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# The Highlands Voice

Since 1967, The Monthly Publication of the West Virginia Highlands Conservancy

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May, 2020

## Bonding: Are the chickens finally coming home to roost?

By Cindy Rank

West Virginia received approval for primacy for the Surface Mining Regulatory program in 1982-3. As a member of the local group Friends of the Little Kanawha (FOLK) and a relative newbie to the WV Highlands Conservancy I recall being at the legislative hearing where the legislature debated the idea of assuming from the federal Office of Surface Mining the responsibility for regulating the mining industry.

People discussed the pros and cons of the action and even then there were concerns about the adequacy of the proposed system for setting bonds for mining operations so that the state wouldn't be stuck with no money to reclaim sites if/when a company went bankrupt or just up and left an operation before completing the job.

It was just 5 years later when WV Highlands Conservancy began the long slog to hold both industry and the regulatory agency accountable for maintaining bonds that would meet the requirements established by the Surface Mine Act of 1977.

In '88 the Highlands Conservancy, Trout Unlimited, Wildlife Federation (National and State chapter) challenged the state program for deficiencies including bonding.

In the 90s Acid Mine Drainage especially in the north threatened water quality and stream health and the cost of treatment began to soar. But permits kept being issued and the state and individual companies continued to be challenged for not fulfilling their duty to provide enough bond money to guarantee successful reclamation.

Then came Mountaintop Removal and things just got worse.

Early predictions of inadequate bonding mechanisms were validated over and over again as the cost of land and water reclamation soared with every new mine.

We appealed to the federal Office of Surface Mining, to state and local appeal boards, and the courts. There were programmatic challenges to the state, and appeals to the federal Office of Surface Mining, Congressional hearings, and litigation against individual mines and mine operators, – and always public actions to educate and involve individuals and communities and sympathetic legislators.

While the obvious legacy of orange water, buried streams and decapitated mountains were glaring enough to make any reasonable person sit up take notice, the insidious unseen but

(More on p. 3)

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## Thoughts from our President

By Larry Thomas

April was another month of dealing with the restrictions associated with COVID-19, what is now known as the silent enemy. Although the coronavirus has us all hunkered down, Mother Nature is on the move. Spring has arrived in our mountains. As winter has faded away, driving and hiking through the mountains, one finds evidence of the different stages of the annual transition. While in some areas the trees are greening with this year's leaves, high on the mountain ridges the trees are still the stately statues of winter waiting for it to get a little warmer. Birds are returning and are busy with their nesting rituals. Mammals who have been sleeping during the long winter have reappeared and are scurrying about filling long empty stomachs. Spring flowers and fruit trees are blooming, and individuals are getting ramps and morels at their very secretive honey holes. What a wonderful time of the year.

I saw an interesting AP article by Seth Borenstein titled "As People Stay Home, Earth Turns Wilder and Cleaner." The first line stated that we are having an unplanned experiment in changing Earth. Observations in the article:

As people across the globe stay home to stop the spread of the new coronavirus, the air has cleaned up. Nitrogen dioxide in the northeastern United States is down 30%. <https://www.nasa.gov/feature/goddard/2020/drop-in-air-pollution-over-northeast> Stars seem more visible at night and people are noticing animals in places and at times they do not usually.

"It's giving us this quite extraordinary insight into just how much of a mess we humans are making of our beautiful planet," says conservation scientist Stuart Pimm of Duke University. "This is giving us an opportunity to magically see how much better it can be."

Scientists have been assembled to access the ecological changes happening with so much humanity housebound. They

are eager to discover such things as changes in weeds, insects, weather patterns, noise and light pollution, sea changes and air pollutants. It is going to be interesting to see what they learn and the affects to our highlands of West Virginia.

I found another interesting AP article that described the difficult but rewarding work of planting trees to aid the climate. In it, it talks about the restoration work being done on Cheat Mountain and other Appalachian forests, projects that WVHC is involved with. That makes for a great article for the June Highlands Voice.

During April, the board and committees have stayed busy. The Climate Change Committee finished the survey and the results are reported herein, the Public Lands Committee continues to review the USFS projects and has provided comments as appropriate; several of its members will attend an upcoming meeting with the USFS concerning the proposed Grassy Ridge Project reported in the April *Highlands Voice*. The Extractive Industries Committee has been reviewing and approving sign-on letters concerning various issues to WVHC and WVHC has signed onto those letters with other conservation organizations.

Please, everyone, stay safe during this coronavirus situation. These times are unprecedented, as Francis Weller notes in his new e-book, "There is nothing ordinary about these days of viruses and deaths, masks and social distancing. Our language has adapted to the pandemic. We speak of peaks and ventilators, hot zones and flattening the curve, washing hands and wiping down surfaces...we have entered a time of descent that takes us down into a different geography...we are hunkered down. Down being the operative word. From the perspective of soul, down is holy ground."

## Virtual Board Highlights

Since we are all sheltering in place, staying at least one turkey vulture wingspan apart, we could not have a regular Board meeting this quarter.

A big part of the Board meeting is Board members and committees reporting on what they have been doing. Instead of having that in person, we did it by email.

The Fall Review committee reported that we have reserved space at Twin Falls State Park in Wyoming County for the week of October 16, 2020. The theme is water. The Committee is working on the program and will have more information as it develops.

The Climate Change Committee reported on the results of the survey of the membership. To see what all they said, see the story on page 5. The Committee is also working on a policy position for the West Virginia Highlands Conservancy. This is hard because Climate Change is such a complicated issue. Not being able to meet in person does not make it any easier.

The Public Lands Committee has been monitoring several Forest Service Projects on the Monongahela National Forest: Beulah Wildlife Enhancement Project, Grassy Ridge Project, Greenbrier Southeast, Panther Ridge, Spruce Knob Grouse Management, and Upper Elk. These are all in various stages of the planning process so we are making comments, reviewing responses to Forest Service responses, etc. He also mentioned The Docks Wildlife Restoration; it was done under a Categorical Exclusion (will not go through the NEPA process with public participation, etc.) so we will not be participating in that.

We are also keeping an eye out for the Ulysses Pump Storage Project. It has failed at three locations and may soon qualify as a zombie project, lumbering around, looking for yet another (as yet unidentified) location. It was most recently the subject of a story in the April edition of *The Highlands Voice*.

## More about the chickens (continued from p. 1)

devastating impact of other pollution like selenium and the toxic brew of dissolved solids quietly degraded even further valuable headwater streams.

As many times that claims by the Conservancy and others about the inadequacy of the bonding program have been verified and remedies ordered by the courts and required by law, the response has never strayed far from the minimum needed to quell the current uprising, and neutralize the opposition ----- a penny here, a penny more there. One tweak after another, one diversion after another.

And always nothing left to do but to live to fight another day and another and another.

One of those fights led to WV Highlands Conservancy, Ohio Valley Environmental Coalition, and Sierra Club chasing after Patriot Coal during its 2015 bankruptcy proceedings and obtaining a Federal Court Order for new owner Virginia Conservation Legacy Fund VCLF and associated mining company ERP Environmental Inc. to accept responsibility for the obligations we had won from Patriot during years of litigation.

Compliance with the court orders would lead not only to ERP properly treating polluting discharges from sites previously owned by Patriot, but also directed a goodly sum of money to Appalachian Headwaters to support its efforts to restore productive native hardwood forests and improve water quality on former surface mine sites in our region.

