

In The  
**Supreme Court of the United States**

—◆—  
OHIO VALLEY ENVIRONMENTAL  
COALITION, et al.,

*Petitioners,*

v.

UNITED STATES ARMY CORPS  
OF ENGINEERS, et al.,

*Respondents.*

—◆—  
**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

—◆—  
**MOTION OF THE WEST VIRGINIA COUNCIL  
OF CHURCHES FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE AND BRIEF AMICUS CURIAE  
IN SUPPORT OF PETITIONERS**

—◆—  
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**MOTION FOR LEAVE TO FILE BRIEF  
OF THE WVCC AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

Pursuant to this Court's Rule 37.2(b), the West Virginia Council of Churches ("WVCC") hereby moves for leave to file the attached *amicus curiae* brief in support of the petition for certiorari in this case.

WVCC includes fourteen denominations, representing approximately 2,500 congregations and 600,000 members throughout the state. WVCC advocates for the protection of the forests and watersheds of West Virginia, not simply because of the spiritual values they embody but also because the welfare of the communities it serves depend on the protection of these resources. WVCC also assists communities with disaster relief, convening training sessions in disaster preparedness, response and recovery, and coordinating disaster relief efforts.

WVCC is in a unique position to aid the Court in its consideration of the issues presented. Through its disaster response and relief efforts, it has witnessed first-hand the human impacts of mountain-top removal mining on the coal field communities of West Virginia. WVCC's brief will describe the true cost of the Corps' failure to comply with the requirement to evaluate the adverse effects of its mountaintop mining permit actions on WVCC members and those to whom they minister.

Counsel for proposed *amicus* made a good-faith effort to obtain the consent of all parties to the filing

of their brief. On September 10, 2009, WVCC sent a facsimile notice and request for consent for the filing of an *amicus curiae* brief to counsel for all parties. Petitioners and the Solicitor General have consented to the filing of this brief. WVCC has not received consent from any of the coal company respondents.

Wherefore, WVCC respectfully moves for leave to file this brief.

Respectfully submitted,

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## **INTEREST OF THE *AMICUS CURIAE***

Pursuant to Supreme Court Rule 37, West Virginia Council of Churches (“WVCC”) respectfully submits this *amicus curiae* brief in support of Petitioner Ohio Valley Environmental Coalition, *et al.*<sup>1</sup>

WVCC, one of the oldest institutions in the state of West Virginia, will celebrate its 130th anniversary in 2010. Today, WVCC includes fourteen denominations, representing approximately 2,500 congregations and 600,000 members throughout the state. Its members – a racially, ethnically, economically, and socially diverse group – work together towards common goals. Informed by their faith and mission, WVCC and its members are active in areas of social justice; children’s health; and economic and environmental issues. Significant to this case, WVCC and its members also assist communities with disaster relief, convening training sessions in disaster preparedness, response and recovery, coordinating disaster relief efforts, and providing long term support to communities in crisis.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of WVCC’s intention to file this brief at least 10 days prior to its due date. Counsel for Petitioners and the Solicitor General have consented to the filing of this brief, and their letters of consent have been placed on file with the Clerk. On September 24, 2009, counsel for Intervenor-Respondents coal companies sent an electronic message stating they would not consent to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

WVCC and its members share a spiritual belief that West Virginia's mountains – home to a temperate rainforest full of unique plants, trees, flowers, and wildlife, and a remarkable variety of resident and migratory birds – exemplify the beauty of creation.<sup>2</sup> WVCC members believe they have a moral duty to steward these resources for the benefit of current and future generations.

WVCC advocates for the protection of the forests and watersheds of West Virginia, not simply because of the spiritual values they embody but also because the welfare of the communities it serves depend on the stewardship of these resources. They have been called on to help communities throughout West Virginia whose wells have dried up or been contaminated by mountaintop removal mining practices; whose homes in denuded valleys have been flooded; or who have been forced to leave their homes and communities because of the threats to their health and safety posed by nearby mines. They have worked with displaced communities in which miners and their families have worked and lived for generations.

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<sup>2</sup> See NASA Earth Observatory, *Coal Controversy in Appalachia* (Dec. 21, 2007), available at <http://earthobservatory.nasa.gov/Features/MountaintopRemoval/> (last visited Sept. 16, 2009) (noting that the Appalachian Mountains contain “some of the world’s most biologically diverse forests outside of the tropics.”).

WVCC thus has a substantial interest in this case. The practice of mountaintop removal mining threatens the health and welfare of WVCC members and communities and increases demand for WVCC's services. WVCC and its members minister to the spiritual and material needs of communities affected by the floods and landslides associated with mountaintop removal mining and have witnessed firsthand the devastating impacts this practice has on their lives. Their faith compels them to bear witness to this profound injustice and seek balance between the protection and use of the region's resources.



