fail because the Club has not shown that Kennecott needs an RHA permit. The section of the RHA at issue in this case is Section 10, which reads as follows:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403.

Kennecott does not need an RHA Section 10 permit because (a) the relevant segments of the STR are not "navigable" waters subject to the RHA, and (b) Kennecott's activities do not affect the navigable capacity of any navigable segment of the STR.

a. The relevant portions of the STR are not "navigable" waters subject to the RHA.

The Club argues that the entire STR, including the headwaters above the ore body, is "navigable-in-law" and therefore subject to RHA jurisdiction. (Appellant's Br. 24-31.) Years ago, the Corps determined that the STR is navigable for RHA purposes only from Lake Superior to the point of the STR's confluence with Sullivan Creek—well downstream of Kennecott's mine. In other words, the headwaters of the STR above the ore body are not Section 10 waters. In light of the Corps' previous finding, and the absence of persuasive evidence showing that the Corps was wrong, the district court concluded that the Club did not show that it is likely to prevail on its claim that the entirety of the STR is navigable. (R.48, Op., PageID 1645, 1648.) The court was correct.

The RHA is not an environmental statute. Rather, it "was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures."[19] *California v. Sierra Club*, 451 U.S.

[19] "Until 1968, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's waters." 42 Fed. Reg. 37,122 (1977); 33 C.F.R. § 320.1. The RHA was the Corps' only regulatory statute until the late 1960s and 1970s when new environmental statutes were passed. Those new statutory schemes, such as the CWA, expanded the Corps' ability to regulate activities in other types of "navigable" waters. The RHA's regulatory scope remains unchanged: the RHA is limited to regulating actual use of

287, 295 (1981). Put simply, the RHA's purpose is limited to preventing impediments to the ability to use waters in commerce. *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 663 (1973); *cf. Economy Light & Power Co. v. United States*, 256 U.S. 113, 121-22 (1921) (explaining that the proper test for navigability is whether a water, even if occasionally obstructed, is "capable of being used as a highway for commerce, over which trade and travel is or may be conducted in the customary modes of trade and travel on water"). Despite the Club's claims to the contrary (*see* Appellant's Br. 36-38), the RHA applies only to a narrow class of "navigable" waters and is more limited than the CWA. *E.g.*, 33 C.F.R. § 320.1(d); 33 C.F.R. § 329.1; *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 622 (8th Cir. 1979); (R.48, Op., PageID 1644).

Consistent with RHA's underlying purpose, the regulations explain that the "[n]avigable waters of the United States" to which the RHA applies are only "those waters that are subject to the ebb and flow of the tide and/or are presently used, or

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interstate waters in commerce. Once its jurisdiction is triggered, however, the Corps is not limited to navigation concerns when deciding whether to issue a permit. Regulations direct that the Corps should engage in a "Public Interest Review" when processing a permit application, meaning that the Corps can consider issues beyond a project's effect on navigability. 33 C.F.R. § 320.4(a)(1). But "public interest" considerations, such as "conservation, general environmental concerns, historic properties, etc.," only influence whether a permit should be issued. They do not influence whether the Corps has jurisdiction over a body of water (*i.e.*, whether the water is navigable). *Id.*

have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4. "It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the *determinative factor*" in deciding whether a water is subject to the RHA. 33 C.F.R. § 329.6(a) (emphasis added).

Caselaw further emphasizes the point that the definition of "navigable waters" subject to the RHA is tied to its purpose of protecting only those waters that are actually used in commerce: "[a] navigable river is one of 'general and common usefulness for purposes of trade and commerce.'" *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449 (6th Cir. 1982) (quoting *United States v. State of Oregon*, 295 U.S. 1, 23 (1935)). A waterway is not navigable if its commercial use is "sporadic and ineffective." *Id.*

Significantly, rivers can be "navigable" for purposes of the RHA at some points and "non-navigable" at others. *See Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 634 (11th Cir. 1995); *Washington Water Power Co. v. F.E.R.C.*, 775 F.2d 305, 332 (D.D.C. 1985); *Rochester Gas & Elec. Corp. v. Fed. Power Comm'n*, 344 F.2d 594, 595 (2d Cir. 1965). Indeed, the RHA regulations specifically recognize that "[t]he character of a river *will*, at some point along its length, change from navigable to non-navigable." 33 C.F.R. § 329.11(b)

(emphasis added). In other words, even rivers that are navigable in parts have an upper limit of navigability.