As for West Virginia Department of Environmental Protection, it too reached agreement with Patriot successor VCLF during those bankruptcy proceedings. As VCLF/ERP assumed ownership and responsibility for some 100+ Patriot mines, WVDEP was given the assurance that ERP was able to guarantee money enough to cover the cost of reclamation should the company fail.

It comes as no surprise to many of us that ERP has had great difficulty living up to any of its agreements but its mine closures and desertion of its workers in the spring of 2020 was the last straw.

Tired of ERPs non-compliance (e.g. West Virginia Department of Environmental Protection had issued the company some 118 cessation orders and 46 show cause orders) but not wanting to revoke ERP's permits, an action that would surely break the Surety Company and add insurmountable liabilities to the Special Reclamation Fund, WVDEP sued ERP in state court, insisting that the company be put in receivership with a person chosen by WVDEP to oversee the financial dealings of the company and barring any

other creditors from access to ERP funds – including those of us with court ordered agreements that transferred from Patriot to ERP.

Despite arguments from our lawyers objecting to the action, the State Court granted West Virginia Department of Environmental Protection the requested Temporary Restraining Order and Preliminary Injunction. There is no telling with delays due to the Coronavirus just when the State Court will proceed any further.

There are two problems of special interest to WVHC (Ohio Valley Environmental Coalition and Sierra Club too). For one thing, it is settled law that state court cannot supersede a Federal Court Order like the one we have against ERP. However, as I understand it, the effort to bar our previously won Federal Court Orders may have been resolved, in which case ERP is still required to comply with the order and we plaintiffs retain the right to enforce that order through Federal Court.

Then there is the more expansive issue of the inadequate bond fund that is once again being given a pass. West Virginia Department of Environmental Protection is side stepping its responsibility and the bond program may yet again escape – or at least put off once again - the day of reckoning.

Perhaps not in my lifetime, but some day, in some way, the state bond program is bound to implode from the weight of decades of imperfect permitting and insufficient bonding.

Blinders off WVDEP. After some 35+ years of warnings, advice, coaxing, and legal battles large and small, the chickens are flocking to your doors.

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For another take on the ERP situation, see Peter Morgan's blog printed elsewhere in this issue of the Highlands Voice. ... Also check out Erin Savage's Front Porch Blog: <https://appvoices.org/2020/04/03/tom-clarke-abandons-mines-in-west-virginia/>.



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The West Virginia Highlands Conservancy web page is [www.wvhighlands.org](http://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.

## Our Readers Write:

The Highlands Voice,

After looking over your survey regarding so-called "global warming," more recently called "climate change," I hope this letter will not be butchered as was my previous communication. Why? As a supporter of academic freedom, I believe all opinions must be expressed.

Regarding number 3 of the survey, there is no proof storms are more severe today compared to those of the past. As proposed by Al Gore, I do not wish to be taxed for my "human activities" when the sea level rises, the birds move north or up Dolly Sods, there's a heavy overnight rain storm, or I don't condemn little children about their "carbon footprints."

Recently I purchased a pick-up truck. I do not want to place a coal energy generated battery in that vehicle although it would employ more miners in our Valley.

Regarding number 5 on the survey, I trust the *Voice* will be more balanced than that which I experienced with *National Geographic*. The publishers of that magazine apparently believed climate change was widely accepted as truth to most of their readers. In my final letter to *National Geographic* I explained "why," after 30 years, I was ending our association: among some 28 pages global warming or climate changed was referenced 17 times.

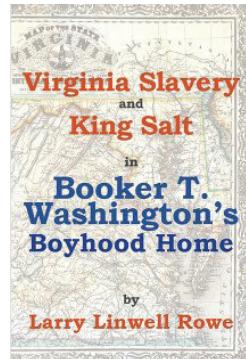
Carl Patsche  
Weirton, WV

## Special Discount for WVHC Members

Larry Rowe of Malden, WV, is offering his book *Virginia Slavery and King Salt in Booker T. Washington's Boyhood Home* at a special rate for West Virginia Highlands Conservancy members. Its regular retail price is \$29.95. He is offering it to WVHC members for \$8.00.

A prominent educator, author, orator and advisor, Booker T. Washington has become a favorite son of West Virginia. He was born in Virginia, and his family moved to Malden during his youth, where he first attended school. In the book, Mr. Rowe tells the story of Washington's boyhood heroes and how he observed them start a black middle-class community in Malden during the first generation after the abolition of slavery.

To take advantage of this offer, call Mr. Rowe at 304-925-1333 or 800-542-6079. Mention that you are a WVHC member for the special rate.



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## The membership speaks

# We Surveyed the Members; What Did They Say?

By the WWHC Climate Change Committee

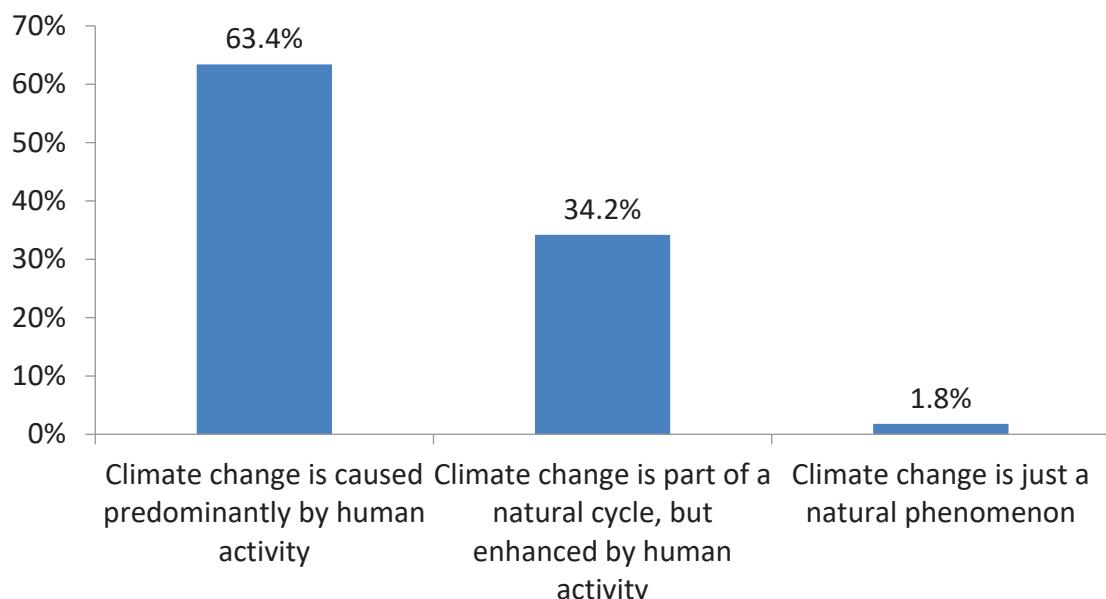
The Climate Change Committee conducted a historic survey of Highlands Conservancy members on climate change in March and the first part of April. This was the first time the Conservancy has surveyed its members on an issue. The Climate Change Committee is grateful for those members who took the time to give us their opinion on climate change. All responses will be kept strictly confidential.

Altogether there were 327 responses with the majority coming through the online service SurveyMonkey. Having this many responses give us a good understanding on what Conservancy members think about climate change.

