



*West Virginia Environmental Council's*

# **GREEN Legislative Update**

*Published Weekly during West Virginia's Legislative Session*

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## **Under the Dome**

By Donald S. Garvin, Jr.  
WVEC Lobbyist

### **Week 3 – Really Trying “To Protect State Waters”**

This week began normally enough. But by Tuesday morning we found ourselves running around like a Chinese fire drill trying to fend off one attempt or another to weaken state water quality standards.

It actually began Monday afternoon, with a “water policy workgroup” conference call scheduled by West Virginia Rivers Coalition executive director Angie Rosser to discuss an “Emergency Rule” filed by DEP’s Office of Water that would weaken water quality standards for aluminum and beryllium.

I participated in that call, along with Angie, Cindy Rank, Evan Hansen, Jim Kotcon and Margaret Janes. We decided to challenge the “emergency” status of the proposed rule. So I worked late that night drafting an appropriate letter to the Secretary of State, which we hand delivered Tuesday morning.

Actually, my colleague Denise Poole hand delivered that letter, because I awoke Tuesday morning with the mother of all head colds.

And then Tuesday morning I learned by email that HB 2579, the coal industry bill that would weaken water quality standards for toxic selenium, had been put on the fast track, and was on the House Judiciary Committee agenda for consideration that afternoon.

So after a flurry of frantic phone calls and discussions with Judiciary Committee members, Denise scampered up to Judiciary Chairman Tim Miley’s (D-Harrison) office and delivered a hand-written request for a public hearing on the bill.

Our request was granted and a public hearing was scheduled for Thursday afternoon at 1:00 P.M. That at least gave us some breathing room and time to send out action alerts, gather materials to present and get witnesses to the hearing.

*But hold on. It gets worse.*

Thursday morning at 10:30 A.M. I received a call from Judiciary staff saying that because of new House rules requiring a full two-days notice for public hearings, they were canceling the hearing for that afternoon and rescheduling it for Friday morning at 9:30 A.M.

So we quickly drafted another letter to Miley citing the two-day notice provision and the hardship caused to our members, some of whom were already on their way to the Capitol for the afternoon hearing.

Well, Chairman Miley agreed with us. The public hearing on HB 2579 is now scheduled for next Monday, March 4, at 2:00 P.M. in the House Chamber.

As a result of all of this, we basically spent the entire week playing defense, rather than working on our own agenda. Call it a circus. Call it a zoo. But that's the way it goes.

Now, about HB 2579.

The bill would eliminate the compliance schedules for coal companies to meet the current EPA water quality standard for selenium, and mandate that the Department of Environmental Protection issue new "state-specific" selenium standards that could be weaker than the current EPA standards.

Selenium is a naturally occurring element that ends up in rivers and streams when rock and soil from mountaintop removal sites are discarded. In small amounts, it is harmless, but some studies have found that it is toxic to aquatic life and humans in larger amounts. Recent studies have found fish samples taken from Mud River, close to a large mountaintop removal mine site, exhibiting gross deformities.

Particularly galling is this note at the end of the bill language: **"The purpose of this bill is to protect state waters by creating an implementation plan to establish state specific selenium criteria."**

Protect state waters??

Hogwash.

Winter's blast is continuing, so be kind to your fine-feathered friends and keep those bird feeders full.

**PUBLIC HEARING – HB 2579 (Selenium bill)  
HOUSE CHAMBERS – FROM 2:00 PM – 3:00 PM**



# Don't Let Legislators Weaken Selenium Standards

<http://www.wvgazette.com/Opinion/201302270120>

February 27, 2013

OpEd in Charleston Gazette  
By Dan Radmacher

Following Kentucky's lead, the West Virginia Legislature is considering a bill (HB 2579) that would weaken state water quality standards for selenium, a toxic pollutant often discharged from mountaintop removal mining operations.

A note in the bill says, "The purpose of this bill is to protect state waters by creating an implementation plan to establish state specific selenium criteria."

That's simply untrue. The new criteria would severely weaken standards, protecting not state waters or the life they support, but the coal industry and its profits.

Selenium pollution is extraordinarily expensive to treat. How expensive? Actions Appalachian Mountain Advocates brought against Patriot Coal resulted in \$440 million in selenium cleanup liabilities.