The Corps is the agency responsible for making navigability determinations under the RHA.[20] 33 C.F.R. §§ 329.1, .14; *Washington Water*, 775 F.2d at 332. The Corps' Detroit District determined long before this matter that the STR is "navigable," but only to the point of confluence with Sullivan Creek, located at T52N, R27W, Sec 31. (R.19-4, Navigable Waters of U.S., PageID 765.) Sullivan Creek joins the STR close to where the STR flows into Lake Superior, approximately 20 river miles from Kennecott's mine. In other words, the "upstream extent of the [Corps'] jurisdiction" is substantially downriver from Kennecott's mine. *Id.*

The Club continues to argue that the Corps' determination "should have been disregarded in light of independent evidence that the STR is indeed navigable under the Corps' own regulations." (Appellant's Br. 25.) But none of the Club's arguments withstand scrutiny.

First, the Club cites to 33 C.F.R. § 329.7 for the proposition that the entire length of a tributary of a Great Lake is *ipso facto* navigable as a matter of law

[20] "Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts." 33 C.F.R. § 329.14(a).

under the RHA regardless of its actual characteristics.[21] (Appellant's Br. 27.) But, as the district court noted, that regulatory section, which provides that a waterbody entirely within a state may still be capable of carrying interstate commerce, especially if it connects with an ocean or one of the Great Lakes, clearly does not stand for that proposition. (R.48, Op., PageID 1647.) And the Club's interpretation is contrary to Section 329.11(b), which makes it clear that not every lateral inch of a river is navigable just because one segment of the river is navigable.

Second, the Club offers occasional log floating and recreational use of downstream portions of the STR as conclusive evidence that the entire river and its wetlands are navigable under the RHA. (Appellant's Br. 27-29.) Again, the Club cannot bootstrap evidence of activities downstream to show that the area above the ore body is navigable. *See Miami Valley Conservancy Dist.*, 692 F.2d at 449. As the district court found, the Club "has not presented any persuasive evidence of recreational use of the waters above the ore body." (R.48, Op., PageID 1647 (noting that all alleged activities took place downstream or are non-specific as to location).) And the court found that "the historic evidence is ambiguous at

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[21] The Club suggests that there is a distinction between "navigable in fact" and "navigable in law" that would support the Club's navigability argument. (Appellant's Br. 29-31.) But the Club's distinction is manufactured. "Navigable in fact . . . means navigable in law." *United States v. Harrell*, 926 F.2d 1036, 1039 (11th Cir. 1991) (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 406 & n.19, 408 (1940); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

best with respect to whether logs were transported in the [STR] in the vicinity of the Eagle Mine."[22] (*Id*. at PageID 1648.) The district court did not err in finding that the Club's evidence was not sufficient to show a likelihood of success on its claim of RHA navigability.

b. Kennecott's activities do not affect the navigable capacity of any navigable segment of the RHA.

The Club argues that Kennecott needs an RHA permit because its mine will "affect" the navigable capacity of the STR. (Appellant's Br. 32-35.) But the district court concluded that there was no evidence showing that the STR would be impacted "in such a manner as to impact on its navigable capacity." (R.48, Op., PageID 1649.) Again, the district court was correct.

