IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

PATRICIA BRAGG, JAMES W. WEEKLEY, SIBBY R. WEEKLEY, THE WEST VIRGINIA HIGHLANDS CONSERVANCY, HARRY M. HATFIELD, CARLOS GORE, LINDA GORE, CHERYL PRICE, JERRY METHENA, TOMMY MOORE, and VICTORIA MOORE,

Plaintiffs,

v. **CIVIL ACTION NO. 3:98-___**

COLONEL DANA ROBERTSON, District Engineer, U.S. Army Corps of Engineers, Huntington District, LIEUTENANT GENERAL JOE N. BALLARD, Chief of Engineers and Commander of the U.S. Army Corps of Engineers, MICHAEL D. GHEEN, Chief of the Regulatory Branch, Operations and Readiness Division, U.S. Army Corps of Engineers, Huntington District, and MICHAEL MIANO, Director, West Virginia Division of Environmental Protection,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Counts 1 through 10 below arise under the citizen suit provision of the Surface Mining Control and Reclamation Act of 1977 (The Surface Mining Act), 30 U.S.C. § 1270(a)(2). Plaintiffs allege that Defendant, the Director of the West Virginia Division of Environmental Protection (DEP), is engaged in an ongoing pattern and practice of violating his non-discretionary duties under the Surface Mining Act and the West Virginia state program approved under that statute. Defendant Miano has routinely approved surface coal mining permits which decapitate the State's mountains and dump the resulting waste in nearby valleys, burying of

hundreds of miles of headwaters of West Virginia's streams. Defendant Miano's issuance of these permits violates his non-discretionary duty to withhold approval from permit applications that are not accurate, complete, and in compliance with the approved State surface mining program.

2. Specifically, Defendant Miano has abdicated his responsibilities to withhold approval of permit applications that will result in unpermitted discharges of pollutants into state waters, violations of state water quality standards, disturbances to 100-foot buffer zones around streams, destruction of riparian vegetation, violations of the requirement to restore mined and reclaimed areas to their approximate original contours, and improper post-mining land uses.

3. Plaintiffs seek a declaration that Defendant Miano has violated his statutory responsibilities, an injunction requiring him to conform his future conduct to federal and state law, and costs and expenses, including attorneys' and expert witness fees.

4. In Counts 11 through 13 below, Plaintiffs seek relief from officials in the Huntington District office of the U.S. Army Corps of Engineers ("Corps") for their failure to carry out their statutory duties under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), the Clean Water Act, 33 U.S.C. § 1344, and the Administrative Procedure Act, 5 U.S.C. §§ 553, 706(2)(A) ("APA").

5. Plaintiffs contend that it is beyond the Corps' jurisdiction under 33 U.S.C. § 1344 to regulate such fills, because the fills are created for the disposal of waste material. Alternatively, if the Corps does in fact have jurisdiction to regulate surface mining valley fills, Plaintiffs contend that the Corps has violated NEPA by unlawfully failing to analyze the adverse and cumulative environmental impacts of filling of waters of the United States when they grant

Nationwide Permits for valley fills and surface coal mining activities in West Virginia. Finally, Plaintiffs contend that it is unlawful for the Corps to issue Nationwide Permits 21 and/or 26 for surface mining valley fills in West Virginia, because those fills have more than minimal adverse environmental impacts. To curtail the continuing effect of these errors, Plaintiffs seek (1) a declaration that the Corps has violated its statutory responsibilities, (2) an injunction requiring the Corps to conform its future conduct to federal law, and (3) an award of costs and expenses, including reasonable attorneys' and expert witness fees.

JURISDICTION AND VENUE

6. This action arises under Section 520(a)(2) of the Surface Mining Act, 30 U.S.C. § 1270(a)(2), the Clean Water Act, 33 U.S.C. §§ 1251-1387, NEPA, 42 U.S.C. §§ 4321 et seq., the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the All Writs Act, 28 U.S.C. § 1651(a). The Court has subject matter jurisdiction by virtue of 30 U.S.C. § 1270(a)(2), 28 U.S.C. §§ 1331, 1361, 1551, 2201 and 2202.

7. By certified letter dated April 16, 1998, and in a supplemental letter dated June 18, 1998, Plaintiffs gave notice of the violations and their intent to file suit to Defendant Miano, DEP, and others entitled to receive notice of intent to sue, as required by Section 520(b)(2) of the Surface Mining Act, 30 U.S.C. § 1270(b)(2), and 30 C.F.R. § 700.13.

8. More than 60 days have passed since the April 16 notice, and Defendant Miano has not redressed the violations.

9. Plaintiffs need not wait 60 days after giving the June 18 supplemental notice because the Surface Mining Act authorizes citizens to sue "immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety

of the plaintiff or would immediately affect a legal interest of the plaintiff," 30 U.S.C. § 1270(b)(2), and Defendant Miano's failure to withhold the permits at issue in this case would immediately affect the Weekleys' property interests.

10. Venue is appropriate in this judicial district pursuant to both 30 U.S.C. §1270(c) and 28 U.S.C. § 1391(e) because (a) the surface mining operations complained of are located within this district, (b) defendants Robertson and Gheen reside in this district, (c) a substantial part of the events or omissions giving rise to this action occurred in this district, and (d) the individual plaintiffs reside in this District.

PARTIES

11. Defendant Lieutenant General Joe N. Ballard is the Chief of Engineers and Commander of the U.S. Army Corps of Engineers. He is charged with the supervision and management of all Corps decisions and actions, including the evaluation of Corps decisions and actions under NEPA and section 404 of the Clean Water Act, which are the subject of this lawsuit.

12. Defendant Colonel Dana Robertson is the District Engineer for the Huntington District office of the U.S. Army Corps of Engineers in Huntington, West Virginia. The District office is responsible for issuing permits for the disposal of dredged and fill material in southern and central West Virginia under section 404 of the Clean Water Act, 33 U.S.C. § 1344.

13. Defendant Michael D. Gheen is the Chief of the Regulatory Branch, Operations and Readiness Division, in the Huntington District office of the U.S. Army Corps of Engineers in Huntington, West Virginia. He is responsible for issuing permits for the disposal of dredged and fill material in southern and central West Virginia under section 404 of the Clean Water Act, 33

U.S.C. § 1344. In this Complaint, "the Corps Defendants" refers to Defendants Ballard, Robertson and Gheen.

14. Defendant Michael Miano is the Director of DEP. He has the responsibility for administering West Virginia's approved state program under the Surface Mining Act, including the authority to approve or withhold approval of permits for surface coal mining activities under that statute. W.Va. Code § 22-3-2. For example, Director Miano has the authority to approve or disapprove a pending permit application from Hobet Mining, Inc. (SMA S-5013-97) for the Spruce Fork No. 1 Surface Mine. This operation would remove several mountaintops near Blair in Logan County, extract the coal, and dump 150 million cubic yards of waste rock into five valley fills, the largest of which would cover 1.6 miles of the stream in the Pigeonroost Branch of Spruce Fork.

15. Plaintiff James L. Weekley owns a home and one acre of land on Pigeonroost Branch in Pigeonroost Hollow, at Blair, Logan County, West Virginia. He and his wife, Plaintiff Sibby R. Weekley, have lived in this home for ten years and in the Hollow for decades.

16. The Weekleys live at the bottom of the Hollow and a few hundred yards directly downstream from the largest proposed valley fill for the Spruce Fork No. 1 mine (SMA S-5013-97). These plaintiffs and their children and grandchildren use this stream and Hollow for recreational and other activities, including swimming, fishing, hiking, nature observation and hunting.

17. As currently proposed, the Spruce Fork No. 1 Surface Mine would have numerous adverse impacts on the Weekleys' residence and throughout Pigeonroost Hollow. It would produce blasting noise audible at their residence and in the Hollow. It would cause airborne dust

to enter into and come to rest upon their property in Pigeonroost Hollow, including but not limited to the interior of their residence there. It would significantly reduce water quality and quantity in areas of Pigeonroost Branch that the Weekleys and their invitees use for recreational and other purposes. One valley fill associated with this mine would not only bury 1.6 miles of Pigeonroost Branch, but it would also would significantly reduce the quantity and variety of wildlife and aquatic life in areas of Pigeonroost Hollow that the Weekleys use for hunting, fishing and nature observation. It would cause a further population exodus from the Blair community and thereby reduce the value of the Weekleys' property and significantly diminish the quality of their lives. It would produce an ugly landscape that would further reduce the value of the Weekleys' property and significantly diminish the quality of their lives.

