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The Highlands Voice

The Monthly Publication of the West Virginia Highlands Conservancy

Volume 43

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STATE HAS TO GET PERMITS FOR BOND FORFEITED SITES

COURT OF APPEALS SAYS STATE HAS TO TREAT WATER AT OLD MINES

By John McFerrin

The United States Court of Appeals for the Fourth Circuit has upheld a decision by United States District Court Judge Irene Keeley requiring the West Virginia Department of Environmental Protection to have permits and meet discharge limits at bond forfeiture sites.

West Virginia's system for assuring that mines are reclaimed involves a performance bond and a related Special Reclamation Fund. Mining companies must post a bond. If the company does not reclaim the site, the state would forfeit the bond and do the reclamation.

If the bond was insufficient, the state would use money from the Special Reclamation Fund to finish the job. The Special Reclamation Fund came from per ton payments that all companies made on the coal they mined.

The question that this decision addresses is what happens when a company does not reclaim a site. When that happens, the state assumes responsibility for the site, using the bond and Special Reclamation money to do the reclamation. The controversy was over whether the state had to meet the same standards as would a coal company which was in control of the site.



The Clean Water Act requires that anyone who discharges water have a permit and meet what are known as discharge limits. The permit sets the discharge limits which are limits upon the concentration of pollutants in water leaving the mine site. It might, for example, say that water leaving the site have no more than one milligram per liter of aluminum, three milligrams per liter of iron, pH within certain limits, etc.

The West Virginia Highlands Conservancy and others have long contended that when the states take over a bond forfeiture site it must have a permit and meet the same discharge limits as any other operator would be required to meet. The Department of Environmental Protection has always contended that it was unlike other polluters and did not have to meet the discharge limits.

Judge Keeley, and now the Court of Appeals, resolved this question. In the words of the Court of Appeals,

The text of the CWA, as well as the corresponding regulations issued by the Environmental Protection Agency, confirm that the permit requirements apply to anyone who discharges

(More on p. 13)

What's inside:

Thoughts from President Hugh	2	Get a Hiking Guide	10
Roster of officers	2	Coal ash	11
Forest Service activities	3	Bicycling and wilderness	12
Filling streams to drill for gas	4	Selenium from mines	13
Matters legislative	5	All about the state mammal	13
How to join	6	Readers write	14
Get a calendar	6	Gas wells in Chief Logan Park?	15
Standing up for the EPA	7	New law for gas wells	16
Outings	8		



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From the Heart of the Highlands

by Hugh Rogers

Leftovers, Updates, and End-of-Year Tales

Re: Blackwater Canyon The Forest Service offered a limited easement to Allegheny Wood Products for emergency vehicles, in exchange for public access to AWP's side of the grade. To sweeten the deal, the Forest Service also offered to do all the necessary maintenance work. AWP had claimed that erosion of the grade was seriously affecting its property down the hill.

Since we wrote, in October, AWP has said, No deal. If it can't use the rail-trail as a logging road, it will let the whole thing slide. "We will just have to find another way to remove our timber from the canyon," said the company's public affairs director. The fact that AWP had already found such other ways—a temporary bridge, helicopter logging—influenced the Forest Service's decision on the easement.

Recent users of the Forest Service's side of the trail have had to lift their bikes over fallen trees. In some places, the grade has eroded all the way back to the uphill side. But it's still a great (unofficial) trail. And I recommend the Limerock Trail, which begins on the grade a couple of miles from Hendricks and gradually climbs to the top of the canyon. In this season, there are views of cascading Big Run that look like ancient Chinese paintings; in summer, you can climb the run, in and out of pools and spray, becoming part of the painting.

Re: "Gaslands" At the end of November, the New York State Assembly voted 93 to 43 to place a temporary moratorium on the capture of shale gas by hydraulic fracturing and horizontal drilling. The Senate had passed a similar bill in August. It is expected that Gov. David Paterson will sign the bill into law—although he has pointed out that the state Department of Environmental Conservation is currently reviewing the potential environmental impact of the drilling in upstate New York, and new regulations probably won't be written before the moratorium expires next May.

Still, this is the farthest any state has gone to protect its citizens from the known and unknown environmental consequences of "fracking" in the Marcellus Shale. New York activists will now seek to extend the moratorium until the federal Environmental Protection Agency completes its study of the effects of fracking in 2012. West Virginia's Department of Environmental Protection is engaged in a review similar to New York's. What we need now is a Marcellus-wide moratorium.

Re: Mining's effect on health With input from the Highlands Conservancy and other groups in West Virginia and Kentucky, at the beginning of December Earthjustice put together a community comment letter to the Environmental Protection Agency, supporting its latest "guidance" on water standards for surface mines. All year we have watched with fascination, hope, some impatience, and a bit of pride, as EPA slowly, slowly, transformed itself back into a regulatory agency relying on objective data to enforce the Clean Water Act. At every step it has sought public comment.

There is a strong consensus on ways to measure the health of streams, on how streams affect the health of ecosystems, and on

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(Continued on p. 9)

U.S. FOREST SERVICE PLANS FOR THE MONONGAHELA NATIONAL FOREST

By Marilyn Shoenfeld

The United States Forest Service regularly publishes the "Schedule of Proposed Action(s)" (or "SOPAs") in the Monongahela National Forest. This happens every three months with the latest one covering October 1, 2010 to December 31, 2010.

The document lists all projects that have an impact in the Mon Forest, including nationwide actions, such as the Land Management Planning, projects occurring in more than one District and projects in one District. Each action or project description contains the title, the type of environmental study called for, the purpose, the planning status, the decision date and implementation date, the project contact within the Forest Service, the physical and geographical description and the web link.

The West Virginia Highlands Conservancy looks at this list and decides which projects are important and writes comments that are sent to the USFS. We would like input from our readers, so are including the projects that were discussed at our last Board of Directors Meeting.

Wildlife Openings. This includes most of the Mon. Scoping will start in January of 2011. This proposal will address maintenance of wildlife openings across the Forest through mowing, prescribed fire, herbicide, and other treatments, and will include long-term strategies for determining, prioritizing, and treating existing and new areas. The web link is <http://fs.usda.gov/mnf>

South Zone Wetland Creation. This includes multiple locations in the Marlinton, White Sulphur and Gauley Ranger Districts. Scoping is to have started in October of 2010. Permanent and ephemeral wetlands would be constructed in wooded and open areas to provide habitat for amphibians, reptiles, aquatic plants, invertebrates, birds and mammals. The Indiana bat could also benefit. The web link is http://www.fs.fed.us/nepa/project_content.php?project=31163

