



WARIOTO WARBLER



CLARKSVILLE NATIONAL AUDUBON CHAPTER

VOLUME 39, NUMBER 1

SEPTEMBER 2007

WARIOTO AT A GLANCE

REGULAR MEETING: Thurs., Sept. 6, 7:30 p.m., Sundquist Science Bldg, conference room, D126, APSU.

PROGRAM: "Exciting Developments in Renewable Energy" by Joe Schiller, Associate Professor of Biology at APSU and Clarksville's renewable energy guru

FIELD TRIP: No field trip has been planned.

BOARD MEETING: Sundquist Science Building, Biology Conference room, D126 at 7:00 p.m.

Visit our webpage at http://www.apsu.edu/schillers/Audubon/Warioto_Chapter.htm

A CALL FOR HELP, Steve Hamilton

"The time has come," the Walrus said, "To talk of many things: Of shoes — and ships — and sealing-wax — Of cabbages — and kings — And why the sea is boiling hot — And whether pigs have wings." Through the Looking Glass, Lewis Carroll.

Well, I don't know that the quote is all that appropriate, but I do know that the time has come to discuss an important issue. That is, who will help run this chapter? Several of us continue in our current roles and do so willingly — maybe with a little gripping. I am willing to continue preparing the newsletter and my wife Debbie has agreed to continue as 3rd Vice-president/Membership Chair. For us this works well enough. Gloria continues in her role as chapter treasurer. Others I'm sure will continue to serve on the board. Joe Schiller has agreed, somewhat reluctantly, to continue for a third year. Elvira Roberts accepted the position of Hospitality Chair. Amy Wallace's name was mentioned at the summer picnic to continue as Secretary, but I do not know if she has been asked. She has held this position for many years now.

Still, at least two important positions are not filled. These are the 1st Vice-President/Program Chair and the 2nd Vice-President/Fieldtrip Chair. The chapter needs people to fill these leadership roles. If this chapter is to continue, it needs people willing to step up and take charge. **Please consider offering a small bit of your time by filling one of these. There are others who will assist you in these positions if you offered to lead.**

PRESIDENT'S MESSAGE, Joe Schiller

The Clean Water Restoration Act (formerly the Clean Water Authority Restoration Act) is at a critical juncture. In July, the Clean Water Restoration Act, which would ensure protections for all waters of the United States under the Clean Water Act, was introduced in the Senate by clean water champion Senator Russ Feingold (D-WI) and 19 cosponsors. The new Senate bill number is S 1870; the House number is HR 2421, introduced by Rep. Oberstar (D-WI) with 168 cosponsors.

There is momentum now in Congress to take action on the Clean Water Restoration Act. Last week there were two historic full-committee hearings in the House with a number of experts from academia, government, and the nonprofit sectors who testified in support of the bill.

Opponents are telling Members of Congress that passing the bill will make all kinds of things — hot tubs and swimming pools, for instance — protected water bodies. They are well-organized and include a number of special interests opposed to fully enforcing the Clean Water Act. Stay tuned for an alert as we push this important bill forward to ensure that wetlands, streams, tributaries and other waterways are protected under the Clean Water Act.

Given recent developments in the Office of Surface Mining Regulations (See editorial in Conservation Letter), it is more imperative than ever that this bill makes it into law.

CONSERVATION LETTER, Joe Schiller

I was asked to provide my opinion about the Final Environmental Impact Statement on the 100 foot Stream Buffer Zone Rule just published by the federal Office of Surface Mining. I don't think they completely understood what they were getting into when they asked me this, so I am not sure if my thoughts will ever be published, but here they are for what they are worth:

The new rule promulgated by the Office of Surface Mining (OSM) basically eliminates the 100 foot stream buffer zone that was passed to prevent mining activities too close to streams. The reason is that mining in and around streams degrades their water quality making it unable to support many species that are usually found in streams with good water quality. In this case, the OSM has passed a rule that not only degrades water quality in streams, it completely destroys the stream by burying it under millions of tons and hundreds of feet of mine waste. When this practice was first challenged in the courts by citizens of West Virginia, the original argument of the state and federal agencies and their coal company "clients" was that because the filled part of the valley no longer contained a stream, provisions of the Clean Water Act (CWA) and Surface Mining Reclamation and Control Act (SMCRA), including the stream buffer zone, only applied to that portion of the stream that flowed out of the valley fill. The late Honorable Judge Charles H. Hayden, II, described this line of reasoning as a "reductio ad absurdum" because it led to the ridiculous situation where an entire river system could be filled in with mine waste and as long as some short segment emerged with relatively good water quality then the CWA and SMCRA would have protected the stream. He went on to rule against the state and federal agencies describing valley fills from mountaintop removal mines as "waste disposal projects so enormous that, rather than the stream assimilating the waste, the