### **SUMMARY OF ARGUMENT**

This case concerns the issuance of four permits issued by the U.S. Army Corps of Engineers ("Corps") pursuant to Section 404 of the Clean Water Act ("CWA"). 33 U.S.C. §1344 (2006). As the courts below and Petitioners document, these permits authorize the burial of twenty-three valleys and more than thirteen miles of streams. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 187 (4th Cir. 2009). Although the Corps conceded the damage will be significant and permanent, *see* App. 90a, 138a, it concluded that mitigation would reduce the damage to insignificance. This determination allowed the Corps to avoid preparing an Environmental Impact

Statement pursuant to the National Environmental Policy Act (“NEPA”). *See* 42 U.S.C. §4332(1)(C) (2006).

The Corps based its evaluation on an analysis of stream structure – but not function – in contravention of the explicit mandate of CWA regulations. *See* 40 C.F.R. §230.11(e). By failing to assess the impacts of the discharges on stream function, it discounted the relationship between stream function and health and welfare and avoided the “hard look” at the human impacts that both NEPA and the CWA require. *See* 42 U.S.C. §4332(C); 33 C.F.R. §325.3(c)(1) (requiring an evaluation of impacts on “the public interest”); 40 C.F.R. §230.10(c) (requiring consideration of “[s]ignificantly adverse effects on “human health and welfare” and “recreational, aesthetic, and economic values” in determining whether “significant degradation” has occurred under Section 404 of the CWA).

The District Court correctly held that the Corps was required to study both the direct and cumulative impacts on human health and welfare and on the recreational, aesthetic and economic values of the region. *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng’rs*, 479 F. Supp. 2d 607, 624 (2007). The Fourth Circuit reversed and improperly deferred to the Corps’ Finding of No Significant Impact. This decision allows the Corps to proceed with permit issuance without a full assessment and disclosure of the impacts to the environment beyond the aquatic

ecosystem as required by NEPA. It also paves the way for the issuance of dozens more permits<sup>3</sup> that, individually and cumulatively, threaten the health, livelihood and communities of the people WVCC and its members serve. *Amicus* WVCC therefore submits this brief to speak to this case's significance to human health and welfare.



## REASONS FOR GRANTING THE PETITION

If left to stand, the Fourth Circuit's decision could be relied on as a precedent that would allow the issuance of scores of other permits that, cumulatively, would destroy dozens more valleys and hundreds more miles of streams – and condemn countless individuals to intolerable conditions.<sup>4</sup> This case is of vital

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<sup>3</sup> On September 11, 2009, EPA released a statement identifying 79 of 108 permits for proposed surface mining sites in four Appalachian states as “likely [to] cause water quality impacts requiring additional review under the Clean Water Act.” U.S. Env'tl. Prot. Agency, EPA Releases Preliminary Results for Surface Coal Mining Permit Reviews (Sept. 11, 2009), <http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/b746876025d4d9a38525762e0056be1b!OpenDocument> (last visited Sept. 24, 2009). *See also* U.S. Env'tl. Prot. Agency, Appalachian Surface Coal Mining: Initial List Resulting from Enhanced Coordination Procedures, *available at* [http://www.epa.gov/owow/wetlands/pdf/ECP\\_Factsheet\\_09-11-09.pdf](http://www.epa.gov/owow/wetlands/pdf/ECP_Factsheet_09-11-09.pdf) (last visited Sept. 24, 2009). Those permits are not at issue here.

<sup>4</sup> From 1985 to 2001, Kentucky, Tennessee, Virginia, and West Virginia saw a total of 83,797 acres of land covered by 6,697 valley fills. West Virginia alone lost 25,178 acres. In the four states, 438,472 acres of watershed have also been affected.

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importance to the people of Appalachia and of the entire Nation. For these reasons the Court should grant the petition for certiorari.

## **I. MOUNTAINTOP REMOVAL MINING HARMS APPALACHIAN PEOPLE ECONOMICALLY, PHYSICALLY AND CULTURALLY.**

Forty-three years ago, President Johnson stood on a miner's porch and proclaimed a War on Poverty, yet the poverty rate in central and southern Appalachia stands where it was in 1964.<sup>5</sup> West Virginia coal employment fell from a high of more than 130,000 in 1940 to just over 12,000 in March 2009, a month that still saw more than ten million tons of coal extracted from the state.<sup>6</sup> The extraction of coal

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See Shirley Stewart Burns, *Bringing Down the Mountains: The Impact of Mountaintop Removal Surface Mining on Southern West Virginia Communities, 1970–2004* at 141 (2007).

<sup>5</sup> Erik Reece, *The Battle for Justice Comes to the Coal Fields of Appalachia*, Orion Magazine, May/Apr. 2006, available at <http://www.orionmagazine.org/index.php/articles/article/166/Reese.html>. The U.S. Census Bureau estimates for Martin County, KY in 2007 indicate a 35.8% poverty rate. Taken from U.S. Census Bureau, Small Area Income & Poverty Estimates, available at <http://www.census.gov/did/www/saipe/county.html> (last visited Sept. 23, 2009). In 1964, the estimate stood at approximately 30%. In West Virginia, the poverty rate rose from 15% in 1979 to approximately 17.1% in 2007.