18. Existing mine operations near Blair have adversely affected these plaintiffs and their community. The operations proposed under Permit Application No. SMA-S-5013-97 would significantly worsen the damage the Weekleys have already suffered.

19. In addition, these plaintiffs will suffer procedural injury if defendant Miano grants the permit for the proposed mine before EPA's objections to it are resolved because plaintiffs would have to challenge the surface mining permit before the final shape, size and hydrologic impact of the proposed mining operations can be known, as described in Count 10 below.

20. Plaintiff Patricia Bragg lives on and owns a home and property on Nighway Branch in Mingo County, West Virginia. Nighway Branch is a perennial stream that Plaintiff regularly uses for recreational and domestic purposes. Nighway branch will be disturbed by valley fills associated with Mingo-Logan Mining Coal Company permits S-5066-92 and 5074-92. Plaintiff Bragg would be affected by dust, noise, and by the reduction of water quantity and quality in

Nighway Branch from the construction of the valley fills associated with the proposed operation. Her property value and aesthetic enjoyment of her property would be reduced by the proposed surface mining operation.

21. Plaintiffs Harry M. Hatfield and Marcia Hatfield own and occupy residential property in Boone County within 2500 feet of the proposed Independence Coal Company permit mountaintop removal operation, SMA S-5025-97. Spruce Fork and Pond Fork, both of which will serve as receiving streams for valley fills, serve as aquifers which supply drinking water to their home. A tributary of Spruce Fork, flows from the proposed Independence Coal mine across the Hatfield property. That tributary is used as a water supply for domestic farm animals. The tributaries contain abundant aquatic life, including fish and crayfish. The Hatfields' children and visitors use the tributaries as well as Spruce Fork for recreation. The Hatfields would be affected by dust, noise, and by the reduction of water quantity and quality in Pond Fork and Spruce Fork and their tributaries from the construction of the valley fills associated with the proposed operation. Their property value and aesthetic enjoyment of their property would be reduced by the proposed surface mining operation.

22. Plaintiffs Cheryl Price and Jerry Methena own and occupy residential property in Uneeda, West Virginia beneath the proposed Independence Coal Company permit mountaintop removal operation, SMA S-5025-97. Their property is situated along Griffith's Branch which runs into the Pond Fork River within view of their front yard. The Pond Fork River has been stocked with bass and trout, and is used by the local residents for swimming in the summer. Ms. Price and Mr. Methena purchased this house approximately 1 ½ years ago, and they were not aware at the time of the purchase of any plans for the Independence Coal Company mining

operations. These Plaintiffs would be affected by dust, noise, and by the reduction of water quantity and quality in Pond Fork and its tributaries from the construction of the valley fills associated with the proposed operation. Their property value and aesthetic enjoyment of their property would be reduced by the proposed surface mining operation.

23. Plaintiffs Carlos Gore and Linda Gore live in a house in Kelly Hollow in Blair, West Virginia. Ms. Gore grew up in the Kelly Hollow house, and has lived there for most of her life. The stream near their house has been referred to as "White Trace Creek", "George's Trace Creek", "Right Fork of Trace Creek" and "Aleshire Branch Hollow." The well used for their domestic water supply is recharged by that stream, and their cats and dogs drink from the stream. The quantity and quality of the stream water is affected by a valley fill from an active Hobet Mountaintop removal mine in Blair. These Plaintiffs have been and continue to be affected by dust, noise, and by the reduction of water quantity and quality in the stream from the construction of the valley fills associated with the active operation and they will be similarly affected by the proposed operation in Blair, SMA S5013-97. The property value and aesthetic enjoyment of their property would be and has been reduced by the active surface mining operation and would be further reduced by the proposed operation.

24. Plaintiffs Tommy and Victoria Moore own approximately one acre of land in Blair along the Spruce Fork River in 1991. The quantity and quality of water in the river are affected by an active Hobet mountaintop removal mine in Blair. There are crayfish and other fish in the river, and the Moores' children and other neighborhood children would often play in the water during the warm summer months. These Plaintiffs' property have been and continue to be affected by dust, noise, and by the reduction of water quantity and quality in the river from

the construction of the valley fills associated with the active operation and they will be similarly affected by the proposed operation in Blair, SMA S5013-97. The property value and aesthetic enjoyment of their property has been reduced by the active surface mining operation and would be further reduced by the proposed operation.

25. Plaintiff West Virginia Highlands Conservancy is a nonprofit, statewide membership organization and is one of the largest and oldest nonprofit conservation organizations in West Virginia. It publishes a monthly newsletter and maintains an active conservation-education program. It holds weekend informational meetings in the spring and fall which are open to the public and which focus on environmental issues, especially water quality, land use, and mining. The Conservancy is a leading source of information about environmental issues, especially surface coal mining and clean water issues, in West Virginia. Conservancy members frequently comment on administrative rules and testify before public bodies concerning clean water issues and valley fills associated with coal mining.

26. The Conservancy and its members are particularly concerned about the protection of streams during coal mining activities. The Conservancy has members who visit, live near, drive by and/or fly over areas of the state that are visibly affected by surface coal mining activities, including the mining operations near Blair, West Virginia. Those activities change the natural landscape in ways that offend these members' aesthetic and environmental interests. In addition, the Conservancy and its members will suffer procedural injury if Defendant Miano grants the permit for the proposed Spruce Fork No. 1 Mine before EPA's objections to it are resolved, because the Conservancy would have to challenge the surface mining permit before the final

shape, size and hydrology of the proposed mining operations can be known, as described in Count 10 below.

FACTS

27. Plaintiffs are affected by the loss and degradation of West Virginia's waters resulting from the valley fills associated with mountaintop removal surface mining operations. In mountaintop removal operations, surface mine operators remove hundreds of feet of overburden from mountaintops to expose and remove multiple coal seams.

28. The waste rock, or spoil, that is not placed back on the mountaintop is dumped in nearby valleys and streams, creating huge "valley fills" as waste disposal areas.

29. All mountaintop removal mines in West Virginia bury the headwaters of streams. Headwaters begin in the hollow or valley between the mountains, beginning their flow as ephemeral streams, then becoming intermittent, and then perennial. All of these types of streams are being filled with mining waste from mountaintop removal operations.

30. These streams contain aquatic life and are often used by nearby residents for recreational, domestic, and other purposes. The streams being filled are classified as at least Tier 1 waters under West Virginia water quality standards and many of them are high quality, Tier 2 waters.

31. The number and size of valley fills are increasing and are burying the State's headwaters at an alarming rate. The United States Fish and Wildlife Service, in a study produced by Dan Ramsey, estimated in March 1998 that 469.3 miles have been lost in just five West Virginia watersheds as a result of surface mining valley fills.

32. Plaintiffs have reviewed many of the surface coal mining applications filed with, and granted by, DEP since 1991. An analysis of those 48 applications for mines over 225 acres in size shows that nearly all of them use mountaintop removal mining[1] and have filled, or will fill, streams with mining waste. Cumulatively, those applications of over 225 acres issued since 1991 involve over 40,000 acres of mined and reclaimed land, on which more than two billion cubic yards of mining waste has or will be placed in over 200 valley fills. A table displaying this information is attached as Exhibit A and incorporated herein by reference.[2]

33. The environmental and social impacts of mountaintop removal mining extend well beyond the streams that are actually filled. Significant portions of the State's forests and mountains are destroyed. The communities below these massive operations are often devastated. The residents are effectively forced from their homes by blasting (which often cracks the walls and foundations of their houses), dust, noise, flyrock, the threat of flooding, fear that the valley fills above their homes are unstable, and the degradation of stream and well water.

