

Appendix G: Settlement Agreement

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

PATRICIA BRAGG, et al.,

Plaintiffs,

v.

Civil Action No. 2:98-0636

COLONEL DANA ROBERTSON, et al.,

Defendants.

PLAINTIFFS' MOTION TO DISMISS ALL CLAIMS
AGAINST THE FEDERAL DEFENDANTS WITH PREJUDICE

Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs move to voluntarily dismiss, with prejudice, their claims against the Federal Defendants in this action-- Defendants Robertson, Ballard, and Gheen. The claims for which Plaintiffs are seeking dismissal are Counts 11, 12 and 13 of their Complaint. Plaintiffs have reached a settlement agreement with the Federal Defendants concerning these claims. A copy of this agreement is attached to this motion.

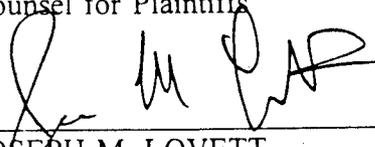
Pending the Court's ruling on this motion, Plaintiffs further move to stay their pending

motion for summary judgment on Count 12 of the Complaint.

Respectfully submitted,

JOSEPH M. LOVETT
PATRICK C. MCGINLEY
SUZANNE M. WEISE
JAMES M. HECKER

Counsel for Plaintiffs



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

AT CHARLESTON

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

Plaintiffs,

v.

CIVIL ACTION NO. 2:98-0636

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, in his
official capacity as Director of the West Virginia
Division of Environmental Protection,

Defendants.

CERTIFICATE OF SERVICE

I, Joseph M. Lovett, do hereby certify that I have served true and exact copies of the foregoing "**Plaintiffs' Motion to Dismiss All Claims Against the Federal Defendants With Prejudice**" upon counsel of record by depositing the same in the regular course of the United States Mail, postage prepaid, on this 23rd day of December, 1998, addressed as follows:

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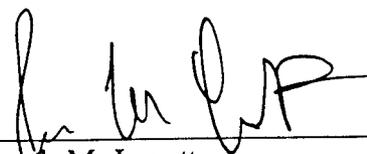
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Joseph M. Lovett

SETTLEMENT AGREEMENT

1. This Settlement Agreement is entered into this 23d day of December, 1998 (hereinafter the "Effective Date") among Plaintiffs Patricia Bragg, James W. Weekley, Sibby R. Weekley, the West Virginia Highlands Conservancy, Harry M. Hatfield, Carlos Gore, Linda Gore, Cheryl Price, and Jerry Methena and Federal Defendants 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, and Michael D. Gheen, Chief of the Regulatory Branch, Operations and Readiness Division, U.S. Army Corps of Engineers, Huntington District.

2. This Settlement Agreement resolves all of the claims Plaintiffs brought against the Federal Defendants seeking declaratory and injunctive relief against the Federal Defendants for their alleged failure to carry out their statutory duties under the Clean Water Act ("CWA"), 33 U.S.C. § 1344, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., which are the subject of the lawsuit captioned Bragg, et al. v. Robertson, et al., Civ. No. 2:98-0636 (S.D.W. Va.).

3. This Settlement Agreement is entered into voluntarily by and among each of the Plaintiffs and each of the Federal Defendants. Plaintiffs and the Federal Defendants agree to

undertake all actions required by the terms and conditions of this Settlement Agreement.

4. This Settlement Agreement shall not be construed to prejudice Plaintiffs' right to challenge actions, including the legality of valley fills in waters of the United States and waters of the State, under the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 120 et seq., and the approved state program.

5. The parties to this Settlement Agreement agree that this Settlement Agreement has been negotiated by the parties in good faith, that settlement of all the claims against the Federal Defendants in this case will avoid prolonged and complicated litigation among the parties, that this Settlement Agreement is fair, reasonable, and in the public interest in accordance with the CWA, NEPA, and the APA.

6. This Settlement Agreement is binding upon each of the Plaintiffs, and their respective heirs, successors and assigns. Any change in ownership or corporate or legal status, including but not limited to, any transfer of assets or real or personal property shall in no way alter the status or responsibilities of the Plaintiffs or the Federal Defendants under this Settlement Agreement.