In general, members recognize that human activity is having an impact on the climate, and they are very concerned about climate change. They believe that climate change will very likely have an impact on the Highlands and other parts of the globe. They support regulatory initiatives, market-based initiatives, international treaties and tough fuel standards to address climate change. They have very high trust in the Conservancy. They support the Board developing and publishing a policy statement on climate change as well as increased material in the *Voice*, on our website, and developing science-based material. They want the Conservancy to be involved in Red Spruce planting, as well as advocating for legislation to reduce greenhouse gasses and advocating for government policies that promote resiliency and adaptation.

Below are some specific results of the survey. Most survey responders thought that climate change was either predominately caused by human activity (63%), or enhanced by human activity (34%). Less than 2% of the responses said that climate change was just a natural phenomenon.

Based on what you have read or heard, which of the following comes closest to your view on climate change?



Most responders were greatly concerned (79%) or concerned a fair amount (17%) about climate change. Less than 5% were only a little or not at all concerned about climate change.

Large majorities of the members thought that the impacts of climate change that were listed in the questionnaire were very likely to occur. Harm to wildlife and their habitats was very likely to occur according to 85% of responders; 82% thought that it is very likely that cold water fisheries would be degraded; 84% thought that it is very likely that storms would be more severe; 84% thought it was very likely that climate change would increase droughts; 83% thought that damage to forest and plant life was very likely to occur. Finally, 90% of responders thought that it is very likely that sea levels will rise as a result of climate change.

A majority of members supported a number of actions to address climate change. Eighty percent of responders thought that regulating power plants would make a big difference. Market-based solutions such as putting a price on carbon or adopting a cap-and-trade initiative were viewed as making a big difference by 59%. International treaties were viewed as making a big difference by 65% of the respondents. Tough fuel standards were viewed by 71% of respondents as making a big difference. There was less agreement on whether more people driving hybrids, eating less red meat, or people or nonprofits planting trees would make a big difference, although a plurality of respondents thought that these actions would make a small difference.

Ninety-two percent of respondents either strongly agreed (55%) or agreed (37%) that the Conservancy is trusted to provide full and accurate information on climate change.

When asked what the Conservancy should be doing to address climate change, 73% would like to see more articles in the *Voice*. More content on the website was supported by 69% of the respondents; more science-based material was supported by 73% of respondents; and 78% wanted the Conservancy to develop and publish a policy statement on climate change.

There was overwhelming support for the Conservancy being involved in activities to address climate change. Ninety-six percent supported planting Red Spruce and other restoration activities. Eighty-five percent supported providing educational material. Ninety-two percent supported advocating for legislation to reduce greenhouse gasses; and 89% supported advocating for policies for resiliency and adaptation.

Clearly, Conservancy members believe that climate change is real, that it is partly the result of human activity, and that the Conservancy should be engaged in finding solutions to protect the Highlands from its most serious impacts.

# ClimateWise – Brook Trout, we need to listen to them

By Jeff Witten, Elkins, on behalf of the West Virginia Highlands Conservancy Climate Change Committee

As I type this article, looking at Shavers Fork on March 28, Elkins has just set a record high temperature of 84° beating the prior record by 3°.

We all know the Eastern Brook Trout is the West Virginia State Fish. It is the only native “trout” in the eastern US and is treasured in West Virginia not only as a fish, not only as a beauty of art, not only as recreation, not only as a contributor to our economy, not only a magnetic tool with which to teach kids and not only as a part of our state’s history but also as an indicator.

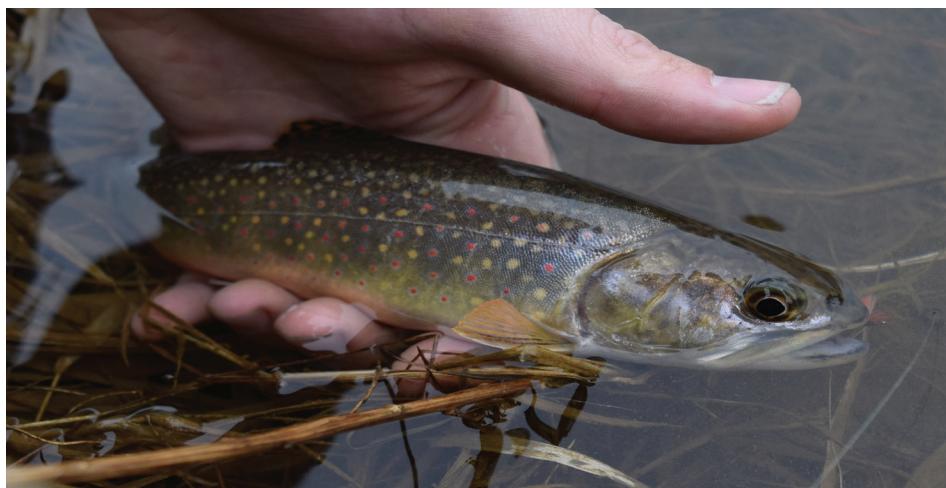
An indicator of what? It’s the “canary in the coal mine.” It might be telling us our future.

The US Fish and Wildlife Service says: “Brookies’ are considered an indicator species, because they help indicate the health or overall quality of the waters they inhabit. Large numbers of brook trout found in a stream indicate a healthy environment while a decline indicates deteriorating habitat and poor water quality.”

A “healthy environment” for the Brookie is also a healthy environment for you and me.

Brook trout populations depend on cold, clear, well-oxygenated water of high purity. Humans do too, not to mention millions of other species of flora and fauna. But Brookies are the indicator; they are the first to indicate a problem. We need to listen to them.

The historic range of the Brookie is shrinking. Trout Unlimited has determined that only 3% of today’s populations occupy high quality habitats or “strongholds,” many in WV. The School of Natural Resources, West Virginia University, studied the climate



**Eastern Brook Trout**  
Photo courtesy of Trout Unlimited

change vulnerability of upper Shavers Fork. They report “continued warming may result in the loss of suitable main-stem habitat and prevent metapopulation.”

Trout Unlimited is dedicated to restoring degraded habitat and reconnecting Brook trout populations. TU, working with partners, invests millions of dollars to improve habitat.

The Brookies’ range has already been reduced by deforestation and siltation. In addition to chemical pollution and algae growth caused by fertilizer runoff, air pollution has been a significant factor in the disappearance of brook trout from their native habitats. Acid rain caused by air pollution from burning coal has killed our trees and trout. Over the years we have addressed many

pollution threats and we continue to monitor pipeline construction and siltation threats and violations.

But there is a bigger, growing threat that is negatively impacting our Brook Trout. As climate change leads to higher water temperatures, the Bookies are threatened. Not overnight but over time and it is happening now.

Of course, it isn’t just West Virginia. Montana forecasts more than a 50% reduction in their native trout habitat by 2080. A long way off but the decline has already started.

Warming leads to reduced brook trout growth, survival and reproduction and at the same time increases non-native, invasive species. More intense storm events increase erosion and sedimentation leading to reduced aquatic insect community and fills in spawning areas. This could lead to the demise of our State Fish.

I know you care about our Highlands. What can you do to protect, reconnect and restore Brook Trout habitat to sustain them for future generations?