<sup>6</sup> W. Va. Office of Miners' Health Safety & Training, Brief History of Coal and Safety Enforcement in West Virginia, available at <http://www.wvminesafety.org/History.htm> (last visited Sept. 23, 2009); W. Va. Office of Miners' Health Safety & Training, WV Coal Production & Employment by Month 2009,

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through mountaintop removal is bleeding the region of its wealth and its people and poisoning its environment, creating “wretched poverty in an area teeming with rich resources.” Patrick C. McGinley, *From Pick and Shovel to Mountaintop Removal: Environmental Injustice in the Appalachian Coalfields*, 34 *Envtl. L.* 21, 42 (2004). And it is being done through a process that excludes the voices of the Appalachian people and others who care deeply about the region.

### **A. A History of Coal Mining Methods and Impacts**

The history of coal mining can be traced back hundreds of years in West Virginia and all along the Appalachian range. Many families who live in the region today come from generations of coal miners.<sup>7</sup> The tradition of underground coal mining is a proud heritage for many miners and touches the lives not just of those working in the mines, but also the lives of their families and communities.

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available at <http://www.wvminesafety.org/month2009.htm> (last visited Sept. 23, 2009).

<sup>7</sup> See, e.g., Jean Snedegar, *Battle Raging in US Mining Country*, BBC News (July 13, 2009), available at <http://news.bbc.co.uk/2/hi/americas/8148395.stm>. Many have struggled to describe their family’s intimate connection to coal mining. “Sorry, Grandpa,” one poet writes to a deceased grandfather who had begged him not to become a miner, “but I’m under that hill: High coal, good top, pouring black diamond on [t]he hoot-owl shift.... Wish you were here.” G.C. Compton, *The Post Card*, in *Coal: A Poetry Anthology* 135, 136 (Chris Green ed., 2006).

Surface mining in Appalachia began shortly before World War II but did not represent a significant technology shift “until the early 1960’s when, for the first time, over 30 percent of the country’s coal was produced in surface mines. [By] 1974, over half of the coal produced came from surface mines.” S. Rep. No. 95-128, at 49 (1977). Congress reported that in 1972, “there were 4 million acres of land disturbed by surface mining, of which 1.7 million acres (43 percent) were disturbed by surface mining for coal, 1.3 million of these acres in the Eastern coalfields. Only about half [of] these lands have been reclaimed.” *Id.* at 50.

For many years, coal companies’ impacts on the environment were largely unregulated by federal legislation. But severe environmental degradation from strip mining prompted Congress to balance the development of the Nation’s coal resources with the protection of other natural resources and the environment. *Id.* at 52. Congress passed the Surface Mining Control Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. §§1201-1328 (2006), which required coal companies to restore the mined land to the “approximate original contour.” *Id.* §1265(b)(3) (2006). SMCRA was designed to “establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations,” 30 U.S.C. §1202(a), and was intended to bring attention to and end the most egregious damage done by surface mining. Congress also made explicitly clear that SMCRA is subordinate to the rules and

procedures of the CWA. 30 U.S.C. §§1292(a), 1292(a)(3).

Now strip mining has returned in its most radical form: mountaintop removal. First, forests are clear cut and the trees and other vegetation stripped from the area are sold to timber companies. The topsoil is then removed or spread over the existing site and the site pre-stripped to make a foundation for the dragline, a large earth-moving machine that can be as tall as twenty stories and actually digs and removes the earth and coal.<sup>8</sup> Access roads are then constructed for transporting the sediment and coal away from the site. Next, the exposed sub-soil and rock is drilled, blasted, and removed from the area. The blasting can be felt throughout the area as hundreds of feet of mountain are removed during this phase and dust and rocks shower down on nearby homes.<sup>9</sup> The coal that is splintered during the blasting process is then extracted and hauled away. Burns, *supra*, at 6.

After the coal is hauled away, the Corps must issue a permit to place the excess solid waste into a valley fill<sup>10</sup> (typically at the head of a hollow), which is

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<sup>8</sup> Some draglines operate twenty-four hours each day, seven days per week. Peggy Loeb, Blair, *available at* <http://www.wvcoalfield.com/newpage2.htm> (last visited Sept. 23, 2009).

<sup>9</sup> *Id.*; Peggy Loeb, Cowen (May 2003), *available at* <http://www.wvcoalfield.com/cowen.htm> (last visited Sept. 23, 2009).

<sup>10</sup> The Corps gains its authority to issue permits for the discharge of fill material into streams from Section 404 of the  
(Continued on following page)

used for general waste disposal. *Id.* An EPA study found that valley fills and hollow fills “permanently bury ... streams located adjacent to the mining operations.” Gregory J. Pond et al., *Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family- and Genus-Level Macroinvertebrate Bioassessment Tools*, 27 J. N. Am. Benthological Soc’y 717, 718 (2008). The liquid waste, which contains heavy metals, chemicals, coal particles and water, is stored in coal slurry impoundments. *See Burns, supra*, 135-36.