waste assimilates the stream.” The reason Judge Hayden made this point is that all other pollutants generated by every other industry or utility are regulated under the principle that only the amount of waste the stream can assimilate without lowering its water quality is allowed. The quantity of waste a stream can assimilate in this way is known as its Total Maximal Daily Load (TMDL). So basically what the Bush administration has done is give the mining industry a free pass, not only to harm streams, but to obliterate them entirely—a privilege extended to no other polluting entity in the country! Of course, environmentalists are enraged, but all industries and utilities should be so enraged because, unlike the mining industry, they still have to play by the rules. All citizens should be so enraged because it is their heritage of beautiful Appalachian streams, teeming with unique and beautiful organisms, many found nowhere else on earth, and in numbers and variety found almost nowhere else on earth, that is being destroyed for all time on an unprecedented scale and at an unprecedented rate.

Judge Hayden’s original ruling was overturned by the 4th circuit court of appeals on a technicality. Subsequent rulings by Judge Hayden and other federal judges have consistently found the state and federal regulatory agencies to be in violation of the CWA, SMCRA, the National Environmental Policy Act (NEPA), and the Administrative Procedures Act (APA), but each time the 4th circuit has overturned those rulings. However, even a few of the 4th circuit justices have dissented from these actions so that the administration has had a very difficult time allowing this practice legally. The administration’s strategy to circumvent these laws was to literally change the rules. It was about the time of the first Hayden ruling that OSM began the rulemaking process to change the stream buffer zone rule so it could legally allow the valley fills required for mountaintop removal mining. However, the first rule making change completed was the one that redefined mine waste being dumped into streams, not as “waste,” but as “fill”. This was to legitimize the US Army Corps of Engineers (Corps) long-standing practice of granting dredge and fill permits to mining companies allowing valley fills. Judge Hayden ruled on this rulemaking, describing it as an attempt by the executive branch to legislate through the rule-making process. Recall, the constitution only allows the legislative branch to pass laws, the administrative branch is supposed to enforce them. The 4th circuit overturned Hayden on this issue, ruling that the agency was allowed deference in its interpretation of the rules.

This victory however, was not enough for an administration intent on making the wholesale destruction of streams as easy as possible. They wanted to issue permits under a streamlined permitting process of the clean water act that allows nationwide permits for small dredge and fill activities with insignificant environmental impact. Under this system, the Corps could rubber stamp valley fills without doing any environmental impact assessments and without public notice and the opportunity for the public to comment on the permitted activity. Citizens of West Virginia challenged this in court. The suit, *OVEC v. Bulen*, was brought in the federal district court for southern West Virginia where the Honorable Joseph Goodwin ruled “... *Nationwide Permit 21 does not comply with the plain language, structure, and legislative history of the Clean Water Act.*” Judge Goodwin enjoined the COE from

authorizing valley fills under NWP 21 and ordered all fills thus authorized but not commenced suspended. This ruling was subsequently appealed to the 4th circuit court of appeals which ruled that the COE had not violated the CWA in authorizing valley fills under NWP 21 and Judge Goodwin’s order was vacated. The Plaintiffs then petitioned the 4th COA for a rehearing by the full 4th COA. This “en banc.” petition was denied; however, three of the 4th circuit judges issued a strongly worded dissent:

“... this case is of exceptional importance to the nation and, in particular, to the states in the Appalachian region. ... The Appalachian mountains, the oldest mountain chain in the world are one of the nation’s richest, most diverse, and most delicate ecosystems, an ecosystem that the mountaintop coal mining authorized by the Corps’ general permit may irrevocably damage or destroy. In enacting the CWA, Congress mandated the protection of our environment through strict procedural requirements. The panel’s decision, in authorizing the Corps to skirt the CWA-mandated permitting process, undermines the enactment’s primary purpose and poses unnecessary risks to one of this nation’s great places. In further support of dissent, I adopt Judge Goodwin’s fine opinion for the district court.”

