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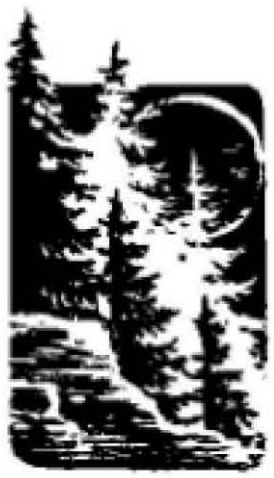


The Highlands Voice

The Monthly Publication of the West Virginia Highlands Conservancy

Volume 47 No. 1 January,, 2014

JUDGE AGAIN ALLOWS SELENIUM WATER POLLUTION LAWSUITS

By Ken Ward Jr.

A federal judge has again ruled that a bill backed by the coal industry and the Tomblin administration does not shield mine operators from citizen group lawsuits for violations of West Virginia's water quality standards.

U.S. District Judge Robert C. Chambers also said he was not going to second-guess whether a 30-year-old state rule -- requiring all water pollution permits to comply with all state water quality standards -- was properly promulgated.

Chambers ruled Thursday in a case brought by the Ohio Valley Environmental Coalition, the Sierra Club and the West Virginia Highlands Conservancy against Fola Coal Co. over selenium pollution from the company's strip-mining operations in Clay County.

The case is the latest legal skirmish in which environmental groups, represented by Appalachian Mountain Advocates lawyers, have been using Clean Water Act citizen suits to force companies to curb mining selenium discharges. In some parts of the state, such discharges have been linked to deformed fish and reduced fish populations downstream from mountaintop removal operations.

In a 51-page opinion, Chambers ruled that the citizens had submitted discharge reports from Fola that showed multiple violations of selenium water quality standards from July 2008 to March 2012 at a variety of operations, including at Cannel Coal Hollow, Leatherwood Creek, Right Fork, Cannel Coal Point Removal and Cannel Coal Surface Mine.

The judge noted that Fola "concedes that no treatment facilities have been put in place for the selenium discharges at issue in this case."

Chambers did not rule on how many violations had occurred and said that he would take up at a later time the issue of what Fola would be required to do to remedy the situation.

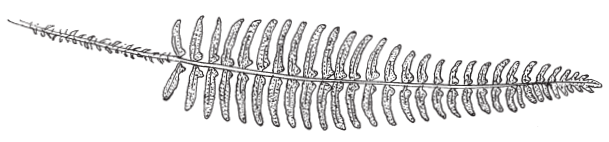
Selenium, a naturally occurring element found in many rocks and soils, is an antioxidant needed in very small amounts for good health. In slightly larger amounts, selenium can be toxic. Selenium impacts the reproductive cycle of many aquatic species, can impair the development and survival of fish, and can damage gills or other organs of aquatic organisms subject to prolonged exposure. It also can be toxic to humans, causing kidney and liver damage, as well as damage to the nervous and circulatory systems.

In 2003, a broad federal government study of mountaintop removal mining found repeated violations of water quality standards for selenium. The following year, a U.S. Fish and Wildlife Service report warned of more selenium problems downstream from major mining operations. One report from a top selenium expert has warned that the pollution from Patriot's Hobet 21 site has left the Mud River ecosystem "on the brink of a major toxic event."

Citizen group lawsuits over selenium violations have prompted, among other things, a move by Patriot Coal to phase out its use of large-scale surface mining in Central Appalachia.

(More on p. 3)

What's inside:



Ramblin' the Ridges

By Cynthia D. Ellis

TRAVELING UPHILL

Journeying almost anywhere in the Mountain State is complicated by slopes and steeps. We invariably must go up. As a new year begins, we can look back to see what kinds of "ups" and "downs" have been traveled by the West Virginia Highlands Conservancy in 2013.

Much lies in familiar terrain of steep challenges of issues we've dealt with before. Pathways we traversed included these…

Regarding coal---we have worked on many aspects. These include reviewing a coal haul road at the Falls of Hills Creek, sharing updates on coal-fired power plants, sharing information on ownership transfers of mines, protesting mining near Kanawha State Forest, supporting the C.A.R.E. (Citizen Action for Real Enforcement) which petitions the Office of Surface Mining to take over the ineffective West Virginia Department of Environmental Protection program for the regulation of strip mining, providing anti-MTR brochures, pursuing litigation regarding selenium, monitoring disposal of coal ash, scrutiny of the financing of coal exports, trying to boost water quality standards, pushing for continuation of site clean-ups,

and mitigation of other effects of mountaintop removal mining, and supporting the A.C.H.E. [Appalachian Community Health Emergency] act,

Regarding industrial-sized ["grid ready"] wind turbine facilities---we have been working with the West Virginia Environmental Council and other groups on siting regulations. Our review and advocacy for bats at the Beech Ridge location in Greenbrier County was recognized. We supported "Smart Wind" guidelines.

Regarding natural gas---we continued to note problems with old, conventional gas wells while partnering with groups to educate on horizontal Marcellus drilling. We scrutinized processes of disposal of waste water--- by river barge transport, and notably in response to a Fayette County underground injection well--- and of drill cuttings. We reviewed proposals for a "Cracker" plant.

Regarding public lands---We hosted a popular series of "This Land is Your Land" outings which took us to a variety of nationally preserved locations here. We continued support for the proposed Birth of Rivers National Monument, worked on alerts about keeping the Monongahela Forest and George Washington National Forest free from fracking and about wind turbines near the Mon.

Regarding highways---we shot down myths about Corridor H.

We also printed about 3700 copies of The Voice each month, with our steady supply of clearly worded, de-mystifying articles, book reviews, educational pieces, and poetry. We sold about 530 copies of our Hiking Guide.

(More on p. 12)

JUDGE SAYS NO TO SELENIUM POLLUTION (Continued from p. 1)

Coal-friendly lawmakers and Gov. Earl Ray Tomblin have tried to blunt the impact of citizen group actions, in part with a bill passed last year that said coal companies would be deemed in compliance with state water pollution laws if they meet discharge limits for specific chemicals listed in their permits.

Industry officials argued that this language would protect them from citizen lawsuits that targeted selenium. In some cases, water pollution permits don't specifically limit selenium discharges, even though the state has a separate in-stream water quality standard for the substance.

In August, Chambers had ruled that the legislation did not protect an Alpha Natural Resources operation from a citizen group suit. The judge noted that state regulations also require all coal-related water pollution permits to prohibit any mining discharges from causing in-stream water quality violations.

Lawyers for Fola Coal had tried to argue that state officials in the mid-1980s improperly approved the rule requiring all permits to prohibit water quality standard violations. Chambers rejected that argument.

"Ascertaining the intent and method behind the addition of the water quality standards language to the final version of the rules is challenging because nearly thirty years have passed and the administrative record regarding the regulations is far from complete," the judge wrote.

"Given the incomplete record before the Court and the lack of concrete evidence showing that the regulations were improperly promulgated, the Court will not now second-guess those regulations so long after their submission to the state rule-making process and approval by the state legislature," he wrote. "Although the Court cannot be certain why the water quality standards language was added, the Court finds that Defendant has failed to meet its burden of demonstrating that the rule should now be overturned as improperly promulgated."

Note: This article originally apeared in *The Charleston Gazette.*

SNOWY OWL IN PRESTON COUNTY

By Cynthia D. Ellis

The West Virginia Highlands Conservancy board of directors, at present, is loaded with birders and bird-friendly folk. So it was gratifying to have one of our own recognized for his contribution to a recent rare sighting.

LeJay Graffious was the first West Virginia birder to report a Snowy Owl. This has been quite a season for these eye-popping creatures and many people came from near and far to see the one at Bruceton Mills in Preston County.