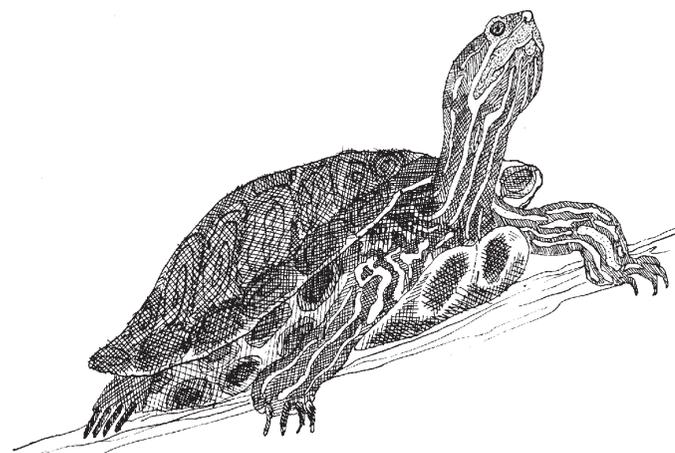
Lower Williams Terrestrial Liming Project. Scoping started in July of 2007. The latest action was taken in response to previous comments and is in the Gauley Ranger District. The Gauley Ranger District of the Mon is proposing to apply lime to up to 2400 acres terrestrial acres in the Lower Williams EIS (environmental impact study) area to restore calcium and enhance soil quality. The USFS supports an alternative that reduces the limestone application to 800 acres. Limestone sands would be applied to ridges and benches in the project area. The web link is http://www.fs.fed.us/nepa/project_content.php?project=22667

http://www.fs.fed.us/nepa/project_content.php?project=22667 This is out for public comment; the period for comments closes December 18th, 2010.

Cheat Mountain Spruce Release. Scoping started in November of 2010. The project is located in the Greenbrier Ranger District. The purpose is to release spruce, conduct approximately 200 acres of noncommercial thinning in stands that are 20 to 25 years old, and/or to create snags in stands that are 60-80 years old. Mechanical methods will be used. The web link is http://www.fs.fed.us/nepa/project_content.php?project=33947

Upper Greenbrier North. Scoping started in August of 2009. This will be back for public comment later in December. It is in the Greenbrier Ranger District. The project proposal includes: commercial timber harvest; timber stand improvement; spruce restoration; road decommissioning, riparian improvement, trail relocation, culvert replacement, and dispersed recreation site management. The web link is http://www.fs.fed.us/nepa/project_content.PHP?project=28198

The Monongahela National Forest is seeking your input regarding **trails on the Forest.** They are in the process of developing a trails plan for non-motorized recreation opportunities. This plan will help determine trail management objectives and trail maintenance priorities for the next several years. The MNF has partnered with WVU to create an interactive website. You can view current information regarding the trails on the forest and provide comments regarding Trail Management Objectives. The web link is <http://www.montrailssurvey.blogspot.com>



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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.

CHESAPEAKE, EPA AND 404 PERMITS

By Cindy Rank

With all our attention on Clean Water Act Section 404 'fill' permits from the Army Corps of Engineers (ACOE) related to coal mining operations, one might have the impression that the coal industry has a lock on problems re stream fills.

WRONG.

Early in November Chesapeake Appalachia, one of the larger gas companies drilling into the Marcellus shale gas reserves in north central West Virginia, was cited by the Environmental Protection Agency for violating Section 404 of the Clean Water Act (CWA) by placing rock, dirt and pipes into streams without legally required permits.

WETZEL AND MARSHALL COUNTIES

Chesapeake has been drilling extensively in Wetzel County these past many months and the local folks in the area have been documenting problems associated with the drilling efforts, traffic, spills, pipeline and compressor station construction, etc. on their website at www.wcag-wv.org.

Pictured on the website are photos of a beautiful cascading shallow waterfall that has delighted local residents for many years and the roadbed that now covers that section of the stream thanks



to Chesapeake's blatant disregard for the resources of the area and for the regulations governing actions that involve stream protection since all this was apparently done with nary a nod to the need for a permit to do so.

Nestled in an area riddled with numerous well permits, Blake Fork of Fish Creek near New Martinsville was found completely filled with gravel when federal inspectors visited earlier this year.

In addition to Blake Fork, EPA cited the company for discharges into Lynn Camp Run, other tributaries and associated wetlands that had also been done without the legally required Clean Water Act permits from the Army Corps of Engineers.

If left unabated, these and other citations from both EPA and the WV Department of Environmental Protection may yield hefty fines, but in the end, 'seeing is believing' and I for one will wait.

The compliance orders require Chesapeake to remove the fill and restore the streams and wetlands "to pre-disturbance conditions." But one wonders just how that can be accomplished where the waterfall once existed.

UPSHUR COUNTY

So, I can't tell this story without also questioning the actions of Chesapeake here in my home county of Upshur.

I've voiced concern at various meetings about the construction of well pads that are carved out of hillsides, many of which involve the relocation or directing of normal stream flow away from or under the newly constructed well site.

But of course the shrug of the shoulders answer indicates that the company must have the necessary 404 fill permits from the Corps.

Without time to check into it any further I assumed [and, yes, I know better] one of the nationwide permits would have covered the placement of culverts to carry stream flow under the new well pads. But there is nowhere in the state well permitting process that indicates such permits have been applied for or granted. And since there is no public notice about nationwide permit applications it is a



bit of a challenge to find that information even if it does exist.

At least two of Chesapeake's sites I'm familiar with here in the Little Kanawha River headwaters area have been of particular concern to me...especially given the fact that – as one mine inspector often said – "when you scratch the ground here it bleeds". I.e. when disturbed, the pyritic content of the rock in our area gives way to acid drainage and was indeed the reason for our successful defeat of strip mine permits in the early 1980's.

Chesapeake's Tall Trees site is built over two rather substantial streams that now run through corrugated piping underneath the well pad. Over the past eleven months I've watched the flow at the lower end of the pipe go from clear to occasionally rust colored and the corrugated pipe accumulate that tell-tale iron stain typical of drainage from disturbed land in this neck of the woods.

The same may have happened at the Archie Hawkins site where neighbors witnessed a yellow-boy discharge after the very large well pad had been constructed.

The amount of iron, lower pH, etc may not be significant from any one of these sources, but after all these years it's painful to watch our local high quality streams be subjected to a thousand new pin-pricks of pollution.

EPA REQUEST FOR DOCUMENTS

We'll surely keep an eye on these activities as best we can, and work through federal and state legislative processes for more responsible permitting and oversight. But I'm also hopeful that the EPA request for documents from Chesapeake as a result of the recent citations in Wetzel and Marshall Counties will expose additional requirements that still exist for companies – not just Chesapeake – to practice increased due diligence in site excavation, road building, pipeline and compressor station construction, and other activities associated with Marcellus drilling that have the potential to directly or indirectly impact our water resources.

WATER ISSUES DOMINATE WEST VIRGINIA ENVIRONMENTAL COUNCIL'S LEGISLATIVE AGENDA

By Donald S. Garvin, Jr.

West Virginia Environmental Council Legislative Coordinator

The West Virginia Environmental Council has adopted a list of legislative priorities for the 2011 session of the West Virginia Legislature that will focus primarily on water quality issues.

Regulating the drilling of Marcellus shale gas wells is shaping up to be the "big battle" in the 2011 session that begins January 12. There are already two bills being discussed: one, a proposal from the WV Department of Environmental Protection (DEP) developed after stakeholder meetings that began last April; and two, a bill being considered by Subcommittee A of the Joint Legislative Interim Judiciary Committee, after about three years of presentations on the subject by various stakeholders.

