

January 2, 2004

John Forren  
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Dear Mr. Forren,

We write on behalf of the 50 undersigned groups, representing millions of Americans, concerning the Draft Programmatic Environmental Impact Statement on Mountain Top Mining/Valley Fill (MTM/VF) in the Appalachian region of the eastern United States. We are extremely troubled over the harmful impacts that mountaintop/valley fill mining has had and could continue to have on a wide array of aquatic and terrestrial organisms. In addition to the direct effects of habitat loss and degradation at mine sites and areas immediately adjacent, the drastic alteration of large landforms over such an extensive region could very well have negative and long-lasting effects on ecosystem processes at considerable distances from the areas more directly disturbed. These concerns are not adequately addressed in the draft EIS. However, despite our serious concerns regarding the potential for disrupting ecological processes and biodiversity in general, these comments are specifically directed to issues regarding migratory birds. The impacts to forest-associated bird species of conservation concern also are not adequately or properly addressed in this draft EIS.

### **I. The DEIS Ignores the High Priority Assigned through Congress by Wildlife Agencies to the Conservation of Mature Forest Bird Species.**

The figures from the draft EIS on cumulative impacts of mining activity in the study area suggest a massive and permanent impact on the entire suite of Partners in Flight priority mature forest birds within the EIS study area (e.g., Cerulean Warbler, Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher) due to a projected loss of over 380,000 acres (149,822 hectares) of high-quality forest to mining in the next ten years. This is in addition to that same amount having been lost in the previous ten years. All of these bird species are also classified as Birds of Conservation Concern by the U. S. Fish and Wildlife Service (USFWS 2002) within the Appalachian Bird Conservation Region, which overlaps the area considered in the draft EIS. This list is mandated by Congress under 1988 amendments to the Fish and Wildlife Conservation Act and denotes species that without additional conservation actions are likely to become candidates for listing under the Endangered Species Act. We consider this level of habitat loss to constitute a significant negative impact for these high priority mature forest birds, and especially for the Cerulean Warbler, the forest species of highest concern in this area. We are struck by the failure of the draft EIS to address this extremely important and significant environmental impact.

While we don't have reliable estimates of the densities of most of these priority species in the region, we do have them for Cerulean Warblers. This is the forest-breeding bird species we are most concerned with because it has suffered drastic population declines over the last several decades and the core of its breeding range coincides very closely with the EIS study area (Figure 1). This species has been petitioned for listing under the Endangered Species Act and is also on

the USFWS' National List of Birds of Conservation Concern (USFWS 2002).

## **II. The DEIS Ignores Available Scientific Data Showing Higher Bird Densities and Higher Potential Losses from Mining Impacts.**

Recent research by Drs. Weakland and Wood (2002) at West Virginia University found the average density of Cerulean Warblers territories in intact forest near mined areas in West Virginia was 0.46 pairs/hectare (ha). Assuming each territory provides habitat for a pair of birds, this equates to 0.92 individuals/ha. With the projected loss of over 149,822 ha to future mining in the next ten years, this will result in a loss of 137,836 Cerulean Warblers in the next decade. Dr. Charles Nicholson (TVA 2002) reported a somewhat higher average density of 0.64 pairs of Cerulean Warblers per ha at his study sites within the draft EIS study area in eastern Tennessee. If his density estimate is more representative of the density over the study area, then even more ceruleans would have been impacted in the last decade and the same number would be impacted in the next. Either estimate represents an unacceptable loss.

Partners in Flight (PIF), a science-based initiative dedicated to the conservation of landbirds in the western hemisphere, estimates the global population of Cerulean Warblers, based on relative abundance estimates derived from 1990s Breeding Bird Survey data, to be roughly 560,000 individuals with 80% of the population breeding in the Appalachian region which encompasses the study area (Rich et al. 2004). Applying similar methods, BBS survey data indicate that the average breeding density of Cerulean Warblers across the Northern Cumberland Plateau physiographic area during the 1990s was 0.065 pairs/acre (Rich et al. 2004. Appendix B, Rosenberg and Blancher in press). These numbers indicate that roughly 9% of the world's ceruleans were lost as a result of mining permitted during the 1992 to 2002 period and another 9% will be lost between 2003 and 2012 should the level of mining the draft EIS projects in the next decade come to fruition. In addition, we fear that in a region where Cerulean Warblers presently occur in such high densities, the breeding habitat could already be saturated and the individuals displaced by mines wouldn't be able to find new areas of high-quality breeding habitat to colonize. If this is the case, the reproductive potential of those pairs also will be compromised and the ability of the population to recover will be reduced as a result. It is important to note that these estimates of Cerulean Warbler population loss substantially underestimate the actual impact of mountaintop mining on this species. By definition, mountaintop mining removes forest habitat on mountain and ridge tops. Cerulean Warblers prefer ridgetops within large blocks of mature forest (Weakland and Wood 2002) In addition, Drs. Weakland and Wood (2002) found significantly reduced densities of breeding Cerulean Warblers in forest fragmented by mining and in forest adjacent to mine edges. We find it disturbing and unacceptable that Dr. Weakland and Dr. Wood's research was not included in the draft EIS document when we know that it was made available to those who were involved in its development.