LeJay helped handle the initial reports and subsequent visits to private property in a careful way. As of this writing, the owl was last seen on December 12 and had been in the northern West Virginia area for about 2 weeks.

"Our" Snowy owl was one of a great number of the Arctic birds traveling south this year. Their populations, and their travels, may be in synchronization with the populations of their prey food---lemmings. That rodent undergoes cyclical increases and decreases in numbers; so do the owls. At first, some news releases were stating that the birds came here because they were hungry. Later explanations reflected more data and noted the opposite. Snowies came south this year due to a very successful breeding season. Young birds were especially abundant and spread out and to the southeast accordingly. The owls have been seen in all states surrounding West Virginia. In Ohio, 87 birds have been seen---mostly in counties along Lake Erie, but then reaching down and south like tentacles of an octopus; there was one in Kentucky at the Louisville airport. Movements of unusual numbers of unusual birds such as this are called "irruptions".

Snowy Owls are knock-out beautiful. They stand about two feet tall, could weigh 4 to 6.5 pounds, and may have pure white feathers. Females and young birds have some darker plumage. For protection from the cold, the feathers extend to cover the talons and most of the beak. In their Arctic habitat, they hunt often in sunlight and stand sentinel over large flat expanses.

There is still much to be learned about the behavior, migration, and habitat of Snowy Owls. Therefore, a new data collecting effort is taking advantage of this irruption. Researchers David Brinker and Scott Weidensaul are launching project SNOWstorm. Snowy Owls will be fitted with solar powered backpack-type tracking transmitters. Mike Lanzone and Trish Miller have assisted in the first attachment; Lanzone owns the transmitter production company and the two have helped with Golden Eagle research here in West Virginia. Miller has been a presenter at a WVHC Fall Review.

Congratulations to all who got to see the Preston County bird; best of luck to others still hoping that this winter will allow them a glimpse of *Bubo Scandiacus;* Snowy Owl.

OBAMA ADMINISTRATION EXTENDS EAGLE 'TAKE' PERMITS TO 30 YEARS

By Larry Thomas

What happened

Environmental groups and the Senate GOP's top environmental lawmaker are irate over the new Interior Department rule. The revised rule, set to take effect next month, will allow the Fish and Wildlife Service to grant programmatic incidental "take" permits to industrial wind energy facilities, transmission projects and other long-term energy operations to accidentally kill or injure bald and golden eagles for 30 years, a six times longer period than the current five-year term.

No one knows how many Bald and Golden Eagles there are, which is the reason 30 year take permits are a bad idea. There are no national studies confirming their numbers. Bald Eagles appear to be increasing in number, but many states stopped tracking their population around the year 2000. Golden Eagles have been estimated at 21,000 to 35,000 in western states in the lower 48 and 1,000 to 2,500 east of the Mississippi. Many experts believe their population is declining in the western U.S. and the eastern U.S. population is very small and vulnerable.

What the wind industry says

In a press release after the announcement, the American Wind Energy Association (AWEA) stated that they still are not satisfied. Immediately after the news broke December 6, that the U.S. Fish and Wildlife Service wants to extend the reach of industrial wind industry permits to kill bald and golden eagles, AWEA was lauding the move, but saying the industry needs more concessions from those charged with protecting eagles.

Praising the extension of "take" permits under the Bald and Golden Eagle Act, AWEA stated that "additional concerns" about the permit rule's impact on the industrial wind industry would require more negotiation between industrial wind companies, FWS and AWEA's "partners in the conservation community."

"[T]his rule must only be a first step in creating a rational and effective approach to eagle permitting," AWEA said, "and we look forward to working with FWS the Department of Interior, and our partners in the conservation community to address additional permit program concerns through future revisions to the Permit Rule."

What eagle advocacy groups say

On January 5, 2012, Save the Eagles International issued a biodiversity warning concerning the United States stating "contrary to the dubious studies financed and controlled by vested interests, the population of golden eagles in the Western States is on the decline. Wind farms are the main cause. The issuing of licenses to kill will accelerate the decline towards extinction". Further, "considering that the Eastern and Central States are not acting any better, it is biodiversity in the whole of the contiguous 48 states which is in peril, including other species such as the Whooping Crane. No amount of bad science financed by the wind industry and government agencies has been able to convince honest conservationists that wind farms don't harm bird and bat populations". http://savetheeaglesinternational.org/releases/stei-opposes-licences-to-kill-eagles.html

In a letter to Secretary of the Interior Sally Jewell, Save the Eagles International president Mark Duchamp stated:

"Dear Interior Secretary Sally Jewell,

As president of Save the Eagles International, I consider it my duty to make you aware of certain realities that your advisors won't tell you about.

Allowing wind farms to legally kill eagles will result in the extinction of the Golden Eagle in the United States (1). It will cause numerous deaths in the Bald Eagle population.

Many more birds of prey will be slaughtered, causing some species to disappear from the contiguous United States. It turns out that wind turbines ATTRACT raptors (2). This is due to various reasons (3). No amount of mitigation will stop them from being decimated by the deadly blades: thirty years of efforts to solve the problem have failed. Compensation measures won't help either, as young raptors born anywhere will eventually come in contact with the ubiquitous machines.

Wind turbines also attract insects, which in turn attract bats, swallows and swifts to their death (4). Bats are slow reproducers, and are already in decline due to White Nose Syndroum. Their disappearance would cause immense damage to agriculture.

For all of the above, I respectfully warn you that President Obama's windfarm policy will cause a biodiversity catastrophe in the United States.

Sincerely,

Mark Duchamp"

Footnotes to Mr. Duchamp's letter

(1) – http://savetheeaglesinternational.org/releases/stei-opposes-licences-to-kill-eagles.html

(2) – http://savetheeagles.wordpress.com/2013/05/28/raptors-attracted-to-windfarms-2/

(3) – http://www.masterresource.org/2013/09/windfarm-mortality-disinformation/#more-27682

(4) – http://wcfn.org/2013/07/24/biodiversity-alert/

Many other environmental organizations have stated their concerns with this revised rule and some have stated that they will be taking action.

American Bird Conservancy http://www.abcbirds.org/newsandreports/releases/131206.html

Defenders of Wildlife: http://www.defenders.org/press-release/fish-and-wildlife-service-tests-new-program-eagles

National Audubon: http://www.audubon.org/newsroom/press-releases/2013/interior-dept-rule-greenlights-eagle-slaughter-wind-farms-says-audubon-

National Wildlife Federation: http://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Global-Warming/2013/12-06-2013-Interior-Dept-Wind-Permit-Rule-Insufficient-to-Protect-Eagles.aspx

NRDC: http://www.nrdc.org/media/2013/131206.asp

The Protect Our Communities Foundation:http://protectourcommunities.org/2013/12/06/federal-rule-change-will-harm-eagles/

Sierra Club: http://content.sierraclub.org/press-releases/2013/12/us-fish-and-wildlife-service-rule-harms-eagles-and-sustainable-energy

(More on the next page)

EAGLES IN DANGER (Continued from p. 4)

The National Audubon Society says “Tell Interior Secretary Jewell the issuing of a 30-year incidental take permit for wind farms is unconscionable, and must be reversed”. https://secure3.convio.net/nasaud/site/Advocacy?pagename=homepage&page=UserAction&id=1549

Groups are deeply concerned with this revised rule and documented attempts to circumvent existing Federal and state laws through governmental mandates, failures to enforce those laws that protect…and blatant disregard of those laws by the industrial wind energy industry.