Always remember this: If the Legislature helps the coal industry successfully evade these costs, the liability will almost certainly end up on the taxpayers.

The bill's authors hang the proposed change on the flimsiest of rationales: "The Legislature finds that [the U.S. Environmental Protection Agency] has been contemplating a revision to the federally recommended criteria for several years but has yet to issue a revised standard."

Therefore, the bill declares, the DEP should deal with the resulting "uncertainty" about whether the current standard is applicable by implementing its own standards.

But there is no uncertainty. The EPA under President George W. Bush proposed a change in 2004, but withdrew it after a multitude of critics eviscerated the proposal as unsupported by the science. If anything, the science suggests current standards should be more restrictive, not less.

There is no current proposal on the record to revise federal criteria for selenium, only persistent rumors. Any change eventually proposed would undergo significant scrutiny.

It's not possible to tell what the final standard would be from the West Virginia bill, but the Kentucky attempt will undoubtedly be instructive. There, regulators wanted to allow greater than 10 times more pollution than the current water-based standard for one-time exposure.

The standard for long-time exposure would be shifted from water-based to exposure in fish tissue -- even though selenium pollution can decimate aquatic life, making it very difficult to even find fish to test.

If this isn't about the science, and it isn't about phantom proposals by the EPA, what is it about?

The answer is as obvious as it is distressing: West Virginia lawmakers are putting the profit of a declining industry above the best interests of the people and environment of the state. Again.

Weakening selenium standards will make it harder to hold coal companies accountable for the damage they cause. It will keep the massive destruction of mountaintop removal mining affordable -- for the coal industry, if not the taxpayers.

Such actions will make it more difficult to attract industries that, unlike Appalachian coal, aren't on a clear glide path to irrelevancy.

Lawmakers can weaken the standards, but changing the law won't change reality: Selenium pollution will continue to harm aquatic life and destroy the biological integrity of streams. Eventually, the pollution will have to be treated, and the enormous cost will fall on the taxpayers of the state.

Citizens of West Virginia shouldn't let that happen without a fight.

Radmacher is communications director for Appalachian Mountain Advocates, [www.appalmad.org](http://www.appalmad.org).

## DEP Emergency Rule on Aluminum and Beryllium

By Donald S. Garvin, Jr.  
WVEC Lobbyist

On January 30, 2013, the Office of Water Resources in the Division of Water and Waste Management of the DEP filed with the Office of the Secretary of State a "Notice of an Emergency Rule" which would amend the "Requirements Governing Water Quality Standards" contained in 47CSR2.

Specifically, the DEP is proposing this emergency rule to *drastically weaken* the dissolved aluminum criteria and human health Category A beryllium criterion contained in 47CSR2.

On February 25 WVEC submitted comments to the Secretary of State on behalf of the West Virginia Environmental Council, the West Virginia Rivers Coalition, the West Virginia Highlands Conservancy, and the West Virginia Chapter of the Sierra Club, urging rejection of the Emergency Rule status proposed by the DEP.

In our comments to the Secretary of State, we stated that the WV DEP has not demonstrated that there is any actual "emergency". While some coal companies have procrastinated in meeting earlier compliance schedules, ***the only emergency seems to be that the water is too clean.*** Delaying the proposed change in standards through the regular rulemaking process does not place the health of any person or any stream in danger, whereas there are legitimate scientific questions about the environmental consequences of weakening the standard.

At this time we do not know how the Secretary of State will respond to our request.

In the meantime, DEP has scheduled a public hearing and comment period on the proposed Emergency Rule. The comment period runs from February 8, 2013 to March 27, 2013. The hearing date has been set for March 27 at 6:00 P.M. at the Coopers Rock Training Room at DEP Headquarters, 601 57th Street, S.E., Charleston, WV 25304. Written comments can be mailed to that address.

Dr. Jim Kotcon, Conservation Chair for the WV State Chapter of Sierra Club and longtime water and air quality rules monitor in the state, has written the following preliminary comments about the science involved in this issue:

“Because WV-DEP has not promulgated any actual standards for Total Dissolved Solids (TDS) in spite of the overwhelming evidence of harm to aquatic life in West Virginia streams from high TDS levels, and because the hardness criteria used in the proposed aluminum standard are directly correlated with TDS, the interaction of aluminum and TDS creates a potential for adverse impacts to streams and aquatic life that were not considered by DEP.