The RHA does not prohibit every effect, no matter how small, on a navigable water. Rather, it prohibits only "[t]he creation of any obstruction . . . *to the navigable capacity* of any of the waters of the Unites States." 33 U.S.C. § 403 (emphasis added); *see also* 33 C.F.R. § 322.3. The Club's argument to the contrary fails because it reads the phrase "to the navigable capacity" out of the

[22] The Club was purposefully vague on this issue to create a suggestion of commercial activity at the headwaters where no evidence of such activity actually exists. For example, the Club presented evidence that there was logging near the mine site and that logs were transported on the STR (*see* Appellant's Br. 28, 57), but it presented no evidence that logs were transported at the headwaters of the STR.

statute. Indeed, even the cases cited by the Club show that not every effect on a navigable water is an effect regulated by the RHA.

An activity "affects" the navigable capacity of a water such that it is subject to regulation under the RHA only if it actually impairs the navigable capacity of the water. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708-09 (1899). Activity in a segment of a river that is not navigable is regulated under the RHA only if that activity actually impacts the navigable capacity of the water "within the limits of present navigability." *Id.* at 709-10.

So the Club is simply wrong when it asserts that any impact, no matter how small, is enough to trigger RHA jurisdiction. *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 461-63 (5th Cir. 1989) (analyzing a proposed aquarium—distinct from a park that was also the subject of contentious litigation in the case—and holding that "it [was] reasonable for the Corps to determine that the possibility of minor or inconsequential effects within the [ordinary high water line] does not impact or obstruct navigable capacity within the meaning of section 10"). The Club must show that Kennecott's activity will actually impact the navigable capacity of a navigable segment of the STR.[23] *Id.* It has failed to do

[23] The Club argues that the district court improperly required the Club to show that Kennecott's activities would "significantly" impact the navigable capacity of the STR, rather than showing "any" impact on navigable capacity. (Appellant's Br.

so. And Kennecott provided the district court with overwhelming evidence from the state permitting proceedings that any impacts to the STR, at the headwaters and downstream, would be de minimis. (*See, e.g.*, R.15-1, Tab 693, 055137-38, 055141-44, Apx. 116-121; Tab 369, 026864, Apx. 62; Tab 373, 026868, Apx. 63; Tab 367, 026860, Apx. 61); *Kennecott*, 2010 WL 276664, at *99.

2. *Kennecott does not need a CWA permit because Kennecott's mine does not involve a discharge of dredged or fill material into a regulated wetland.*

Even if CWA Section 404 were relevant to Kennecott's activities,[24] the district court properly concluded that the Club's general allegations of damaging and draining wetlands simply do not implicate Section 404—even if such damage or draining were to occur. (R.48, Op., PageID 1650-51.)

a. Kennecott is not discharging dredged or fill material.

The Club argues that Kennecott needs a permit under Section 404 of the CWA. But the district court properly held otherwise, finding that the Club's

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34-35.) But the court did no such thing. The court simply adhered to the RHA, requiring the Club to show impacts on navigable capacity—not just any impacts.

[24] In Michigan, the federal Section 404 wetlands program has been assumed by MDEQ under Part 303 of NREPA. 33 U.S.C. § 1344(g); Mich. Comp. Laws §§ 324.30301-.30329. If any wetlands permit program is applicable here, it is the state Part 303 program, not the federal 404 program. (R. 48, Op., PageID 1641-43.) Thus, the Club's Section 404 claims are meritless. Assuming for the sake of argument, however, that the Club is correct in its delineation of the delegated 404 program, Section 404 does not apply to Kennecott's conduct.

allegations of water-table drawdown and related impacts do not implicate the Section 404 permitting program. (*Id.* at PageID 1649-50.)

Section 404 is not triggered unless there is a "discharge" of dredged or fill material. *Save Our Cmty. v. EPA*, 971 F.2d 1155, 1163-64, 1167 (5th Cir. 1992). Excavation is not a "discharge." *Id.*; *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006); *Am. Mining Cong. v. U.S. Army Corps of Eng'rs*, 951 F. Supp. 267, 278 (D.D.C. 1997), *aff'd sub nom. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399 (D.C. Cir. 1998).