RELIEF

Long-Term Approach: Environmental Impact Statement

7. The U.S. Environmental Protection Agency ("EPA"), the U.S. Army Corps of Engineers ("Corps"), the Office of Surface Mining ("OSM"), and the U.S. Fish and Wildlife Service ("FWS") (collectively the "Federal Agencies"), and the State of West Virginia Department of Environmental Protection ("WVDEP") will enter into an agreement to prepare an Environmental Impact Statement ("EIS") on a proposal to consider developing agency policies, guidance, and coordinated agency decision-making processes to minimize, to the maximum extent practicable, the adverse environmental effects to waters of the United States and to fish and wildlife resources affected by mountaintop mining operations, and to environmental resources that could be affected by the size and location of excess spoil disposal sites in valley fills. The parties intend that the EIS will be completed no later than 24 months after the Effective Date of this Settlement Agreement.

8. The Federal Agencies agree to afford Plaintiffs reasonable opportunities to meet with the Federal Agencies to inform the development of the scoping document for the EIS consistent with the provisions of NEPA.

9. Consistent with all applicable federal contracting requirements, the Federal Agencies will attempt to retain John Morgan, a mining engineer, and Bruce Wallace, a biologist, or a different mining engineer or biologist who is mutually acceptable to the parties, as consultants to assist the agencies in preparing the EIS. Plaintiffs may also nominate and the Federal Agencies will attempt, consistent with all applicable federal contracting requirements, to retain a third consultant who is mutually acceptable to the parties, to assist the Federal Agencies in preparing the EIS.

10. The parties agree that from time to time the Federal Agencies shall provide Plaintiffs, free of charge, with a copy of the documents that comprise the administrative record for the EIS. The parties further agree that EPA shall provide Plaintiffs as soon as practicable with a copy of any related public notices that EPA generates.

Interim Approach: Memorandum of Understanding

11. Prior to the completion of the EIS process and issuance of any record(s) of decision, any application for mountaintop mining operations in the State of West Virginia that would result in more than minimal adverse effects in waters of the United States will require an individual Corps permit under CWA section 404 for

all overburden and other fill material (hereafter "fill") in waters of the United States. As a general matter, any mining operation in the State of West Virginia that proposes to discharge fill in waters of the United States draining a watershed of 250 acres or more shall be considered to have more than minimal adverse effects in waters of the United States and require an individual CWA section 404 permit. The Corps and EPA will also specifically evaluate the number of watersheds to be affected by the proposed discharge of fill material to inform the Corps' determination of whether or not the cumulative adverse impact to waters associated with a particular mining operation is minimal. In addition, if the Corps determines that a discharge of fill material into waters of the United States draining a watershed of 250 acres or less would cause more than minimal adverse environmental effects (e.g., on endangered or threatened species or Federal trust resources under the FWCA) the Corps will require the processing of an individual CWA section 404 permit. If the Corps determines that the discharge of fill material into any water of the United States under an individual CWA section 404 permit or a nationwide permit may affect an endangered or threatened species, the Corps will consult with the FWS. All such proposed operations requiring an individual CWA

section 404 permit will be subject to the inter-agency process described below.

12. An inter-agency coordination process will be implemented to ensure compliance with all applicable federal and state laws and guidance, improve the permit process, and minimize any adverse environmental effects associated with excess spoil created by mountaintop mining operations in West Virginia. The inter-agency process will be governed by a Memorandum of Understanding ("MOU") entered into among the following agencies: EPA, the Corps, OSM, FWS, and the WVDEP. Under the coordination process, WVDEP will notify upon permit application the signatory agencies to this MOU of any permit application for surface coal mining and reclamation operation that would result in a discharge into waters of the United States requiring a CWA permit. Where an individual CWA section 404 permit will be required, the signatory agencies would then initiate a process of consultation and coordinated evaluation of the proposed individual permits. The goal of the process is coordinated permit decisions that minimize adverse environmental effects.