The whole site is then graded and reseeded using grasses and other vegetation, when enough soil remains to support plant life. *Id.* at 123-24. The reclaimed landscape is a terraced slope of “non-native grasses and a few shrubs” where trees once grew along the ridges of a mountain. *See* Photograph of Reclamation of Cazy Mountain in Boone County, in *Burns, supra*, following p. 98. The result is a level

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CWA. 33 U.S.C. §§1311(a), 1344(b)(1) (2006). In issuing a 404 permit, the Corps must apply the “guidelines developed by the [EPA] Administrator, in conjunction with the Secretary [of the Army].” *Id.* §1344(b)(1). In 1980, EPA promulgated these guidelines in conjunction with the Corps and codified them at 40 C.F.R. §230 pursuant to the provisions of the Administrative Procedure Act. Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 45 Fed. Reg. at 85,336 (Dec. 24, 1980) (*codified at* 40 C.F.R. §230 (2008)) (“404(b)(1) Guidelines”). The 404(b)(1) Guidelines specifically prohibited “modifications to the basic application, meaning, or intent” of the regulations contained therein, except through notice-and-comment rulemaking undertaken by EPA. 40 C.F.R. §230.2(c) (2008).

plateau where a mountain once stood, its elevation reduced by hundreds of feet. McGinley, *From Pick, supra*, at 68. The effects of this method of extraction have been borne by the residents of mountain communities, who have witnessed the evisceration of their landscape, the loss of jobs and the burial of their ancestral homes.

The permits at issue in this case and the practices they authorize are at odds with SMCRA's intent and violate the mandate of the CWA. In fact, the harms caused by mountaintop removal are disturbingly similar to the harms SMCRA was enacted to prevent.

### **B. Mountaintop Removal Coal Mining Harms the Health, Welfare and Economy of the People of Appalachia**

The effects of mountaintop removal mining are felt in every aspect of life for residents of the coal-mining region. From the air they breathe to the water they drink and the communities in which they live, life has been forever altered. Many have been forced to leave their homes; others would leave if only someone would buy them out.<sup>11</sup>

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<sup>11</sup> The value of one resident's home fell from \$144,000 to \$12,000. Burns, *supra*, at 53, *citing* Interview by Shirley Burns with Mary Miller, in Glen Fork Area, W. Va. (August 10, 2004).

For generations, Appalachian miners have unearthed veins of black coal to supply the electricity needs of the United States and secure a measure of economic prosperity for the people who live in the region. If used sustainably, the coal reserves can continue to provide for the economic welfare of local communities while providing energy for the country. But mountaintop removal is not a practice that can be sustained in harmony with the welfare of the people and the environment on which they depend.

The economic benefits of coal production in the region have been exaggerated and mythologized. Although strip mining and underground mining were once common throughout Appalachia, surface mining and mountaintop removal are cheaper for producers today. “This is a function, in part, of economies of scale and, in part, of the increasing cost of contour stripping.... [W]hile nearly half of Central Appalachian coal currently comes from surface mining, these mines account for only about 38 percent of mining jobs in the region.” Mountain Ass’n for Cmty. Econ. Dev., *The Economics of the Coal Industry in Kentucky: Current Impacts and Future Prospects 2* (2009).

It is cheaper, too, because it allows companies to externalize their costs of production. Dumping waste into valleys saves money for the companies, but the practice impoverishes the lives of the affected communities. See generally, McGinley, *From Pick, supra*. The people of West Virginia have paid “a hurtful price for ... the coal industry’s cost-cutting efficiency.” John G. Mitchell, *When Mountains Move*, Nat’l Geographic,

Mar. 2006, *available at* <http://ngm.nationalgeographic.com/2006/03/mountain-mining/mitchell-text/2>.

The recent economic story of coal mining is one in which people and communities are left behind. The individuals once employed to work the coal fields have been replaced by twenty-story machines and dangerous explosives. *Id.* Between 1985 and 2005, the number of coal miners in Appalachia declined from 122,101 to 53,509. Michael Hendryx & Melissa M. Ahern, *Mortality in Appalachian Coal Mining Regions: The Value of Statistical Life Lost*, 124 *Pub. Health Rep.* 541, 544 (2009). Company towns no longer support the communities of miners and communities have been abandoned. Burns, *supra*, at 4. Some have even been targeted for annihilation. Residents are forced to sell or abandon their homes, leaving ghost towns where vibrant communities once stood. McGinley, *From Pick*, *supra*, at 36.

Today, “the human cost of the Appalachian coal mining economy outweighs its economic benefits.” Hendryx & Ahern, *Mortality*, *supra*, at 541. Despite intense mining of the low-sulfur coal found in the West Virginia mountains, coal companies are hiring fewer miners because of mountaintop removal. Penny Loeb, *Shear Madness*, *U.S. News & World Rep.* (Aug. 11, 1997), *available at* [http://www.usnews.com/usnews/culture/articles/970811/archive\\_007620.htm](http://www.usnews.com/usnews/culture/articles/970811/archive_007620.htm); *see also* Ky. Office of Energy Policy, *Kentucky Coal Facts* 10 (illustrating the generally downward trend in the number of workers with direct mining employment).