WVEC will support comprehensive legislation to address the multitude of new environmental issues surrounding the drilling of Marcellus shale natural gas wells. It requires huge amounts of water to drill and "fracture" the Marcellus shale formation, and in turn produces huge amounts of wastewater. Specifically, WVEC supports regulatory changes that will address water withdrawal from rivers and streams, the content of "frac" fluids, and the disposal of wastewater, along with other important issues arising from this drilling.

In a related matter, the DEP Office of Water has proposed significant changes to the Water Quality Standards Rule that contains a new narrative standard for water withdrawals, new criteria for "total dissolved solids" (TDS), and new nutrient standards for the Greenbrier River. The rule also proposes to create a permanent "mixing zone" variance for Weirton Steel and to lower the criteria for iron on trout streams. WVEC supports some of the proposed changes, and opposes others, and will work to make this rule stronger.

Another water issue of high priority to the E-Council is the impact on human health caused by the injection of coal slurry into underground mine pools. The DEP's own study has shown contamination of nearby groundwater supplies from this process, and the agency has put in place a temporary moratorium on the issuance of new slurry injection permits. It now appears that Subcommittee A of the Joint Legislative Interim Judiciary Committee will begin discussing a bill that would ban this practice (again, after about

three years of presentations on the subject by various stakeholders). WVEC will continue to support legislation that would permanently ban the underground injection of coal slurry.

In an effort to address climate change and greenhouse gases, and reduce West Virginia's carbon footprint, WVEC will continue its support of two bills.

The first is the West Virginia Energy Efficiency Act (last session's bill number was HB 4012). This bill includes a revenue sharing mechanism for utilities so that if the company can lower a consumer's bill through reduced energy consumption then the utility can generate a higher profit rate. The bill mandates that utilities submit a plan to the WV Public Service Commission (PSC) to reduce (per capita) energy consumption by 15% by 2015.

The second is the West Virginia Green Buildings Act (last session's bill number was HB 4008). This bill would mandate that new state buildings be built to the Silver certification level of "green" standards under the LEED's certification program. This means the buildings must earn at least 33 out of 69 possible points based on six criteria: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process.

As a new priority, this year WVEC will also support legislation that would eliminate tax "subsidies" for the production and burning of coal.

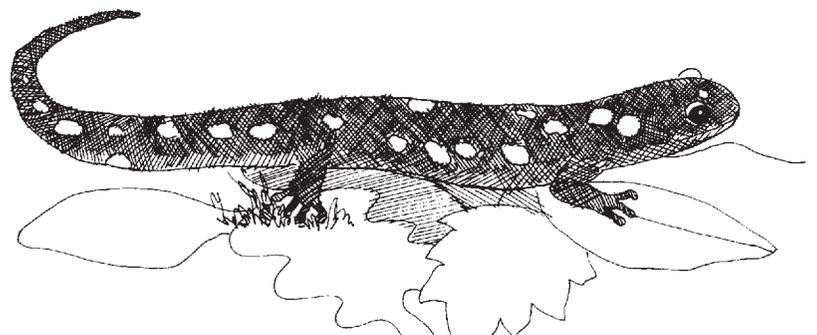
WVEC will continue to support a Public Health Impact Assessment Bill. This legislation would require the Bureau of Public Health to provide the Legislature with an independent assessment of the public health impacts of DEP rules proposals to change water quality or air quality standards.

Finally, WVEC will ask the Legislature to adopt a resolution calling for an "accountability" of both the Department of Environmental Protection and the Public Service Commission.

And, as usual, the WVEC lobby team will be ready to "play defense" on any number of bad proposals that pop up during the session.

Voice Available Electronically

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



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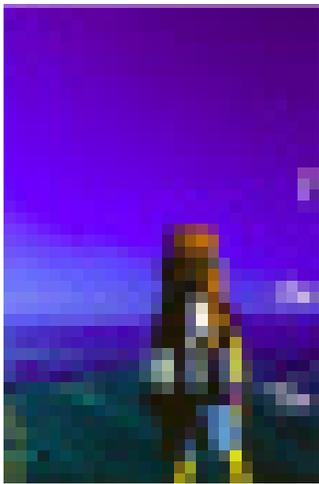
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West Virginia Highlands Conservancy
Working to Keep West Virginia Wild and Wonderful!



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 \$24.95, 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.

SUCH A DEAL!

Book Premium With Membership

Although *Fighting to Protect the Highlands, the First 40 Years of the West Virginia Highlands Conservancy* normally sells for \$24.95, we are offering it as a premium to our members. Anyone who adds \$10 to the membership dues listed on the How to Join membership form will receive the history book for free. Just note on the membership form that you wish to take advantage of this offer.

This offer is available to current members as well as new members. Current members may add \$10.00 to the amount they pay when they renew their memberships and receive a book as well.

CANAAN VALLEY PHOTOGRAPHIC CALENDAR AVAILABLE

The Friends of the 500th has produced a calendar of Canaan Valley Photographic images. Each photo was taken on the Refuge by local or regional photographers, including Kent Mason, Gerri Wilson, Joe Henry, Frank Ceravalo, Mark Anderson and Mary Ann Honcharik. Each image captures wildlife, plants and scenes from the Refuge. The calendar can be purchased at the CVNWR bookstore (Mon, Wed, Fri, Sat) or by sending an email to Marilyn Shoenfeld (marilyn.shoenfeld@gmail.com).

This makes a wonderful and unusual Holiday gift. All proceeds go to fund projects on the Refuge. The retail price is \$11.95 plus tax.

Groups oppose obstructionist lawsuits**STANDING UP FOR EPA – PART II**

By Cindy Rank

The November issue of *the Highlands Voice* featured a story about the West Virginia Highlands Conservancy (WVHC) and several other regional organizations defending the rights of the federal Environmental Protection Agency (EPA) against a legal challenge by the National Mining Association by filing a motion to intervene in that challenge.

Shortly after the Voice went to press West Virginia Highlands Conservancy and the other Appalachian organizations filed a motion to intervene in a second lawsuit in defense of the U.S. Environment Protection Agency's (EPA) new Clean Water Act guidance and its interagency review process with the U.S. Army Corps of Engineers (Corps). The lawsuit was filed by West Virginia Governor Joe Manchin on behalf of the state of West Virginia just before his election to the U.S. Senate.

The intervening groups -- all of which have members directly affected by mountaintop removal mining across Appalachia -- are the West Virginia Highlands Conservancy, Sierra Club, Coal River Mountain Watch, Ohio Valley Environmental Coalition, Kentuckians For The Commonwealth, Southern Appalachian Mountain Stewards, and Statewide Organizing for Community eMpowerment (SOCM). The Appalachian Center for the Economy and the Environment is representing the groups.

The groups are intervening in this challenge because they believe that the state of West Virginia should not be able to stop federal government agencies from following one of the nation's cornerstone and longstanding laws, the Clean Water Act; from considering and using the best available science; or from protecting America's waters from destruction.

At the heart of this legal challenge is an interagency review process that EPA and the Corps are conducting in partnership, along with a policy guidance issued by EPA Administrator Lisa Jackson in April 2010. The interagency review and policy guidance aim to ensure compliance with the Clean Water Act and to strengthen the role of science in reviewing applications for mountaintop removal coal mining permits. The guidance also provides scientific information to help regulators prevent irreversible damage to Appalachian watersheds at risk from mining.