While the 4th circuit deferred to the Corps rulemaking interpretation, the Corps was still required to follow the law which only allows dredge and fill permits to be issued under the nationwide permit if the activities have no significant environmental impact. In a recent suit alleging that the Corps was ignoring this requirement Judge Robert Chambers ruled: *“The court finds fundamental deficiencies in the Corps’ approach, resulting in EAs [Environmental Assessments] which are inadequate and unsupported...”* Judge Chambers ordered the Corps to either come back with valid assessments or go back to individual permits that require full environmental impact studies and citizen involvement. Judge Chambers was openly skeptical of the Corps ability to do a valid EA that would conclude the proposed valley fills would have no significant environmental impact. Judge Chambers’ ruling is being appealed to, guess, the 4th circuit.

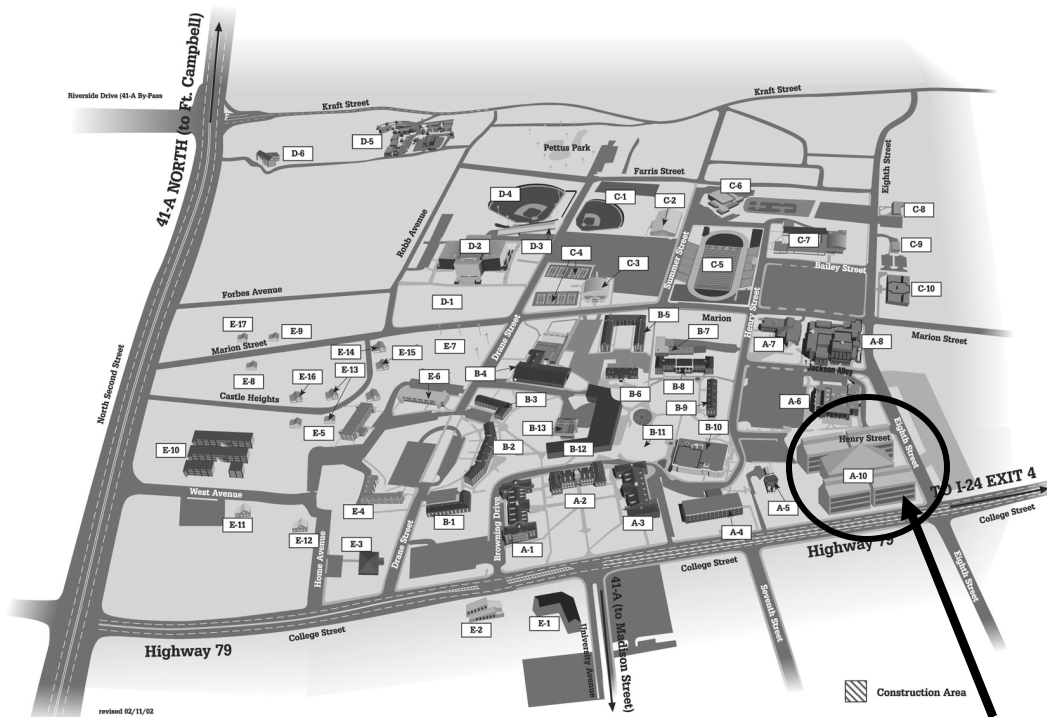
Then last week, the Environmental Impact Statement studying the proposed stream buffer zone rule change was published. When OSM first published its intent to change this rule it tried to do so under the less onerous and less transparent process of conducting an ES. In order to change the rule by this process, OSM would have had to conclude that the proposed rule change would have no significant environmental impact. In other words, OSM would have to convince everyone that a rule change that would rubberstamp the destruction of hundreds of thousands of acres of Appalachian forests and hundreds of miles of Appalachian streams would have no significant environmental impact. They thought better of it and decided to proceed with the slower, more painful, but more legally defensible process of a full Environmental Impact Statement (EIS). Typical of the unmitigated cynicism and contempt for environmental protection of this administration, the proposed rule change is titled “Excess Spoil Minimization, Stream Buffer Zones” to give the impression that the rule change is increasing the protection of streams, when in reality, it is removing all protection. How can this be? Remember, under the current rule streams are protected and at least three federal judges, in several different rulings, have

upheld this protection. The proposed rule change will actually allow the complete destruction of streams by codifying in law the practice that all of these judges formerly ruled illegal. How does it do this? First, the rule change assumes that the current practice of allowing valley fills is legal, when in fact it is not. Thus, just by ignoring this fact and talking about alternative rules that minimize excess spoil, they are shifting the debate. Under the current rule, even minimized amounts of spoil cannot be legally deposited into the 100 foot stream buffer zone! Even though the proposed rule talks about the use of best available technology and alternatives that will minimize waste, the mining companies are only required to consider them, they are not required to implement them. The mining companies are given the final say in determining if these spoil minimization strategies are "feasible." In other words, we are to just trust the coal companies and assume that they would never destroy any more streams that absolutely necessary even if that would net them many millions more dollars of profit!