1. **Spread awareness to others.** Not just about climate change but about its impact on the Highlands you love. Tell others it is important to you (and likely them) and why. Personal stories are the most effective!
2. **Let your public officials know how you feel and what you want.**
3. **Demand responsible logging.** Retaining mature trees takes harmful carbon out of the air and stores it safely and helps keep our streams cool and clean.
4. **Plant trees.** Especially along stream banks, shade from the sun cools the water. Stream-side vegetation is also disproportionately good at storing carbon.
5. **Work to remove non-native trout,** which can push native brook trout out of cold-water habitats.
6. **Work to reconnect streams** so trout can address more and diverse habitat (but remember threats of non-native invasions).
7. **Remove other stressors.** Monitor and improve water quality, restore the natural function of streams (braided channels, connections to flood plains).
8. **Rely on furry friends.** Beavers can do great things for trout waters – for free!
9. **Enjoy your Highlands.** Hike, fish, hunt, camp, birding, nature, fresh air, exercise.
10. **Teach.** Teach kids, grandkids.
11. **Donate!** WV Highlands Conservancy, WV Trout Unlimited, WV Rivers Coalition protect our streams.



Central Appalachian  
Spruce Restoration Initiative

# CENTRAL APPALACHIAN SPRUCE RESTORATION INITIATIVE

## 2019 Highlights

### YEAR-END REVIEW

*We are pleased to share highlights of the Central Appalachian Spruce Restoration Initiative!*

CASRI is a diverse partnership of private, state, and federal organizations who share a common goal of restoring historic red spruce-northern hardwood ecosystems across the Central Appalachians.

CASRI envisions a functioning red spruce-northern hardwood forest ecosystem with the scale, connectivity, and maturity to support the natural communities dependent upon this ecosystem. To achieve this landscape scale restoration, CASRI works on both public and private lands, promoting the health of forested, riparian, and agricultural lands, as well as the multitude of plant and animal species which make their home in the central Appalachian mountains.



**We  
Are  
CASRI**



The Nature Conservancy  
Protecting nature. Preserving life.<sup>™</sup>



**APPALACHIAN**  
LANDSCAPE CONSERVATION COOPERATIVE

CASRI partners digging soil pits during the 2019 Ecological Site Description field week.

### MAJOR HIGHLIGHTS

*2019 proved to be yet another year of impressive accomplishments for CASRI:*

- Over 250 acres of high-elevation lands placed on a trajectory to develop into functioning red spruce ecosystems.
- 38,600 red spruce seedlings and 38,000 native plants planted on high-priority conservation and restoration sites.
- 670 acres of red spruce were released.
- Seeds were collected from different native species and will be used to propagate seedlings for planting in 2020 and 2021.
- Over 100 volunteers dedicated their time to restoring red spruce habitat and planted over 13,500 native plants.

To learn more about CASRI and view the complete 2019 annual report, visit:  
<http://www.restoreredspruce.org/>

## Join Now !!!

Name \_\_\_\_\_

**Membership categories** (circle one)

Individual      Family      Org.

|              |       |       |        |
|--------------|-------|-------|--------|
| Senior       | \$15  |       |        |
| Student      | \$15  |       |        |
| Introductory | \$15  |       |        |
| Other        | \$15  |       |        |
| Regular      | \$25  | \$35  | \$50   |
| Associate    | \$50  | \$75  | \$100  |
| Sustaining   | \$100 | \$150 | \$200  |
| Patron       | \$250 | \$500 | \$500  |
| Mountaineer  | \$500 | \$750 | \$1000 |

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ Email \_\_\_\_\_

Mail to West Virginia Highlands Conservancy, P. O. Box 306, Charleston, WV 25321

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

You may also join on-line at [www.wvhightlands.org](http://www.wvhightlands.org)

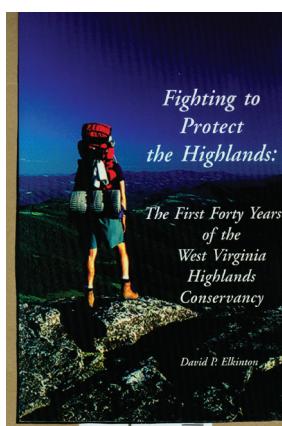
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Person you wish to refer: \_\_\_\_\_

Address: \_\_\_\_\_

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Your name: \_\_\_\_\_

Filling out the form, etc. is, of course, the old school way of doing things. If you prefer, just email the information to Beth Little at [blittle@citnet.net](mailto:blittle@citnet.net).

The way it works: Anyone you refer gets *The Highlands Voice* for six months. At the end of the six months, they get a letter asking if they want to join. If they join, we're happy. If not, then maybe next time.

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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 Considers Weakening Water Protections

By Randy Kessling

The West Virginia Department of Environmental Protection held a virtual public hearing on April 20 to receive comments on its proposed Biological Assessment Rule which governs the process by which the state's wadeable streams are evaluated and determination made on the health of each stream. The Highlands Conservancy last reported on the issue in the June, 2019, issue of *The Highlands Voice*. Since that time, the WV Department of Environmental Protection has continued its efforts to weaken the biological impairment standards for West Virginia streams by continuing to rely on obsolete, less accurate assessment methods to identify impaired streams, and by changing the definition of impaired streams based on stream assessment scores.

The Clean Water Act establishes a narrative standard by which water quality in a stream is assessed based on the degree to which it can support aquatic life. Through stream sampling, a profile of the number and type of macroinvertebrates living in a stream is an indicator of the extent to which a stream has suffered impairment of its ability to support life. These profiles are scored numerically on a scale from 1-100 and the numeric score for a given stream is called its Index of Biotic Integrity (IBI).

Under current Department of Environmental Protection rules, streams with benthic Index of Biotic Integrity scores greater than 72 are considered unimpaired, while streams with IBI scores less than 72 are considered impaired. Current DEP Benthic IBI protocols require the identification of stream macroinvertebrate species at the taxonomic Family level. A more accurate assessment would be obtained if the Benthic IBI protocols were based upon macroinvertebrate species identification at the taxonomic genus level.

Since 2010, the Environmental Protection Agency has suggested to DEP that it use the more accurate genus-level identification of species in its Index of Biotic Integrity protocols, and that DEP increase the unimpaired IBI threshold level from 72 to 74.5 based upon WV DEP's own data. DEP's proposed rule ignores both of EPA's recommendations, even though West Virginia's surrounding states, Kentucky, Maryland, Ohio, and Pennsylvania, now

base their assessments on species identification at the more accurate genus level.

The current DEP rule uses a binary classification of stream impairment in which a stream is either unimpaired or impaired based upon the Index of Biotic Integrity score discussed above (stream IBI score  $\geq 72$  = unimpaired, and an IBI score  $<72$  = impaired). DEP's proposed rule creates a "Gray Zone" in which streams with IBI values between 61 and 72 are considered neither impaired nor unimpaired but, per the proposed rule, "considered as having insufficient data until additional information is collected or supplied that allows a determination to be made on the thresholds set forth above". If DEP's proposed rule is enacted, over 2,200 of the total 34,000 stream segments currently classified as "impaired" would fall within the proposed Gray Zone and lose their "impaired" classification status and, consequently, their eligibility for remediation assistance.