34. Rather than fight constant complaints from homeowners, Arch Coal, one of largest mountaintop removal mining companies in the State, has bought more than half of the 231 houses in Blair. In Blair, the elementary school and the town's only grocery stores have closed.

[1]The phrase "mountaintop removal" has both a practical and a statutory meaning. In practice, it refers to any surface coal mine that removes a mountaintop. However, its statutory meaning is restricted to mining operations that meet certain criteria and that, in return, receive a variance that relieves the operations of the normal duty to restore the land to its approximate original contour after mining. See 30 U.S.C. § 1265(c).

[2] The number of new mountaintop removal mines permitted in the State is rapidly accelerating. "During all of the 1980's, the state issued 44 permits for mountaintop removal mines that covered a total of 9,800 acres . . . . In the last three years alone, DEP has permitted 38 new mountaintop removal mines that cover a total of nearly 27,000 acres." The Charleston Gazette, May 3, 1998.

According to plaintiff Sibby R. Weekley, a life-long resident of Blair, trying to live in the midst of the destruction resulting from one of these operations has led her to "appreciate how the Indians must have felt" as they were driven from their land.

35. Congress authorized mountaintop removal mining permits as a narrow exception to the general rule that surface mining sites must be restored to approximate original contour after mining.

36. In return for this exception, Congress expected that the flattened mountains would be used for economic development or public recreational facilities. For the most part, this promise has not been realized.

37. Few mountaintop removal mines have brought economic opportunities to the surrounding communities. Instead, these operations have destroyed the very communities that Congress intended them to benefit.

38. DEP has recently granted many permit applications for very large mountaintop removal mines in southern West Virginia. For example, one of these permit applications, filed by Hobet Mining, Inc., seeks approval for a 3113-acre (nearly five-square-mile) surface mine in Logan County near Blair. This mine, called Spruce Fork Surface Mine No. 1, would be adjacent to Hobet's existing, nearly seven-square-mile, mountaintop removal mine near Blair.

39. The Spruce Fork mine would extract coal from land at the headwaters of three watersheds, including the Pigeonroost Branch of Spruce Fork, a tributary of the Little Coal River. As it progresses down Pigeonroost Hollow through the area to be mined, Pigeonroost Branch becomes an intermittent and then a perennial stream. Most of the stream segment that would be filled is intermittent and perennial and contains abundant aquatic life. The mine would

excavate 826 million cubic yards of material and place 151 million cubic yards of this material into valley fills. According to the U.S. Environmental Protection Agency (EPA), the excavation would remove over 400 feet from the top of the mountain and the largest valley fill would cover about 1.6 miles of the main channel of Pigeonroost Branch. Other valley fills proposed by the permit application would bury other streams.

40. Hobet asked DEP for a variance from stream buffer zone requirements so that it may disturb land within 100 feet of the streams. The "disturbance" consists of placing millions of tons of waste rock in the streams.

41. As of the date of the filing of this complaint, the Hobet application in SMA-S-5013-97 fails to present any data to support Hobet's conclusory assertions that the valley fills proposed as a part of the mining operation would not (a) adversely affect the normal flow or gradient of affected streams, (b) adversely affect fish migration or related environmental values, (c) materially damage the water quantity or quality of affected streams, or (d) cause or contribute to violations of applicable State water quality standards. Consistent with DEP's pattern and practice of not requiring permit application to submit the information necessary to make an informed permitting decision, the Hobet application does not present any data regarding the effects of the proposed fill on the stream segment to be filled.

42. As is typical of the permit applications examined by Plaintiffs and summarized in Exhibit A, the Hobet application, SMA-S-5013-97, presents data which affirmatively establish that the currently proposed operations would in fact, at a minimum, (a) adversely affect the normal flow or gradient of affected streams, (b) adversely affect fish migration or related

environmental values, (c) materially damage the water quantity or quality of affected streams, and (d) cause or contribute to violations of applicable State or Federal water quality standards.

43. Hobet also asked DEP to issue a new state NPDES permit to control discharges of pollutants from the mine to the streams.

44. However, this permit would only regulate discharges from a small in-stream pond downstream from the toe of the valley fill, and not the waste rock dumped into the much larger stream segment above the pond.

45. Hobet also asked the Corps to issue a permit to authorize the discharge of fill material into the waters of the United States.

46. On May 22, 1998, in accordance with DEP's pattern and practice of ignoring regulatory requirements, including those for obtaining variances from the buffer zone requirement, Larry Alt in DEP's Logan field office found that Hobet's permit application "meets the requirements of the Rules and Regulations for surface mining set forth by the State of West Virginia for mining activities" and advised Director Miano that he "recommend[ed] that this permit be issued."

47. On June 5, 1998, EPA issued a general objection to the draft National Pollutant Discharge Elimination System (NPDES) permit for this mine pursuant to 40 C.F.R. § 123.44(b) and 33 U.S.C. § 1342(d) under the Clean Water Act. EPA stated that it was "concerned that the permit may not be in compliance with the West Virginia Water Quality Standards or the Clean Water Act." EPA stated that it would supply specific grounds for its objection, or withdraw the general objection by August 4, 1998.

48. In response to Plaintiffs' June 18, 1998 notice of intent to sue, DEP officials have indicated that they will not agree to withhold issuance of the Hobet permit until EPA's objection is resolved. However, DEP has agreed to provide plaintiffs' counsel with two days' advance notice before the permit is approved.

49. Since at least 1990, the Corps Defendants have followed a pattern and practice of issuing Nationwide General Permits 21 and/or 26 under section 404 of the Clean Water Act for valley fills associated with surface coal mining activities in West Virginia.

50. On June 22, 1998, Plaintiffs' counsel sent a letter to Defendant Gheen that asked him to state whether his office had the authority under section 404 to issue such permits. In that letter Plaintiffs also asked Defendant Gheen whether surface mining valley fills were regulated by section 404 of the Clean Water Act or by section 402. In a letter dated July 2, 1998, Gheen declined to state either that section 404 authorizes valley fills or that section 402 does not.

CLAIMS

General Allegations for Counts 1 Through 10

51. Section 520 of the Surface Mining Act, 30 U.S.C. § 1270, authorizes citizens to bring suit against the appropriate State regulatory authority "where there is alleged a failure of the . . . appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the . . . State regulatory authority."

52. Section 503(a) of the Surface Mining Act, 30 U.S.C. § 1253(a), requires each State that wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations in a state to submit a State program to the Secretary of the Interior which demonstrates that the State is capable of carrying out the provisions of the Surface Mining Act

and that the State's laws, rules and regulations meet the minimum requirements of, and are consistent with, the Surface Mining Act.

53. Effective January 21, 1981, the Secretary of the U.S. Department of the Interior, through his designee, the Office of Surface Mining and Reclamation (OSM), approved West Virginia's state program under the Surface Mining Act. 30 C.F.R. § 948.10. West Virginia's state program is contained in the West Virginia Surface Coal Mining and Reclamation Act, W. Va. Code § 22-3-1, et seq., and in state regulations implementing that state law, 38 C.S.R. § 2-1, et seq. Defendant Miano has the authority to administer this state program. W.Va. Code § 22-3-2.

54. State-promulgated regulations that comprise a federally approved state program under the Surface Mining Act are "issued pursuant to" that Act and are federally enforceable.

55. Defendant Miano has a continuing duty to implement, administer, enforce and maintain the State program in a manner consistent with that program and with the Surface Mining Act and its implementing regulations. 30 C.F.R. § 733.11.

56. According to the approved State program, Defendant Miano has a nondiscretionary duty to refrain from approving a permit application unless the application affirmatively demonstrates and Defendant Miano finds, in writing, on the basis of information set forth in the application or from information otherwise available that is documented in the approval, that the application is complete and accurate and the applicant has complied with all requirements of the West Virginia Surface Coal Mining and Reclamation Act and its implementing regulations. 38 C.S.R. § 2-3.32.d.

57. Plaintiffs have no adequate remedy at law for the claims raised herein.

Count 1

58. Section 702(a) of the Surface Mining Act, 30 U.S.C. § 1292(a), provides that nothing in that statute "shall be construed as superseding, amending, modifying or repealing" the Clean Water Act. Congress intended by this section to ensure that there is no inconsistency between mining activities and the water pollution control requirements in effect under the Clean Water Act.