Areas with the fewest miners may be lucky, however. “[C]urrent and persistent distress within the Central Appalachian Region has been associated with employment in the mining industry, particularly coal mining.” Appalachian Reg’l Comm’n, *Trends in National and Regional Economic Distress: 1960-2000* (2005), available at <http://www.arc.gov/index.do?nodeId=2966> (last visited Sept. 23, 2009). In fact, “Central Appalachia is the only region [studied] in which higher employment in mining was associated with current and persistent economic distress.” *Id.* This has led to decreased corporate investment into the sustainability of coal extraction and shifted the responsibilities to the tax paying communities. One study shows that even if the human and environmental costs were discounted, the coal industry revenues do not outweigh the costs associated with attracting the mining industry to the state.

[T]he industry provides an estimated \$528 million in state revenue, with the coal severance tax making up over 40 percent of that revenue. But those revenues do not offset the expenditures associated with hosting the industry... [T]he state spends nearly \$643 million on coal-related infrastructure, regulation, tax preferences, research, training and other expenses for an annual net fiscal impact of -\$115 million. Melissa Fry Konty & Jason Bailey, Mountain Ass’n for Cmty. Econ. Dev., *The Impact of Coal on the Kentucky State Budget* 23 (2009).

But the problems of mountaintop removal go far beyond coal industry economics. Communities living downstream from the valley fills and slurry ponds experience higher rates of infections and chronic disease. Recent studies confirmed that “health disparities exist in coal mining regions of Appalachia compared with other areas of the region or the nation, including elevated mortality rates for total causes, lung cancer, and some chronic illnesses.” Hendryx & Ahern, *Mortality, supra*, at 542. The studies showed higher rates of mortality correlating with environmental pollution from the mining industry, in addition to other factors. *Id.*

The air in the blasting zones is choked with black coal dust, which comes down through the air in heavy flakes, settling on their gardens and seeping into their homes.<sup>12</sup> The big black balls of dust come over schoolhouses and fall on school playgrounds and seep into classrooms. D. Scott Simonton, *Initial Expert Report, Fugitive and Respirable Coal Dust, Marsh Fork Elementary School, Raleigh County, WV* (March 21, 2006), available at [http://www.sludgesafety.org/what\\_me\\_worry/marsh\\_fork/coal\\_dust\\_report.pdf](http://www.sludgesafety.org/what_me_worry/marsh_fork/coal_dust_report.pdf) (last visited Sept. 23, 2009). The coal dust can be so severe that schools are forced to close. Burns, *supra*, at n.41. The dust also comes from the coal trucks transporting coal and spoil. Neighbors report “they are unable to

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<sup>12</sup> Sue Sharps, Sylvester, available at <http://www.wvcoalfield.com/sylvester.htm> (last visited Sept. 23, 2009).

sit on their porches, have to restrict the amount of time they spend outdoors, and have to spend many hours each week contending with daily coatings of dust that cover the exteriors and interiors of their homes.” Viney P. Aneja, *Characterization of Particulate Matter (PM<sub>10</sub>) in Roda, Virginia* at iv, available at [http://www.eenews.net/public/25/10670/features/documents/2009/04/23/document\\_pm\\_01.pdf](http://www.eenews.net/public/25/10670/features/documents/2009/04/23/document_pm_01.pdf) (last visited Sept. 24, 2009).

The coal dust is not only a nuisance but a source of health concern. Parents worry that the dust exacerbates their children’s asthma. Others believe the dust is linked to sinus problems, emphysema and other respiratory ailments. *Id.* at 1. Air sampling conducted in the community of Roda in the coal mining region of southwestern Virginia “revealed the presence of antimony, arsenic, beryllium, cadmium, chromium, cobalt, lead, manganese, mercury, nickel, [and] selenium,” all of which “are known to be present in coal.” *Id.* at 13.

The practice of mountaintop removal also threatens physical dangers associated with landslides and flooding. Empirical studies show that shifting the hydrologic balance of streams causes changes in “rainfall/runoff ratios and increased flood frequency and magnitude.” J.R. Ferrari *et al.*, *Surface Mining and Reclamation Effects on Flood Response of Watersheds in the Central Appalachian Plateau Region*, Water Resources Res. (Apr. 7, 2009), at ¶ 4. Earth-movers used in mountaintop removal reclamation projects cause densely compacted soil layers, decreased soil porosity and infiltration of water. *Id.* at

¶ 2. The rate of flood magnitude increases at a linear rate corresponding to increased mining activities. The findings indicate that “mine reclamation leaves the landscape in a condition more similar to urban areas ... and call[s] into question the effectiveness of reclamation in terms of returning mined areas to the hydrological state that existed before mining.” *Id.* at ¶ 1.