What the law requires

Research has concluded that compliance with major Federal and State laws established for the protection of our “Commons” are circumvented, blatantly ignored and consciously broken by this industry and the federal and state agencies charged with enforcement thereof are ignoring their responsibilities. The industrial wind energy project developers and operators are relying on lack of staff and funding at federal and state agencies to provide adequate monitoring of their projects. Concerned about compliance are with:

Golden Eagle
Photo by Larry Lynch

In 1973 Congress passed the Endangered Species Act to “provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, and to provide a program for the conservation of these species.” The United States Department of the Interior, Fish and Wildlife Service is responsible for protection of terrestrial species, which form the majority of listed species. The Endangered Species Act prohibits both government agencies and private citizens from “taking” listed species, whether on public or private land. A “take” is any activity that kills or harms listed species or that destroys their habitat.

In 1983 Congress adopted Section 10 of the Endangered Species Act as a way to promote “creative partnerships between the public and private sectors and among governmental agencies in the interest of species and habitat conservation.” Section 10 authorizes states, local governments, and private landowners to apply for an Incidental Take Permit for otherwise lawful activities that may harm listed species or their habitats. To obtain a permit, an applicant must submit a Habitat Conservation Plan outlining what he or she will do to “minimize and mitigate” the impact of the permitted take on the listed species. The principle underlying the Section 10 exemption from the ESA is that some individuals of a species or portions of their habitat may be expendable over the short term, as long as enough protection is provided to ensure the long term recovery of the species.

Congress enacted the National Environmental Protection Act in December 1969 and it was signed into law on January 1, 1970. The National Environmental Protection Act was the first major environmental law enacted in the United States and is often called the “Magna Carta” of environmental laws. Most importantly, the National Environmental Protection Act established our national environmental policies. Because the impact of the proposed location of industrial wind energy projects in the forests is likely to be significant, the National Environmental Protection Act will require the preparation and evaluation of an environmental impact statement to assess the impact and allows for public involvement in the process. Three government agencies are charged with overseeing the National Environmental Protection Act, the Council for Environmental Quality, the Environmental Protection Agency and the United States Institute for Environmental Conflict Resolution.

In 1782 the Continental Congress adopted the bald eagle as a national symbol. In 1940, to prevent the species from becoming extinct, Congress passed the Bald Eagle Protection Act. The Act was extremely comprehensive, prohibiting the take, possession, sale, purchase, barter, or offer to sell, purchase, or barter, export or import of the bald eagle at any time or in any manner. In 1962, Congress amended the Bald Eagle Protection Act to cover golden eagles, a move that was partially an attempt to strengthen protection of bald eagles, since the latter were often killed by people mistaking them for golden eagles. The golden eagle, however, is accorded somewhat lighter protection under the Act than the bald eagle.

The Migratory Bird Treaty Act, originally passed in 1918, implements the United States’ commitment to four bilateral treaties, or conventions, for the protection of a shared migratory bird resource. The MBTA provides that it is unlawful to pursue, hunt, take, capture, kill, possess, sell, purchase, barter, import, export, or transport any migratory bird, or any part, nest, or egg or any such bird, unless authorized under a permit issued by the Secretary of the Interior. Some regulatory exceptions apply. Take is defined in regulations as: “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” The Migratory Bird Treaty Act protects over 800 species of birds that occur in the United States.

Federal and state decision makers must also consider the provisions and requirements of the National Forest Management Act, the Federal Land Policy and Management Act and the National Historic Preservation Act to assess the impact of industrial wind energy projects.

Numerous government agencies have spent enormous amounts of time and money developing ways to protect, preserve, or

(Continued on p. 6)

MORE ABOUT EAGLES (Continued from p. 5)

rehabilitate watershed areas on a regional scale and must be taken into consideration by the Federal and state decision makers in any consideration to allow the siting of industrial wind energy projects in "The Commons". Following is a list of projects to protect our environment.

One provision of the Watershed Protection and Flood Prevention Act, enacted in 1954 as Public Law 83-566 (http://www.nrcs.usda.gov/programs/watershed/pl56631705.pdf), was for conservation and proper use of land. This act encompasses over 1,500 active or completed watershed projects. In 1992, the Natural Water Resources Council of the U.S.D.A. published a National Watershed Manual (http://www.nrcs.usda.gov /programs/watershed/NWSM.html). The Flood Prevention Act of 1944 (Public Law 78-534; http://www. nrcs.usda.gov/programs/watershed/pl534.html was also developed for the conservation and proper use of land, including the Potomac River Basin.

In 1997, the U.S. Environmental Protection Agency published the approximately 200-page "Volunteer Stream Monitoring: A Methods Manual" (http://www.epa.gov/volunteer/stream/), which emphasizes that watersheds are important because if natural land becomes impervious:

• "Less precipitation is evaporated back to the atmosphere. (Water is transported rapidly away via storm drains and is not allowed to stand in pools.)

• Less precipitation is transpired back to the atmosphere from plants. (Natural vegetation is replaced by buildings, pavement, etc.)

• Less precipitation percolates through the soil to become ground water. (This can result in a lower water table and can affect base flow.)

• More surface runoff is generated and transported to streams. (Stream flow becomes more intense during and immediately after storms.)"

The U.S. Forest Service, in its publication "Wildland Waters", repeatedly emphasizes the importance of watershed protection of headwaters for sustaining water supply and water quality (http://www.fs.fed.us/wildlandwaters/ newsletters/wildlandwaters_sp02.txt).

Section 305(b) of the Clean Water Act requires states to report to the U.S. Environmental Protection Agency on the designated uses of their waters, the extent of the impairment of those uses, and the causes and sources of impairment.

What is happening

Deforestation of ridges where wind turbines are placed results in storm water drainage not only to streams but also to interconnecting underground conduits, especially caves in karst areas where the bedrock consists of limestone. Where storm water is drained away from the headwater areas on ridges, there is a decrease in groundwater recharge. Increased storm water flow to streams causes greater flooding potential. Both the decrease in groundwater recharge and the increase in storm water flow to caves changes the cave environment.

The Government Accountability Office (GAO) found, at the request of Congress, that "no one is considering the impacts of wind power on a regional or 'ecosystem' scale" and that state and local officials have no guidelines for considering the negative environmental impacts caused by huge wind turbines (The Inter-Mountain, Elkins, WV September 20, 2005; see also www.gao.gov/hew.items/d05906.pdf). The GAO learned that the wind turbine farm at Altamont Pass in California kills an estimated 1,700 to 4,700 birds a year, including between 880 and 1,300 federally protected raptors such as burrowing owls, red-tailed hawks, and golden eagles. The GAO has urged the U.S. Fish and Wildlife Service to work with state and local officials to provide expertise. A study by Bat Conservation International at the Mountaineer wind turbine farm in Tucker County, West Virginia, found that an estimated 1364 – 1980 bats were killed by the wind turbines during 6 weeks (www.batcon.org/wind/BWEC2004Reportsummar.pdf).

Our West Virginia wildlife and environmental laws must also be strictly enforced, requiring all energy production industries to abide by the law to protect our natural resources.

The Highlands Voice is published monthly by the West Virginia Highlands Conservancy, P. O. Box 306, Charleston, WV 25321. Articles, letters to the editor, graphics, photos, poetry, or other information for publication should be sent to the editor via the internet or by the U.S. Mail by the last Friday of each month. You may submit material for publication either to the address listed above or to the address listed for Highlands Voice Editor on the previous page. Submissions by internet or on a floppy disk are preferred.

The Highlands Voice is always printed on recycled paper. Our printer uses 100% post consumer recycled paper when available.

The West Virginia Highlands Conservancy web page is www.wvhighlands.org.