59. West Virginia's approved state program provides that "discharges from areas disturbed by surface mining shall not violate effluent limitations" under the Clean Water Act. 38 C.S.R. § 2-14.5.b. Surface mining operators must protect the prevailing hydrological balance. Id. This means that they must "comply with all applicable non-Act [i.e., non-Surface Mining Act] requirements for water quality protection." 48 Fed. Reg. 30315 (June 30, 1983). Applicants for surface mining permits must also submit a hydrologic reclamation plan that contains the steps that will be taken during mining and reclamation "to meet applicable Federal and State water quality laws and regulations." 38 C.S.R. § 2-3.22.f.

60. Surface mining applications that are inconsistent with the Clean Water Act and which do not demonstrate how the operation will meet State water quality laws are not complete, accurate or in compliance with the approved State program.

61. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), makes it unlawful for any person to discharge any pollutant into navigable waters of the United States unless the discharge is in compliance with enumerated sections of that Act, including sections 402 and 404, 33 U.S.C. §§ 1342, 1344.

62. Section 402 of the Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES). EPA, and states authorized by EPA, may issue NPDES permits for the discharge of pollutants into navigable waters from point sources, if the discharger complies with the terms and conditions in such permits. EPA authorized West Virginia to issue NPDES permits in May 1982. 47 Fed. Reg. 22363. Defendant Miano administers the NPDES program for West Virginia.

63. Defendant Miano has not issued any NPDES permits for the discharge of rock and earth from valley fills into streams, even though these permits are required by section 402.

64. The construction of valley fills constitutes a "discharge of a pollutant," because it adds pollutants to waters of the United States from a point source. 40 C.F.R. § 122.2. The dump trucks, draglines, end loaders, bulldozers, and other earth- and rock-moving equipment used to transport mining spoil into valley fills are point sources, because each of these machines is a "discernible, confined and discrete conveyance," including "rolling stock." Id. The materials in valley fills are pollutants, because this term includes "dredged spoil, solid waste, . . . rock, sand, cellar dirt and . . . industrial . . . waste discharged into water." Id. In addition, the stream segments being filled (most of which are intermittent and perennial stream segments) are waters of the United States. Id.

65. Section 404 of the CWA authorizes the Secretary of the Army to issue permits for the discharge of dredged or fill material into the navigable waters of the United States at specified disposal sites. Discharges of dredged and fill material under section 404 are excluded from the NPDES permit program under section 402. 33 U.S.C. § 1342(a); 40 C.F.R. 122.3(b).

The Secretary of the Army has delegated to the Chief of Engineers of the Corps the authority to issue or deny section 404 permits. 33 C.F.R. § 323.6(a).

66. The Corps defines “fill material” as “any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody.” 33 C.F.R. § 323.2(e). This definition also states that this term “does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.” Id.

67. The primary purpose of valley fills associated with surface mining activities is to dispose of waste (i.e., mining spoil) not to create dry land or elevate a waterbody.

68. As a result, section 404 permits do not, and cannot, regulate the disposal of mining spoil in valley fills. Such spoil is a discharge of a pollutant and is therefore subject to the section 402 permit requirement.

69. Defendant Miano is engaged in a pattern and practice of approving applications for mountaintop removal surface coal mining operations without requiring the applicants to obtain NPDES permits under section 402 of the Clean Water Act for the mining spoil discharged into streams, when the fills are created by disposing of mining spoil directly into waters of the United States. As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state program.

Count 2

70. The approved State program and federal regulations establish a 100-foot wide buffer zone between streams and mining operations. The buffer zone requirement provides that “no

land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director." 38 C.S.R. § 2-5.2(a); 30 C.F.R. § 816.57. The director may grant a variance for surface mining activities "closer to or through" a stream only if he finds that such activities "will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards." Id.; 38 C.S.R. § 2-5.2(a). The Director is engaged in pattern and practice of approving buffer zone variances on the basis of applications that do not include information that supports a finding such findings.

71. The 100-foot limit in the buffer zone requirement "is used to protect streams from sedimentation and help preserve riparian vegetation and aquatic habitats." 48 Fed. Reg. 30314 (June 30, 1983).

72. Since 1990, Defendant Miano has granted buffer zone variances for dozens of surface coal mining operations without making the required findings. These variances often authorize burying large stream segments with mining spoil. As a result, in relation to just those applications which cover more than 225 acres issued since 1991, over 200 valley fills containing billions of tons of mining spoil from surface mining activities have been approved in southern West Virginia without any analysis of whether they will adversely affect the normal flow or gradient of streams, adversely affect fish migration and related environmental values, materially damage the water quantity and quality of streams, and cause or contribute to violations of applicable state water quality standards in regard to the stream segments being filled.

73. Defendant Miano is engaged in a pattern and practice of approving applications for surface mining permits that disturb areas within buffer zones without making the required findings for a buffer zone variance, in violation of 38 C.S.R. § 2-5.2(a). As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and are not in compliance with all requirements of the state program.

Count 3

74. The Director may grant a variance for surface mining activities closer than 100 feet to, or through, an intermittent or perennial stream only if he finds that such activities "will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards." 38 C.S.R. § 2-5.2(a).

75. Under this rule, Defendant Miano's authority is limited to allowing surface mining activities "closer to, or through" land within 100 feet of an intermittent or perennial stream. The rule therefore allows minor incursions but forbids Defendant Miano from approving activities that bury substantial portions of such a stream.

76. Valley fills in intermittent and perennial streams containing spoil from surface mining activities necessarily violate the buffer zone requirement because such fills bury and destroy substantial portions of intermittent or perennial streams. By their very nature, such fills adversely affect the normal flow or gradient of the stream, adversely affect fish migration and related environmental values, materially damage the water quantity and quality of the stream, and cause or contribute to violations of applicable state water quality standards in the segment of

the stream actually filled. Accordingly, Defendant Miano may not lawfully find that such activities meet the criteria for a variance from the buffer zone requirement.

77. Defendant Miano is engaged in a pattern and practice of approving applications for surface mining permits that disturb buffer zones, even though the permitted activities cannot satisfy the criteria for a variance, in violation of 38 C.S.R. § 2-5.2(a). As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state program.

Count 4

78. Permits issued pursuant to the approved state program for surface mining activities in West Virginia must ensure compliance with state water quality standards under the Clean Water Act. West Virginia's approved state program provides that "discharges from areas disturbed by surface mining shall not . . . cause a violation of applicable water quality standards." 38 C.S.R. § 2-14.5.b. Applicants for surface mining permits must also submit a hydrologic reclamation plan that contains the steps that will be taken during mining and reclamation "to meet applicable Federal and State water quality laws and regulations." Id., § 2-3.22.f. In addition, no surface mining activities may be conducted within 100 feet of intermittent or perennial streams if such activities would "cause or contribute to violations of applicable State or Federal water quality standards." Id., § 2-5.2(a).

79. Section 303 of the Clean Water Act, 33 U.S.C. § 1313, requires each state to develop water quality standards for its waters. These standards must consist of the designated uses of such waters and the water quality criteria for such waters based on such uses. 33 U.S.C. § 1313(2)(A).

80. West Virginia statutes define the waters of the state as "any and all water on or beneath the surface of the ground," including rivers, streams, creeks and branches. W.Va. Code § 22-11-4(23).

81. West Virginia water quality standards provide that, "at a minimum, all waters of the State are designated for the Propagation and maintenance of Fish and Other Aquatic Life (Category B) and for Water Contact Recreation (Category C) consistent with Clean Water Act goals." 46 C.S.R. § 1-6.1.

82. The Clean Water Act requires each state to develop an anti-degradation policy for its waters. 33 U.S.C. § 1313(d)(4)(B); 40 C.F.R. § 131.12. Pursuant to this requirement, West Virginia water quality standards provide that "existing water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 46 C.S.R. § 1-4.1.a.