Certainly, it is reasonable to conclude that an unassisted Gray Zone stream is likely to degrade further without assistance, and it is known that under the proposed rule, it would have to be even further degraded to an IBI score below 61 before it would receive any help. It is also easy to surmise that the lower a Gray Zone stream's IBI sinks, the more money, resources and time will likely be required for its remediation.

There is no rationale, scientific data, or any apparent public benefit to support this proposed Gray Zone scheme, and one can only speculate on the motives that underly it. There are, unfortunately, multiple, agents out there who are willing, eager, and quite capable of helping a struggling Gray Zone stream to further degrade its water quality until its descending IBI scores reach the "impaired" threshold where then, and only then, it becomes eligible for assistance.

The comment period for this proposed rule is now closed. We await DEP's response to the comments that have been provided. It may be that the Environmental Protection Agency will tire of DEP's continuing disregard its recommendation and change the course of what the DEP is trying to do with this proposed rule. It does appear that passage of this proposed rule as it stands, will increase cost to the WV

taxpayer and lower the water quality of thousands of WV streams. We hope that DEP will reconsider this proposed rule and acts responsibly to retract it.

## Public Hearings in the Age of Social Distancing

It is standard practice to hold public hearings on proposed regulations, including the one on Biological Assessment discussed in the accompanying story. Now that we are all staying at least eighteen hands apart, the Department of Environmental Protection holds such hearings by teleconference.

West Virginia Highlands Conservancy Board members Randy Kessling and Cindy Ellis went (in a manner of speaking) to the one on Biological Assessment. While Randy drew the short straw (unravelling and making sense of a complicated rule), Cindy got to report on her impression of this new hearing method.

Her impression was that the teleconference served fairly well in the place of an on site meeting and seemed to even increase attendance. There were forty one people online. Some fresh faces/voices chimed in from the eastern panhandle.

The Department of Environmental Protection has different views on how to do Biological Assessment from those of meeting participants from the West Virginia Highlands Conservancy, the West Virginia Rivers Coalition, and the Ohio Valley Environmental Coalition. Even those who did not fully understand the nuances of Biological Assessment made a contribution by demonstrating that disagreement with DEP's view was widespread.

*Note: A "hand" is a unit of measurement, equivalent to four inches. It is most commonly used to describe the height of horses.*

# West Virginia Admits That Its Coal Mine Reclamation Bonding System Is On Brink of Collapse

By Peter Morgan

A recent filing by the West Virginia Department of Environmental Protection (WVDEP) makes clear that state mine regulators are completely unprepared to deal with the coming tsunami of coal mine abandonments. Since 2015 when mine operators began entering bankruptcy, Sierra Club has warned that lax reclamation bonding policies left states vulnerable to the risk of mine abandonment. Now West Virginia has admitted, in court filings, that allowing a single mine operator to liquidate and abandon its mines could bankrupt one of the state's primary surety bond providers, and would overwhelm and exhaust the state's emergency "Special Reclamation Fund" for mine cleanup.

On March 26, WVDEP took the highly unusual step of asking a state court to place a coal mine operator—ERP Environmental Fund, Inc.—into receivership. WVDEP's filings make clear that the agency's main goal was to prevent ERP from entering bankruptcy. The filings further clarify that WVDEP is desperate to avoid an ERP bankruptcy because that would almost certainly lead to the state assuming responsibility for cleaning up the now valueless mines. That outcome is unacceptable to West Virginia because the state has failed to take the necessary steps—including steps mandated by the Surface Mining Act—to ensure that it has access to adequate funds to pay for such reclamation.

Congress created the Surface Mining Act in 1977 for the very purpose of avoiding exactly this scenario. The Surface Mining Act was passed to address the trend of coal mine operators abandoning mine sites once they'd extracted all of the coal, leaving behind hazardous sites that turned streams orange with mining pollution. In response, the Surface Mining Act created a system under which mine operators were required to provide financial assurances to guarantee that resources would be available to fully reclaim any mine should the operator go out of business or otherwise abandon the mine. But industry managed to insert significant loopholes into the Act, and to pressure state regulators into allowing operators to exploit those loopholes. The effect has been to shift the risk and cost of mine abandonment away from mine operators and onto state taxpayers and the communities who live around the mines.

DEP's filings in the ERP case make clear that West Virginia has completely failed to protect its residents or comply with the Surface Mining Act. Under West Virginia's coal mining laws, there are supposed to be two forms of financial assurances in place to cover the cost of reclaiming abandoned mines: a permit-specific surety bond, and a "Special Reclamation Fund" bond pool to cover any additional costs. In the case of ERP, the surety bonds total \$115 million, but the actual reclamation costs far exceed that amount, meaning West Virginia would need to draw on the Special Reclamation Fund.

West Virginia has now acknowledged that it has failed to secure reliable surety bonds, and that its bond pool is drastically underfunded. West Virginia has acknowledged that under normal circumstances, "DEP would have to continue with its efforts to revoke all of ERP's remaining permits, forfeit, ultimately, the full \$115-plus million in surety bonds backing those permits, and transfer all of ERP's permits to the State's Special Reclamation Fund, which would thereupon assume responsibility for reclaiming

and remediating all of ERP's mining sites in accordance with the terms of its permits."

West Virginia has admitted that it can't follow the law, however, because the surety bonds authorized by DEP are not actually reliable, and the Special Reclamation Fund does not contain adequate resources. West Virginia's filings state that "DEP is concerned that forfeiting \$115 million in surety bonds as more or less the same time could be problematic," and that "transferring more than 100 permits to the Special Reclamation Fund would overwhelm the fund both financially and administratively." In fact, West Virginia states that the consequence of allowing ERP to liquidate would be "potentially bankrupting [ERP's] principle surety and administratively and financially overwhelming the Special Reclamation Fund, the State's principle backstop for all revoked and forfeited mine sites in West Virginia."

Unfortunately, West Virginia's ERP filings—even if successful—will only delay the inevitable. ERP is just one operator. And West Virginia is not alone in its failure to require adequate bonding. There are many more operators in similarly precarious financial circumstances who will also seek to abandon their unreclaimed mines. Ohio maintains a bond pool similar to West Virginias—the Ohio Forfeiture Fund. Currently, that fund contains just \$22.2 million to backstop \$544.8 million in potential reclamation costs. Just one company—Murray Energy—has mines with over \$200 million in reclamation liabilities. Murray Energy is itself currently in bankruptcy, and its plans to reorganize and continue operating have recently run into trouble as the company hemorrhages cash. The bill for state regulator's industry-friendly reclamation bonding policies is about to come due. The question is who will be forced to pay it.

**Peter Morgan is a staff attorney with the Sierra Club's Environmental Law Program. He is one of the Sierra lawyers who have assisted Appalachian Mountain Advocates and Jim Hecker of Public Justice in West Virginia Highlands Conservancy's many litigation efforts over these past 10 years or so.**

## 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](mailto: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.

## Mon National Forest Hiking Guide

Celebrating the 50th anniversary of the West Virginia Highlands Conservancy, the new edition of the treasured guide to every trail in the Monongahela National Forest features brand-new topographic maps and Kent Mason's gorgeous photos, all in color.

The Guide has been updated with the cooperation of National Forest District Rangers and Recreation Specialists to reflect changes in the past ten years:

- \* newly designated wilderness areas
- \* new trails near campgrounds and sites of special significance
- \* a new complex of interconnected trails on Cheat Mountain
- \* rerouted and discontinued trails
- \* ratings for difficulty, scenery, access to water, and much else

The definitive guide to the Mon adds a wealth of information about history, wildlife, and botany; safety, preparation, and weather; horseback and mountain bike riding and cross-country skiing; as well as sources of further information on the Forest and its environs.