The West Virginia Highlands Conservancy is a non-profit corporation which has been recognized as a tax exempt organization by the Internal Revenue Service. Its bylaws describe its purpose:

The purposes of the Conservancy shall be to promote, encourage, and work for the conservation—including both preservation and wise use—and appreciation of the natural resources of West Virginia and the Nation, and especially of the Highlands Region of West Virginia, for the cultural, social, educational, physical, health, spiritual, and economic benefit of present and future generations of West Virginians and Americans.

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West Virginia Highlands Conservancy
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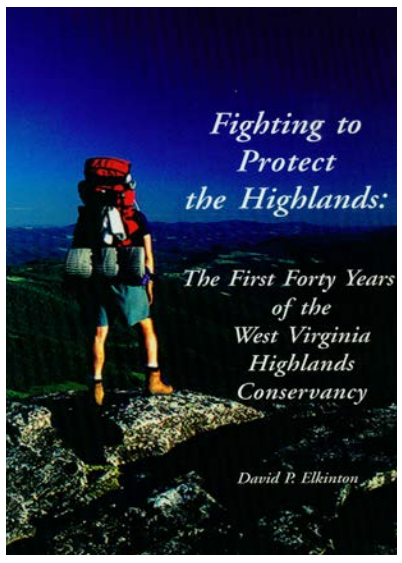
GREAT HISTORY BOOK NOW AVAILABLE



For the first time, a comprehensive history of West Virginia's most influential activist environmental organization. Author Dave Elkinton, the Conservancy's third president, and a twenty-year board member, not only traces the major issues that have occupied the Conservancy's energy, but profiles more than twenty of its volunteer leaders.

Learn about how the Conservancy stopped road building in Otter Creek, how a Corps of Engineers wetland permit denial saved Canaan Valley, and why Judge Haden restricted mountaintop removal mining. Also read Sayre Rodman's account of the first running of the Gauley, how college students helped save the Cranberry Wilderness, and why the highlands are under threat as never before.

With a foreword by former congressman Ken Hechler, the book's chapters follow the battle for wilderness preservation, efforts to stop many proposed dams and protect free-flowing rivers, the 25-year struggle to save the Canaan Valley, how the Corridor H highway was successfully re-routed around key environmental landmarks, and concluding with the current controversy over wind farm development. One-third of the text tells the story of the Conservancy's never-ending fight to control the abuses of coal mining, especially mountaintop removal mining. The final chapter examines what makes this small, volunteer-driven organization so successful.

From the cover by photographer Jonathan Jessup to the 48-page index, this book will appeal both to Conservancy members and friends and to anyone interested in the story of how West Virginia's mountains have been protected against the forces of over-development, mismanagement by government, and even greed.

518 pages, 6x9, color cover, published by Pocahontas Press
To order your copy for $14.95, plus $3.00 shipping, visit the Conservancy's website, wvhighlands.org, where payment is accepted by credit card and PayPal. Or write: WVHC, PO Box 306, Charleston, WV 25321. Proceeds support the Conservancy's ongoing environmental projects.

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The Highlands Voice is now available for electronic delivery. You may, of course, continue to receive the paper copy. Unless you request otherwise, you will continue to receive it in paper form. If, however, you would prefer to receive it electronically instead of the paper copy please contact Beth Little at blittle@citynet.net. Electronic copies arrive as e-mail attachments a few days before the paper copy would have arrived.

BEECH RIDGE WIND GRANTED INCIDENTAL TAKE PERMIT FOR BATS

By Peter Shoenfeld

On December 5, 2013, the U.S. Fish and Wildlife Service (USFWS) issued a decision approving the habitat conservation plan (HCP) and issuing an incidental take permit (ITP) for the Beech Ridge Energy (BRE) industrial wind energy project in Nicholas and Greenbrier Counties. This decision was based on analysis of issuance criteria, as well as a biological opinion considering whether this is likely to jeopardize the continued existence of the Indiana bat and Virginia big-eared bat, both endangered species. BRE is a subsidiary of Invenergy, LLC.

Endangered Species in the United States are protected by the Endangered Species Act (ESA) which prohibits the "taking" (killing or harming) of listed species in the absence of an incidental take permit (ITP). The purpose of the Act is to prevent extinction of endangered plants and animals.

.An Incidental Take Permit is issued under Section 10 of the Endangered Species Act to private, non-federal entities undertaking otherwise lawful projects that might result in the take of an endangered or threatened species. Application requirements for an ITP include preparation of a Habitat Conservation Plan. A Habitat Conservation Plan is supposed to describe measures which will be taken to minimize or mitigate the effects of the project upon endangered species.

The Beech Ridge Habitat Conservation Plan relies substantially on the expected reduction of bat mortality with increases in turbine cut-in speed under low wind speed conditions. This was first observed in 2004 through the comparative analysis of mortality data at the Backbone Mtn, WV and nearby Meyersdale, PA industrial wind energy facilities, where both weather and mortality data were correlated in time. The Highlands Conservancy was involved in review of this work and later in advocacy of cut-in speed adaptive management to BRE management and the Public Service Commission. This policy is credited with the project's thus far superior record among Appalachian projects regarding bat mortality. Procedures are spelled out in the Research, Monitoring and Adaptive Management Plan (RMAMP) portion of the Habitat Conservation Plan.

These include use of the Conservancy's so-called "Shoenfeld Estimator" of turbine-induced bird and bat mortality, correcting for fatalities which remain forever unobserved. No claim is made for superior accuracy-in-practice to the many alternatives since proposed, but it remains one of the oldest reasonable choices for post-construction monitoring studies and is that most often used, making it suitable for inter-comparison of such study results.

BRE will also implement two off-site conservation projects totaling $758,000 within two years. One is to protect the Indiana bat's hibernating, foraging and swarming habitat. The other protects hibernating Virginia big-eared bats.

Proposed industrial wind turbine projects in the Beech Ridge region have an interesting history within the Highlands Conservancy. This region is a huge, remote in-holding at the southern end of the Monongahela National Forest, now decimated by logging and strip-mining, and owned largely by Mead Westvaco. The topography is high and rugged, but arguably with fewer long range vistas than the Alleghenies to the north. There was a Kenetech proposal in the 1990s; it met with general approval. That of BRE arrived at a time of greater wind-project-resistance and was much more controversial amongst the Board. Long time wind committee figures held a rather kindly view of the project, and newer arrivals the opposite.

BRE was granted a permit to erect 119 turbines on 23 miles of mountain ridge and began construction in 2009. They were opposed by a local group called Mountain Communities for Responsible Energy (MCRE) and others before the Public Service Commission and later in an Endangered Species Act action in federal court before Judge Roger W. Titus. He ruled that, while BRE could complete the construction of the 40 windmills currently under construction, 27 others could not be built until the company applied for and received an Incidental Take Permit for Indiana bats from the USFWS in accordance with a settlement agreement. BRE also agreed to operate the turbines only during times of the day and year when bats normally are hibernating and thus not at risk from the turbines.

Last June, the PSC granted another permit for an additional 33 turbines, bringing the total to 100. The project became operational in September 2010.

WHAT TO DO WITH DISCARDED CHRISTMAS TREES?

There are a couple of options for trees after they have outlived their usefulness as Christmas trees. One is to take them to a recycling drop off site where they are collected and ground into mulch. Many solid waste authorities offer this service.

For birders, and particularly those who feed birds, there is another option. They can create additional cover around their bird feeders.

A problem can arise when the cover around a feeder is made up of deciduous trees or shrubs. In the winter they offer little cover to birds feeding at the feeder or on the ground. This makes them vulnerable to the hawks who make their living hanging around bird feeders, hoping they get lucky.