83. West Virginia water quality standards also provide that "waste assimilation and transport are not recognized as designated uses." 46 C.S.R. § 1-6.1.a. No "industrial wastes or other wastes present in any of the waters of the State shall cause therein or materially contribute to "deposits . . . on the bottom" or "any other condition which adversely alters the integrity of the waters of the State." Id., § 1-3.2. In addition, "no significant adverse impact to the chemical, physical, hydrologic or biologic components of aquatic ecosystems shall be allowed." Id., § 1-3.2.i. Industrial wastes are defined to include any solid waste substance "incidental to the development, processing or recovery of any natural resources," which includes wastes from surface mining activities. W.Va. Code § 22-11-3(11).

84. By burying waters of the State beneath millions of tons of rock and dirt, valley fills from surface mines necessarily kill aquatic life in the buried part of the stream and make water

contact recreation impossible. These fills therefore violate West Virginia's anti-degradation standard.

85. Valley fills that cover streams, creeks and branches use such waters for waste assimilation, cause deposits of materials on the bottom of such waters, and adversely and significantly alter the integrity of such waters, including the physical, hydrologic and biologic components of their aquatic ecosystems.

86. Defendant Miano is engaged in a pattern and practice of approving applications for surface mining permits that cause or contribute to violations of state water quality standards. Specifically, Defendant Miano has approved permits which authorize the filling and burying of numerous streams, creeks and branches in southern West Virginia with billions of tons of mining spoil. As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the approved state program.

Count 5

87. West Virginia's approved state program provides that surface coal mine operators "shall avoid disturbances to, enhance where practicable, restore, or replace, wetlands, and riparian vegetation along rivers and streams and bordering ponds and lakes." 38 C.S.R. § 2-8.2.a.

88. Valley fills not only make it impossible to avoid disturbance to, enhance, restore or replace, riparian vegetation and wetlands, they forever destroy the wetlands and riparian vegetation along rivers and streams by burying it beneath millions of tons of mining spoil.

89. Defendant Miano is engaged in a pattern and practice of approving applications for surface mining permits that lead to the construction of valley fills and to the resulting destruction of riparian vegetation along rivers and streams in southern West Virginia. As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and fail to comply with all requirements of the state program.

Count 6

90. West Virginia's approved state program provides that each application for a surface coal mining permit "shall contain a hydrologic reclamation plan." 38 C.S.R. § 2-3.22.f. This plan must contain descriptions of, among other things, "the steps to be taken during mining and reclamation through bond release to minimize disturbances to the hydrologic balance within the permit and adjacent areas" and "to meet applicable Federal and State water quality laws." Id.; 40 C.F.R. § 780.21(h).

91. Although valley fills disturb the hydrologic balance within the permit area and violate applicable state water quality standards by burying and destroying streams, Defendant Miano is engaged in a pattern and practice of approving permits that do not contain a hydrological reclamation plan describing the steps to be taken to minimize disturbances to the hydrological balance, particularly disturbances within the permit area.

92. Defendant Miano is therefore engaged in a pattern and practice of approving applications for surface mining permits that propose to construct valley fills in streams but that fail to contain a hydrologic reclamation plan. As a result, Defendant has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state program.

Count 7

93. In granting any permit for mountaintop removal mining, the Director shall require, in part, that "no damage will be done to natural watercourses." W.Va. Code § 22-3-13(c)(4)(D).

94. Defendant Miano is engaged in a pattern and practice of approving applications for mountaintop removal mining permits that damage natural watercourses. Specifically, Defendant

Miano has granted permits that authorized the construction of valley fills and the resultant filling and burying of natural watercourses with millions of tons of mining spoil. As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state program.

Count 8

95. The Surface Mining Act requires that mined lands be returned to their "approximate original contour" (AOC). 30 U.S.C. § 1265(b)(3). Approximate original contour is defined as a "surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area . . . closely resembles the general surface configuration of the land prior to mining . . . ." Id., § 1291(2). Congress provided an exception to the AOC requirement "where the mining operation will remove an entire coal seam or seams running through the upper fraction of a mountain, ridge, or hill . . . by removing all of the overburden and creating a level plateau or a gently rolling contour . . . ." Id., § 1265(c)(2). This mining practice is known as "mountaintop removal." Id., § 1291(28)(A).

96. The Surface Mining Act and West Virginia's approved state program provide that DEP may grant a permit application for surface coal mining activities using mountaintop removal if the applicant demonstrates that several conditions are satisfied. W.Va. Code § 22-3-13(c); 30 U.S.C. § 1265(c). Among other things, the applicant must demonstrate that:

a. The proposed postmining land use is "an industrial, commercial, agricultural, residential or public facility (including recreational facilities)," 30 U.S.C. § 1265(c)(3); and

b. The applicant presents "specific plans for the proposed postmining land use and appropriate assurances that such use will be," in part:

i. "obtainable according to data regarding expected need and market," 30 U.S.C. § 1265(c)(3)(B)(ii);

ii. "assured of investments in necessary public facilities," id., § 1265(c)(3)(B)(iii);

iii. "practicable with respect to private financial capability for completion of the proposed use," id., § 1265(c)(3)(B)(v); and

iv. "planned pursuant to a schedule attached to the reclamation plan so as to integrate the mining operation and reclamation with the postmining land use," id., § 1265(c)(3)(B)(vi).

97. Defendant Miano is engaged in a pattern and practice of approving permit applications for mountaintop removal mining activities that do not meet the AOC requirement, do not propose permissible postmining land uses (but instead propose such uses as fish and wildlife habitats and recreation lands or rangeland, etc.) and do not contain the specific plans, assurances, and schedule described in paragraph 96 above. As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval of permit applications that are not complete and accurate and fail to comply with all requirements of the state program.

Count 9

98. West Virginia's approved state program provides that unless DEP has granted a mountaintop removal permit as described in Count 8 above, all reclaimed areas must be restored to their approximate original contours. W.Va. Code § 22-3-13(b)(3). "Approximate original contour" means "that surface configuration achieved by backfilling and grading of the disturbed areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain . . . ." Id., § 22-3-3(e).

99. Because valley fills are part of the reclaimed area, the AOC requirement applies to the fills as well as to the rest of the reclaimed area.

100. Defendant Miano has adopted and followed a policy that the AOC requirement does not apply to valley fills.

101. Defendant Miano is engaged in a pattern or practice of approving permit applications that do not propose to restore the valley fills and the rest of the reclaimed areas to approximate original contour even when a mountaintop removal permit as described in Count 8 above has not been granted. As a result, Defendant Miano has violated his nondiscretionary duty to withhold approval from permit applications that are not complete and accurate and in compliance with all requirements of the state program .

Count 10

102. Section 702(a) of the Surface Mining Act, 30 U.S.C. § 1292(a), provides that nothing in that statute "shall be construed as superseding, amending, modifying or repealing" the Clean Water Act. Congress intended by this section to ensure that there is no inconsistency

between mining activities and the water pollution control requirements in effect under the Clean Water Act.

103. EPA's June 5, 1998 objection represents EPA's opinion that the existing permit application and draft NPDES permit for the Spruce Fork No. 1 Surface Mine may be inconsistent with the Clean Water Act. To resolve or withdraw its objections, EPA may require that the scope and configuration of the proposed mining operations be changed to reduce its impacts on water quality, such as by changing the amount and placement of mine spoil, the size and location of valley fills, the size and location of water impoundments, and the plans for hydrologic reclamation activities.

104. Until EPA's objection is withdrawn or resolved, Defendant Miano cannot lawfully determine under the Surface Mining Act whether the permit application for the Spruce Fork No. 1 Surface Mine is complete and accurate and whether its proposed activities are consistent with the Clean Water Act If Defendant Miano issues the permit before that objection is withdrawn or resolved, his actions will be in conflict with the requirements of the Surface Mining Act and the Clean Water Act.

105. Defendant Miano is engaged in a pattern and practice of issuing permits for surface coal mining activities before EPA objections to the draft NPDES permits for those activities are withdrawn or resolved. Defendant Miano's past conduct concerning prior permits, and his recent agreement to provide only two days' notice to plaintiffs' counsel before the permit is issued, create an imminent threat that he will issue the permit for that mine before EPA's objection is withdrawn or resolved. As a result, Defendant Miano has violated, and threatens to again violate in the very near future, his nondiscretionary duty under the Surface Mining Act to

withhold approval of permit applications until they are complete and accurate and comply with all requirements of the state program.