13. The process will result in the issuance or denial of a CWA section 404 permit by the Corps, a CWA section 401 certification by WVDEP, a CWA section 402 ("NPDES") permit by

WVDEP, and a permit to engage in surface mining and reclamation operations by WVDEP. The MOU will apply to all such pending and future permits described in paragraph 11 until this MOU is amended or rescinded.

14. The Corps will provide Plaintiffs with actual notice of applications for individual permits for valley fills in waters of the United States and a copy of the permit application free of charge. The Corps will also provide Plaintiffs and their designees with a reasonable opportunity to comment on each of these permit applications.

15. Consistent with controlling principles of fiscal law, EPA shall endeavor to fund or provide a position in the Corps' Huntington District to provide the Corps with technical assistance in making CWA section 404 authorization decisions for valley fills in waters of the United States.

DISMISSAL OF ACTION

16. The Plaintiffs agree to dismiss all claims against the Federal Defendants with prejudice within one business day of the Effective Date of this Settlement Agreement. The parties further agree that Plaintiffs reserve the right to challenge under the APA any future Corps' CWA section 404 authorization for any valley fill in waters of the United States that may be authorized by the Corps

after the Effective Date of this Settlement Agreement. The parties further agree that Plaintiffs shall not challenge the Corps' authority under CWA section 404 to authorize discharges of surface mining spoil into waters of the United States based on the argument that such spoil is not fill material pursuant to 33 C.F.R. § 323.2(e).

GENERAL PROVISIONS

17. The parties agree that Hobet Mining, Inc.'s Spruce Mine No. 1 (S-5013-97) is not subject to this Settlement Agreement. Plaintiffs reserve the right to challenge under the APA any Corps' CWA section 404 authorization for discharges associated with this surface mine. As a purely procedural matter, the parties agree that Plaintiffs may seek to present this challenge by amendment to the complaint rather than filing a new action. The parties further agree, however, that Plaintiffs shall not challenge the Corps' authority under CWA section 404 to authorize discharges of surface mining spoil into waters of the United States associated with Spruce Mine No. 1 (S-5013-97) based on the argument that such spoil is not fill material pursuant to 33 C.F.R. § 323.2(e).

18. Nothing in this Settlement Agreement shall be construed to require the obligation or disbursement of any funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

19. The Federal Defendants agree that they will pay Plaintiffs' reasonable attorneys' fees and expenses for the prosecution of this action. Plaintiffs will provide the Federal Defendants with an itemized fee and expenses bill within 45 days after the Effective Date of this Settlement Agreement. The parties shall endeavor in good faith to reach agreement as to the appropriate amount of attorneys' fees and expenses within 45 days following the Federal Defendants' receipt of the fees and expenses bill. If the parties are unable to reach agreement, the parties shall request the assistance of the Court in resolving the issue before it is litigated.

20. Nothing in this Settlement Agreement shall be construed to make any person or entity not executing this Settlement Agreement a third-party beneficiary to this Settlement Agreement.

21. Except as expressly provided herein, nothing in this Settlement Agreement shall be construed to limit or modify the discretion accorded the Federal Agencies by the CWA, SMCRA or general principles of administrative law. Nothing in this Settlement Agreement shall be construed to limit or modify the Federal Agencies' discretion to alter, amend, or revise from time to time any actions taken by them pursuant to this Settlement Agreement or to promulgate superseding regulations.

22. The Federal Defendants do not admit any liability arising out of the transactions or occurrences alleged in the lawsuit. The participation of the Federal Defendants in this Settlement Agreement shall not be considered an admission of liability against the Federal Defendants in any judicial or administrative proceeding other than in proceedings to enforce this Settlement Agreement.