Discarded Christmas trees can fix that problem. Propped up close to the feeder or on the ground alongside the feeder area, they offer protection should a hawk show up.

WEST VIRGINIA ENVIRONMENTAL COUNCIL SETS LEGISLATIVE PRIORITIES

By Donald S. Garvin, Jr. West Virginia Environmental Coordinator Legislative Coordinator

Improving regulation of Marcellus Shale gas drilling operations, opposing the weakening of state water quality standards for toxic aluminum, and renewing the residential solar energy installation tax credit are the top legislative priorities for the West Virginia Environmental Council for 2014.

These priorities were adopted by the WVEC Board of Directors in December. They were selected from a long list of issues submitted by individuals and member organizations at the West Virginia Environmental Council fall conference in October.

Improving regulation of Marcellus Shale gas drilling operations was at the top of almost everyone's list. It was also a hot topic at several legislative interim committee meetings. However, it now appears that those committees will not be sponsoring any related legislation for the upcoming session.

So West Virginia Environmental Council will be supporting legislation that:

- Establishes a new setback distance – 1,500 feet from a home to the edge (or limit) of disturbance, instead of 625 feet to the center of the well pad; requires monitoring of air, noise, dust and VOCs (Volatile Organic Compounds); establishes best available control technologies that can be adjusted for geography and weather conditions; and funds long-term health studies of area residents.
- Requires drillers to use "closed loop" drilling systems, where all materials and wastes are hauled in and out by truck. This eliminates the need for any waste pits, and is a common practice throughout the nation.
- Requires the disposal of drilling mud and drill cuttings in special landfills paid for by the drilling companies; monitoring of that waste for radioactive elements; and the restoration of the tonnage caps for our solid waste landfills. (Beth Little wrote an excellent article about this, "Deviance and Denial about Drilling Waste at the DEP", for the November Voice).

WVEC will support legislation renewing the Solar Energy Tax Credit passed by the legislature in 2009. That legislation provided a state personal income tax credit of up to $2,000 for the installation of a residential solar energy system, and required a "net metering" credit for any excess electricity generated. The legislation expired on July 1 this year.

WVEC will continue our effort to oppose the weakening of state water quality standards for toxic aluminum. This rule change, proposed by the WV Department of Environmental Protection's Division of Water and Waste Management, requires the calculation of aluminum criteria based on the "hardness" of the stream. The new rule would significantly weaken current protections, as compared to the existing rule. The revisions are drastic and equate to greater than a 13-fold and 46-fold increase over the current criteria for acute and chronic aluminum toxicity to aquatic life respectively. (See my article about this rule in the December Voice).

But that's not all your lobby team will be working on in the 2014 legislative session. The WVEC Board also adopted a secondary list of other important issues that the team will work on as opportunity or time affords.

For example we will support Energy Efficiency West Virginia's efforts to pass legislation establishing energy efficiency resource standards in the state, and require the electric utility industry to use integrated resource plans.

We will also work to have legislation reintroduced requiring the Commissioner of the Bureau for Public Health to conduct a public health impact assessment of any changes proposed by the Department of Environmental Protection to water or air quality standards (HB 3089 and SB 621 from 2013).

And we will work to have legislation introduced establishing better siting rules for industrial wind farms. (See article "Where Should We Put (Or Not Put) Big Windmills?" in last month's issue of the Voice).

Finally, it is inevitable that there will be "bad" legislation introduced, and unfortunately that always occupies a substantial portion of the lobby team's time. But that's the name of the game.

We will attempt to keep everyone up to date on the latest actions of the legislature through emails, action alerts and our regular weekly "*Legislative Update*". You can sign up to receive the *Update* by email at the WVEC web site, http://www.wvecouncil.org/.

MOUNTAINTOP REMOVAL UP CLOSE AND PERSONAL

Visit Kayford Mountain and/or Mud River Mountain south of Charleston to see mountain top removal (MTR) up close. Bring lunch for a picnic on Kayford mountain. Hear the story on how the late Larry Gibson saved fifty acres from mountain top removal on Kayford Mountain. Call in advance to schedule. Julian Martin (304) 342-8989; martinjul@aol.com.

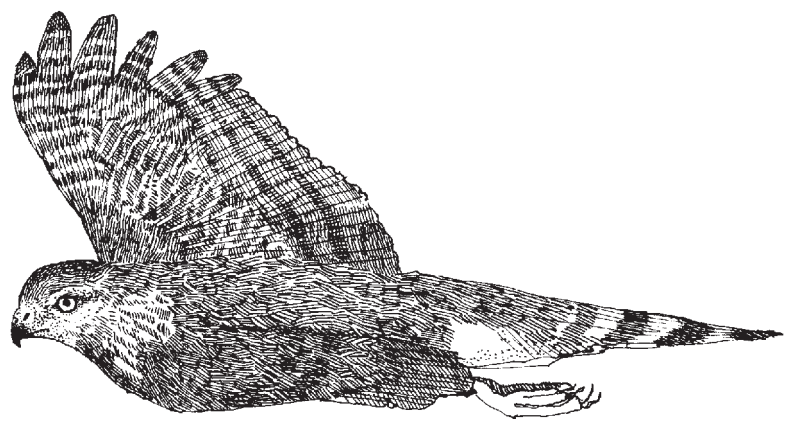
ADVENTURES IN BIRD FEEDING

By Dave Cooper

Boom!!

I've heard birds hit the windows of our house many times. The smaller birds, such as sparrows and finches, make a light noise when they hit the glass. The larger birds sound like "thump." This was a "boom," and I put on my slippers and hurried outside to see the latest casualty.

We began feeding the birds at our house in Lexington about ten years ago. My affinity for feeding birds comes from the time I spent living at our family home on Spooky Hollow Rd. in Cincinnati. My father is an avid bird watcher, and he installed a large picture window in the living room overlooking the nearby woods. About fifteen feet from the house he dug two holes for 4 x 4 posts, mounted a three-foot long wooden feed tray atop the posts, and put a roof on top to keep the seed dry.



Dad bought 40-lb. bags of black oil sunflower seed, which birds love, and filled the tray several times each day during the winter months. He added thistle feeders for the finches, and some suet feeders for the woodpeckers. Suet is congealed fat mixed with seeds, and comes in cakes about 3 inches square. It is placed inside a little metal cage.

The birds went wild at dad's feeders. The combination of nearby wooded habitat and a wide variety of feed attracted many different bird species. We sat in the living room by the fire and counted the cardinals, and tried to learn some of the other species. It was good family entertainment, and free - if you don't count the cost of the bird seed.

One of the problems with attracting backyard birds, however, is that they are confused by the windows on the house. In the morning the windows of our house reflect the branches of nearby trees, and this image is apparently inviting to the birds, and they crash into the storm windows. Usually they are just stunned for a minute or two, but sometimes they break their little necks and die. It's sad.

I walked out to see what kind of bird had made such a loud boom. It was about 12-15 inches tall, had a white speckled belly and brown wings and was lying on its side on the driveway. I eased a little bit closer to get a better look, when suddenly it leaped off the pavement and flew straight towards my face. I ducked and it veered away, and flew very quickly into an oak tree.

It was a hawk. I think it was too small to be a red-tailed hawk, so perhaps it was a sharp-shinned hawk. Hawks often visit our backyard to prey on the birds that visit our feeders, and sometimes we find the remains of a dove in our yard.

While canoeing on an owl-infested section of South Elkhorn Creek my father told me that sometimes owls will attack humans who get too close to their nests. I have seen the talons of hawks up close and they are fearsome, so I'm glad this one didn't claw my face. But it sure startled me.