General Allegations for Counts 11 through 13

106. The Clean Water Act establishes a general prohibition against the discharge of pollutants into waters of the United States unless a permit is first obtained, 33 U.S.C. § 1311, and it requires all persons who wish to discharge dredge or fill material into waters of the United States to first acquire a § 404 permit. See 33 U.S.C. §§ 1311(a), 1344(a). 'Waters of the United States' is defined as including "[a]ll other waters, such as intra-state lakes, rivers, streams (including intermittent streams), mudflats . . . the use, degradation, or destruction of which could affect interstate commerce or foreign commerce. 30 C.F.R. § 328.3(a)(3). Many of the streams being filled by surface mining valley fills are waters of the United States.

107. The Clean Water Act establishes a two-track system for obtaining permission to discharge dredge or fill materials to waters of the United States through either individual or general permits. See id. § 1344(a)(e). The Corps is the delegated federal agency responsible for administering the issuance of either individual or nationwide permits for the filling of waters of the United States, and has established regulations concerning their issuance. Individual permits are issued following a "case-by-case evaluation of a specific project involving the proposed discharge(s)." 30 C.F.R. § 323.2(g). Conversely, a nationwide, or general, permit is issued on a "nationwide or regional basis for a category or categories of activities . . . [that] cause only minimal individual and cumulative environmental impacts . . .. Id. § 323.2(h)(1)(2). Any permit issued by the Corps must comply with the "404(b)(1) guidelines" published by EPA at 40 C.F.R. § 230.

108. The Corps has further promulgated regulations that specify the criteria for its Nationwide Permit Program in 30 C.F.R. § 330 et seq. "Nationwide permits (NWPs) are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities having minimal impacts." Id. § 330.1(b). Activities that do not qualify for authorization under an NWP can still be permitted, but must go through the individual permitting process. See id. § 330.1(c).

109. Before issuing a general permit, the Corps must "set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated." 40 C.F.R. § 230.7(b). The Corps must document the "potential short term or long term effects" of a proposed permit, 40 C.F.R. § 230.11, and must predict its cumulative effects by estimating "the number of individual discharge activities likely to be regulated." 40 C.F.R. § 230.7(b)(3). The Corps must prepare a "precise description" of the activities to be permitted explaining why they "are sufficiently similar in nature and in environmental impact to warrant regulation under a single general permit. 40 C.F.R. § 230.7(b). The Corps may not issue a permit unless there is "sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with [404(b)(1)] guidelines." 40 C.F.R. § 230.12(a)(3)(iv).

110. The NWP permitting process generally allows a permittee to proceed with an activity authorized by an NWP with little or no notice to the Corps, however the Corps does retain the authority to intervene and mandate additional provisions to the NWP or to compel the permittee to seek an individual permit. See id. § 330.1(d). A Corps Division Engineer retains the authority to "modify, suspend, or revoke NWP authorizations for any specific geographic area, class of activities, or class of waters within his division, including on a statewide basis. Id.

330.5(c). A Corps District Engineer retains the authority to "modify, suspend, or revoke a case specific activity's authorization under an NWP" based on changes in circumstances, the adequacy of the specific conditions of the authorization, "any significant objections to the authorization not previously considered," and "cumulative adverse environmental effects occurring under an NWP . . .." Id. § 330.5(d).

111. NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its purpose is "to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." Id. § 1500.1(c). The Council on Environmental Quality ("CEQ") -- an agency within the Executive Office of the President -- has promulgated regulations implementing NEPA, which have been adopted by the Corps. See 40 C.F.R. §§ 1500-1508; see also 57 Fed. Reg. 43188 (Sept. 18, 1992).

112. To accomplish its purpose, NEPA requires that all agencies of the federal government must prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C. § 4332(2)(C). This statement -- known as an Environmental Impact Statement ("EIS") -- must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." Id.

113. "Major Federal actions" includes "actions with effects that may be major and which are potentially subject to Federal control and responsibility," including "new and continuing

activities . . .[and] projects . . . regulated or approved by federal agencies." 40 C.F.R. § 1508.18. "Significantly," takes into account both the context and intensity of a proposed action. See id. § 1508.27. The intensity of an action's impacts involves several factors, including: "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts ...." Id. § 1508.27(b)(7).

114. CEQ regulations provide for the preparation of a document known as an environmental assessment ("EA") so that agencies may determine whether a particular action may have a significant impact on the quality of the human environment and thus require preparation of an EIS. 40 C.F.R. § 1501.4.

115. The Corps's regulations also define a 'Finding of No Significant Impact' ("FONSI"): "A FONSI shall be prepared for a proposed action, not categorically excluded, for which an EIS will not be prepared." 33 C.F.R. § 230.11.

116. If an EIS must be prepared, it must include an analysis of direct and indirect environmental "effects" of the proposed action, including "cumulative" impacts and "cumulative actions." 40 C.F.R. §§ 1502.16, 1508.8, 1508.25(a)(2). A "'cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. "Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." Id. Cumulative actions are actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." Id., § 1508.25(a)(2).

117. The Corps, under the authority delegated to it by section 404 of the Clean Water Act, has issued a number of nationwide permits ("NWP"). On December 13, 1996, the Corps reissued and modified its NWP program. 61 Fed. Reg. 65874. Two of the reissued NWPs are NWP 21, which concerns activities associated with surface coal mining activities, and NWP 26, which concerns the filling of headwaters and isolated bodies of water. Id. at 65916-17.

118. The Corps completed a programmatic EA on the issuance of the modified NWPs which generically examined the impacts of NWPs on a national level and made a finding of no significant impact for all of them. See Decision Document - Nationwide Permit 21, U.S. Army Corps of Engineers (Dec. 10, 1996) ("Decision Document"). The Corps issued a FONSI for NWP 21 and 26. 61 Fed. Reg. 65879.

119. In large measure, the Corps based its FONSI on the fact that it was "substantially increasing the number of instances where a Corps review is necessary, and [that it was] requiring increased and more detailed data collection to better monitor NWP activity." 61 Fed. Reg. at 65879. Moreover, the Corps asserted that it was even "more strongly directing the Corps districts and divisions to add regional conditions for high value watersheds, and additional generalized regional conditions that will ensure that only minimal impacts will occur . . . [in order to] ensure that cumulative impacts will not be significant." Id.

120. Despite these statements, the Corps Defendants have never documented or analyzed pursuant to NEPA or its own regulations the regional or site-specific impacts of NWP 21 and 26 permits on streams in West Virginia. Nor have they added any regional conditions for NWP 21 and 26 permits in West Virginia. Instead, the Corps has a longstanding practice of approving

surface coal mining operations and associated valley fills in West Virginia without assessing their cumulative impacts.

121. The Corps' use of NWP 21 and 26 has not been limited to activities with minimal adverse environmental impacts. Hundred of miles of streams in West Virginia have been filled pursuant to NWP 21 and 26.

122. On April 30, 1996, Don Henne, the Regional Environmental Officer in the Office of Environmental Policy and Compliance in the U.S. Department of Interior office in Philadelphia, wrote a letter to EPA Region 3 requesting that EPA "consider preparation of an environmental impact statement that would evaluate the nationwide impacts" of valley fills associated with surface coal mining activities. Mr. Henne stated that he was not "aware of a complete and thorough analysis of the cumulative impacts of this practice, either for Pennsylvania or for all States where this practice is allowed." He stated that Corps review of individual Section 404 permits "would not add measurable environmental protection," because "adverse impacts may be such that mitigation is not feasible." He further stated that:

> While there was a programmatic impact statement many years ago that attempted to primarily address hydrologic balance issues, the equally important impacts to water quality, aquatic communities, riparian zones, fish and wildlife habitat, and general ecological integrity of these areas have not been analyzed, particularly for cumulative impacts. In addition, we are not aware of any valid monitoring to measure the effectiveness of approved valley fills in protection of resources, any associated mitigation, or tally the total area of habitat lost. In short, regulatory focus on this issue appears to be too frequently on consistency with approved programs without our realization of the significant and cumulative impacts of this practice.