Many communities near mountaintop removal mines have experienced devastating floods, including Seng Creek, Clear Creek, McGraws, Pigeon Creek, Gilbert Creek, Mud River, and Buffalo Creek. See Penny Loeb, West Virginia Coal Field, *available at* <http://www.wvcoalfield.com> (last visited Sept. 22, 2009). In May 2009, Wyoming County was devastated by floodwaters, which damaged 150 homes and at least twenty businesses. Mary Catherine Brooks, *Wyoming Bears Brunt*, Beckley, W. Va., Reg.-Herald (May 10, 2009), *available at* [http://www.register-herald.com/local/local\\_story\\_129233124.html](http://www.register-herald.com/local/local_story_129233124.html); see also Mary Catherine Brooks, *Wyoming County to Get Nearly \$500,000 for Flood Control*, Beckley, W. Va., Reg.-Herald (June 4, 2009), *available at* [http://www.register-herald.com/local/local\\_story\\_154231011.html](http://www.register-herald.com/local/local_story_154231011.html). Some communities are repeatedly flooded.<sup>13</sup> In these situations, WVCC and its members respond immediately and stay as long as it takes – sometimes for years – to help those in need of homes, relocation assistance, food and counseling.

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<sup>13</sup> Reece, *supra* note 5.

In addition to flooding from denuded landscapes, there is the risk of collapse of coal waste storage impoundments. The slurry of toxic refuse and sediment are stored in ponds and lakes of sludge constructed at the end of the valley fills. Some of these sludge impoundments sit alarmingly near homes and schools. In Sundial, West Virginia, for example, a 2.8 billion gallon coal slurry waste impoundment “looms directly above the Marsh Fork Elementary School,” which enrolls children from kindergarten through fifth grade. Mitchell, *When Mountains, supra*. Some schools are repeatedly flooded by the slurry breaks. Burns, *supra*, at 41. “Some children [and the elderly] are so frightened of flooding and slurry breaks that when it rains, they sleep fully clothed.” *Id.* Throughout the region, people live in fear of being washed away by breaching ponds.

These fears are well founded. Waste slurry impoundments have been “involved in several accidents since the 1972 Buffalo Creek incident, where a coal waste impounding structure collapsed, killing 125 people, injuring 1,000, and leaving more than 4,000 homeless.” Comm. on Coal Waste Impoundments, Nat’l Research Council, *Coal Waste Impoundments: Risks, Responses, and Alternatives 2* (2002); see also Mitchell, *When Mountains, supra*. One such impoundment failure hit the community of White Oak in 1997, washing out a road and killing two people. Loeb, *Shear, supra*. The “[f]ear of impoundment failures haunts the collective memory” of the people in these communities. *Id.*

In addition to the threat of collapse and flooding, mountaintop removal practices threaten widespread contamination of streams and groundwater.<sup>14</sup> Precipitation percolates through the overburden on the mined sites and in the valley fills, picking up contaminants before it discharges into surface water or seeps into the groundwater. EPA studied the downstream effects of mountaintop mining and found that “[t]he water quality downstream of the [valley fills] can have elevated levels of SO<sub>4</sub>, Ca, Mg, hardness, Fe, Mn, Se, alkalinity, K, acidity, and NO<sub>3</sub>/NO<sub>2</sub>.” Gregory, *Downstream, supra*, at 718. EPA concluded that the mountaintop removal may be a cause of downstream biological degradation, “given the wholesale landscape changes, hydrological alterations, and potential toxicants that are discharged.” *Id.* at 731.

Studies conducted by several government agencies also have documented groundwater and surface water contamination with selenium, an essential mineral that, in excess amounts, causes serious health effects in humans and poisons aquatic life. Toxic Selenium: How Mountaintop Removal Coal Mining Threatens People & Streams (Apr. 2009), available at <http://www.sierraclub.org/coal/downloads/Seleniumfactsheet.pdf> (last visited Sept. 20, 2009).

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<sup>14</sup> In other instances, mining has shut off the water flowing to drinking water wells. See, e.g., Peggy Loeb, Clear Creek, available at <http://www.wvcoalfield.com/clearcreek.htm> (last visited Sept. 23, 2009); Peggy Loeb, Chambers (May 2003), available at <http://www.wvcoalfield.com/newpage4.htm> (last visited Sept. 22, 2009).

Studies also have found contamination of local water sources with lead, mercury and arsenic. U.S. Env'tl. Prot. Agency, *Mountaintop Mining/Valley Fills in Appalachia: Final Programmatic Environmental Impact Statement* 12 (2005), available at [http://www.epa.gov/region3/mtntop/pdf/mtm-vf\\_fpeis\\_full-document.pdf](http://www.epa.gov/region3/mtntop/pdf/mtm-vf_fpeis_full-document.pdf) (last visited Sept. 24, 2009). All of these chemicals are associated with coal production. See U.S. Nat'l Comm. for Geochemistry, *Trace-Element Geochemistry of Coal Resource Development Related to Environmental Quality and Health* (1980).