23. This Settlement Agreement shall be governed and construed under the laws of the United States.

24. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original Settlement Agreement, and all of which shall constitute one Settlement Agreement. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

25. In computing any period of time prescribed or allowed by this Settlement Agreement, the day of the act after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

26. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by Plaintiffs and the Federal Defendants. Accordingly, the parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

27. This Settlement Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement.

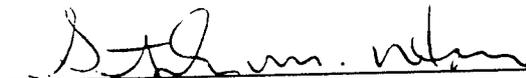
28. In the event of a disagreement between the parties concerning the interpretation or performance of any aspect of this Settlement Agreement, the dissatisfied party shall provide the other party with written notice of the dispute and a request for negotiations. The parties shall meet and confer in order to attempt to resolve the dispute within 30 days of the written notice, or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 60 days of such meeting, then Plaintiffs' sole remedy is to refile the litigation. The Federal Defendants do not waive or limit any defense relating to such litigation. The parties agree that contempt of court is not an available remedy under this Settlement Agreement.

29. The undersigned representative(s) for each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Settlement Agreement and to bind them legally to it.

THE UNDERSIGNED PARTIES enter into this Settlement Agreement in the matter of Bragg, et al. v. Robertson, et al., Civ. No. 2:98-0636 (S.D.W. Va.).

Respectfully submitted,

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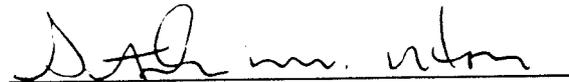


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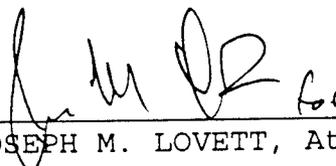
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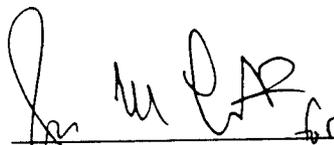


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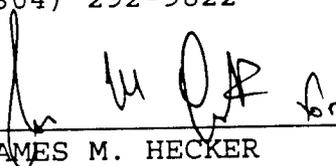
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DATE: December 23, 1998

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

FILED

JAN - 6 1999

SAMUEL L. KAY, CLERK
U. S. District & Bankruptcy Courts
District of West Virginia

PATRICIA BRAGG, et al.,

Plaintiffs,

v.

Civil Action No. 2:98-0636

COLONEL DANA ROBERTSON, et al.,

Defendants.

Plaintiffs' Motion for Leave to File a Second Amended Complaint

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, plaintiffs move this Court for leave to file a second amended complaint, and in support thereof they state as follows:

1. Plaintiffs filed their original Complaint on July 16, 1998. That Complaint contained ten counts against Defendant Miano alleging violations of his non-discretionary duties under the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (the Surface Mining Act), and three counts against the Corps Defendants alleging violations of the Clean Water Act, 33 U.S.C. § 1251, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4331, et seq.

2. Defendants filed their Answers to the original Complaint on September 14, 1998.

3. This Court's November 5, 1998 Scheduling Order provided that motions to amend pleadings were to be completed by December 5, 1998. As explained below, Plaintiffs have good cause to seek an extension of this deadline because all of the proposed changes narrow the scope of the Complaint to make it consistent with the December 23, 1998 settlement agreement between Plaintiffs and the federal Defendants..

4. On December 30, 1998, the Court granted Plaintiffs' motion for leave to file an amended Complaint. In that amended Complaint, Plaintiffs made certain corrections to their original Complaint, and added two new counts against Defendant Miano under the Surface Mining Act. These two new counts alleged similar violations of Defendant Miano's non-discretionary duties under the Surface Mining Act and involved the same course of conduct, i.e., the issuance of surface mining permits in West Virginia which are incomplete, inaccurate, and inconsistent with the requirements of that Act and the approved state program thereunder. Plaintiffs' proposed second amended Complaint includes these same two Counts and the other changes in the amended Complaint.

5. On December 23, 1998, Plaintiffs settled the claims in Counts 11, 12 and 13 of their original Complaint against the Corps Defendants. Those Counts challenged the Corps' general pattern and practice of issuing Nationwide Permits for mountaintop mining operations in West Virginia. As a part of that settlement, the Corps agreed to change its permitting policies for those operations, with the exception of the Hobet Spruce Fork No. 1 permit. In return, Plaintiffs agreed to dismiss those Counts, but reserved the right to amend their Complaint to challenge individual permitting decisions by the Corps after December 23, including the Hobet permit.