The Monongahela National Forest has long been known as a 'Special Place'. The hiking, backpacking, and cross-country skiing opportunities it provides are among the best in the eastern U.S. New wilderness and backcountry trails have been added to the outstanding areas we have appreciated for decades – Otter Creek Wilderness, Dolly Sods Wilderness, Flatrock Plains, Roaring Plains, Blackwater Canyon, Spruce Knob, North Fork Mountain, Shaver's Mountain, Laurel Fork Wilderness, Cranberry Wilderness -- and there are lesser-known gems to be found in between.

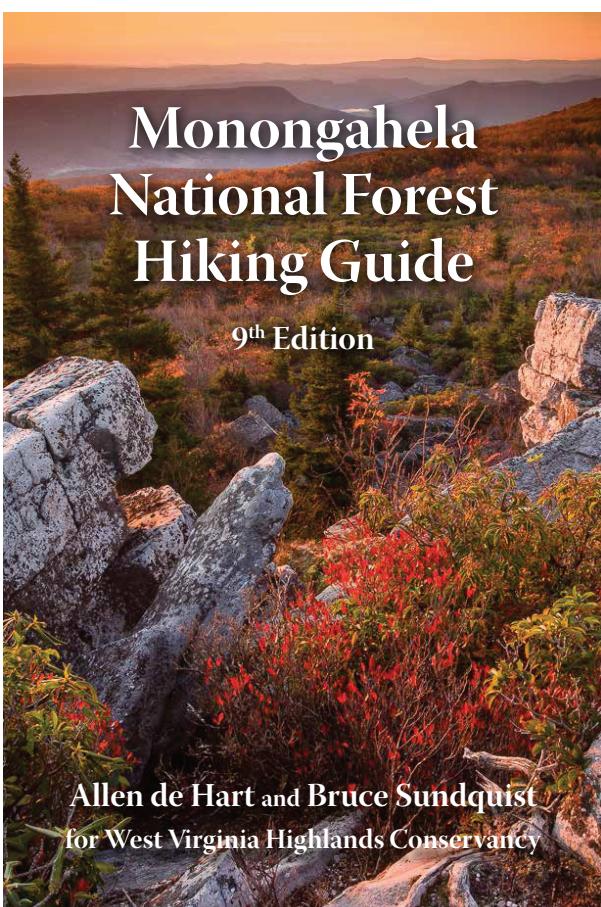
Profits from the sale of these guides support a wide variety of worthy environmental projects for the West Virginia Highlands Conservancy.

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### The Highlands Voice: It's Not Just for Reading Any More

*The Highlands Voice* is the main way that the West Virginia Highlands Conservancy communicates with its members. But we would like to communicate with more than our members. We have a valuable perspective and information; we would like to communicate with everybody. We still offer electronic delivery. If you would prefer to receive it electronically instead of the paper copy please contact Dave Saville at [WVHC50@gmail.com](mailto:WVHC50@gmail.com). With electronic delivery, you will receive a link to a pdf of the Voice several days before the paper copy would have arrived.

No matter how you receive it, please pass it along. If electronically, share the link. If paper, hand it off to a friend, leave it around the house, leave it around the workplace. It's not just for reading. It's for reading and passing along.

### BUMPER STICKERS

To get free *I ♥ Mountains* bumper sticker(s), send a SASE to P. O. Box 306, Charleston, WV 25321. 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.)



# The New Trail

*Finding a way while keeping apart during the pandemic*

By Hugh Rogers

Twenty-some years ago, Ruth and I led a hike for the Highlands Conservancy's "Mon-a-thon" program. We brought tea. When we reached some flat rocks off the Highlands Scenic Highway, our friends Young and Chung Moon demonstrated the Korean tea ceremony. The tea and company spurred a lively, wide-ranging conversation.

Now I remember that event not so much for the tea and company as because it was so exceptional to hike with a group. We don't even hike with each other!

These days, staying home, no arrivals, no departures, our different hiking styles are in sharp contrast. She likes to wander around the woods above our house. I like to find ways and improve them. She finds herself stuck in brier patches and I'm no Br'er Rabbit. But I think my avocation is more than practical. A well-drawn line on the landscape can enhance it: show possibilities, suggest a rhythm, sing a song that was waiting to be heard.

As we're sharing from solitudes, I'd like to offer, if not a virtual tour, at least a verbal one.

To get to the new trail, we begin on the old trail, which was here when our family arrived in 1977. It goes to the top, elevation 2300' (the house sits at 2000'). The trail along the ridge, ignoring deed lines, is used almost exclusively during deer season. In forty-three years of walking on the hill, how many times have I met another person who wasn't hunting? Twice.

We follow a mowed path uphill and enter the woods. The trail climbs a sort of dike alongside the eroded remnant of a track to the upper pasture. No tractor has used it for more than half a century; now the pasture is all poplars. Elsewhere, tall oaks stand on a carpet of leafmeal. Multiflora rose wants to move in, but only on one short stretch does it encroach on the trail.

After five minutes or so (I haven't measured distances), we come to a junction. To the left, a trail heads off on the level; it will drop twice to cross tributaries that debouch into Leading Creek. Our new trail stays above those hollows.

From that first junction, the main trail is steep—every creature seems to leave skid marks. This section concludes with a couple of down trees, easily stepped over. A cairn on the left marks the new trail. It begins on a gentle downgrade, a relief after the climb.

A stone's throw from the junction, raggedy grapevines crawl across, loom over, and hang beside the trail. This whimsical gate could have been put up for Halloween. We'll encounter more grapevines, some thick as your arm, others like computer cables, weaving arabesques through the tall poplars and oaks.

A little further, beside the trail, is the lone leaf of a putty root orchid—not really rare, but interesting. The leaf stands up all winter while other plants are bedded down. It's longitudinally pin-striped, like an origami tightly folded again and again until the green has worn away along the folds.

Past an old fence post, we're on Cutright's land (with permission). The trail gradually climbs as it negotiates the head of the hollow. Gazing down the steep canyon, we can spot the lower trail. Between the first hollow and the larger second one, the trail crosses a flat where beeches congregate, their leftover leaves fluttering like confetti.

After we pick our way over a clutter of grapevines, the way seems blocked by a large root ball, which is just as well since beyond is multiflora all the way down. Our trail's sharp right turn is marked by rocks stacked against a sapling.

The trail climbs again to stay above the hollow. Better-behaved patches of multiflora are keeping social distance. Among the older trees are many amputees—this area was hard hit by Superstorm Sandy.

After leveling out on a narrow shelf, the trail climbs more gradually as it curves around the far side of the hollow. Ground cover is more evident: trout lily, bloodroot, yellow violets and many more, along with the ferns the deer won't eat.

Past a giant vine's contortions around a double poplar, there's a patteran pointing uphill. It's too bad that word doesn't appear in our abridged dictionaries. I learned it from Arthur Ransome's *Swallows and Amazons* books for children and child-rearing adults. A patteran is simply an arrow made of sticks laid where the way might be obscure. We go left at the other end of a short connector. After circumventing another root ball, we come to a spot where the trail passes on both sides of a tree, like a cartoon of separated ski tracks.