On October 6, Governor Manchin (now Senator) announced that the state of West Virginia was filing suit against the EPA and the

Army Corps. The lawsuit attempts to block the EPA and the Corps from enforcing important existing Clean Water Act protections, including the consideration of important scientific information during the permitting process. The West Virginia case is similar to the case filed by the National Mining Association in Washington, D.C., where the same conservation groups, presented by Earthjustice, have intervened in support of the agencies.

It's taken nearly twenty years of pleading, polite encouragement, legal actions that brought scientists and academic experts to focus on the impacts of these large mining operations, and untold numbers of articles, books, documentary films as well as thousands of hours of volunteer time on the part of community members impacted by this mining to finally bring about a fair evaluation of the impacts of mountaintop removal mining. Now is not the time for West Virginia to turn its back on protecting the health of our valuable water resources or to challenge the authority of EPA to assist in that effort.

When science indicates harm is being done to streams below valley fills throughout the region it is time... no past time, to heed the sage warnings of Fourth Circuit Judge Wilkinson who noted in his dissent in a closely divided Fourth Circuit decision involving our earlier litigation about particular individual mountaintop removal mining permits [OVEC v. Aracoma Coal Co., 567 F.3d 130, 133 (4th Cir. 2009) (Wilkinson, J., dissenting from denial of rehearing):

"West Virginia is witnessing in the Appalachian headwaters the long, sad decline that Virginia and Maryland have seen with the Chesapeake Bay. Once the ecologies of streams and rivers and bays and oceans turn, they cannot be easily reclaimed. More often than not, the waterway is simply gone for good."

Postscripts:

We have yet to learn if the various legal challenges to EPA will be consolidated into one action in the district court in Washington DC, but EPA has requested that be done.

In the meantime prior to the December 1st deadline EPA received hundreds of comments about their April 2010 guidance, scientific reports and interagency review process. We'll summarize some of these comments if there is time and space in the January issue of *The Highlands Voice*.

BROCHURES

The West Virginia Highlands Conservancy has joined with the Sierra Club, Coal River Mountain Watch, Ohio Valley Environmental Coalition, West Virginia Rivers Coalition, Appalachian Voices, Kentuckians for the Commonwealth, Keeper of the Mountains Foundation and Christians for the Mountains have put together a new brochure entitled **"Mountaintop Removal Destroys Our Homeplace STOP THE DEVASTATION!"** For a copy send a self addressed stamped envelope to Julian Martin, 1525 Hampton Road, Charleston, WV 25314.

Quantities are available for teachers, civic and religious groups and anyone who can distribute them.

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.

West Virginia Mountain Odyssey



Outings, Education and Beyond

Sunday, December 26: 1 pm, White Grass Winter Outing led by Chip Chase of White Grass Ski Resort. Come join Chip as he takes you on a care-free snow shoe tour of beautiful Canaan Valley. For more information, visit www.whitegrass.com or call 304 866-4114.

Friday, December 31: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

Sunday, January 9: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

Sunday, January 16: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

Sunday, January 23: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

Sunday, January 30: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

Monday, February 7: 1 pm, Red spruce ecosystem restoration in Central Appalachia, at White Grass Ski Touring Center. The red spruce ecosystems once covered more than 500,000 acres of West Virginia's mountain counties. After the industrial logging era (1880-1920) this iconic West Virginia forest has been reduced to less than 10 percent of its original size. Once the virgin spruce was extracted, much of the ground cover and soils dried out. Wide spread fires swept across parts of the landscape eliminating the seed source. Today, this critical habitat for West Virginia Northern flying squirrel, federally threatened Cheat Mountain salamander and other rare species is confined to the highest ridge tops. The remaining red spruce is often found in fragmented patches. Now a multi-partner group, the Central Appalachian Spruce Restoration Initiative (CASRI), is working to restore this important Appalachian ecosystem. Join Evan Burks, Partnership Specialist for the Monongahela National Forest and CASRI coordinator, on this interpretive walk to learn about the importance of this ecosystem and the group's efforts to restore it. For more information, visit www.whitegrass.com or call 304 866-4114.

Sunday, February 20: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

Sunday, March 6: 1 pm, White Grass Winter Outing. Winter-themed snow shoe tour. Outing takes place on over 50 km of ski trails. Join us to see and learn about all the unique wildlife habitats in Canaan Valley and much more! For more information, visit www.whitegrass.com or call 304 866-4114.

WHITE GRASS WINTER OUTING SERIES KICKS OFF

All the outings listed on the previous page are part of The White Grass Winter Outings Series. The series is a group of individual events that provides recreational access and educational opportunities for the public during the winter months in beautiful Canaan Valley. Outings begin at White Grass Ski Touring Center, last 1 hour and are about 1 mile in distance. All outings will begin at 1 pm this year and are free to the public. Join us as knowledgeable professionals and Master Naturalists lead you through a pristine winter landscape while you see and learn about the diverse array of natural and cultural features of Canaan Valley. For more information, visit www.whitegrass.com, or call 304 866-4114. The slate of outings has had the dates determined but the leaders are still being identified. If you would like to share some of your knowledge of the natural world with some fine folks eager to learn, contact Glenn Waldron at glnwald@hotmail.com or call 585-322-2015 and we'll get you signed up.

HUGH FINISHES UP (Continued from p. 2)

how ecosystems affect the health of people living there. Moreover, that consensus extends to recognition of the cumulative impacts of the loss of more than 2,000 miles of streams to mountaintop removal mining. The Scientific Advisory Board, an independent body of scientists who provide advice to EPA, has approved the methods and conclusions of EPA's study and the benchmarks it proposes, but it cautioned that the benchmark levels are likely not protective enough.

It can't be emphasized enough that we are talking about *people's* health. People in a sick environment get sick. People who are chronically exposed to contamination of their water and air by mining pollution suffer cancers, kidney disease, emphysema, and other illnesses at much greater rates than the general population; their children begin life at lower birth rates, and have to deal with more learning disabilities.

The mining industry can't refute these facts; instead, it plays the victim, wails about changes, attacks the science as "nitpicking," and calls for "balance" between environmental health and economic interests.

Its position was perfectly reflected in an editorial in the Charleston Daily Mail titled "Economic murder by micromanagement." The nub of the piece was a recitation of terms that might be unfamiliar to the average reader: "stream functions ... substrate characteristics and elevation, water or substrate chemistry, nutrients, currents,

circulation, fluctuation, and salinity, ... recolonization of indigenous aquatic organisms or communities ..." Science was ridiculed for its technical vocabulary.

This condescension may have backfired. A reasonably intelligent reader would figure out that a stream that was impaired in so many functions would be, in effect, dead. The editorial's conclusion—"The result [of EPA's benchmarks] could be a pristine environment that cannot support people"—had it exactly backward.

"I am I plus my surroundings and if I do not preserve the latter, I do not preserve myself."