Residents complain of black or orange water pouring from their faucets, and water quality tests reveal the presence of toxic chemicals associated with coal extraction. Creeks run solid black and suffocate the aquatic organisms living within. Children bathe in arsenic, lead, and other heavy metals that may be absorbed into their skin. Interview by Zach Wise with Jennifer Hall-Massey, in Prenter, W. Va. (2009), available at <http://video.nytimes.com/video/2009/09/12/us/1247464506260/toxic-waters-coal-in-the-water.html> (last visited Sept. 23, 2009). Parents are afraid to allow their children to drink or bathe in the water and are forced to truck in clean sources of water. The contamination has depressed home values, making it impossible for residents to sell their homes and move to cleaner, safer communities. *Id.*

### **C. The Appalachian People Value Their Mountains, Streams and Wildlife.**

Like many Americans, the people of Appalachia “came [to the area they settled] for many reasons, but always for new opportunity and freedom – freedom from religious, political, and economic restraints, and freedom to do as they pleased.” Loyal Jones, *Appalachian Values* 29 (1994). Their shared experiences, weathered by life in the mountain range and forged deep in the coal mines, have produced Appalachian values that are as unique as they are American. West Virginians are mountain people, settled in tradition, self-reliant, and educated by the natural environment.

West Virginia is the only state in the Union sitting entirely within the Appalachian range. It is composed of two regions, exemplifying two remarkably different sections of the Appalachians: The western portion of West Virginia is part of the Appalachian Plateau Province – which contains minable coal; the eastern portion of West Virginia is part of the Ridge-and-Valley Appalachians – an area defined by its folded and faulted rocks and its lack of minable coal. The south-western section of the Appalachian Plateau forms the Cumberland Mountains, which West Virginia shares with Virginia, Kentucky, and Tennessee.<sup>15</sup>

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<sup>15</sup> W. Va. Geological & Econ. Survey, *West Virginia Geology: Physiographic Provinces* (July 1996), available at <http://www>.  
(Continued on following page)

The state motto, state song,<sup>16</sup> and state university mascot<sup>17</sup> evidence the extent to which West Virginians understand themselves primarily in relation to West Virginia's mountains. Many individuals raised in Appalachia developed such a close relationship with the natural world in their youths. They remember walking through the forest, listening to animals and creeks, and feeling a part of nature. See Reverend Dennis Sparks, W. Va. Council of Churches, *Testimony Before the House Natural Resources Subcommittee on National Parks, Forests and Public Lands* (Feb. 26, 2008), available at [http://resourcescommittee.house.gov/images/Documents/20080226/testimony\\_sparks.pdf](http://resourcescommittee.house.gov/images/Documents/20080226/testimony_sparks.pdf) (last visited Sept. 20, 2009). The Appalachian backcountry was not merely a place of childhood fantasies and adventures, but was also a classroom for parents and grandparents to

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[wvgs.wvnet.edu/www/geology/geolphyp.htm](http://wvgs.wvnet.edu/www/geology/geolphyp.htm) (last visited Sept. 23, 2009).

<sup>16</sup> West Virginia's motto is *Montani Semper Liberi*, "Mountaineers are always free." Rachel Sargent, *The Great Seal: A Symbol of West Virginia Sovereignty*, WRAP-UP (Feb. 28, 2007), at 1, available at [http://www.legis.state.wv.us/Wrapup/pdfs/Vol.XVIII\\_issue7.pdf](http://www.legis.state.wv.us/Wrapup/pdfs/Vol.XVIII_issue7.pdf) (last visited Sept. 19, 2009). One of West Virginia's official state songs is the 1885 song "The West Virginia Hills," lyrics by Ellen Ruddell King and music by Henry Everett Engle. Richard Ramella, West Virginia's Three State Songs, available at <http://www.wvculture.org/goldenseal/summer04/wvhills.html> (last visited Sept. 19, 2009).

<sup>17</sup> West Virginia University adopted the Mountaineer as its mascot during the 1936-37 school year. W.V. University, Mountaineer Mascot: Traditions, available at [http://alumni.wvu.edu/traditions/mountaineer\\_mascot](http://alumni.wvu.edu/traditions/mountaineer_mascot) (last visited Sept. 19, 2009).

teach their children lessons about self-reliance, sustainability and stewardship. But without the mountains, they cannot be Mountaineers.

Appalachian values have sustained the people of West Virginia for generations. But those same values may limit West Virginians' choices in the face of environmental and community degradation. Though many Appalachians value self-reliance, independence, and freedom, pride in these values has left many stranded downstream from valley fills and slurry ponds or living across from flattened mountains. The "[s]ense of place is one of the unifying values of mountain people, and it makes it hard for [them] to leave the mountains, and when [they] do, [they] long to return." Jones, *supra*, at 99. Rather than fleeing the devastation, they want to protect the streams, the valleys and the mountains.<sup>18</sup>

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<sup>18</sup> One poet wrote, "I shall not leave these prisoning hills[, t]hough they topple their barren heads to level earth ... I cannot go. Being of these hills I cannot pass beyond." James Still, *Heritage*, in *From the Mountain, From the Valley* (Ted Olsen ed., 2001).