6. Plaintiffs now seek to amend their Complaint a second time to conform to the terms of the settlement agreement and to challenge the Corps' imminent decision on the Hobet permit. Plaintiffs are deleting Counts 11, 12, and 13 against the Corps, and also Count 1 against Defendant Miano, since Count 1 is based on the same allegations as Count 12. Plaintiffs have also modified other sections of the Complaint which relate to these Counts,

including the deletion of certain factual allegations, two of the three Corps defendants, and requests for relief. Plaintiffs are adding new Counts 17 and 18 against the Corps to challenge its new decision on the Hobet permit.

7. Plaintiffs have also narrowed the scope of Count 4 against Defendant Miano so that it only relates to intermittent and perennial streams and not to all waters of the United States or to all waters of the State..

8. Under Rule 15(a) of the Federal Rules of Civil Procedure, after the defendant's answer is served, a party may only amend its complaint by leave of court. Rule 15(a) states that "leave shall be freely given when justice so requires." The Federal Rules "strongly favor granting leave to amend." Medigen of Ky. v. Public Service Comm'n, 985 F.2d 164, 167-68 (4th Cir. 1993). Under Rule 15(d), the court may permit the filing of a supplemental complaint setting forth events which have happened since the date of the original complaint.

9. There is no prejudice to Defendants from these amendments because they are consistent with the settlement agreement and make the second amended Complaint narrower in scope than the original and amended Complaints. In addition, the two new Counts relate to events which have happened since Plaintiffs filed their motion to file an amended Complaint, and which involve issues which are similar to those in the original Complaint, *i.e.*, the Corps' failure to require applications for individual permits under § 404 of the Clean Water Act and to prepare environmental documents under the National Environmental Policy Act. Finally, in paragraph 17 of the December 23 settlement agreement, the Corps agreed that Plaintiffs may amend the Complaint to challenge individual permit authorizations, including Hobet's Spruce Mine No. 1 permit.

10. Plaintiffs are filing their proposed second amended Complaint with this motion.

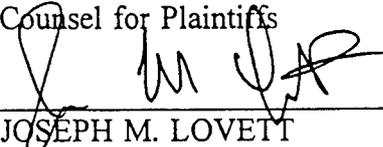
WHEREFORE, Plaintiffs request that their motion for leave to file a second amended Complaint be granted, and for all other just and proper relief to which they may be entitled.

Respectfully submitted,

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COLONEL DANA ROBERTSON, District Engineer,
U.S. Army Corps of Engineers, Huntington
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Readiness Division, U.S. Army Corps of Engineers,
Huntington District; and MICHAEL MIANO, in his
official capacity as Director of the West Virginia
Division of Environmental Protection,

Defendants.

CERTIFICATE OF SERVICE

I, Joseph M. Lovett, do hereby certify that I have served true and exact copies of the foregoing "Plaintiffs' Motion for Leave to File a Second Amended Complaint and the Second Amended Complaint" upon counsel of record by depositing the same in the regular course of the United States Mail, postage prepaid, on this 6th day of January, 1999, addressed as follows:

FILED

JAN - 6 1999

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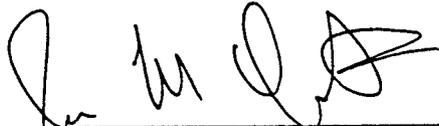
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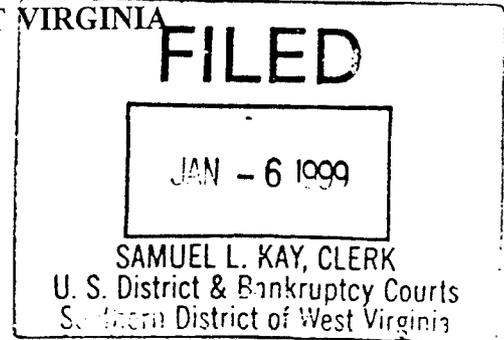
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HIGHLANDS CONSERVANCY, HARRY M.
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GORE, LINDA GORE, CHERYL PRICE, and
JERRY METHENA,



Plaintiffs,

v.