-- José Ortega y Gasset

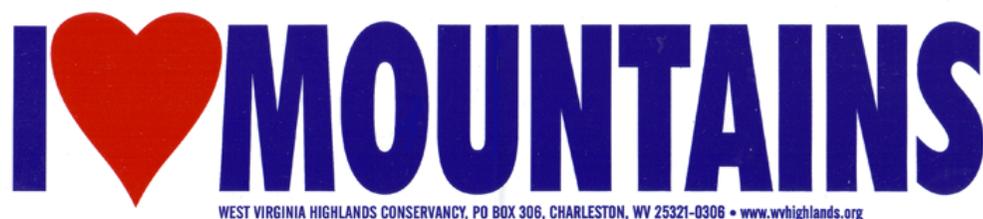
Re: a Senator's legacy Honoring the memory of Senator Byrd, on November 30 the Senate defeated a proposed ban on earmarks. The King is dead, long live the pretenders to the throne.

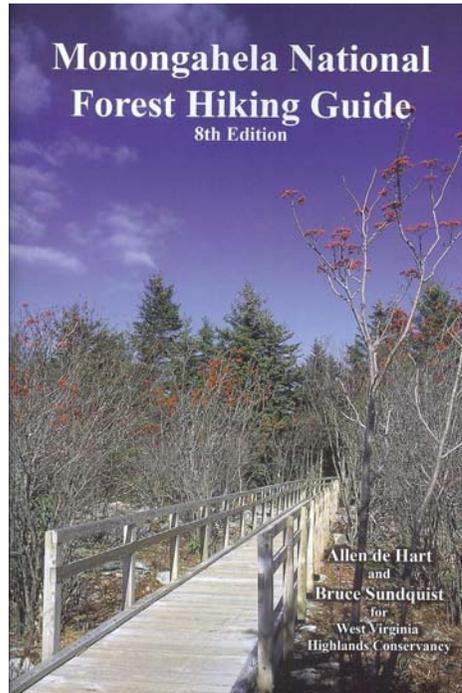
Re: the averages On a slow news day, the Associated Press analyzed census data on income, age, race, education, immigration, rural population percentage, and more than a dozen other factors, to determine the "most average state" in America. It found that Illinois mirrored the country as a whole better than any other state. And the "least average state?" West Virginia. We're often called "below average," but this is something else. "Exceptional," say. Something worth preserving.

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.





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)

Send \$14.95 plus \$3.00 shipping to:
West Virginia Highlands Conservancy
P.O. Box 306
Charleston, WV 25321
OR
Order from our website at
www.wvhighlands.org

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.

HATS FOR SALE

We have West Virginia Highlands Conservancy baseball style hats for sale as well as I ❤️ 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



❤️ Mountains on the back. It is soft twill, unstructured, low profile, sewn eyelets, cloth strap with tri-glide buckle closure.

The I ❤️ Mountains The colors are stone, black and red.. The front of the cap has I

❤️ 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 Jaames Solley, P.O. Box 306, Charleston, WV 25321-0306.

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 \$12 total by mail; **long sleeve** is \$15. 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.



Hazardous or Beneficial?**COAL ASH**

By Cindy Rank

ENVIRONMENTAL PROTECTION AGENCY

While the Environmental Protection Agency (EPA) considers whether to designate coal ash as hazardous waste, questions continue to mount about the content of these combustion wastes generated at coal fired power plants and the safety of current methods of disposal and/or use of the by-products.

Nearly two years after the breach of the coal combustion waste impoundment in Kingston Tennessee and the release of nearly 1 billion gallons of toxic coal ash, researchers at Duke University have documented high levels of arsenic in sediment downstream of the TVA power plant even as levels in the surface waters appear to have abated.

“For their current report, the team collected over 220 surface water and sediment samples during an 18-month period of TVA’s clean up. They measured concentrations of five leachable coal ash contaminants, including arsenic and selenium. The researchers found that anaerobic bacteria in the sediments produce conditions that reduce arsenic from the common pentavalent form to the more-toxic trivalent form, As³⁺. Meanwhile, selenium leeches out of these anoxic sediments and migrates to the more-oxygenated surface water.

“While surface water concentrations of selenium were high only in the cove [near the spill site], As³⁺ levels were high in sediments throughout the 300-acre spill site and surrounding watershed, ...”

The researchers also questioned the adequacy of the cleanup and the accuracy of the Toxicity Testing EPA relies on.

“...even after the remediation, buried ash in some locations still contaminates water among river sediments at arsenic levels beyond 2,000 ppb [parts per billion]. In comparison, EPA’s maximum contaminant level for arsenic in drinking water is 10 ppb. (The threshold for protection of aquatic life is 150 ppb.)

If one has heard Jim Kotcon or Duane Nichols speak about EPA’s toxicity testing, the opinions of the Duke researchers will sound familiar. ...

“The EPA Toxicity Characteristic Leaching Procedure (TCLP) which is used to determine whether a material must be regulated as a hazardous waste, only considers leaching in weakly acidic conditions (pH \square 4), and does not consider leaching of contaminants under a wide range of pH conditions, nor possible anaerobic conditions. In the case of coal ash waste, our [Duke] results indicate that the TCLP test would greatly underestimate leachate concentrations of As [arsenic] for anaerobic disposal conditions, thus would underestimate the potential impact of coal ash leachate in many situations.”

OFFICE OF SURFACE MINING

Whether or not EPA finally determines coal ash and other coal combustion wastes should be considered hazardous, and whatever restrictions the agency requires for its disposal or for its reuse in road surfacing, wallboard and other building materials, etc., the EPA has left to the Office of Surface Mining Reclamation and Enforcement (OSM for short) the responsibility for regulating and overseeing the use of coal ash as backfill at strip mines.

Here in WV coal ash is being used as backfill in strip mines to add alkalinity to otherwise acidic overburden at several mines in the northern part of the state ... most notably several International Coal Group (ICG) mines operating under the name Patriot Mining

Company. [Patriot Coal whose selenium discharging mines in southern WV are the ongoing focus of litigation discussed in previous issues of the Voice is an entirely different beast.]

Neighbors of the expanding ICG/Patriot Mining job in Monongalia County near Cassville, WV have challenged the use of coal ash at the proposed 225 acre New Hill West mine. [A portion of the mine is clearly visible from Interstate 79 to the west as you cross the state line travelling south from PA into WV.]

Patriot Mining intends to apply coal ash and other forms of coal combustion waste (CCW) to mined areas on the mine expansion in amounts between 1,000 to 10,000 tons per acre.

The water permit in question already covers discharges from five previously approved surface mining permits, and the proposed mine would add another 225-acre operation that would discharge into Scotts Run of the Monongahela River drainage.

The appeal by Sierra Club and local residents argues that the WV Department of Environmental Protection (WVDEP) did not perform a reasonable potential analysis of possible water quality impacts and failed to establish discharge limits based on the analysis for specific conductivity, total dissolved solids or sulfate for any of the outlets; for pollutants associated with coal combustion waste (e.g. antimony, arsenic, barium, beryllium, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, thallium, and zinc), etc.

Concerns were also raised about the potential to contribute to another outbreak of golden algae similar to the one responsible for the huge 2009 fish and mussel kill in nearby Dunkard Creek. And mention was made that existing mining at the site is already violating water quality standards.

In mid-November the state Environmental Quality Board (EQB) temporarily blocked this permit expansion and scheduled a week long hearing for December.