123. The "programmatic impact statement" referred to in Mr. Henne's letter was prepared by the Office of Surface Mining Reclamation and Enforcement (OSM) when it issued the first rules concerning the permanent regulatory program under the Surface Mining Act in

1979. This EIS analyzed, among other things, the impact of spoil disposal generally and of valley and head-of-hollow fills in particular. OSM, Final Environmental Impact Statement, Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977, January 1979. However, it did not consider or evaluate the possibility that these fills would destroy any streams. The entire discussion of the impact of these fills is as follows (id. at p. BIII-40):

> (ii) Valley and head-of-hollow fills.--Disposal of excess spoil from surface mining operations in steep-slope areas poses special problems for protection of the hydrologic regime. Spoil in these areas is disposed of in valleys or hollows. Valley and head-of-hollow fills, if not properly constructed, lead to physical and chemical degradation of water through seepage and leachage discharges from the fills, erosion leading to sediment discharges, and contaminated discharges from underdrains (Grimm and Hill, 1974; U.S. Bureau of Mines, 1977a).

124. In its response to Mr. Henne's April 30, 1996 letter, Alvin Morris, the Director of the Water Protection Division in EPA's Region 3 office, wrote to Mr. Henne that "this agency shares your concerns" and that "cumulative effects are very important." He stated that "[s]everal valley fills in the same watershed could reduce the food chain, spawning areas and other necessities for supporting aquatic life." However, he did not agree to prepare an EIS. He instead suggested that cumulative impacts might be addressed "during reviews under the Corps of Engineers individual 404 permit process."

125. On August 16, 1996, Mr. Henne wrote another letter to EPA Regional Administrator Michael McCabe, reiterating his concern that valley fills posed "a serious threat to water quality and ecosystem health in areas of Pennsylvania, West Virginia" and other states. He rejected the idea that cumulative impacts could be adequately addressed in the Corps' individual 404 permit process and again requested that a full EIS be prepared.

126. On February 9, 1998, Richard V. Pepino, Director of the Office of Environmental Programs in EPA Region 3, sent a letter to Richard P. Buckley, Chief of the South Permit Section in the Huntington District of the Corps, in which Mr. Pepino discussed the proposed nationwide permit 21 for valley fills for Elkay Mining Company's Freeze Fork surface mine in Logan County, West Virginia. He stated:

> We have serious concerns resulting from the elimination of approximately 3.3 miles of stream and associated impacts. The cumulative impact of such an elimination is certainly significant and goes beyond the purpose and intent of the nationwide permit. Few could reasonably argue that this proposal would not result in significant environmental impacts either on a cumulative or an individual basis as required for projects eligible for nationwide permits. Consequently, our position is that nationwide permit 21 and the associated Environmental Assessment are not applicable for this proposal. We strongly recommend that the District Engineer take discretionary authority over this proposal by requiring an Individual permit review and separate document to comply with the procedural provisions of the National Environmental Policy Act.

127. On February 25, 1998, Defendant Gheen responded in a letter that rejected Mr. Pepino's request and declined to require an individual permit review or the preparation of an EIS under NEPA.

128. The Corps Defendants have never required an individual section 404 permit rather than a NWP 21 or 26 for valley fills associated with surface coal mining activities in West Virginia. The Corps Defendants have never prepared an EIS concerning the environmental impacts of these activities.

129. Defendant Gheen and the Corps' Huntington District have granted NWP 21 and 26 permits for many surface coal mining permit operations with associated valley fills in West Virginia since January 1997. For example, on May 28, 1996, they granted a NWP 21 permit to Hobet Mining, Inc. for its Westridge Surface Mine for a valley fill that impacted 7.0 acres of waters of the United States in Lincoln and Boone Counties, West Virginia. On August 23, 1996,

they granted a NWP 26 permit to Princess Beverly Coal Company for its Island 5 Surface Mine for a valley fill that impacted 2,925 feet of waters of the United States in Kanawha County, West Virginia. On September 15, 1997, they granted a NWP 21 permit to Independence Coal Company for its Twilight MTR Surface Mine for a valley fill that impacted 7.54 acres of waters of the United States in Boone County, West Virginia. On June 2, 1998, they granted a NWP 21 permit to Elkay Mining Company for its Freeze Fork Surface Mine for a valley fill that impacted 1.84 acres of waters of the United States in Logan County, West Virginia.

130. The Corps' NWP 26 permit allows filling of headwaters of streams, but only if the fill covers no more than 500 linear feet of stream bed. 61 Fed. Reg. 65916. When it reissued this general permit, the Corps acknowledged that "[t]he most recent data and scientific literature indicate that isolated and headwater wetlands often play an ecological role that is as important as other types of wetlands in protecting water quality, reducing flood flows, and providing habitat for many species of fish and wildlife." 61 Fed. Reg. 65891. In explaining the 500-foot limitation, the Corps stated that it was designed "to ensure that projects with potentially greater than minimal impacts will not be authorized under the NWP." Id. at 65894.

131. Despite this limitation in NWP 26, the Corps Defendants have repeatedly used NWPs 21 and 26 to authorize surface coal mining activities which will fill more than 500 linear feet of streambed. For example, they approved a NWP 21 permit for the Independence Coal Company Twilight MTR Surface Mine, which includes a valley fill that will bury two miles (over 10,000 feet) of James Creek in Boone and Raleigh Counties in West Virginia.

132. The Corps, however, may be in the process of revising its policy. Official in both the Corps' Cincinnati regional office and its Huntington District office, including Defendant

Gheen, Richard Buckley, and Rodney Woods, have, within the past several months, made statements that § 404 (and thus NWPs 21 and 26) does not and cannot authorize the disposal of mining waste in the waters of the United States. These statements have not been disclosed to the public in any written document. Huntington and Cincinnati Corps permitting officials have made these statements because they have come to believe that surface mining spoil is "waste" rather than "fill" material because it does not satisfy the primary purpose test of 33 C.F.R. § 323.2(e).[3]

Count 11

133. The failure of the Corps Defendants to prepare an EIS analyzing the cumulative environmental impacts of the issuance of, or coverage under, numerous Corps permits for valley fills in West Virginia that cover waters of the United States is contrary to NEPA, 42 U.S.C. § 4332(2)(C), and the CEQ's implementing regulations, and is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706(2).

Count 12

134. The Corps has defined "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody." 33 C.F.R. § 323.2(e). This definition also states that this term "does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act." Id.

---

[3]If the Corps has, in fact, adopted a final, legally binding position that § 404 does not authorize surface mining valley fills, the claims against the Corps alleged in this complaint would be moot.

135. The primary purpose of valley fills associated with surface mining activities is to dispose of waste (i.e., mining spoil) not to create dry land or elevate a waterbody. As a result, section 404 permits do not, and cannot, regulate the disposal of mining spoil in valley fills. Such spoil is a discharge of a pollutant and is therefore subject to the permit requirement under section 402 of the Clean Water Act.

136. The Corps Defendants are engaged in a pattern and practice of granting applications for Nationwide Permits under section 404 of the Clean Water Act for valley fills, even though those fills dispose of mining spoil directly into waters of the United States.

137. As a result, the Corps Defendants have violated the Corps' regulations and section 404 of the Clean Water Act, 33 U.S.C. § 1344, and have acted in a manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706(2).

Count 13

138. The Corps Defendants have engaged in a pattern and practice of granting applications for Nationwide Permits under section 404 of the Clean Water Act for valley fills, even though those fills have more than minimal adverse environmental impacts.

139. As a result, the Corp Defendants have violated the Corps' regulations and section 404 of the Clean Water Act, 33 U.S.C. § 1344, and have acted in a manner that is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, in violation of the APA, 5 U.S.C. § 706(2).