CIVIL ACTION NO. 2:98-0636

COLONEL DANA ROBERTSON, District
Engineer, U.S. Army Corps of Engineers,
Huntington District, and MICHAEL MIANO,
Director, West Virginia Division of
Environmental Protection,

Defendants.

SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Counts 1 through 10 and 14 and 15 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 unlawful 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. Plaintiffs bring Counts 16 and 17 below under the Administrative Procedure Act, 5 U.S.C. §§ 553, 706(2)(A) ("APA"), to challenge a permit to be issued under § 404 of the Clean Water Act, 33 U.S.C. § 1344, by the District Engineer in the Huntington District office of the U.S. Army Corps of Engineers ("Corps") to Hobet Mining Company for its Spruce Fork No. 1 mine near Blair, West Virginia. Plaintiffs contend that, in issuing this permit, Defendant Robertson intends to, and will, violate the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), by failing to prepare an Environmental Impact Statement (EIS) on the Spruce Fork mine, and intends to, and will, violate § 404 by failing to require Hobet to apply for an individual permit for the valley fills associated with that mine.

5. [deleted]

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) defendant Robertson resides 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. [deleted]

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. [deleted]

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 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, 5074-92 and 5019-98. 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 these proposed operations. Her property value and aesthetic enjoyment of her property would be reduced by the proposed surface mining operations.

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. [deleted]

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. dep estimates that

more than 1000 miles of wva's streams have been filled or otherwise eliminated by mining activities.

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 mining¹ 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,

¹The 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.

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. 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. 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. This permit will be issued in January 1999.

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. Plaintiffs expect that the Corps will issue this permit in January 1999.

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. EPA issued a specific objection on August 4, 1998, but withdrew that objection on December 23, 1998, after Hobet eliminated two valley fills, reduced others, and made other changes.

48. In response to Plaintiffs' June 18, 1998 notice of intent to sue, DEP officials indicated that they would not agree to withhold issuance of the Hobet permit until EPA's objection is resolved. However, DEP agreed to provide plaintiffs' counsel with two days' advance notice before the permit is approved. In violation of this agreement, DEP issued a state mining permit for the Hobet Spruce Fork mine on November 4, 1998.

49. [deleted]

50. [deleted]

CLAIMS

General Allegations for Counts 1 Through 10 and 14 Through 15

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.; 30 U.S.C. § 1260(b).

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

Count 1

58. [deleted]

59. [deleted]

60. [deleted]

61. [deleted]

62. [deleted]

63. [deleted]

64. [deleted]

65. [deleted]

66. [deleted]

67. [deleted]

68. [deleted]

69. [deleted]

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 and the segment downstream from the sedimentation ponds. 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 that affect intermittent or perennial in West Virginia must ensure compliance with state water quality standards under the Clean Water Act. 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.” 38 C.S.R. § 2-5.2(a). 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.

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 intermittent and perennial streams 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. They also degrade stream segments downstream from the fills. These fills therefore violate West Virginia’s anti-degradation standard.

85. Valley fills that cover intermittent and perennial streams use such streams 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 in intermittent and perennial streams. Specifically, Defendant Miano has approved permits which authorize the filling and burying of numerous intermittent and perennial streams in southern West Virginia with billions of tons of mining spoil. These fills in intermittent and perennial streams do not and cannot comply with State water quality standards. 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 the proposed use will constitute an equal or better use of the land, id., the watershed control of the area will be improved, W.Va. Code § 22-3-13(e), 38 C.S.R. § 2-14.12, only spoil not necessary to achieve the postmining land use may be removed from the bench, id., and:

- a. The proposed postmining land use is "an industrial, commercial, agricultural, residential or public facility (including recreational facilities)," W.Va. Code § 22-3-13(c)(3); 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), and "practicable with respect to achieving the proposed use," W.Va. Code § 22-3-13(c)(3)(B)(ii);

- ii. “assured of investments in necessary public facilities,” id., § 1265(c)(3)(B)(iii), and “supported by commitments from public agencies where appropriate,” W.Va. Code § 22-3-13(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 W.Va. Code § 22-3-13(c)(3)(B)(iv); 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) and W.Va. Code § 22-3-13(c)(3)(B)(v).