Previous Voice articles about the Patriot New West Mine laid out the concerns of residents John and Petra Wood. Speaking for her neighbors about the EQB decision, Petra expressed relief.

“We’re very pleased that the Environmental Quality Board appreciates the risk of harm that will occur to streams and the environment if the company is allowed to conduct its proposed mining operations, and that the board has granted the motion for a stay. ... We look forward to the hearing in December which will show the board all of the problems with the permit, and that these streams and our community should be permanently protected.”



BICYCLES AND WILDERNESS

By Todd Romero

As a second home owner in Canaan Valley, it is with fresh eyes and the passion of a convert that I have embraced the outdoors of the West Virginia Highlands. I have come to have an even greater appreciation for the wonderful area as I become more in tune with it and discover and experience all the hidden gems.

I care deeply about this place and have volunteered many hours giving back to it, participating in such things as red spruce restoration projects and trail work in the Wildlife Refuge. I am also the secretary (and a major worker) for the Tucker County Trails organization. The four-season recreational opportunities coupled with some of the most exhilarating and breathtaking trails in the East are why I (and many others) have chosen to call the area "Home".

As an avid cyclist, I appreciate the opportunity to be able to explore these great areas; using my pedal-power for the rigorous exercise, testing myself, being able to wander and reach the highest heights and taking in the breath-taking views along the way. Nobody understands more than I how precious the places are that I get to enjoy travelling by bicycle, and the need for them to be protected against exploitation from logging, gas drilling, wind farms and even ATV travel which can degrade the trails.

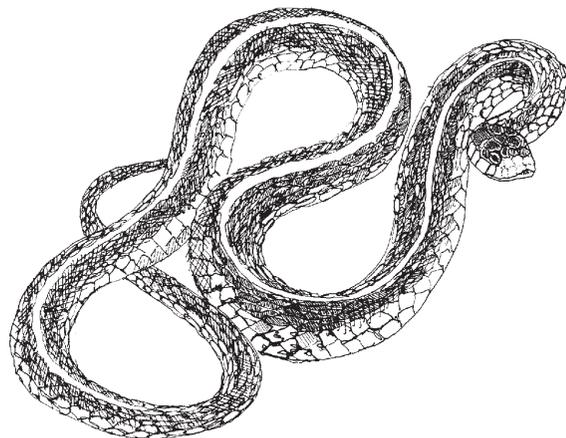
The "gold standard" in the United States for land conservation is Congressionally-designated Wilderness and there is no denying that fact. This becomes a catch 22 for myself as an avid mountain biker who wants to preserve these places just as much, if not more, than most. If they are exploited by resource extraction, the damage cannot be reversed and both physical and philosophical qualities are degraded. But if they become

Wilderness Areas, they can no longer be enjoyed on a bicycle either.

Wow, that's a tough place to be!

But Wilderness is supposed to be a tough, hard, remote place, so it is fitting. I do think you will find that most folks in the cycling community are passionate about land conservation also. There will always be a few voices that come across as brash and tactless in any situation, but that's just life. In this new political climate, the partnerships between environmental groups, recreationalists and community organizations need to be strengthened to protect the places we love. For this to happen, we need to work together in a new and open way, one of communication and building trust. New designations, such as National Conservation Areas or National Scenic Areas will need to be considered in conjunction with Wilderness to protect larger areas.

I think we will start to see that the voice and actions of the cycling community in the state of WV (WV MBA) is as sincere about land conservation as they are about cycling and have been extending hands to other groups such as WV Wilderness Coalition to begin working together to provide the need for protection of areas of the national forest all for the same reasons. As cyclists are beginning to carry an ever growing and more organized voice into the 21st Century, it is my hope that their support of land-conservation will be able to be harnessed by major land-conservation groups by establishing a great working relationship together. Many of us cyclists think we all have a chance to do something great here and think everyone working together will be nothing but a positive for everyone involved! So stay tuned!



A LITTLE HISTORY

Here is some background on how bicycles became prohibited in Wilderness areas. The 1964 Wilderness act did not actually include bicycles. 36 CFR § 293.6 prohibits "use of motor vehicles, motorized equipment, motorboats, or other forms of mechanical transport." It defined "mechanical transport" as transport that is powered by a non-living power source:

"(a) Mechanical transport, as herein used, shall include any contrivance which travels over ground, snow, or water on wheels, tracks, skids, or by floatation and is propelled by a nonliving power source contained or carried on or within the device" 36 CFR § 293,6(a).

It was not until 1984 that the Forest Service re-interpreted that to include bicycles as mechanical transport. There is no doubt they are, but at that time, the cycling community did not extend into mountainous areas as it is a relatively new sport. As a result, that ruling was made without the input of any cyclists because there were almost none at the time.

However, times have changed and mountain biking is a well-established recreational activity and often a preferred option for millions of people who want to explore the natural beauty of our country.

More important to this debate, and what is clear after 30+ years of the existence of our sport, mountain biking is consistent with the values for which Wilderness areas are established - it does not "dominate the landscape," nor does it cause change to the natural condition of the land any more (and often less) than permitted forms of recreation, such as hiking and especially the use of pack animals. Not just setting aside land for preservation, the Wilderness Act was intended to provide places for people to recreate in an atmosphere of adventure, challenge, "tolerable discomfort," solitude and "a difficult to achieve sensory experience." Who can argue that mountain biking doesn't perfectly embody and promote those recreational values?

PATRIOT COAL APPEAL DISMISSED; SELENIUM TREATMENT TO PROCEED

Patriot Coal has decided not to continue with its appeal of a decision by U.S. District Judge Robert Chambers requiring it to carry out a \$45 million plan to clean water that comes from its mines.

As previously reported (*The Highlands Voice*, September 2010) Judge Chambers held Patriot Coal in contempt of court and ordered the company to install equipment to clean up selenium pollution at two of its operations in Southern West Virginia.

U.S. District Judge Robert C. Chambers gave Patriot's Apogee Coal subsidiary 2 1/2 years to install treatment systems at its Ruffer Mine in Logan County and at the Hobet 21 complex along the Boone-Lincoln county border.

Chambers also ordered Patriot to post a \$45 million letter of credit to ensure the treatment systems are installed. and appointed a special master to oversee the matter.

In October, 2010, Patriot Coal filed an appeal from the decision with the United States Court of Appeals for the Fourth Circuit.

Now it has dismissed its appeal, leaving the decision by Judge Chambers as final.

Part of the consideration for dismissing the appeal was an agreement with the plaintiffs, The West Virginia Highlands Conservancy and the Ohio Valley Environmental Coalition. In that agreement, the plaintiffs agreed that if the company continued implementing the Court's Order and doing the things it was required to do then the plaintiffs would not complain about violations that may occur between now and when the treatment system is installed. The

agreement assures the plaintiffs that the system will be installed and not derailed by an appeal. At the same time, the company is assured that the plaintiffs will not complain about ongoing violations while the system is being installed.

As additional assurance that the treatment system will be installed, Judge Chambers appointed James Kyles to run the project as special master. Judge Chambers gave Mr. Kyles sweeping powers to inspect mines, review proposals, and oversee compliance with schedules and guidelines. At least once a week Mr. Kyles will lead a telephone conference with lawyers for Patriot and groups that signed the consent decree. He can talk to Chambers whenever he wishes, without participation by the lawyers.