None of the mining activities that the Club complains of will result in a "discharge." Indeed, the Club does not even allege a "discharge." Rather, the Club's argument is based on the alleged effect of Kennecott's excavation work (*i.e.*, alleged drawdown, temperature change, change in flow, and change in reach of surface waters). Even if its excavation activities impact, affect, or drain a surface water or jurisdictional wetland, they would not require a permit.[25] *See Am. Mining Cong.*, 951 F. Supp. at 278; *Save Our Cmty.*, 971 F.2d at 1167 (dissolving an injunction and holding that "the wetlands draining activity per se does not require a section 404 permit under the CWA, as only activities involving

[25] Unlike Section 404, Kennecott's Part 632 permit does regulate potential wetland impacts not related to the discharge of dredged or fill material. The permit requires extensive monitoring of surface water, groundwater, and wetlands to prevent pollution, impairment or destruction of these resources. (R.19-3, Part 632 Permit, PageID 731-43.)

discharges of effluent necessitate obtaining such a permit"); *Great Basin Mine*, 456 F.3d at 963 ("[I]n the absence of state law to the contrary, water withdrawals are not subject to the requirements of the Clean Water Act."). Kennecott is not required to obtain a CWA Section 404 permit because there is no "discharge" into a wetland.

b. Kennecott's activities are not occurring in a wetland or any other water subject to the CWA.

Even if Kennecott's underground mining activities could be characterized as a "discharge," Kennecott still would not need a Section 404 permit. Section 404 regulates discharges to a "wetland." 33 C.F.R. § 328.3(b) (defining a wetland as an area inundated with water that supports certain types of vegetation); 40 C.F.R. § 230.3(t). Kennecott will not discharge anything to a "wetland." Rather, Kennecott's mining operations and subsequent backfill will take place well below the water table (a football field below at its highest point), in the deep bedrock and beyond the reach of Section 404.

Beyond the fact that the deep bedrock in which Kennecott will be mining cannot possibly be considered a "wetland" under Section 404, no provision of the CWA extends to groundwater—"such authority [is] to be left to the states." *Kelley ex. rel. Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985). "[T]he Clean Water Act does not attempt to assert national power to the fullest" and does not extend jurisdiction to groundwater, hydrologically connected or

otherwise. *Cooper Indus., Inc. v. Abbott Labs.*, No. 93-CV-193, 1995 WL 17079612, at *3 (W.D. Mich. May 5, 1995) (citing *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994)); *accord Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp*., 24 F.3d 962, 965 (7th Cir. 1994); *Patterson Farm, Inc. v. City of Britton, S.D.*, 22 F. Supp. 2d 1085, 1091 (D.S.D. 1998); *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320 (D. Or. 1997).

The Club, for the first time in this case, contends that "sub-surface discharges to the groundwater of the STR require a CWA permit," citing *Ass'n of Concerned Res. & Nature , Inc. v. Tenn. Aluminum Processors, Inc.*, 2011 WL 1357690, at *17 (M.D. Tenn. Apr. 11, 2011). (Appellant's Br. 40.) But that case does not help the Club. That court simply concluded that the CWA regulates groundwater only to the extent it acts as a conduit for discharges of pollutants to migrate to and "impact" surface waters of the United States. *Id*. at *14. Here, the Club complains that Kennecott's subsurface mining activity will cause flows *into* the mine that would impact surface waters, not that the subsurface activity will introduce pollutants that will migrate from groundwater to surface water. Nothing in the holding of *Aluminum Processors* or any of the cases cited therein suggests that such a connection would render bedrock groundwater subject to CWA

jurisdiction, since the connection would not result in any discharges of pollutants or fill materials to surface waters.[26]

Accordingly, even under the unreasonably expansive reading of the CWA suggested by the Club, Kennecott's underground activities are not subject to the CWA.