RELIEF

Wherefore, Plaintiffs respectfully request this Court to grant the following relief:

A. Enter a declaratory judgment that Defendant Miano has violated his non-discretionary duty under West Virginia's approved program to withhold approval of permit applications until they are complete and accurate and comply with all requirements of the state program, and in particular, that Defendant Miano is engaged in a pattern or practice of illegally approving permit applications in which:

1. Permit applicants have not applied for an NPDES permit under section 402 of the Clean Water Act for discharges of mining spoil which create valley fills and, in the process, bury waters of the United States;
2. Defendant Miano has not made and cannot make the findings required by 38 C.S.R. § 2-5.2(a) as to requests for buffer zone variances for proposed valley fills that disturb areas within 100 feet of an intermittent or perennial stream;

3. Defendant Miano has approved buffer zone variances for proposed valley fills that bury or destroy portions of intermittent or perennial streams and that do not and cannot meet the criteria for a variance;

4. Defendant Miano has failed to enforce, and prevent violations of, anti-degradation requirements, state water quality standards, and riparian vegetation protection requirements as to proposed valley fills that bury or destroy portions of waters of the United States and the State;

5. Permit applicants have not submitted a hydrologic reclamation plan to minimize, prevent or remedy the adverse hydrological consequences and environmental impacts of valley fills within both the permit and adjacent areas;

6. Permit applicants have requested permits for mountaintop removal under W.Va. Code § 22-3-13(c) and 30 U.S.C. § 1265(c) but have proposed the construction of valley fills that will damage natural watercourses, proposed postmining land uses that are impermissible, and have not included the specific plans, assurances, and schedule required by those sections for such uses;

7. Defendant Miano has taken action inconsistent with the Clean Water Act by acting on permit applications before EPA objections to the draft NPDES permits requested in those applications are withdrawn or resolved.

B. Enter a declaratory judgment against Defendant Miano that valley fills violate state water quality standards, because they destroy existing stream uses, in violation of the anti-

degradation requirement, and that they dispose of industrial waste into streams, in violation of the water quality standards' prohibition on waste assimilation.

C. Enter a declaratory judgment against Defendant Miano that valley fills cannot meet the criteria for a buffer zone variance because they adversely affect the normal flow or gradient of the stream, adversely affect fish migration and related environmental values, materially damage the water quantity and quality of the stream, and cause or contribute to violations of applicable state water quality standards.

D. Enter a declaratory judgment against all Defendants that the placing of mining spoil in valley fills is the disposal of waste, not fill, under 33 C.F.R. § 323.2(e), is not authorized by section 404 of the Clean Water Act, and is instead regulated by section 402 of that Act.

E. Enter a declaratory judgment against Defendant Miano that valley fills damage natural watercourses, and therefore cannot be authorized in a mountaintop removal permit under West Virginia Code § 22-3-13(c)(4)(D) and 30 U.S.C. § 1265(c)(4)(D).

F. Enter a declaratory judgment against Defendant Miano that the area subject to the approximate original contour requirement includes valley fills;

G. Enter a declaratory judgment against Defendant Miano that permit applications that request permits for mountaintop removal under W.Va. Code § 22-3-13(c) and 30 U.S.C. § 1265(c) but propose the construction of valley fills that will damage natural watercourses are not accurate, complete and in compliance with the approved State program.

H. Enter a declaratory judgment against defendant Miano that "fish and wildlife habitat" and "recreation lands," or a combination of the two, is not an authorized postmining land use for mountaintop removal operations under W.Va. Code § 22-3-13(c) and 30 U.S.C. § 1265(c).

I. Enter a declaratory judgment against Defendant Miano that applications requesting permits for mountaintop removal under W.Va. Code § 22-3-13(c) and 30 U.S.C. § 1265(c) which propose impermissible postmining land uses such as fish and wildlife habitat and recreation lands, or pasturelands or rangelands are not accurate, complete and in compliance with the approved State program.

J. Enter a declaratory judgment against Defendant Miano that applications requesting permits for mountaintop removal under W.Va. Code § 22-3-13(c) and 30 U.S.C. § 1265(c) which do not include the specific plans, assurances, and schedule required by those sections for such uses are not accurate, complete and in compliance with the approved State program.

K. Enter a declaratory judgment against Defendant Miano that surface coal mining permit applications are not accurate and complete and in compliance with the approved state program until EPA's objections to a related draft NPDES permit under 33 U.S.C. § 1342(d) are resolved or withdrawn.

L. Issue an order directing Defendant Miano to comply with his non-discretionary duties under West Virginia's approved state program and, in particular, to withhold approval of permit applications for surface coal mining and reclamation operations that include proposed valley fills in waters of the United States and the State unless and until:

1. Permit applicants obtain an NPDES permit under section 402 of the Clean Water Act for discharges of mining spoil that create valley fills which bury waters of the United States;
2. The permit application contains information showing that the proposed disturbance will not a) cause or contribute to the violation of applicable

State or federal water quality standards, b) adversely affect the normal flow or gradient of the stream, c) adversely affect fish migration or related environmental values, and d) materially damage the water quantity and quality of the stream. 38 C.S.R. § 2-5.2(a);

3. Defendant Miano makes each of the findings required by 38 C.S.R. § 2-5.2(a) as to requests for buffer zone variances for proposed valley fills that disturb areas within 100 feet of an intermittent or perennial stream;

4. Defendant Miano denies all buffer zone variances for proposed valley fills that bury or destroy portions of intermittent or perennial streams;

5. Defendant Miano determines that each proposed valley fill will not lead to a violation of the anti-degradation requirements, state water quality standards, and riparian vegetation protection requirements in regard to the stream segments (which are waters of the United States and of the State) to be filled;

6. Permit applicants submit a hydrologic reclamation plan to minimize, prevent or remedy the adverse hydrological consequences and environmental impacts of valley fills within both the permit and adjacent areas;

7. Defendant Miano determines that proposed valley fills authorized by permits for mountaintop removal under W.Va. Code § 22-3-13(c) and 30 U.S.C. § 1265(c) cause no damage to natural watercourses, and that permit

applicants use permissible postmining land uses and include the specific plans, assurances, and schedule required by those sections for such uses;

8. Defendant Miano determines the valley fills as well as the other reclamation areas will be restored to AOC; and

9. EPA objections to draft NPDES permits requested in permit applications are withdrawn or resolved.

M. Issue an order enjoining the Corps Defendants from granting any permits under section 404 of the Clean Water Act for any valley fills that are associated with surface coal mining activities in West Virginia and that bury or destroy streams.

N. In the alternative, if the Court finds that the Corps Defendants have the authority to issue permits under section 404 of the Clean Water Act for valley fills that are associated with surface coal mining activities in West Virginia and that bury or destroy streams, issue an order enjoining these Defendants from granting any further such permits unless and until they first prepare an EIS under NEPA concerning the cumulative effects of such activities, and unless and until they issue individual rather than nationwide permits under section 404 for such activities.

O. Award plaintiffs their costs and expenses, including reasonable attorneys' and expert witness' fees, as authorized by Section 520(d) of the Surface Mining Act, 30 U.S.C. § 1270(d), and 28 U.S.C. § 2412(d)(2)(A); and

P. Grant plaintiffs such other and further relief as this Court deems appropriate.

RESPECTFULLY SUBMITTED,

____

JOSEPH M. LOVETT
Mountain State Justice, Inc.
Suite 525
922 Quarrier Street
Charleston, West Virginia 25301
(304) 344-3144
Counsel for Plaintiffs James W. Weekley, Sibbey R. Weekley and Patricia Bragg.

____

PATRICK C. McGINLEY
737 South Hills Drive
Morgantown, West Virginia 26505
(304) 292-9822
Counsel for Plaintiffs The West Virginia Highlands Conservancy, Harry M. Hatfield, Carlos and Linda Gore, Tommy and Victoria Moore, Cheryl Price and Jerry Methena

____

SUZANNE M. WEISE
P.O. Box 343
Morgantown, West Virginia 26507-0343
(304) 292-9822
Counsel for Plaintiffs The West Virginia Highlands Conservancy, Harry M. Hatfield, Carlos and Linda Moore, Tommy and Victoria Moore, Cheryl Price and Jerry Methena

JAMES M. HECKER
Trial Lawyers for Public Justice
1717 Massachusetts Avenue, N.W., Suite 800
Washington, D.C. 20036
(202) 797-8600
Co-Counsel for Plaintiffs