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.

106. [moved below]

107. [moved below]

108. [moved below]

109. [moved below]

110. [moved below]
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121. [moved below]
122. [deleted]
123. [deleted]
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126. [moved below]
127. [deleted]
128. [moved below]
129. [deleted]
130. [deleted]
131. [deleted]

132. [deleted]

Count 11

133. [deleted]

Count 12

134. [deleted]

135. [deleted]

136. [deleted]

137. [deleted]

Count 13

138. [deleted]

139. [deleted]

Count 14

140. Unless either a steep slope or mountaintop removal variance is granted, all surface mining operations must backfill, compact and grade to restore the approximate original contour of the land in the manner described at W.Va. Code §§ 22-3-13(b)(3) and (22); § 22-3-3 (e); 30 U.S.C. §§ 1265(b)(3) and (22); and 30 C.F.R. §§ 816.102, 816.104, 816.105, and 816.107. In situations in which neither variance has been authorized, however, Defendant Miano has established a pattern and practice of authorizing permits on the basis of applications that fail to insure that the mine site will be restored to approximate original contour as mandated by those statutes and regulations. This pattern and practice violates the Act and approved State program which require that the surface configuration achieved by backfilling and grading of the mined areas be such 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, with all highwalls, spoil piles and coal refuse piles eliminated. 30 C.F.R. § 701.5; W.Va. Code §§ 22-3-13(b)(3) and (22); W.Va. Code § 22-3-3(e).

141. Defendant Miano has established a pattern and practice of unlawfully authorizing surface mining permits on the basis of applications that show that the post-mining site will not and/or cannot be restored to approximate original contour in a manner that complies with the requirements of W.Va. Code §§ 22-3-13(b)(3) and (22) and § 22-3-3(e); 30 U.S.C. §§ 1265(b)(3) and (22); 30 C.F.R. §§ 816.102, 816.104, 816.105, and 816.107; and 30 C.F.R. § 701.5, when no variance has been proposed or approved. Specifically, Defendant Miano routinely approves surface mining permits that will not result in reclamation in which the reclaimed areas, including the valley fill areas, closely resemble the general surface configuration of the land prior to mining. This constitutes a violation of Defendant Miano's non-discretionary duties pursuant to 30 C.F.R. § 773.15(c), 38 C.S.R. § 2-3.32.d et seq., and W.Va. Code § 22-3-13(a).

Count 15

142. A mandatory prerequisite to issuance of a permit under the Surface Mining Act and the approved State program is that the permit application must comply with requirements relating to contemporaneous reclamation. 38 C.S.R. § 2-14.15 et seq.; 30 C.F.R. § 816.100. These requirements are designed to minimize total land disturbance and keep reclamation operations as contemporaneous as possible with the advance of mining operations. 38 C.S.R. § 2-14.15.a.

143. Defendant Miano has routinely approved permit applications that do not meet these contemporaneous reclamation requirements, and has routinely granted variances from these requirements that do not comply with the requirements of 38 C.S.R. §2-14.15f. For example, he has granted variances even though the permit applications (such as the application for the Spruce Fork No. 1 mine) do not include any scientific and/or engineering data which describe how site-specific conditions make compliance with contemporaneous reclamation standards technologically or economically infeasible (*id.*, § 2-14.15.f.2), do not specify alternative standards of the same type and specificity for which a standard is sought (*id.*, § 14.15.f.3), and do not include specific time frames for commencing and completing each phase of the mining and reclamation operation (*id.*, § 14.15.f.4).

144. As a result, Defendant Miano has established a pattern and practice of approving permit applications that do not meet the requirements of these rules in violation of his non-discretionary duty to deny permit applications that are not complete, accurate, and that do not comply with all of the requirements of the Act, the implementing regulations and the approved state program.

General Allegations for Counts 16 and 17

145. 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

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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.

146. 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.

147. 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 (NWP) 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).

148. 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).

149. 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).

150. 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).

151. 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.

152. “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).

153. 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.

154. 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.

155. 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).

156. 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.

157. The Corps completed a programmatic EA on the issuance of the modified NWP's which generically examined the impacts of NWP's 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.