C. The Club's NEPA, NHPA, and ESA claims fail because the Club does not have a claim under the CWA or RHA.

NEPA, NHPA, and the ESA are all triggered only by federal actions and undertakings. *E.g.*, *Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988) (NEPA); *Nat'l Trust for Hist. Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996) (NHPA); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 640 F.3d 979, 987-88 & n.8 (9th Cir. 2011) (ESA). The only such action or undertaking even alleged by the Club is the Corps' issuance of permits under the CWA and RHA. (R.1, Compl. ¶¶ 151, 179, 188, PageID 29, 33, 35.) But the Corps has not required Kennecott to obtain these permits and has no legal obligation to do so. Accordingly, the Club's

[26] The Club argues that the district court addressed *Aluminum Processors* by concluding that the Club failed to show a hydrological connection between surface and groundwater. But that is incorrect. The court simply found that, even under the Club's expansive reading of the CWA, the Club did not show that "the nature of Kennecott's underground extraction and subsequent backfill will involve the kind of discharges that are subject to the CWA." (R.48, Op., PageID 1651.)

claims under NEPA, NHPA, and the ESA fail because there has been no federal action or undertaking triggering those statutes.[27]

II. The Club cannot show that it will suffer irreparable harm absent a preliminary injunction.

The district court held that the Club failed to carry its heavy burden of demonstrating "that irreparable injury is *likely* [and not merely possible] in the absence of an injunction." *Winter*, 555 U.S. at 22. In fact, the district court found that "[t]he timing of this action suggests an obstructive motive, rather than a sincere belief that [the Club] is being irreparably harmed by Kennecott's failure to comply with federal law." (R.48, Op., PageID 1655.) The court did not abuse its discretion.

To obtain a preliminary injunction, the Club must show irreparable harm that is certain, great, actual, not merely speculative or conjectural, and also

[27] As discussed further on page 20 of Kennecott's brief in opposition to the Club's preliminary injunction motion, the Club's claims are also barred by laches. The Club's lack of diligence is inexcusable. It has been actively involved in every piece of litigation challenging Kennecott's mine and knew as early as February 2006 that Kennecott planned to construct and operate its mine without RHA and CWA permits. Beyond that, the Club inexplicably waited over seven months after Kennecott began its underground construction—which the Club labels the "permit-dependent work"—to file this lawsuit (notwithstanding the denial of its state court stay motion). So the Club stood idly by while Kennecott invested millions of dollars in its project and created hundreds of jobs for the local community.

imminent.[28] *See Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir. 2006); *Miron v. Menominee Cnty.*, 795 F. Supp. 840, 846-47 (W.D. Mich. 1992). The purpose of this prong of the preliminary injunction test is to ensure that preliminary injunctions are issued only when they are necessary to prevent harm from occurring before a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see Garlock, Inc. v. United Seal Inc.*, 404 F.2d 256, 257 (6th Cir. 1968) (upholding the district court's decision to deny an injunction based, in part, on the determination that injunctive relief "was not necessary in order to maintain the status quo which had existed for one and one-half years before plaintiff commenced its action").

The Club failed to carry its burden here. In fact, in its brief on appeal, the Club hardly addresses this prong of the test, even though a failure to establish

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[28] The Club's suggestion that "procedural injury" in and of itself is sufficient to show irreparable harm is incorrect. The "United States Supreme Court has made it clear that violations of procedural environmental statutes do not mandate the issuance of an injunction, and that plaintiffs must still show some tangible irreparable environmental injury." *Hirt v. Richardson*, 127 F. Supp. 2d 833, 845 (W.D. Mich. 1999) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531 (1987); *Town of Huntington v. Marsh*, 884 F.2d 648 (2d Cir.1989)); *see also Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2756-57 (2010). In any event, the Club's claim of irreparable "procedural harm" rings particularly hollow given the unprecedented process the Club received at the state level—with MDEQ concluding that the environmental harms hypothesized by the Club will not occur—and the additional process the federal government undertook as part of its UIC permit review.

irreparable harm is itself cause to deny a preliminary injunction. *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991).