Once I was pumping gas near the interstate gas station when I heard a very loud "boom" on the metal roof overhead. I looked up and saw a flock of pigeons circling up and away, but I could not figure out the source of the noise. I puzzled until a red-tailed hawk finally flew off with a big fat meal in his talons. Evidently these hawks hit their prey with tremendous force.

Last winter Patty and I heard a bang on our front picture window and walked out to find a flicker lying stunned on the ground. A flicker, a type of woodpecker, is a fairly large bird. We carefully picked him up to examine his injuries. His long red tongue was hanging sideways out of his beak, and it was festooned with little barbs, which I guess help the bird retrieve insects when they peck on trees. The bird appeared to be choking. "Put his tongue back in!" Patty said. But eventually the bird woke from his stupor, pulled in his tongue and flew off.

We have tried to reduce bird collisions at our house: There is the silhouette of a hawk on one window, which is supposed to frighten small birds. Interestingly, this is the same window that the hawk crashed into - perhaps the hawk thought it was battling an intruder or competitor in its territory. We have also put two static-cling leaf decals in our picture window, but we aren't really sure that they work.

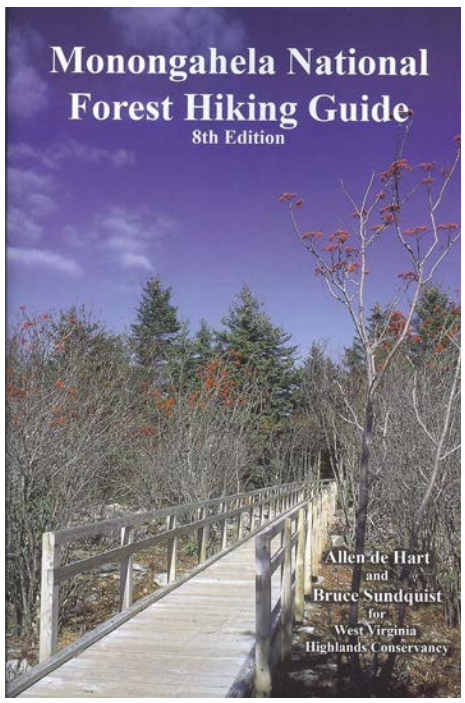
According to ornithology professor Daniel Klem at Pennsylvania's Muhlenberg College, as many as a billion birds die each year in window strikes in America. Other major sources of bird kills include feral and domestic cats, cars, cell phone towers and power lines. But according to Sibley Guides, "the single most significant threat to bird populations is habitat destruction."

Send Us a Post Card, Drop Us a Line, Stating Point Of View

Please email any poems, letters, commentaries, etc. to the VOICE editor at johnmcferrin@aol.com or by real, honest to goodness, mentioned in the United States Constitution mail to WV Highlands Conservancy, PO Box 306, Charleston, WV 25321.

Leave a Legacy of Hope for the Future

Remember the Highlands Conservancy in your will. Plan now to provide a wild and wonderful future for your children and future generations. Bequests keep our organization strong and will allow your voice to continue to be heard. Your thoughtful planning now will allow us to continue our work to protect wilderness, wildlife, clean air and water and our way of life.



The Monongahela National Forest Hiking Guide

By Allen de Hart and Bruce Sundquist

Describes 180 U.S. Forest Service trails (847 miles total) in one of the best (and most popular) areas for hiking, back-packing and ski-touring in this part of the country (1436 sq. miles of national forest in West Virginia=s highlands). 6x9" soft cover, 368 pages, 86 pages of maps, 57 photos, full-color cover, Ed.8 (2006)

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New 8TH Edition Now Available on CD

WV Highlands Conservancy proudly offers an Electronic (CD) version of its famous Monongahela National Forest Hiking Guide (8th Edition), with many added features.

This new CD edition includes the text pages as they appear in the printed version by Allen deHart and Bruce Sundquist in an interactive pdf format. It also includes the following mapping features, developed by WVHC volunteer Jim Solley, and not available anywhere else:

- All pages and maps in the new Interactive CD version of the Mon hiking guide can easily be printed and carried along with you on your hike
- All new, full color topographic maps have been created and are included on this CD. They include all points referenced in the text.
- Special Features not found in the printed version of the Hiking Guide:Interactive pdf format allows you to click on a map reference in the text, and that map centered on that reference comes up.
- Trail mileages between waypoints have been added to the maps.
- ALL NEW Printable, full color, 24K scale topographic maps of many of the popular hiking areas, including Cranberry, Dolly Sods, Otter Creek and many more

Price: $20.00 from the same address.

BUMPER STICKERS

To get free ***I ♥ Mountains*** bumper sticker(s), send a SASE to Julian Martin, 1525 Hampton Road, Charleston, WV 25314. Slip a dollar donation (or more) in with the SASE and get 2 bumper stickers. Businesses or organizations wishing to provide bumper stickers to their customers/members may have them free. (Of course if they can afford a donation that will be gratefully accepted.)

Also available are the new green-on-white oval ***Friends of the Mountains*** stickers. Let Julian know which (or both) you want.

CYNTHIA D. FINISHES UP (Continued from p. 2)

We continued to join in the effort to lobby, and, equally important, to try to educate the West Virginia Legislature.

We hosted a Spring Weekend with seminars on longwall mining and health effects of mining. We offered a lecture on the history of mining above the Coal River and

We planted---goodness knows, how many Spruce Trees. That number will likely come up soon in another report.

We conducted outreach through E-Day at the Legislature and Earth Day at Fayetteville.

But, which of these are "ups" and are any of these discouraging "downs"? Some of the categorization could come from you. You know why you support the West Virginia Highlands Conservancy. You know which issues are the most compelling to you personally. Perhaps a high point for you was that the Spruce Mine veto was upheld or that the Diamond Darter habitat requirements have been written. Many of these heights are those we've scaled again and again, in the past. Sometimes we get to the top and enjoy the view. In 2014, we'll keep trying, and keep climbing.

GET YOUR RAFFLE TICKETS NOW!!!

We are having a raffle of the sculpture by Mark Blumenstein entitled "Mountain Melody: Phoenix Duet."(Picture on this page). Tickets are $3 each; 2 for $5. The drawing will be held on Sunday, October 19, 2014. The piece is 31" tall, 21" wide, and is on a base that is 12 1/2" in diameter. Tickets are available from any Board member.

~GET TOGETHER~

Our 2nd annual "Lunchbreak Lecture" presentation for Sunday, January 26, 12:30 to 1:30, offers a multi-media project centered on Blair Mountain. Featured presenter is Saro Lynch-Thomason--- illustrator, award-winning ballad singer, amateur folklorist, and activist--- who uses music and narrative to tell the story of the West Virginia Mine wars of 1900-1921. Join WVHC board members in Charleston at the Habitat for Humanity ReStore Community Center conference room, 301 Piedmont Rd., use *Court Street* entrance. Parking is available opposite that entrance, on Piedmont. We look forward to meeting you---anew or again!!

Note: The Lunch Break Lecture described above is a part of the quarterly Board Meeting. While the lecture is the most interesting part, members are welcome at the entire Board Meeting as well. It begins at 9:30 a.m. All members are invited to attend. While only Board members may vote or make motions, any member is free to listen, participate in the discussion, palaver, pontificate (within limits), etc.

HORMONE-DISRUPTING CHEMICALS LINKED TO FRACKING FOUND IN COLORADO RIVER

This week, more evidence came in that hydraulic fracturing (or fracking) poses potentially serious risks to drinking water quality and human health.

A team of researchers from the University of Missouri found evidence of hormone-disrupting activity in water located near fracking sites – including samples taken from the Colorado River near a dense drilling region of western Colorado.