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. In humans it can cause deadly 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 limits for selenium. The following year, a U.S. Fish and Wildlife Service report warned of more selenium problems downstream from major mining operations.

A LOOK AT OUR STATE MAMMAL

Researched by Katherine McFerrin

Black bears are North America's most familiar and common bears. They typically live in forests and are excellent tree climbers, but are also found in mountains and swamps. Despite their name, black bears can be blue-gray or blue-black, brown, cinnamon, or even (very rarely) white.

Black bears are very opportunistic eaters. Most of their diet consists of grasses, roots, berries, and insects. They will also eat fish and mammals—including carrion—and easily develop a taste for human foods and garbage. Bears who become habituated to human food at campsites, cabins, or rural homes can become dangerous and are often killed—thus the frequent reminder: Please don't feed the bears!



Solitary animals, black bears roam large territories, though they do not protect them from other bears. Males might wander a 15- to 80-square-mile (39- to 207-square-kilometer) home range.

When winter arrives, black bears spend the season dormant in their dens, feeding on body fat they have built up by eating ravenously all summer and fall. They make their dens in caves, burrows,

brush piles, or other sheltered spots—sometimes even in tree holes high above the ground. Black bears den for various lengths of time governed by the diverse climates in which they live, from Canada to northern Mexico.

Female black bears give birth to two or three blind, helpless cubs in mid-winter and nurse them in the den until spring, when all emerge in search of food. The cubs will stay with their very protective mother for about two years.



MORE FROM THE COURT OF APPEALS

(Continued from p. 1)

pollutants into the waters of the United States. Under the CWA, it does not matter that a mining company may have created the conditions that call for reclamation. What matters is that an entity, private or public, is currently discharging pollutants into the waters of the United States. In fact, the statute contains no exceptions for state agencies engaging in reclamation efforts; to the contrary, it explicitly includes them within its scope.

Immediately at issue in the case before Judge Keeley and the Court of Appeals were eighteen sites where the bond had been forfeited and the state of West Virginia had taken over reclamation.

The West Virginia Department of Environmental Protection stipulated that the pH, iron, manganese, and aluminum levels in the water at the sites frequently exceeded both the EPA technology-based and West Virginia water quality standards. It also stipulated that those chemicals are pollutants under the CWA and that they are being discharged into navigable waters. A Department of Environmental representative acknowledged that the pollutant levels at the sites would not meet the West Virginia water quality standards and admitted that the discharge points were places where compliance with the Clean Water Act would have been required. The same representative admitted that it had not issued any permits for those sites.

The decision is important because it clarifies that the state must meet discharge standards at mines where it assumes responsibility for the reclamation.

The decision also has implications for the Special Reclamation Fund. The West Virginia Highlands Conservancy and others have been saying for decades that both the bonds and the Special Reclamation Fund are inadequate to meet the costs of reclaiming forfeited sites. This is especially true in the acid mine drainage sites, mostly in the northern part of the state. If the bonds and the Special Reclamation Fund were inadequate before--when the state was inadequately treating water at forfeited sites—it will be more so now that the state must meet the discharge limits and water quality standards. If the bonds and the Special Reclamation Fund could not afford to do lousy water treatment and reclamation, how could they afford to do the better water treatment and reclamation required by this decision?

In addition to the drain on the Special Reclamation Fund from acid sites, there exists the very real possibility that some of the big mines where selenium is a growing problem will also eventually have their bonds forfeited. If that happens, the expenses of cleanup will be added to the list of hundreds of acid mine drainage sites that still await full reclamation (land and water) from the Special Reclamation Fund.

Our Readers Write

An encouraging word

I almost didn't give to your organization this year. You know, because so many causes and I'm here in Michigan, etc. But fortunately I sat down and read the Nov. issue of the Highlands Voice and I'm reminded of all the good work you do. Enjoyed Dave Cooper's article and had the pleasure (or sorrow) of seeing his road show. Julian Martin's history on Rockefeller was interesting. Thank you,
Carol Rall
Lansing Michigan

A cautionary tale

As frequent users of the Monongahela National Forest and great admirers of West Virginia's scenic natural beauty, we implore you to take a close look at what is happening to State Forest land in Pennsylvania. The gas rush for the Marcellus Shale in Pennsylvania is having a severe impact on public land. Areas that have been leased to gas well companies are being carved up to further fragment the existing forest not to mention the addition of countless new roads.

Also, please keep in mind of the danger posed to clean water and all aquatic life by the existence of these well pads and the distinct possibility of the spilling or leaking of frac fluids into any body of water. I can assure you this development is not a pretty picture. If you haven't seen the movie "Gas Land" by Josh Fox, please do so. This is happening now in Pennsylvania.

Please do everything you can to stop this in West Virginia because it will never be the same.
Jeff, Shirley and Sam Raisch

Your comments and opinions are important to us.

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

Speakers Available !!!!!

Does your school, church or civic group need a speaker or program presentation on a variety of environmental issues? Contact Julian Martin at 1525 Hampton Road, Charleston, WV 25314, or Martinjul@aol.com, or 304-342-8989.

Think it o-o-ver

PARTIES ASK SUPREMES TO RECONSIDER CHIEF LOGAN STATE PARK DECISION

By John McFerrin

The West Virginia Highlands Conservancy, the Friends of Blackwater, and Cordie Hudkins (a retired Chief of the West Virginia State Park System in the West Virginia Division of Natural Resources) have asked that the West Virginia Supreme Court of Appeals reconsider an earlier decision. That decision denied the appeal of the West Virginia Highlands Conservancy, the Friends of Blackwater, and Mr. Hudkins and upheld the Circuit Court of Logan County's decision to allow the drilling of gas wells in Chief Logan State Park.

The West Virginia Highlands Conservancy, the Friends of Blackwater, and Mr. Hudkins had all appealed the Circuit Court's ruling, as had the West Virginia Department of Natural Resources and the West Virginia Department of Energy.

There is a statute that prohibits drilling for gas in state parks. The appellants (the Conservancy, Friends of Blackwater, etc.) had argued that the statute prohibited the proposed drilling.

While it did not expressly say so, the Supreme Court apparently agreed that the statute would, under some circumstances, prohibit the drilling. In this case, however, the Court held that the statute did not apply. The minerals were severed from the surface when the landowners conveyed the surface to the state and kept the minerals. The Court ruled that, since this conveyance took place before the statute prohibiting drilling in parks was passed, the statute did not apply here and could not prohibit the drilling.

The Conservancy, Friends of Blackwater, and Mr. Hudkins all expressed disappointment at the ruling, believing that the Court did not correctly apply the law. Both because of this and because of some ambiguities in the decision of the Court, these appellants have filed a Petition for Reconsideration.

The Petition for Reconsideration has limited goals. These appellants asked the Court to do three things: (1) clarify that the opinion does not apply to other state parks; (2) eliminate or modify the opinion's reference to the federal Land and Water Conservation Fund; and (3) correct a factual error in the opinion. While it would be possible for the Court to completely reverse itself, the probability of that is extremely small. These appellants believe that these three requests are reasonable and that it would be possible for the Court to grant them and modify its opinion accordingly.