The harms alleged by the Club are both highly speculative and distant. And the Club's own conduct belies any argument that Kennecott's ongoing underground construction activities will cause irreparable harm at any point in time, particularly before a trial on the merits in this case.

The cataclysmic environmental harms alleged by the Club result from Kennecott's actual mining of the ore body—not from Kennecott's lengthy process of constructing the decline and getting to the ore body. This is clear from the testimony of even the Club's own witnesses at the contested case hearing. Kennecott will not begin mining the ore body before 2014. (R.15-3, Burley Decl. ¶ 5, PageID 635-36.) So even under the Club's own fanciful theories regarding the impacts of Kennecott's mine, there is no imminent threat of harm.[29]

Further, any claim by the Club that Kennecott's pre-mining underground construction activity will cause irreparable harm is disingenuous. "Since an application for preliminary injunction is based upon an *urgent* need for the protection of [a] Plaintiff's rights, a long delay in seeking relief indicates that speedy action is

[29] Even beyond that, the Club's arguments are primarily predicated on the theory that the crown pillar to the mine will collapse. But even under the Club's own fanciful theory, it could not possibly occur for years since Kennecott is mining the ore body from the bottom up.

not required." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (emphasis added, alteration in original). The Club clearly failed to seek preliminary injunctive relief with the necessary "haste and dispatch." *Id.*

The Club should not be permitted to do in "federal court what [it has] failed to do over the past six years in other fora, that is, to stop the project or change it to [its] liking." *Allens Creek/Corbetts Glen Pres. Group, Inc. v. Caldera*, 88 F. Supp. 2d 77, 78, 82 (W.D.N.Y. 2000), *aff'd sub nom. Allens Creek/Corbetts Glen Pres. Group, Inc. v. West*, 2 F. App'x 162 (2d Cir. 2001); *see also Herman Miller, Inc. v. Palazzetti Imports & Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001); *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir. 1997); *Stow v. United States*, 696 F. Supp. 857, 862-63 (W.D.N.Y. 1988); *Pearson v. U.S. Dep't of Transp.*, CIV. 07-272-PA, 2009 WL 464469, at *2-3 (D. Or. Feb. 24, 2009). The Club could have raised Kennecott's alleged failure to obtain RHA and CWA permits that it now calls "*absolute* preconditions to Kennecott's ability to legally construct or operate the Eagle Mine" that are triggered by Kennecott's "intent to mine and excavate ore located underneath the STR and wetlands" (R.1, Compl. ¶¶ 20, 195, PageID 5, 37) at any time after February 2006—when Kennecott filed its 10,000 page MPA—

which clearly signaled such an intent. Instead, the Club sat on its hands for six years.[30]

For the past six years, the Club had knowledge of Kennecott's mining project and challenged it at every stage. It challenged Kennecott's permit application in 2006, filed a contested case petition initiating a 42-day contested case hearing in 2008, filed an appeal to the state circuit court in 2010, and sought to stay underground construction of the mine in state court in 2011. Surely, given the dire consequences that the Club has alleged will result if Kennecott is not required to obtain RHA and CWA permits, Kennecott's initiation of surface facility construction in April 2010, its initiation of underground construction in September 2011, or both, should have caused the Club to sprint to court to obtain the injunctive relief that it now says it so desperately needs.[31] At a minimum, one would expect the Club to have contacted the Corps in some way to make it aware of Kennecott's conduct and to demand that the Corps require Kennecott to obtain these permits.

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[30] The dichotomy that the Club creates between so-called "permit-dependent work" (*i.e.*, any underground construction work, regardless of what it is or where it takes place) and non-permit-dependent work (*i.e.*, everything else, including Kennecott's two years of construction of its surface facilities) in order to justify its decision to wait until May 2012 to file its federal lawsuit, is completely manufactured.