The Colorado River is a source of drinking water for more than 30 million people.

The peer-reviewed study was published this week in the journal Endocrinology.

The University of Missouri team found that 11 chemicals commonly used in the fracking process are "endocrine disrupters" – compounds that can affect the human hormonal system and have been linked to cancer, birth defects, and infertility.

"More than 700 chemicals are used in the fracking process, and many of them disturb hormone function," said Dr. Susan Nagel, associate professor of obstetrics, gynecology, and women's health at the University of Missouri School of Medicine and a co-author of the study, in a news release.

"With fracking on the rise, populations may face greater health risks from increased endocrine-disrupting chemical exposure."

The research team collected samples from ground water and surface water from sites in Garfield County, Colorado, where fracking fluids had accidentally spilled, as well as from the nearby Colorado River, into which local streams and groundwater drain. They also took samples from other areas of Garfield County where little drilling has taken place, as well as from a county in Missouri where there had been no drilling at all.

They found that the samples from the spill site had moderate-to-high levels of endocrine-disrupting activity, and the Colorado River samples had moderate levels. The other two samples, taken from areas with little or no drilling activity, showed low levels of endocrine-disrupting activity.

The new findings add urgency to calls for moratoriums on fracking until the risks have been fully assessed and regulations and monitoring put in place to safeguard water supplies and public health.

Due to the so-called "Halliburton loophole," the oil and gas industry is exempt from important requirements under the federal Safe Drinking Water Act, and states have been slow to fill the regulatory gap.

A statement about the new findings of endocrine-disrupting chemicals (EDCs) in waters near fracking sites issued by Concerned Health Professionals of New York, and posted here, concludes with this warning:

"These results, which are based on validated cell cultures, demonstrate that public health concerns about fracking are well-founded and extend to our hormone systems. The stakes could not be higher. Exposure to EDCs has been variously linked to breast cancer, infertility, birth defects, and learning disabilities. Scientists have identified no safe threshold of exposure for EDCs, especially for pregnant women, infants, and children."

Note: This is an abbreviated version of a post by Sandra Postel of National Geographic's Freshwater Initiative in Water Currents on December 20, 2013

LAND BRIDGE PROTECTED IN RANDOLPH COUNTY

Working closely with a local landowner and other conservation partners, The Nature Conservancy has protected 555 acres of West Virginia high country that will provide a habitat connection between some of the wildest lands within the Monongahela National Forest.

Permanent conservation easements on Steve Callan's Gandy Ranch properties in Randolph County will ensure that the land is protected from development in perpetuity, and a comprehensive land restoration effort will restore native red spruce forest and tributaries to Gandy Creek – providing habitat for the West Virginia Northern flying squirrel, Cheat Mountain salamander, native brook trout, and other uncommon species.

"This project will protect and restore a 'land bridge' that is two to three miles wide, connecting the high country habitats of the Laurel Fork Wilderness and the Seneca Creek Backcountry," said Keith Fisher, director of conservation programs for The Nature Conservancy in West Virginia. "The property we're protecting runs along about 1.25 miles of Gandy Creek and reaches all the way up to the 4,636-foot summit of Pharis Knob, one of our state's highest peaks."

A conservation easement is a legal agreement restricting certain future uses of the land. This easement provided by Callen, of Morgantown, through a combination of bargain sale and donation, is binding on all future owners and ensures that the land will remain undeveloped. The property will serve as a corridor for far-ranging species like black bear and connect currently separated populations of flying squirrels. And the habitat restoration project already under way will improve habitat for brook trout in Gandy Creek and improve downstream fishing opportunities.

The Conservancy has been working to protect the land since 2012, when it secured a grant from American Rivers and the U.S. Environmental Protection Agency as part of a comprehensive initiative to protect and restore rivers in the Potomac Highlands region. Funding sources for land acquisition and habitat restoration also include the West Virginia Northern Flying Squirrel Conservation Fund (administered by the U.S. Fish & Wildlife Service), and the West Virginia Outdoor Heritage Conservation Fund, the Wildlife Conservation Society, and the West Virginia In-lieu Fee Mitigation Program (sponsored by the West Virginia Department of Environmental Protection).

In addition to securing the easement, the money will be used to replant spruce and northern hardwood forest, eliminate non-native invasive species, fence out cattle, stabilize eroding banks and add fish habitat structures. Partners on the project, which will be completed next year, include Trout Unlimited, the Central Appalachian Spruce Restoration Initiative (the West Virginia Highlands Conservancy is a partner in this), the U.S. Forest Service, Canaan Valley Institute, and the Mountain Institute.

"Through the foresight of this landowner and the support of our partners, we're protecting an important freshwater resource and the home fishing waters for future generations of West Virginians," said Fisher. "We're also providing habitat for a number of iconic Central Appalachian species."

OFFICE OF SURFACE MINING RESPONDS TO PETITION TO TAKE OVER MINING PROGRAM

By John McFerrin

In June, 2013, eighteen groups petitioned the federal Office of Surface Mining, asking that it take over all or parts of the regulation of surface mining in West Virginia. In the petition, the groups set out the various ways in which it considered West Virginia to be deficient in its regulation of mining.

The Office of Surface Mining has now responded. In its response it said that it considered fourteen of the nineteen alleged deficiencies to be unsupported. It will not take any further action on those allegations.

The Office of Surface Mining considered five of the nineteen to be potentially meritorious. Because of this, it will further evaluate those five.

Background

The West Virginia Highlands Conservancy and its allies (Appalachian Catholic Worker; Appalachian Voices; Catholic Committee Of Appalachia; Center For Biological Diversity; Center For Health, Environment & Justice; Christians For The Mountains; Coal River Mountain Watch; Earthjustice; Keeper Of The Mountains Foundation; League Of Women Voters; Mountain Heritage And Health Association; National Wildlife Federation; Ohio Valley Environmental Coalition; Sierra Club; West Virginia Citizen Action; West Virginia Environmental Council; And West Virginia Rivers Coalition) have filed a petition requesting that the federal Office of Surface Mining take over responsibility for regulation of surface mining in West Virginia.

The regulation of strip mining is supposed to be a joint state-federal responsibility. The federal Surface Mining Control and Reclamation Act sets out standards both for performance (how mining may be conducted, reclamation standards, etc.) and for enforcement (inspections, penalties, etc.) The Act also sets up a program for the federal Office of Surface Mining to enforce the Act.

States may enact a state program that is just as effective as the federal program. If they do this, then the state assumes primary responsibility for regulating mining. The Office of Surface Mining's role is limited to oversight. It is supposed to oversee states to make sure that they are effectively regulating mining.

West Virginia chose to enact its own state program. In 1981, the West Virginia program was approved by the Office of Surface Mining. Ever since then, the state has had primary responsibility for regulating strip mining.

In the view of the petitioners, West Virginia has done a poor job of carrying out its program and effectively regulating strip mining. The petitioners ask that the Office of Surface Mining revoke its approval of West Virginia's program and take over enforcement in West Virginia.

According to the Petition, West Virginia is deficient in most, if not all, of the parts that make up the regulation of mining. For more detail on some of the allegations, see the July, 2013, issue of *The Highlands Voice.*

What the Office of Surface Mining Did

The Office of Surface Mining responded to the Petition by asking the West Virginia Department of Environmental Protection what it had to say for itself as well as doing some of its own research. The product was a 78 page OSM Analysis and Determination of the June 2013 West Virginia 30 CFR Part 733 Petition. If you want to read the whole thing, go to http://www.osmre.gov/lrg/SMCRA/OSM_Analysis_WV733_123013.pdf. Considering the genre´, it's not a bad read.

