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Saturday, April 26, 2014

Alpha violating water pollution limits, judge rules

by **Ken Ward Jr.**, Staff writer

 [Brushy Fork Selenium Ruling pdf file](#)

A federal judge has ruled that Alpha Natural Resources is illegally discharging excess levels of toxic selenium from a Raleigh County coal-slurry impoundment, in a case that illustrates a potentially major flaw in a U.S. government pollution settlement with the coal giant.

U.S. District Judge Robert C. Chambers found that Alpha subsidiary Marfork Coal violated water quality standards and its state-issued pollution permit with the excess selenium discharges from its long-controversial Brushy Fork slurry impoundment, located on Little Marsh Fork south of Whitesville.

In an 11-page ruling issued last Thursday, Chambers cited selenium samples that showed violations of the state's water quality standard for the pollutant, which has been linked to aquatic life deformities downstream from mountaintop removal coal-mining operations.

The judge ruled in a case brought by the Ohio Valley Environmental Coalition, the West Virginia Highlands Conservancy, Coal River Mountain Watch and the Sierra Club. The citizen groups were represented by Derek Teaney, a lawyer with Appalachian Mountain Advocates.

"Again it is the citizens who shoulder the task of making sure these coal companies are 'running right,'" said Coal River Mountain Watch co-director Debbie Jarrell, using the term for Alpha's corporate safety and environmental program.

The ruling by Chambers is the latest move in a long-running dispute between coal companies and citizen groups over selenium discharges from large-scale mining operations. Scientists are concerned about






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developmental damage and reproductive problems in fish population downstream from selenium-producing mines, and citizens say state and federal regulatory agencies are doing little to really fix the problems.

Steve Higginbottom, a spokesman for Alpha, said the company still believes that state legislation passed in 2012 should have shielded the company from the citizen lawsuit.

Last August, Chambers ruled that bill did not block citizen suits like the one over the Brushy Fork selenium. The legislation aimed to declare coal companies in compliance with state water pollution laws as long as they meet discharge limits for specific chemicals listed in their permits. In cases like the Brush Fork one, the water pollution permit, issued by the state Department of Environmental Protection, does not specifically limit selenium, even though the state has a separate in-stream water quality standard for the substance.

In ruling last year that the legislation did not protect Alpha from the Brushy Fork lawsuit, Chambers noted that state regulations also require all coal-related water pollution permits to prohibit any mining discharges from causing in-stream water quality violations of the sort Coal River Mountain Watch alleges exists downstream from the impoundment.

Higginbottom also noted that the DEP recently renewed Alpha's permits for the Brushy Fork site.

"We have agreed with DEP to install selenium treatment on a specified schedule, and we are currently in compliance with our schedule," Higginbottom said.

That Alpha agreement with DEP, though, does not specify a type of treatment and gives the company until March 2016 to comply with the state's selenium water quality standard.

In last week's ruling, Chambers accepted evidence of selenium violations that showed up in water samples taken by Downstream Strategies, a consulting firm hired by the citizen groups. Meghan Betcher, Downstream's sampler, found selenium violations at the impoundment's pollution outfall during sampling visits in October 2012 and December 2012.

The outfall in question, called Outfall 001, discharges downhill, via a spillway, directly into what remains of a stream known as Brushy Fork, which the judge noted "at this point is little more than a pond." Brushy Fork is comprised of the water between the end of the spillway and several culverts 20 to 30 feet away, the judge observed. At the culverts, the water from Brushy Fork joins with the water in another stream, Little Marsh Fork.

During one sampling trip in December 2012, Betcher found selenium concentrations that equated to violations of the state's limit on average selenium levels. A sampler from Research Environmental & Industrial Consultants, or REIC, was hired by Alpha and took samples at the same locations at the same time as Betcher.

Alpha's sampler, Jimmy Bennett, found similar selenium levels, except in one instance he found 1.6 parts per billion of selenium where Betcher had found 6.1 parts per billion, and found 6.1 parts per billion where Betcher had found 1.7 parts per billion. The selenium standard at issue is 5.0 parts per billion.

In his ruling, Chambers found that Bennett had switched his samples, likely because he had — in violation of his company's policy — pre-labeled the sampling bottles rather than marking them at the time he took the samples.

"Such pre-labeling is frowned upon because it increases the chance of mistakenly putting a sample in the wrong bottle," the judge wrote. "Ms. Betcher specifically remembered that Mr. Bennett's bottles were



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pre-labeled because, she testified, it was cold during the December trip and labeling the bottles just before taking the samples was uncomfortable.”

Last month, Alpha agreed to what the Obama administration said was a major environmental settlement that includes \$27.5 million in fines and major improvements in many of the company’s pollution treatment efforts at its operations in West Virginia, Kentucky, Pennsylvania, Tennessee and Virginia.

But the settlement involves only violations in situations where Alpha exceeded a pollution limit written into one of its state-issued discharge permits, not situations like Brushy Fork, where there is no specific permit limit, and only a broader in-stream water quality standard.

“It’s a shame that community groups have to do the work of regulatory agencies,” said Vernon Haltom, Coal River Mountain Watch’s executive director.

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