[31] Indeed, even if the Club somehow thought that it could obtain injunctive relief from the state circuit court, that belief evaporated in September 2011 when the circuit court denied the Club's emergency motion to stay underground construction. The Club did not appeal that denial to the Michigan Court of Appeals and it did not file its federal lawsuit. Instead, it waited until May 2012 to yet again seek emergency relief, this time in federal district court.

(R.39, Tr., PageID 1486-89.) But it did not do any of those things, which suggests that even the Club does not seriously believe that Kennecott's pre-2014 construction activities will cause irreparable harm. The Club's inexcusable lack of diligence in seeking injunctive relief should not be rewarded to the prejudice of Kennecott, the local community, and the state.

III. Issuing a preliminary injunction would do far more harm than good.

The district court found that "[s]topping the construction of the Eagle Mine would cause substantial concrete and immediate harm to Kennecott" as well as "substantial harm to the local community in terms of lost jobs, lost tax revenue, and lost infusion of capital." (R.48, Op., PageID 1656.) The district court did not abuse its discretion in finding that the Club failed to carry its heavy burden of making a clear showing that the requested injunction would do "more good than harm." *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2748 (2010) (requiring movant to show that "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted.").

With respect to the harm suffered by Kennecott, that harm cannot be ignored merely because the Club purports to seek relief under the All Writs Act. *See Florida Med. Ass'n v. U.S. Dep't of Health, Educ. & Welfare*, 601 F.2d 199, 202

(5th Cir. 1979); *In re Dublin Securities, Inc*., 133 F.3d 377, 380-81 (6th Cir. 1997); *California Energy Comm'n v. Johnson*, 767 F2d 631 (9th Cir. 1985). And in considering the harm to Kennecott, it is not an abuse of discretion for a district court to give considerable weight to that harm even if it were, as the Club wrongly contends (Appellant's Br. 66-67), "self-inflicted." *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) ("[I]t is error to dismiss as self-inflicted the harms that might be suffered by a defendant if an injunction were to issue."). The district court did not err in considering the harm to Kennecott.[32]

The Club would like to ignore Kennecott's harm because the outcome is inevitable—distant and speculative environmental injury does not outweigh the concrete and immediate harm that Kennecott will likely suffer from an injunction.[33] *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (concluding that economic harm outweighed environmental concerns). Construction of the

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[32] Of course, even if it did, the district court's decision on this factor would still be proper because the court concluded that there was harm to not only Kennecott but also the local community (R.48, Op., PageID 1656-57), and it was not an abuse of discretion for the district court to weigh that harm to the community in deciding not to grant a preliminary injunction.

[33] *See also Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1217-18 (1972); *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc); *Natural Res. Def. Council v. Kempthorne*, 525 F. Supp. 2d 115 (D.D.C. 2007) (rejecting preliminary injunction motion to stay drilling permits, even while the plaintiffs' NEPA challenge was pending, because it would cause the energy companies to lose $4 million of their fixed bid contract and incur $63,000 per rig per day as the rigs sat idle).

mine began in April 2010, with underground construction ongoing since September 2011. (R.15-3, Burley Decl. ¶¶ 4-5, PageID 635-36.) As of May 2012, Kennecott had invested over $330 million into the mine, approximately $114 million since underground construction began in September 2011. (*Id.* ¶ 7, PageID 636.) A stay will cost Kennecott tens of millions of dollars. The district court did not err in considering that harm. *See Amoco*, 480 U.S. at 545; *Scotts Co.*, 315 F.3d at 284.

IV. Issuing a preliminary injunction would seriously harm the public interest.

The district court found that "[b]ecause [the Club] has little likelihood of success on the merits of its permitting claims, the public interest in injunctive relief is slim, and is outweighed by the public's interest in maintaining jobs, tax revenues, and capital investment in the local economy." (R.48, Op., PageID 1657.) The court did not abuse its discretion.