For the most part, once I found a way, I did little more than move deadfalls and clip branches. Just ahead, though, I had to saw through a fallen trunk that was suspended hip-high with no good way around it. Now it serves as a gate to a large flat. The trail picks its way across blowdowns. One patteran guides us where the trail swings closer to the eastern, downhill, edge.

Shortly before the ridge drops to this level and the flat ends in a tangle of brush, a cairn at the foot of an oak marks the final junction. To the left is a steep descent to the lower trail; to right is a connector to the ridge trail. We have a good view of Bickle Knob, northern Randolph County's presiding mountain spirit—a fine place to stop and reflect on re-engaging with the natural world as we're isolated from society.



Putty Root Orchid

## Invitations

Come, come  
say those jiggling white ashes  
of gnats netting my face

Did you know we dance  
when orphans  
walk our way,  
that we wait for  
the nubs  
of leaves to trim  
clipped bereft  
branches  
and the trembling tremolos  
of bog frogs -  
when we know  
you will drift in  
seeking home?

And the raven, too,  
graveling *thwowrck, thworck*;  
could be kind words of  
welcome,  
calling  
to a neighbor  
who has been  
too long away  
lost in digital distances  
now at last  
showing up

Come, come  
And the fresh ascending  
lushly verdant blade  
of grass over there  
with a single  
stuck on white spongy  
plug of a cocoon  
whose held flecky eggs  
that might open any second  
into yet wingless  
earth enraptured crawling forms  
and receive me

Come, come, yes  
come to us  
with your hunger and thirst  
they seem to voice,  
come and eat  
this freshly risen  
spring redeemed bread  
and drink this newly honeyed  
wild wine  
with us,  
come, yes again,  
come

*By Jack Slocumb*

## Ruminations on Mon Timber Harvesting Planning and Wildlife Management Planning--Twin Misguided Cousins

By Jack Slocumb

I have been reading in the Voice about the development of the Management Plan for the Mon. In regard to timber harvesting operations, I would like to suggest that the Conservancy push very aggressively that all harvesting activities be certified by The Forest Stewardship Council. I haven't read anywhere that this is being practiced in the Mon or that the Forest Service intends to do so in the future. But maybe I'm wrong. Conservancy members who are currently involved with providing the Conservancy's input into the planning process would know, I'm sure.

Certification by the Forest Stewardship Council, as you or others in the Conservancy may already know, insures that the harvesting operation is done in such a way that assures maximum forest sustainability of the harvested area, protects biodiversity, protects flora and fauna native to the area being harvested, maximizes soil conservation and health, and protects waterways in the area from runoff siltification that could result from the harvesting process.

I feel that the Forest Service, being the government agency that is specifically charged with the responsibility for protecting the ecological health of federally owned forest lands, should be obligated to accept *nothing less* than harvesting in compliance with Forest Stewardship Council guidelines regardless of special interest pressures to do otherwise.

I also have also read for years a lot about "wildlife management" - with tongue in cheek and a chuckle. I personally feel that this is an absurd concept. It's not the wildlife that needs to be managed, it's *human impact on* wildlife that needs to be managed. If this is done, I think the wildlife will be just fine. For millions and millions of years, wildlife has thrived on its own without the humans intervening to "manage" it. In the same vein, "forest stand improvement" programs, to me, are just a silly. It is nothing less than hubris that leads people to believe they can do better than nature itself in somehow making the forest more healthy. And, further, I must confess that I have a strong suspicion that «forest improvement» is just code for promoting the maximum yield of commercially harvestable timber. God.

I would really be interested in hearing what the Conservancy's stance might be on these concepts.

Perhaps I can get an animated dialogue going.

### Want More Jack Slocumb?

Jack Slocumb is a poet, essayist, and novelist of the Alleghenies; his work celebrates both the large sweep and subtleties of the natural world of his home in a number of publications. A full collection of his poems, "Native Tongue" is available for order at [akinogapress.com/books/nativetongue](http://akinogapress.com/books/nativetongue). Royalties from the sale of this collection go to support the work of the small press, Akinoga (Baltimore), in publishing beautifully hand- bound editions of poems by new poets. He also has a novel, "Come the Snow Owl", which he hopes to have published soon. Royalties from that work will go to local conservation organizations.

## Monongahela National Forest Celebrates 100 Years of Conservation and Service

April 28 marks the 100-year anniversary of the establishment of Monongahela National Forest. In 1920, following the passage of the Weeks Act in 1911, President Woodrow Wilson signed the proclamation designating land purchased for the protection of the Monongahela River as Monongahela National Forest. Since that time, the Forest has grown from an initial 7,200 acres to more than 900,000 acres, all in West Virginia. The Forest continues to benefit the public more than ever by providing recreational opportunities, a wide variety of forest products, and abundant natural resources for all to enjoy.

**Bad news for ACP, MVP**

## Federal Court Voids Key Permit

By John McFerrin

A United States District Court Judge in Montana has ruled that Nationwide Permit 12 issued pursuant to the Clean Water Act is invalid because it was issued without following the Endangered Species Act. Even though this happened in Montana, it could have dramatic implications for both the Atlantic Coast Pipeline and the Mountain Valley Pipeline.

**Background (stop me if you've heard this; skip if you have heard it before)**

Under the federal and state Clean Water Acts, anybody who wants to cross a stream or a wetland must have a permit. It has a choice of either getting an individual permit for each crossing or proceed under what is called a General Permit, often referred to as a Nationwide Permit.

Nationwide Permits are issued for large classes of activities. The Corps issues nationwide permits for categories of activities that are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. It is a one size fits all approach for lots of nearly identical activities that have small impacts. Individual permits are site specific; developers would submit an individual plan for each crossing and regulators would look at each one individually.

There is (or at least there was; see below) a Nationwide Permit, known as NWP 12, that covers utilities. Anywhere in the country that someone wants to do “[a]ctivities required for the construction, maintenance, repair, and removal of utility lines” can apply to do it under NWP 12. “Utility lines” is defined in such a way that it includes natural gas pipelines.

Both the Mountain Valley Pipeline and the Atlantic Coast Pipeline want to be able to cross streams and wetlands under the authority of NWP 12. It is easier to get approval for the whole pipeline (or at least the part in West Virginia; parts in Virginia and North Carolina would have to be approved separately) all at once under the Nationwide Permit than to make plans for each crossing and get them approved individually.

Many people and groups (including the West Virginia Highlands Conservancy) have long maintained that a Nationwide Permit is inappropriate for projects such as

the Mountain Valley Pipeline or the Atlantic Coast Pipeline. Nationwide Permits are designed to allow for crossings that have limited impact, are all the same, and where standard industry practices will be sufficient. These pipelines, on the other hand, cross varied and difficult terrain, require something other than standard practice, and have an enormous cumulative impact.

This is a big deal for both pipelines because of the number of crossings involved. The Mountain Valley Pipeline has 591 stream or wetlands crossings in West Virginia. The Atlantic Coast Pipeline has 739.

**What happened**

Nationwide Permit 12 was first issued in 1977 and was last reissued in 2017. In the case Northern Plains Resource Council, et al. v. U.S. Army Corps of Engineers, et al, the Northern Plains Resource Council challenged crossings of the Yellowstone River and the Cheyenne River in Montana by the Keystone XL Pipeline.