Yes, this rule change will almost certainly be challenged in court, but that is no guarantee that the destruction will end. Even if litigation ultimately succeeds, this will take a very long time and in the interim, the drag lines will continue their inexorable destruction of the Appalachian Mountains and its streams.

What is to be done? First, it is essential that citizens everywhere submit written comments denouncing this proposed rule and demanding the nation's streams remain protected under the old stream buffer zone rule. The ramifications of this rule extend well beyond the boundaries of Appalachia. This rule will allow destruction of streams by mining operations everywhere in the US. Comments can be submitted in writing by ground mail to: David Hartos, Office of Surface Mining Reclamation and Enforcement, 3 Parkway Center, Pittsburgh, PA 15220 or by email at

dhartos@osmre.gov before 4:00PM Eastern Time, October 15 2007. Identify your comments as referencing OSM-EIS-34. At the same time citizens should demand public hearings on this proposed rule so they are afforded the opportunity to openly express their opposition to this rule change in a forum that can be viewed by all citizens. To do so, request an opportunity to testify at a public hearing before September 17, 2007 to the same address as for your comments. The next step is to write your federal legislators to demand that they pass strong water protection legislation that reasserts the clear intent of the original clean water act and its revisions to protect and restore the nations' waters. A strong stream buffer zone provision is an essential feature of any legislation that purports to do this. Fortunately, such legislation is already pending before congress. It is called the Clean Water Protection Act, H.R. 2169, in the House of Representatives. Currently, two Tennessee congressmen are cosponsors of this bill, Jim Cooper and Steve Cohen. They deserve our sincere thanks, but it is sad that more Tennessee congressional representatives are not cosponsoring this bill. Tennessee has a great deal at stake. For example, did you know that the Sundquist and Royal Blue Wildlife Management Areas could both be destroyed by mountaintop removal mines? Did you know that additional hundreds of thousands of acres of Tennessee's Cumberland mountains and streams could also be destroyed by such mining? The whole purpose of the proposed rule change is to legalize the filling of streams and accelerate their destruction. While you are writing your federal representatives, do not forget to write governor Bredesen and your state legislators. They have more power to protect Tennessee's streams from the devastating effects of mountaintop removal than they care to admit. Demand that state regulators deny water quality permits to mountaintop removal and other strip mining operations that would degrade the waters of Tennessee. They have the power to do this even though they would have you believe they do not!



Meetings in the Sundquist Science Building, D-126 (Arrow points to D-wing).

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ARTICLES AND INFORMATION FOR THE OCTOBER NEWSLETTER ARE **DUE 19 SEPTEMBER.**

MAIL TO: Steve Hamilton, 290 Ardmoor Dr., Clarksville, TN 37043 or hamiltonsw@apsu.edu

NEW MEMBER FORM

Yes, I would like to become a member of the National Audubon Society and the local chapter: Clarksville Warioto Audubon Society for the introductory rate of \$20.00.

I will receive six issues of National Audubon magazine, the Warioto Audubon society newsletter (9) issues, and help to protect America's Birds, rescue endangered wildlife and preserve vital habitat.

Please Print:

Name _____

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Make Checks payable to National Audubon Society and send this coupon and your check to
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WARIOTO AUDUBON SOCIETY
C/O STEVE HAMILTON, EDITOR
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Ever Heard of a "Cat Bib?" Check this out!

Some folks in Australia developed a neoprene "cat bib" that significantly reduces cats' ability to kill birds and other wildlife (both by visual cue to prey and some interference with the cat's hunting). The bibs were independently tested by folks at Murdoch University in Perth. In the US, the bibs are sold online by Cat Goods in Oregon.

<http://www.catgoods.com/index.html>

The CatBib is a unique, patented product that prevents your cat from catching and killing wildbirds... simply, safely, effectively, and inexpensively! AND it's been scientifically proven to stop cats from catching birds!

