

Via e-mail to: mountaintop.r3@epa.gov (3 pages)

2616 Mountain Brook Pkwy.
Birmingham, Alabama 35223
January 5, 2004

Environmental Protection Agency, Region 3
1650 Arch Street
Philadelphia, Pennsylvania

Gentlemen:

We write to supplement the comments on the Draft EIS for Mountaintop Mining/Valley Fill submitted by some 20 conservation agencies under date of December 30, 2003 ("the main comment letter"). We strongly urge -- and submit that it would be in the national interest -- that the present "preferred alternative" be withdrawn and reissued for public comment and (i) that an alternative containing environmental constraints like those advocated in the main comment letter be adopted and (ii) that filling all but the smallest ditches and ones with no free-flowing streams be strictly prohibited. We urge that any other alternative would be arbitrary and capricious and in violation of law, a position that the Administration should strongly avoid. We urge particularly:

(1) Great Biodiversity of Mountaintop and Ridgeline Forests -- The great biodiversity of the forests of the Southern Appalachians and Cumberland Plateau has been stressed in the main comment letter. These include sensitive bird species documented by the scientists working for Partners-in-Flight, the consortium of government agencies like the Fish & Wildlife Service and U.S. Forest Service and nongovernmental organizations, as well as salamanders, frogs and other amphibians (which are important enough even "to make" a recent issue of U.S. postage stamps). The birds include neotropical migrants such as the Wood Thrush, Kentucky Warbler, Ovenbird, Acadian Flycatcher and others, many of which have lost 50% of their population over the last 30 years. Further, this area is the world center for salamanders, very sensitive species of which there are more species here than anyplace else in the world!

One of the neotropical migrants is the Cerulean Warbler, one of the most beautiful little birds on the planet. The adverse impacts on it of this mountaintop mining is documented by the studies reported in the main comment letter. But, please just note that this mining will adversely impact 380,000 acres of its mountain/ridge habitat. Scientific estimates are that, over ten years, there will be a loss of over 135,000 birds, which could well be more than this species can absorb.. Consequently, it is essential that environmental constraints be included in the alternative that is adopted.

(2) Great Biodiversity of Riverine Forests -- These are one of the most productive, yet declining, habitats on earth. This is true for birds, mammals, fish and amphibians as well as trees and other plantlife. In fact, these are part of what was known, when the country was settled, as the Great Eastern Deciduous Forest. It should be unthinkable to destroy the riverine part of them by just dumping mining overburden on them! We asked at a meeting if the mining companies could not truck out the overburden spoil somewhere else and were advised that they opined, "That would be too expensive." If it is too expensive to avoid destroying riverine forests, then it should obviously be too expensive to carry out the project!

(3) Lack of Cost-Effectiveness -- Destroying riverine forests is not cost-effective for many reasons. Among them, assimilation of wastes, recharge of groundwater, protection of biodiversity and protection of all types of natural resources (see above). It would cost government entities (and private organizations) much more to restore these resources -- and over a substantial time -- than could be gained from destroying them. Consequently, if the mining overburden spoil cannot be taken elsewhere, the mining project should not be carried out.

Reference has been made above and in the main comment letter to the adverse impacts on sensitive species. The Cerulean Warbler, for example, is under consideration for listing under the Endangered Species Act. It takes government (as well as private entities) much expense and much time to attempt to recover a species once its numbers have declined so that it is threatened or endangered. Consequently, it is not cost-effective to conduct any activities that would place them in that condition.

Consideration should also be given to destruction of scenic vistas and lost natural recreational activities from mountaintop mining and destroyed water resources. These represent lost recreational resources and tourist revenues that are costs that should also be taken into consideration.

(4) Violation of Administrative Procedures Act (“APA”)-- Federal agencies are constrained by the APA (5 USC 701 et seq.) not to adopt any actions that are (i) arbitrary, (ii) capricious, (iii) an abuse of discretion, or (iv) otherwise not in accordance with law, in this case, the National Environmental Policy Act (“NEPA”). The agency cannot, under law, merely disregard environmental factors. That would be a violation of NEPA and APA. Applied to this case, an action not giving adequate consideration to the factors referred to in (1) through (3) above and in the main comment letter, particularly since they have been documented by scientific studies or are facts of general knowledge, would be unlawful.

APA applies to all forms of government action, environmental as well as otherwise. Motor Vehicle Mfgs. Asso. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 at 43, 77 L.Ed.2d 442 at 458 (U.S. Supreme Court, 1983) (holding rescision of regulation requiring passive restraints in automobiles was arbitrary and capricious); Audubon Society of Central Arkansas v. Dailey, 977 F.2d 428 (8th Cir. 1982) (arbitrary and capricious choosing of alternatives by Corps of Engineers); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774 at 784 (9th Cir. 1980) (per Mr. Justice Kennedy, then writing for the Ninth Circuit, holding a highway EIS defective for not evaluating an improved two-lane road); and ILGU v. Donovan, 722 F.2d 795 (D.C. Cir. 1983) (holding action of Secy. of Labor, in eliminating restrictions on counting homework in setting wage rates, was arbitrary and capricious).

In State Farm, the Supreme Court stated, “The agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. . . .and whether there was a clear error of judgment.” In Donovan, referring to the CEQ Regs, 40 CFR 1502, that it is arbitrary for an agency to limit its consideration of alternatives, the court held that artificially narrowing his alternative options was “antithetical to reasoned decisionmaking and cannot be upheld, citing State Farm.” Then, in the Arkansas case, it

was held that, while the agency must take a “hard look” at the facts, it must take action on what that “hard look” showed and not “ignore what it saw.” It is instructive that in Canyon Preservation, the Court, through now Mr. Justice Kennedy writing for the Ninth Circuit, held in a highway case that a two-lane road must be evaluated. That would translate to a different type of mountaintop mining as applied here, i.e. one with environmental constraints.

It appears that here the lead agency is being directed to limit its consideration of alternatives and would not be taking an action based on the known and established facts, i.e. would be ignoring what the required “hard look” shows. That is a violation of APA as well as NEPA and it would appear should also be a violation on the part of the officials directing that violation. We do not believe that is an action the Administration would intend be taken, especially at times like these. And, further, in times like these with the present budgetary deficits, it would appear the government should avoid all actions that are not cost-effective. For that reason, these comments are being sent to the OMB.

For the above reasons, these comments are submitted in behalf of the Alabama Audubon Council, Alabama Environmental Council and Alabama Ornithological Society, which have an aggregate of over 10,000 members in Alabama and surrounding states. Each of those organizations is strongly concerned over protection of all of our natural resources, and, for the same reasons, these comments are concurred in by the undersigned as an interested citizen and taxpayer. Your consideration will be greatly appreciated.

Sincerely yours,

/s/ Robert R. Reid, Jr.

Robert R. Reid, Jr., for himself and
the above three organizations

cc: Director, Office of Management and Budget
Commenting organizations