“The risk of aluminum toxicity is great in the moderate pH ranges covered by the proposed standard (e.g., pH 6.5), and these ranges are likely to be common in effluent from mining operations. (Besser, et al. 2007. Impacts of historical mining on aquatic ecosystems - an ecological risk assessment. Professional Paper 1651. US Geological Survey).

“Aluminum forms soluble complexes with ions such as sulfate, nitrate, and chloride, all frequently found to be at high levels in mining effluent, thus, no single parameter (such as hardness) can accurately predict the amount of soluble aluminum. Under some water conditions, solutions of aluminum will approach equilibrium rather slowly, again suggesting that a hardness measure is a poor predictor of the dissolved aluminum concentration. (EPA, 1988. Ambient Water Quality Criteria for Aluminum. EPA 440/5-86-008). In particular, they noted that even the particulate forms of aluminum may be harmful to aquatic life in the field because the flocculates physically block movement and clog the pore spaces of benthic organisms, effects that would not appear in laboratory studies of aluminum toxicity.

They conclude, “Bottom-dwelling organisms might be impacted more by aluminum floc in the field than in the laboratory.”

“DEP’s Emergency Rule Justification includes a section on “Scientific Justification” that claims that numerous scientific studies have validated the impact of hardness on toxicity to aquatic communities, yet it does not actually cite ANY studies, nor does it provide any actual data. The proposed standard appears to be little more than an attempt to weaken a standard simply because Colorado adopted something similar for certain waters in that state. (Colorado Department of Public Health and the Environment. 2012. Regulation No. 34 Classifications and numeric standards for San Juan and Dolores River basins. 5 CCR 1002-34.) Note that these Colorado equations appear to generate values that are more protective than the values proposed by WV-DEP.”

## **Late Reports Put Lawmakers in Hole**

EDITORIAL, Dominion Post ~ February 26, 2013

DEP’s inability to finish studies may halt tweaks of Marcellus regulations, again.

Wonder if those Department of Environmental Protection (DEP) reports fell down the rabbit hole.

That is, how did two of three reports the DEP was ordered to prepare after passage of Marcellus shale regulations in December 2011 come to qualify as such a difficult or bizarre situation.

We would have never predicted it would come to this given that the DEP had a year to prepare these studies. The author who coined that rabbit phrase also once said “Which form of proverb do you prefer: Better late than never, or Better never than late?”

As it regards these two studies, one on dust, light, noise and volatile organic compound levels at drilling well pads and the other on the resultant pits and impoundments of Marcellus drilling, we prefer neither of Lewis Carroll’s options. Indeed, we find it unacceptable that the DEP – 14 months later – would not have these reports bound and copied for the Legislature’s review.

Some legislators last week expressed concern that they still may not have the studies in time during the regular legislative session to tweak the 2011 Natural Gas Horizontal Well Control Act. It’s easy to understand that concern, however, why not call the DEP’s director on the carpet and hold him accountable for starters. Make it clear that the Dec. 31, 2012 charge for the one report and the Jan. 1 deadline for the other were assignments – orders, if you will – not suggestions.

That’s how it works where most of us work, despite any and all circumstances. No one doubts that these subjects for study were groundbreaking efforts and not simple. However, to our knowledge, the DEP never once said it might be two or three months late with these reports.

Another report on air quality and the need for more regulations is due July 1. Should we just assume that report won’t be available until this fall? If the DEP needed additional resources or an extension on its deadline why would it not notify legislative leaders?

During the 2012 regular legislative session nearly a score of bills were introduced calling for tweaks to the then new Marcellus regulations. All of those proposals were met with the same refrain: Let’s wait for the DEP’s studies to be completed. Now, the Legislature once again finds itself still waiting for data vital to amending these Marcellus regulations.

We urge the Legislature’s leadership and the governor to demand the DEP explain its cavalier attitude toward these reports. Though the DEP has informed lawmakers the reports will be ready in a couple of weeks, we have reason now to be skeptical. After all, these reports could fall into a drill shaft.