The Court held that the Corps of Engineers had improperly issued Nationwide Permit 12.

Before it takes any substantial action, the Endangered Species Act requires that the Corps of Engineers ensure that its actions are not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. The Corps must review its actions “at the earliest possible time” to determine whether an action “may affect” listed species or critical habitat.

The law assumes that the Corps doesn’t know much about endangered species, or at least not enough to make a judgment of the effects of its actions upon endangered species. If it determines that the action “may affect” a listed species or critical habitat it has to ask for help (the jargon is “initiate formal consultation”) from the United States Fish and Wildlife Service.

In the case of its decision to reissue Nationwide Permit 12, the Corps decided that it didn’t need to consult with the Fish and Wildlife Service. Even while it acknowledged that issuing Nationwide Permit 12 would have widespread effects on waterways, it went ahead and reissued Nationwide Permit 12 without consultation on endangered species.

The Court disapproved of this approach. It said that the Corps of Engineers was mistaken to reissue Nationwide Permit 12 without consultation. It vacated NWP 12 pending completion of the consultation process and enjoined the Corps from authorizing any dredge or fill activities under NWP 12.

The Corps of Engineers should have known better. When it reissued NWP 12 in 2002 without consulting the Fish and Wildlife Service about the impact on endangered species it was successfully sued. It did do consultation when it reissued NWP 12 in 2007 and again in 2012. Maybe now that it knows better it can do better.

**Why does this matter in West Virginia?**

Montana is way over a thousand miles and two time zones from West Virginia (It is 1439 miles from the Chester, northernmost city in West Virginia, to Alzada, Montana, the first town one comes to. This is by the hard road. It is shorter as the Blackpoll Warbler flies). Why does it matter in West Virginia what a judge in Montana decides about stream crossings in Montana?



**Blackpoll Warbler**

It matters in West Virginia because the judge did not just prohibit the stream crossings. He vacated Nationwide Permit 12. Both the Atlantic Coast Pipeline and the Mountain Valley Pipeline rely upon Nationwide Permit 12 as their authorizations to cross streams and wetlands. Without NWP 12, it has no authority to cross streams and wetlands.

**(More on the next page)**

## Spruce Knob

Up Spruce Knob road in cloud mist  
How like the heart when absence  
outweighs that heft once carried  
Forest Roads 12 and 1024

Startle doe at East Overlook  
light rain & one cardinal flower  
Seven more deer  
one fawn eohippus-sized

Spruce smell invokes  
memory's myriad things:  
Far West Far North Ultima Thule  
like 10,000 songs of Milarepa

Lone blackberry bush in bloom  
rain harder now at a slant  
Oxalis (?) plant snugs low  
ignores drying montane winds

Spruce Knob in cloud  
& imagination  
Views cloud-blanked  
like hard-sought No-mind  
10 years' sitting worth

Piles of rock slabs on top  
like large scree below no slope  
Frost-heave quarried maybe  
then weather-smoothened

*Cloud-hidden  
whereabouts unknown*

— Ed Zahniser

## Fossilized Sunshine

by Kent Karriker

Fossilized sunshine, we dig it out of the ground  
It can still shine brightly and it makes the world go 'round  
We use it all day long, by the ton and by the pound  
Fossilized sunshine, it makes the world go 'round

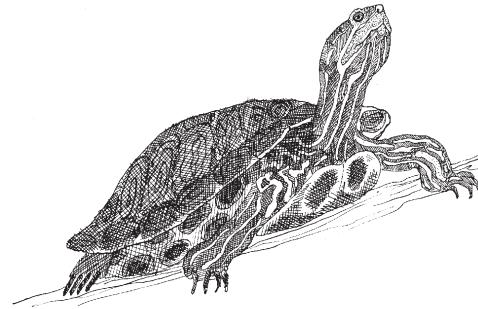
Fossilized sunshine, three hundred million years old  
Like a present from the devil, it won't ever leave you cold  
It must come straight from hell, 'cause we take it from a real deep hole  
Fossilized sunshine won't ever leave you cold

Ferns and cycads and giant horsetails  
The ghost of photosynthesis past  
Put down your shovel, man, your poor eyes have failed  
To see that this bonanza won't last

Fossilized sunshine, we pump it back into the air  
Buried through the eons, now it's floatin' 'round everywhere  
It can fry us like bacon, so we'd better all beware  
Fossilized sunshine floatin' round everywhere

Fossilized sunshine floatin' round everywhere  
Fossilized sunshine floatin' round everywhere  
Fossilized sunshine floatin' round everywhere

**Note: These are the lyrics to a song that WVHC Board member Kent Karriker wrote. Although it might be easy to jump to the conclusion that this is the product of covid enforced idleness, he actually wrote it ten years ago.**



## More about Pipelines and Endangered Species (continued from previous page)

### Does this apply to the whole country?

So far, at least, it appears that this ruling applies to the whole country. United States District Courts occupy the lowest perch in the federal court pecking order. In recent years, in other contexts, District Courts have been criticized for issuing injunctions that order the whole country, and not just where they sit, to do something.

This is not, however, an injunction. It is vacating a permit, a permit which applies to the whole country. Courts who are higher in the pecking order have objected to lower courts issuing injunctions that are binding on the whole country. It is unclear whether the same reasoning applies when the lower court is vacating a permit.

People are certainly acting as if this decision applies to the whole country. On its website the plaintiffs, the Northern Plains Resource Council, interprets without equivocation the ruling as prohibiting the use of NWP 12 anywhere. The Corps of Engineers has issued a directive which interprets the ruling as applying to projects across the country which had been relying upon NWP 12.

### What next?

The Court left open the option that the Corps of Engineers could go back and correct its mistake. The Corps could do the consultation with the Fish and Wildlife Service as the Endangered Species requires. This would take time and would probably result in some conditions that the Fish and Wildlife Service would suggest adding to any future Nationwide Permit.

The other possibility is that the Corps could appeal to a higher court, the United States Court of Appeals. This is not the type of decision that the Corps takes lying down. The Corps has asked the District Court to stay the effectiveness of its Order while the Corps appeals to the United States Court of Appeals. At press time there was no decision on whether the stay would be granted.

# 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.]---\$25, Infant tee [18 mo.]---\$20, Toddler tee, 2T,3T,4T, 5/6---\$20

► Soft pima cotton adult polo shirts are a handsome earthtone light brown and feature the spruce tree logo. Sizes S-XL [Shirts run large for stated size.] \$ 25.00, 2XL \$26.50

To order by mail [WV residents add 6 % sales tax] make check payable to West Virginia Highlands Conservancy and send to West Virginia Highlands Conservancy, Online Store, PO Box 306, Charleston, WV 25321-0306

**The same items are also available at our on-line store: [www.wvhightlands.org](http://www.wvhightlands.org)**

## 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 \$18 by mail; **long sleeve** is \$22. West Virginia residents add 6% sales tax. Send sizes wanted and check payable to West Virginia Highlands Conservancy. ATTEN: Online Store, 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 ❤️ 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 ❤️ 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 \$20 by mail. West Virginia residents add 6% tax. Make check payable to West Virginia Highlands Conservancy and send to West Virginia Highlands Conservancy, Atten: Online Store, P.O. Box 306, Charleston, WV 25321-0306