Of the nineteen allegations, the Office of Surface Mining determined that five were worthy of additional evaluation. They are:

1. WVDEP Fails to Address Potential flooding Impacts in the Permitting Process with
Storm Water Runoff Analysis (SWROA);

The permitting process is supposed to include modeling to predict whether the proposed mine would cause flooding. The Petitioners had alleged that the West Virginia Department of Environmental Protection didn't really have the personnel or the expertise to evaluate applications on this issue. Instead, it relied upon whatever the company and its engineers said. OSM more or less agreed with this but it also noted that the West Virginia DEP had done some trainings and that there was nothing inherently wrong with relying upon certifications by professional engineers. As a result, OSM did nothing on this aspect of the issue.

It did, however, decide to further evaluate how West Virginia was handling this aspect of its program. It had done oversight inspections of West Virginia and had been noticing problems with this aspect of the program since 2009. It thought that this history justified further evaluation.

2. WVDEP Fails to Issue SMCRA Violations Where National Pollutant Discharge
Elimination System (NPDES) Violations Exist;

Surface mines are primarily regulated under the Surface Mining Control and Reclamation Act, an act which is specific to mining. They are also subject to the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) requirements. These requirements control how clean water leaving the mine site must be.

Because both the Surface Mining Control and Reclamation Act and the Clean Water Act regulate water, the Petitioners conclude that a violation of one is a violation of both. West Virginia DEP does not, however, routinely take SMCRA enforcement action when the Clean Water Act is violated. This failure has an impact upon how bonds are released and whether new permits may be issued.

In its analysis, OSM said that the DEP has different duties under the Surface Mining Control and Reclamation Act and the Clean Water Act. It also said that only a small fraction of the discharges from mines were in violation of NPDES requirement.

While this initial analysis seems to suggest that OSM thinks that West Virginia is not doing anything wrong in this area, it is still going to do further evaluation.

3. WVDEP Fails to Regulate Selenium Pollution;

Selenium is a naturally occurring element that is associated with certain strata near certain coal seams. While harmless of even beneficial in very small concentrations, it is toxic in greater concentrations. The Petitioners say that West Virginia's program for regulating selenium is totally inadequate, resulting in a widespread risk to state waters.

The Office of Surface Mining says that there are a couple of ways to deal with selenium. An operator can isolate the selenium

(More on the next page)

OFFICE OF SURFACE MINING RESPONDS TO PETITION (Continued from previous page)

bearing strata. It could also treat the water to remove selenium before it is discharged. OSM concluded that, rather than being a systemic failure, any problems which the WVDEP has with regulating selenium represent an agency that is trying to deal with the problem but hasn't quite gotten it figured out yet.

Because West Virginia has not yet developed a fully effective way to regulate selenium, it will evaluate the West Virginia program further.

4. WVDEP Fails to Properly Define Impacted Areas in Cumulative Hydrologic Impact Analysis (CHIA) Results in Harm to Watersheds

As part of the permitting process, West Virginia DEP is supposed to do a Cumulative Hydrologic Impact Analysis (or CHIA, unrelated to the line of pets that share the same name). The analysis is supposed to consider not just the mine being currently proposed but the cumulative impact of all existing and anticipated mining.

The Petitioners had pointed out several permit applications which were reviewed without considering all the existing or anticipated mining in the watershed. OSM largely conceded that there had been lapses. At the same time, it concluded that the WVDEP was trying to improve this facet of its program. It declined to characterize this as a systemic failure but rather an agency still struggling to improve its practices.

Because the practices still need improvement, OSM will further evaluate this area.

5. WVDEP Fails to Require Properly Protective Soil Removal and Reclamation Measures for Mining Sites.

Mine operators are supposed to reclaim mined areas contemporaneously with the extraction of the coal. While the requirement is not that the mining and reclamation be literally contemporaneous, reclamation of mined areas must follow shortly after the extraction of the coal.

The Petitioners had pointed to several mines where the reclamation was not contemporaneous with the coal extraction. OSM concluded that the examples cited were from a while ago; DEP said that it had improved its procedures. OSM concluded that the examples of tardy reclamation were a small fraction of the mines and refused to conclude that the examples were evidence of a systemic breakdown.

Even though OSM found no evidence of a systemic breakdown, it did conclude that there were problems. Accordingly it will further evaluate this area.

What the Office of Surface Mining didn't do

While the Office of Surface Mining indicated that it would take some further action on these five things, it identified fourteen other issues that it will take no action on. These include slurry impoundments, the issuance of permits to companies with current violations, and the adequacy of performance bonds.

What the Petitioners Think

The Petitioners are, of course, disappointed that the Office of Surface Mining will not take action on all their complaints. While it is disappointing to see continued inaction relating to the failings of WVDEP with regard to regulating coal slurry impoundments, and the continued issuing of permits to sites with active SMCRA violations, the groups are encouraged that the federal office of OSMRE will be investigating 5 out of 19 of the issues raised in the petition.

C.A.R.E. (Citizen Action for Real Enforcement) is not just the Petition. The Petition was a partial success but the filing of the Petition was only the first step, not the last one. The campaign to improve the enforcement of mining laws in West Virginia will continue. People are urged to contact their elected officials as well as the United States Secretary of the Interior, the agency which oversees the Office of Surface Mining.

Huzzahs to the Petitioners!

Just from reading the Petition and all the things the Office of Surface had to respond to, one thing is apparent: the people who put together the Petition did a lot of work and produced a high quality product. We all owe them our thanks. Even if did not result in all the relief the Petitioners asked for, it did result in a step forward, something we should never take for granted.

Photo © Jonathan Jessup (Not intended to illustrate anything. Just beauty for its own sake.)

HIGHLANDS CONSERVANCY BOUTIQUE

► The baby shirts are certified organic cotton and are offered in one infant and several toddler sizes and an infant onesie. Slogan is "I ♥ Mountains Save One for Me!" Onesie [18 mo.]---$17, Infant tee [18 mo.]---$15, Toddler tee, 2T,3T,4T, 5/6---$18

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T- SHIRTS

White, heavy cotton T-shirts with the ***I ♥ Mountains*** slogan on the front. The lettering is blue and the heart is red. "West Virginia Highlands Conservancy" in smaller blue letters is included below the slogan. Short sleeve in sizes: S, M, L, XL, and XXL. Long sleeve in sizes S, M, L, and XL. **Short sleeve** model is $15 by mail; **long sleeve** is $18. West Virginia residents add 6% sales tax. Send sizes wanted and check payable to West Virginia Highlands Conservancy ATTEN: James Solley, WVHC, P.O. Box 306, Charleston, WV 25321-0306.

HATS FOR SALE

We have West Virginia Highlands Conservancy baseball style caps for sale as well as I (Heart) mountains caps.

The WVHC cap is beige with green woven into the twill and the pre-curved visor is light green. The front of the cap has West Virginia Highlands Conservancy logo and the words West Virginia Highlands Conservancy on the front and I (heart) Mountains on the back. It is soft twill, unstructured, low profile, sewn eyelets, cloth strap with tri-glide buckle closure.

The I (heart) Mountains The colors are stone, black and red.. The front of the cap has I "HEART" MOUNTAINS. The heart is red. The red and black hats are soft twill, unstructured, low profile, sewn eyelets, cloth strap with tri-glide buckle closure. The stone has a stiff front crown with a velcro strap on the back. All hats have West Virginia Highlands Conservancy printed on the back. Cost is $15 by mail. West Virginia residents add 6% tax. Make check payable to West Virginia Highlands Conservancy and send to James Solley, P.O. Box 306, Charleston, WV 25321-0306