## **II. THE CORPS MUST FULLY ASSESS AND DISCLOSE IMPACTS TO HUMAN HEALTH AND WELFARE.**

The advent of mountaintop removal mining has been accompanied by the Corps' failure to assess and disclose the wide array of environmental impacts associated with the issuance of §404 permits, contrary to the mandate of NEPA and the CWA 404(b)(1) regulations. The Corps' failure exacerbates the harms suffered by the WVCC and its members and makes this case even more important to them.

Pursuant to both NEPA and CWA, the Corps was required to give careful consideration to the quality of the human environment, including health and welfare, when evaluating whether to issue the four permits at issue in this case. *See* NEPA, 42 U.S.C. §§4331, 4332(2)(C); 33 C.F.R. §325.3(c)(1); 40 C.F.R. §230.10(c)(1). NEPA directs the Corps to identify, evaluate and disclose any significant adverse impacts to the "human environment" when issuing a dredge and fill permit under §404. 42 U.S.C. §4332(2)(C) (2006); *see also* 40 C.F.R. §230.10(c). This includes an analysis of the impacts, both direct and as the result of cumulative and reasonably foreseeable future action (even if those actions are not under the control of the agency), to cultural and historic resources, human health and safety, and recreational, aesthetic and economic values of the region. 40 C.F.R. §§1508.8, 1508.14, 1508.27. The Corps' regulations complement NEPA and the 404 regulations, identifying impacts to water quality and historic properties, recreation, and the creation of flood hazards, as well as safety and

“the needs and welfare of the people,” as important factors for evaluation of the public interest. 33 C.F.R. §325.3(c)(1); 40 C.F.R. §230.10(c).

The Corps conceded that the valley fills would permanently destroy the filled streams. But rather than prepare a full EIS that would consider the impacts this would have on the people of the region, the Corps determined that mitigation would reduce any impacts identified to an insignificant level. *Ohio Valley Envtl. Coal.*, 479 F. Supp. 2d at 631. Because the mitigation focused solely on impacts to the *structure* of the streams, *see id.* at 631-635; 40 C.F.R. §230.11(e), impacts that interact with the aquatic ecosystem were given inadequate consideration and thus the full array of impacts was poorly understood.<sup>19</sup> In effect, the Corps swept “stubborn problems ... under the rug.” *County of Suffolk v. Sec’y of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978). As the Fourth Circuit has ruled previously, “any proposed mitigation measures dependent upon an incomplete environmental analysis necessarily fail.” *Nat’l Audubon Soc. v. Dept. of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989)).

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<sup>19</sup> It is noteworthy that none of the four permits at issue in this case included assessments of the individual or cumulative effects of the permits, contrary to the requirements of NEPA and the CWA. *See* App. 37a, 145a; 40 C.F.R. §§230.10(c), 1508.25(a)(2).

As the District Court properly determined, the Corps violated NEPA's principle of informed decision-making. *Ohio Valley Envtl. Coal.*, 479 F. Supp. 2d at 642. *See also Dep't of Transport. v. Public Citizen*, 541 U.S. 752 (2004). The Fourth Circuit's decision condemned coal field communities to even greater impacts and diminishes community confidence in the system of justice. Their disillusionment is palpable: people freely wonder what it will take for the government and courts to protect them – a “flyrock” crashing through a house and killing someone, or perhaps a child dying from black lung disease from the coal dust produced by mountaintop removal. *See generally* Peggy Loeb, *West Virginia Coal Field*, *supra*.

These permits, and many similar proposed permits in the region,<sup>20</sup> will damage the ecology of Appalachian streams and rivers around which communities have developed and grown. Mountaintop removal mining has turned back the clock and erased the gains of regulatory programs. This radical form of strip mining “leaves a legacy of foul streams, hideous slag heaps and polluted air.” Harry M. Caudill, *Night Comes to the Cumberland*s at x (1962). Unless this Court takes this case, the people of Appalachia will watch helplessly – without being heard – while more streams are buried, more mountains are flattened

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<sup>20</sup> As noted *supra*, note 3 currently there are at least 108 permits pending Corps' review. [www.epa.gov/owow/wetlands/pdf/ECP\\_Q&A\\_09-11-09\\_final.pdf](http://www.epa.gov/owow/wetlands/pdf/ECP_Q&A_09-11-09_final.pdf).

and more communities displaced. “[T]he seeming invisibility of the people in Appalachia does not make their plight any less real.”<sup>21</sup>

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## CONCLUSION

This case shapes the very life of the Appalachian people and the land they love. The District Court correctly found that the Corps violated the law. The impact of the Fourth Circuit’s decision will adversely affect the Appalachian people and other mining communities for generations to come. This case presents an important federal question that should be settled by this Court.

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<sup>21</sup> Reece, *supra* note 5.

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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