## **III. The DEIS Fails to Address Technology Changes that will Alter Projections of Future Forest Loss**

We believe that the draft EIS projection that an additional 3.4% of forest will be lost between 2002 and 2012 may significantly underestimate the impact of mining on hardwood forests. Not

only do these figures fail to include an estimate of the cumulative loss of cove forests from valley fill operations, they also do not take into consideration the anticipated increase in future demand for Appalachian coal due to the planned construction of flue gas desulfurization units (scrubbers) at existing coal-fired generating plants in the study area (TVA 2002). For example, the draft EIS projects that Tennessee will issue permits causing the loss of 9,154 acres of forest in 2003 through 2012, when over 5,000 acres of surface mining permits have already been approved between December 2002 and October 2003 (Siddell 2003).

#### **IV. The DEIS Fails to Identify and Analyze Effective Mitigation Measures to Reduce Bird Losses**

The only mitigation offered in the draft EIS for the destruction of large areas of biologically diverse hardwood forest habitat by mining operations is a suggestion that the denuded areas could be reforested after operations cease. While recent research indicates that some forest communities may be reestablished on reclaimed mine sites (Holl et al. 2001), the draft EIS concedes that initiatives to improve the establishment of forests on reclaimed mine sites have only recently begun and “that it would be premature to attempt to evaluate the success of these efforts at this time”. In addition, the draft EIS states that “as post-mined sites will likely lack the requirements of slope, aspect and soil moisture needed for cove-hardwood forest communities, it is unlikely that these particular communities can be re-established through reclamation”. It will take many decades before these experimental forests mature sufficiently to assess whether they will provide suitable breeding habitat for Cerulean Warblers or any other interior forest-breeding birds of concern. Even if reforestation was determined to be the preferred mitigation for Cerulean Warbler habitat loss, the development of reforestation BMPs (Action 13) would be voluntary and a state or federal legislative change (Action 14) could take years. The suggestion that reforestation is a panacea to mitigate the negative effects of mining on interior forest habitat within the foreseeable future is therefore wrong and misleading. Furthermore, we find it extremely inappropriate that the draft EIS suggests that a mining company could be offered an economic incentive, through the sale of carbon credits, for planting trees to replace the forest that they themselves destroyed during mining activities.

We also find it inappropriate to consider replacing forest habitat with grassland habitat for “rare” eastern grassland species even though these species have declined dramatically as a group in recent decades. Their recovery and habitat restoration efforts should be targeted towards ecosystems and landscapes where they occurred historically, not on eastern mountaintops, where grassland habitat was rare, and currently supports high quality forest habitats.

#### **V. The DEIS Fails to Identify and Analyze Reasonable Alternatives to Avoid Bird Losses**

We find the draft EIS’ failure to provide an alternative proposal that would provide better regulation of mountain top mining to protect the environment unacceptable and inappropriate. We believe that taken together, these two major flaws are fatal and require the re-issuance of the draft EIS. These fatal flaws mean the draft EIS fails to comply with NEPA. The draft EIS needs to be cured by an EIS that appropriately addresses both the concerns over priority bird species mentioned herein and that offers a solid environmentally sound alternative.

The U.S. Fish and Wildlife Service's September 2002 (USFWS 9/20/02) memo clearly supports our conclusion that the draft EIS is fatally flawed. The FWS warned in the memo that publication of the draft EIS as written, "will further damage the credibility of the agencies involved." That inter-agency memo cites the proposed actions offering "only meager environmental benefits" and criticizes the draft EIS because it did not consider any options that would actually limit the area mined and the streams buried by valley fills. "There is no difference between [the alternatives]," the Fish and Wildlife officials said. "The reader is left wondering what genuine actions, if any, the agencies are actually proposing." The draft EIS erroneously only offers alternatives that would streamline the permitting process for approval of new mountaintop-removal permits. The alternatives, including the preferred alternative, offer no environmental protections and the lack of any such environmentally sound options destroys the NEPA EIS process.

The FWS memo argued for "at least one alternative to restrict, or otherwise constrain, most valley fills to ephemeral stream reaches...As we have stated repeatedly, it is the service's position that the three 'action' alternatives, as currently written, cannot be interpreted as ensuring any improved environmental protection ... let alone protection that can be quantified or even estimated in advance."

#### **VI. Because the DEIS Is Fatally Defective, It Should Be Revised and Reissued for Public Comment and Permit Issuance Should Cease.**

We do not find that the three "action" alternatives offered would improve environmental protection in any measurable way. We propose that a moratorium be placed on new mountaintop mining permits until a new draft EIS is written to provide for the avoidance of key Cerulean Warbler habitat and significant environmental protection for the Louisiana Waterthrush, Worm-eating Warbler, Kentucky Warbler, Wood Thrush, Yellow-throated Vireo, Acadian Flycatcher and other PIF priority species and FWS Birds of Conservation Concern. This moratorium should continue until a final EIS is adopted with an environmentally acceptable alternative.

We believe that NEPA requires such a moratorium as the environmental impacts are so great and the federal government has failed to complete an EIS as required, even after 5 years have passed since litigation was initially filed on this issue. Settlement of the litigation was to result in an EIS and better measures to protect the environment. The draft EIS clearly indicates that this is not occurring. Also, the Clean Water Act dictates individual permits should be required for such major actions and thus, the current use of nationwide permits is illegal.

We conclude that mining is a short-term benefit to local economies and once the coal is extracted, the industry will leave the region. However, if the scenic vistas and natural heritage of the area are preserved, an economy buoyed by recreation and tourism would provide added value for generations to come.

We appreciate the opportunity to comment on this Draft Environmental Impact Statement.  
Respectfully Submitted on Behalf of all the Undersigned Individuals and Organizations,

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