"[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24. The public interest favors development needed to maintain or increase jobs, tax revenues, capital investment, public services, education, and infrastructure, particularly in a struggling economy, even if it results in real, imminent, and irreparable harm to the environment (which MDEQ and the state circuit court conclusively determined does not exist here). *See, e.g.*, *McNair*, 537 F.3d at 1005 (holding that

the public interest favored "aiding the struggling local economy and preventing jobs loss" over preserving a wilderness area); *Kempthorne*, 525 F. Supp. 2d at 126-27.[34] In this case, the public harm from an injunction would be substantial.

As it did with the other two non-merits factors of the preliminary injunction test, the Club essentially ignores this factor. It does so because despite whatever generic public benefit it might claim in ensuring that the government applies the law, the fact is that in this case, the public need for Kennecott's capital investment to support the ailing economy of the Upper Peninsula is significant. Kennecott presented the district court with extensive evidence regarding the mine's economic impact on the local economy, as well as the significant royalties that the mine will generate for the State Park Endowment Fund. Specific examples and explanations are found in the eleven declarations supporting Kennecott's response to the Club's preliminary injunction motion. (R.15-2 to 19-2, PageID 630-706.) Of course, the benefits of the tax revenues, royalties, employment, and investments largely depend upon and will not begin until the nickel/copper ore is mined. (R.15-3, Burley Decl. ¶ 15, PageID 638-39.) Enjoining underground construction

[34] *See also Sierra Forest Legacy v. Rey*, 691 F. Supp. 2d. 1204, 1213-14 (E.D. Cal. 2010); *Backcountry Against Dumps v. Abbott*, 2011 WL 3567963 (S.D. Cal. Aug. 12, 2011); *Sierra Club v. U.S. Army Corps of Eng'rs*, 2005 WL 2090028 (D.N.J. Aug. 29, 2005).

jeopardizes the project's timeline and puts all of these economic contributions at risk. The district court did not err in considering that harm.

CONCLUSION AND REQUESTED RELIEF

For the above reasons, Kennecott respectfully requests that the Court affirm the district court's denial of the Club's motion for a preliminary injunction and direct the court to dismiss the Club's complaint for lack of subject matter jurisdiction or for failure to state a claim. *Munaf v. Geren*, 553 U.S. 674, 691 (2008).

Dated: January 30, 2013

s/ Daniel P. Ettinger

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation pursuant to Fed. R. App. P. 32(a)(7)(B). The foregoing brief contains 13,915 words of Times New Roman 14-point proportional type. The word processing software used to prepare this brief was Microsoft Word 2010.

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This certifies that Appellee Kennecott Eagle Minerals Company's Brief was served January 30, 2013, by electronic mail using the Sixth Circuit's Electronic Case Filing system on: Frederick W. Addison, III, Maggie B. Smith, and Carolyn A. Almassian.

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DESIGNATION OF RECORD

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1	5/6/12	Complaint	5; 23; 29; 33; 35-37
15	5/30/12	Kennecott's Brief in Opposition to the Club's Motion for Preliminary Injunction	554-588
15-1	5/30/12	Michigan Department of Environmental Quality ("MDEQ") Administrative Record Index	590-627
15-2 – 19-2	5/30/12	Eleven Declarations	630-706
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23-2	5/30/12	Opinion Affirming DNR (Michigan Court of Appeals)	1064-67

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23-3	5/30/12	Kennecott's Response to Petitioners' Part 632 Brief in Support of Petition for Review (Michigan Circuit Court)	1069-97
24-3	5/30/12	Petitioners' Brief in Support of Motion for Stay (Michigan Circuit Court)	1193-97
24-4	5/30/12	Transcript of Hearing on Motion for Stay (Michigan Circuit Court)	1201-04
24-5	5/30/12	Kennecott's Brief in Opposition to Motion for Stay (Michigan Circuit Court)	1206-41
25-1	5/30/12	Opinion Affirming MDEQ Part 632 Permit Decision (Michigan Circuit Court)	1244-351
39	6/11/12	Transcript of Hearing on Motion for Preliminary Injunction	1486-89
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