158. 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.

159. Despite these statements, the Corps has 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 has it 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.

160. 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.

161. 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.

162. [deleted]

163. The Corps has 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 has never prepared an EIS concerning the environmental impacts of these activities. However, on December 23, 1998, in response to the original Complaint in this action, the Corps agreed, inter alia, to prepare a programmatic EIS on the adverse environmental effects of valley fills, and generally to issue individual rather than Nationwide permits under § 404 for such fills in watersheds greater than 250 acres.

Count 16

164. In January 1999, Defendant Robertson intends to issue a Nationwide Permit 21 under 33 U.S.C. § 1344 to Hobet Mining Co. for its Spruce Fork No. 1 mine near Blair, West

Virginia. This permit will authorize Hobet to construct three large valley fills associated with its surface coal mining operations. The Corps has refused to prepare any environmental assessment or EIS pursuant to NEPA concerning the direct or indirect environmental effects of this mine either individually, or cumulatively in combination with other similar mines in West Virginia.

165. The Spruce Fork mine will have significant adverse environmental effects on the human and natural environment, both individually, and cumulatively together with other similar mines in West Virginia. Defendant Robertson's refusal and failure to prepare an EIS analyzing these environmental effects 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 17

166. The Corps can issue Nationwide § 404 permits only for activities that "will cause minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment." 33 U.S.C. § 1344(e)(1). If a project has greater than this level of effects, the proponent must submit an application to the Corps for an individual § 404 permit. 33 C.F.R. § 330.1(e)(3).

167. The Spruce Fork mine will have more than minimal adverse environmental effects, both individually and cumulatively. By issuing a Nationwide Permit 21 for this mine, rather than requiring Hobet to apply for an individual permit, Defendant Robertson intends to, and will, violate § 404 of the Clean Water Act, 33 U.S.C. § 1344, and the Corps' regulations

thereunder, and intends to, and will, act 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. [deleted];
2. Defendant Miano has not made 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 require the protection of riparian vegetation 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;
8. Permit applicants have not received a variance from the requirement to restore the reclamation area to approximate original contour and in which the permit applications show that the proposed reclamation areas will not be restored to approximate original contour; and
9. Permit applicants have not demonstrated how or whether they will satisfy the contemporaneous reclamation standards, or the requirements for variances from those standards, set forth at 38 C.S.R. § 2-14.15 et seq.

B. [deleted]

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, and materially damage the water quantity and quality of the stream. They also cause or contribute to violations of applicable state water quality standards in intermittent and perennial streams 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..

D. [deleted]

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 unless and until:

1. [deleted];
2. The permit application contains information showing that the proposed disturbance will not violate the buffer zone requirements in intermittent or perennial streams by a) causing or contributing to the violation of applicable State or federal water quality standards, b) adversely affecting the normal flow or gradient of the stream, c) adversely

affecting fish migration or related environmental values, and d)
materially damaging 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 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;
9. EPA objections to draft NPDES permits requested in permit applications are withdrawn or resolved;
10. Permit applications show that the reclamation areas will be restored to approximate original contour or until the application has received a valid variance from that requirement; and
11. Permit applications satisfy the standards for contemporaneous reclamation or until Defendant Miano carries out his non-discretionary duty to require a complete and accurate variance request that complies with the requirements of the approved State program.

M. Issue an order enjoining Defendant Robertson from granting, or ordering him to revoke, a Nationwide 21 permit under § 404 of the Clean Water Act to Hobet Mining Company for its Spruce Fork No. 1 mine.

N. Issue an order enjoining Defendant Robertson from granting any permit or authorization under § 404 of the Clean Water Act to Hobet Mining Company for its Spruce Fork No. 1 mine unless and until the Corps first prepares an EIS under NEPA that adequately analyzes the individual and cumulative environmental effects of that mine on the human and natural environment.

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.

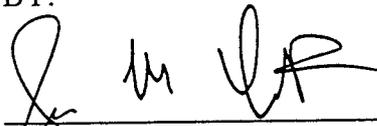
RESPECTFULLY SUBMITTED,

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