As with much land in West Virginia, the surface at Chief Logan State Park was severed from the minerals, including the gas. In the severance deed that was before the Court, there were very specific requirements for how any gas drilling would be carried out. Such language is rare, if not unique in severance deeds. Most simply convey the minerals with no discussion of how they would be extracted.

In making its decision, the Court relied at least in part on this explicit language of the severance deed. At the same time, its decision could be interpreted as allowing gas well drilling in any park pursuant to any standard, general severance deed. The appellants want the Court to clarify its ruling to make clear that the decision does not automatically apply to all parks. It only applies to the limited circumstances that were present at Chief Logan, including a specific severance deed that makes clear that the parties intended the extraction of the gas in a very specific way.

Second, these appellants want to Court to eliminate a reference to the Land and Water Conservation Fund, an issue that was not properly before the Court.

The Land and Water Conservation Fund is a federal grant making program. In order to participate, states must complete a comprehensive statewide outdoor recreation plan. Once it has a plan, a state may apply for grants equal to up to 50 per cent of the cost of a project.

West Virginia has done a plan and has received money for several state parks, including Chief Logan State Park.

If a project is completed using Land and Water Conservation Fund, no part of it may be converted to anything other than outdoor recreational use without the Department of the Interior's consent.

In this case, the West Virginia Department of Natural Resources has not sought the Department of Interior's consent to convert part of Chief Logan State Park to an oil and gas drilling use rather than a recreational use.

While the appellants believe that the Department of Natural Resources has not fulfilled its obligations as a Land and Water Conservation Fund grantee, that issue was not a part of the case in Logan County or before the Supreme Court. In spite of this, the Supreme Court made a gratuitous observation that the Land and Water Conservation Fund did not prohibit the drilling contemplated here. In their Petition for Reconsideration, these appellants ask that the Court eliminate this observation as unnecessary matter that was included in error.

Finally, the Petition for Reconsideration asks the Court to correct a factual error in the decision. In the decision, the Court said that the land was conveyed with the intention of creating a state park.

The actual fact of the matter, as shown by the unrebutted evidence, is that the land was conveyed with the intention of creating a state recreation area. The land was only later considered as a candidate for a state park. Because a state park is different from a state recreation area, the Court was mistaken in its statement that the land was transferred for the purpose of making a state park. While this mistake probably did not make any difference in the outcome of the case, it is a mistake which the appellants would like corrected.

There is no indication when the Court might make a decision on the Petition for Reconsideration.

DEPARTMENT OF NATURAL RESOURCES CIRCULATES PROPOSED STATUTE ON GAS WELL REGULATION

The Department of Environmental Protection wants natural gas companies to submit comprehensive water management plans, including lists of chemicals to be used, when applying for future permits to drill horizontal wells in the Marcellus shale field.

A 100-page draft of proposed legislation provided to The Associated Press shows the DEP wants companies to identify when, where and how much water they withdraw for drilling operations. The department also wants to know what chemicals companies use in hydraulic fracturing, how much wastewater they produce, and when and where they would dispose of the waste.

The Marcellus field is a vast, mile-deep natural gas reserve underlying most of West Virginia, Pennsylvania, New York and portions of Ohio, Maryland and Virginia. It is believed to hold trillions of cubic feet of gas, but breaking it free from the rock requires horizontal drilling and water-intensive hydraulic fracturing technologies.

The proposed legislation, which DEP Secretary Randy Huffman calls "rough and raw," also would require companies to replace water they contaminate. Companies would have to provide emergency supplies within 24 hours, a temporary supply within 72 hours and a permanent supply within two years.

Companies would need permission from the secretary and professionally engineered designs before building open pits that hold more than 210,000 gallons of water. Those pits may have to be lined to prevent chemicals from leaching out, and the DEP could revoke or change permits for any pit deemed a public hazard. Huffman cautioned that the legislation, which contains seven new sections of code, is a working document that will likely change.

"It's very rare that we release proposed legislation in such a rough and raw format, but we didn't want there to be an appearance of secrecy or lack of access," Huffman told the AP, which had requested the documents.

Nor is the legislation all-inclusive, he said. Still to be addressed are issues such as the spacing of wells, noise control, road protection and bonding requirements.

Huffman's team also must tackle the complex issue of mineral rights and whether holdout property owners can be forced to give them up, or how much to charge for Marcellus permits. The DEP needs more revenue to expand its inspection staff.

New fees for Marcellus drilling permits would be "significantly higher" than the fees for conventional shallow wells, Huffman said, but the amounts will be determined later.

"This is the foundation," Huffman said. "This is just to get the process started."

Both DEP staff and a nine-member task force Huffman appointed are now reviewing the legislation. Huffman said the document is mainly the result of public comments and private meetings with stakeholders held over the summer.

Industry officials have said they expected the state to modify West Virginia's drilling laws, and to increase fees to compensate the agency for permitting and monitoring Marcellus operations.

The legislation contains a new section of "environmental protection performance standards," which would require companies to notify landowners of blasting plans, replant disturbed areas, case and seal wells to prevent groundwater contamination, and protect offsite areas from damage.

Companies would not only have to inform the DEP of their

water withdrawal locations but post signs identifying them to the public, along with the operator's permit and telephone numbers.

Huffman said the DEP wants to ensure Marcellus wells are properly planned to address the large-scale disturbance of earth and problems with slippage and sediment runoff, among other things.

"Right now, you can almost hand-draw a well site on a piece of paper and fill out a form and get a permit," he said.

The legislation also has extensive record-keeping and reporting requirements for water, including how much is being transported, by whom, and when and where.

All the required records would have to be kept for three years.

"Right now we're doing nothing," said DEP general counsel Kristin Boggs. "The fact that we're going to make them do something is a departure from what they're used to."

Huffman said he hopes to have a more polished draft of the legislation by mid-December.

Note: This article previously appeared in *The Charleston Gazette*.

STILL IN NEED OF SOMETHING TO READ?

AN OVERVIEW OF MARCELLUS SHALE

In the last few months there have been many stories in *The Highlands Voice* and elsewhere about drilling in the Marcellus shale. For some background on all aspects of Marcellus shale drilling, you should consider a Pennsylvania League of Women Voters Marcellus White Paper. The League did a study and issued a good, non-biased report on many aspects - physical, environmental, economic - of Marcellus Gas Development. It is easy reading, clear, concise, and a good overview. There is basic science and info on the mechanics of the drilling, as well as environmental and economic impact discussions. There are also some good tables that summarize pro and con arguments.

Some of the material (tax and some regulatory issues) is specific to Pennsylvania but most of it would be useful in any state. There is a discussion of federal regulatory issues.

To get to the study, start at the League's basic Marcellus Info Page: <http://palwv.org/issues/MarcellusShale/index.html>. It will guide to the study itself. It will also provide references to other studies and resources.

To go directly to the study, go to <http://palwv.org/issues/MarcellusShale/Marcellus%20Shale%20Study%20Guide%20Parts%201-5.pdf>.

Reading the study will give you a good background on Marcellus shale drilling. There are a lot of references; reading the study plus all the references it cites might tell you more than you wanted to know.

Thanks to Buff Rodman for discovering and pointing out this resource.