## **Thank You for Supporting WVEC** 😊

Here it is - already 17 days into the 60 day session .... and counting! We also count on you to help see us through to the end. We *desperately* need your financial support to meet our legislative budget. And you need us to be here.

Even though the session is still young, the forces of evil are busy pushing terrible legislation that would put more pollution into West Virginia’s rivers and streams. We are here on your behalf to fend off these attacks.

Over the years the WVEC lobby team has become a respected and credible voice for the environment at the capitol. Your dollars will help us continue to be so.

~ Thanks, from Don & Denise

## **WVEC's Annual E-Day! At the Capitol**

Thursday, March 14<sup>th</sup> ~ 9 am till 3:00 pm  
Senate & House Halls / Upper Rotunda

Environmental & Sustainable Business Displays / Citizen Lobbying

## **E-Day Benefit Dinner & Awards Ceremony**

Woman's Club of Charleston, Virginia Ave.  
From 6 pm till 9 pm

Dinner Buffet: Lasagna (vegetarian & meat based), Variety of Homemade Soups,  
Fresh Green Salad, Bread, Dessert & Drinks.  
Cash donation bar

Awards bestowed to:

**Don Gasper (*posthumously*) ~ *Mother Jones***  
**Ben Stout ~ *Don Gasper Science In The Public Interest (new)***  
**Mayor John Manchester ~ *Chuck Chambers Public Service***  
**Bill Hughes, Wetzel County Action Group ~ *Laura Forman Grassroots Activist***

- Silent Auction • Music provided by:  
Pianist Robin Godfrey  
Sandy Sowell & Gerry Collyard

Donation of \$15 per person or \$25 per couple at the door

## **Rules Rolling**

All Rules Bills were introduced in the House this week. However, rules are moving first in the Senate. This week all of the DEP air quality rules were passed out of Senate EIM Committee, and next passed out of Senate Judiciary.

[61CSR28](#) (SB 261), the Agriculture rule relating to poultry litter and manure movement into primary poultry breeder rearing areas, was passed out of Senate Agriculture. It is triple referenced, next to Senate Finance, then to Senate Judiciary.

[33CSR12](#) (SB 246), the DEP rule implementing the ban on disposing of "certain electronic devices" such as televisions and computers in landfills, was passed out of Senate Judiciary, with an amendment allowing more time for solid waste authorities to construct the buildings required under the rule.

[87CSR4](#) (SB 251), the Fire Commission rule updating the energy code within the state building code to the 2009 International Energy Code standards, was passed out of Senate Gov Org and next referred to Senate Judiciary.

There has been no movement yet on [35CSR8](#) (SB 245), the DEP rule that implements the Horizontal Well Control Act; however we anticipate that the rule will be on the agenda in Senate EIM Committee on Tuesday, May 5<sup>th</sup>. There has also been no movement on [47CSR30](#) (SB 249), DEP's proposed WV/NPDES Rule for Coal Mining Facilities.

## Bills We Are Tracking

### Bad Bills:

#### Coal Industry Bills:

- HB 2571, which would further weaken the conflict-of-interest provisions for members of the state Environmental Quality Board.
- HB 2579, which would delay efforts to force the coal industry to clean up its selenium pollution. **This bill is the subject of a PUBLIC HEARING on Monday, March 4 – at 2:00 PM in the House Chambers.**

#### The Governor's Bills:

- SB 187 (same as HB 2507), which would allow the Governor, or the Speaker of the House, or the Senate President to require a "Jobs Impact Statement" on any proposed legislation.
- SB 342 (same as HB 2590), which would create a "WV Land Stewardship Corporation" that could by-pass current brownfields law.
- SB 185 (same as HB 2506), which would remove electric and hybrid-electric vehicles from eligibility for the alternatively fueled vehicle tax credit.

#### Others:

- SB 56 (same as HB 2214), creating the Intrastate Coal and Use Act, which would eliminate federal oversight of coal mined and burned within the state.
- SB 98, creating the Shale Research, Education, Policy and Economic Development Center at WVU.

### Good Bills

- SB 158 (same as HB 2494), Creating the "Complete Streets Act".
- SB 167, Creating the "West Virginia Future Fund".
- SB 413, Continuing the Supreme Court Public Campaign Financing Act.
- HB 2747, Relating to open Government proceedings.
- HB 2748, Requiring reporting & publication of all compensation, including the source of that compensation paid to lobbyists.

We'll have more information about most of these bills in future issues of the *Legislative Update*.





## Calendar of Events



**March 4:** PUBLIC HEARING on HB 2579. House Chambers. 2:00 pm – 3:00 pm. This is a horrible bill that would allow the coal industry to continue to discharge selenium at high levels into West Virginia's rivers and streams. ► Our time for number of speakers will be limited due to the time restraints. Please prepare written comments for the record, and if you cannot attend we encourage comments be sent to the House Judiciary Committee members.

For more information: [deniseap@earthlink.net](mailto:deniseap@earthlink.net)

**March 5:** Rally to Stop MTR and Save Blair Mountain. 12 pm – Kanawha Blvd. East & Summers Street, Charleston.

For more information: [Vivian@ohvec.org](mailto:Vivian@ohvec.org)

**March 14:** WVEC Annual E-Day at the Capitol. From 9 AM till 3 PM. Senate & House Halls & Upper Rotunda. Environmental Groups, Sustainable Businesses, Citizen Lobbying.

We hope you can attend. If your group or business would like to display contact Kevin Smith (e-mail listed below), or call the WVEC office: (304) 414-0143.

For more information: [www.wvecouncil.org](http://www.wvecouncil.org) or contact Kevin, [a\\_clean\\_wv@yahoo.com](mailto:a_clean_wv@yahoo.com)

**March 14:** WVEC Annual E-Day Benefit Dinner & Awards Ceremony. The Women's Club of Charleston (corner of Elizabeth St. and Virginia Ave.). From 6 PM – 9 PM. Dinner buffet; cash donation bar; silent auction; live music by Robin Godfrey, Sandy Sowell & Gerry Collyard; Award presentations. Join us and relax after E-Day at the Capitol. Donation of \$15 per person, or \$25 per couple at the door.

For more information: [www.wvecouncil.org](http://www.wvecouncil.org) or contact Kevin, [a\\_clean\\_wv@yahoo.com](mailto:a_clean_wv@yahoo.com)

**April 16-18:** Good Jobs Green Jobs Conference. The Hilton Hotel, Washington, D.C. Theme: Let's Get to Work: Climate Change, Infrastructure and Innovation. Cost: \$225 Full Conf., \$125 for 1 Day, \$50 for Wed. evening networking reception, and \$50 for a Plenary Pass – to all 4 sessions.

For more information & to register: [www.greenjobsconference.org](http://www.greenjobsconference.org)

To submit articles or calendar events send to Denise Poole, *editor*  
[deniseap@earthlink.net](mailto:deniseap@earthlink.net)

## Legislative Session 2013 Information Sources:

### Legislative Reference & Information Center:

MB-27, Bld. 1 - State Capitol Complex, Charleston WV 25305

**WV Legislative web-site:** [www.legis.state.wv.us](http://www.legis.state.wv.us)

(For bill tracking, bulletin board (journals), legislators' e-mails.)

**To Call Toll Free:** 1-877-565-3447 or local Charleston area: (304) 347-4836

**Listen Live:** West Virginia Legislature page <http://www.legis.state.wv.us/> and click on "listen live."

**WV Environmental Council Web-site:** [www.wvecouncil.org](http://www.wvecouncil.org)

WVEC Office: (304) 414-0143

**Ohio Valley Environmental Coalition:** <http://ohvec.org/news.php>

Every morning, OVEC checks scores of news sources and posts links.

**WV Citizen Action Group:** <http://www.wvcag.org>

**Legislative Update** is published by the West Virginia Environmental Council (WVEC) – a statewide organization dedicated to facilitating communication and cooperation among citizens in promoting environmental protection in West Virginia. *Legislative Update* is published weekly during the regular Legislative Session.

We welcome letters, articles, and artwork from readers and reserve the right to edit or reject submissions. Please send materials to Denise Poole, *editor* at [deniseap@earthlink.net](mailto:deniseap@earthlink.net)

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## Support the West Virginia Environmental Council

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WVEC Legislative Update Newsletter

March 1, 2013