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## Environmental groups hail selenium ruling as 'game changer'

By Ken Ward Jr.

CHARLESTON, W.Va. -- A federal judge's ruling that Patriot Coal must clean up toxic selenium pollution violations at two mines in Southern West Virginia is a "game changer" that could force the mining industry to bear far more of the full costs of its operations, environmental groups said Wednesday.

If eventually applied across dozens of other mining operations and hundreds of water pollution outlets, the treatment required by the court decision could easily cost the industry hundreds of millions of dollars.

"This court order is a game changer in our fight to protect streams and communities in West Virginia and to hold coal mining companies accountable for their pollution," said Ed Hopkins, senior Washington, D.C., director of the Sierra Club.

Patriot Coal blasted the court decision as unnecessary and said the coal industry needs to focus on efforts to rewrite West Virginia's water quality rules to weaken the state's selenium limits.

"Looking forward, Patriot is assessing its position in these cases and will determine its actions after the written judgment has been received," Patriot President Richard M. Whiting said in a news release.

On Tuesday, U.S. District Judge Robert C. Chambers ruled against Patriot in two combined cases involving repeated selenium violations at the company's Ruffner Mine in Logan County and its Hobet 21 complex along the Boone-Lincoln County border.

Selenium, a naturally occurring element found in many rocks and soils, is an antioxidant needed in very small amounts for good health. In slightly larger amounts, selenium can be toxic. Selenium impacts the reproductive cycle of many aquatic species, can impair the development and survival of fish, and can damage gills or other organs of aquatic organisms subject to prolonged exposure. It can also be toxic to humans, causing kidney and liver damage, as well as damage to the nervous and circulatory systems.

In 2003, a broad federal government study of mountaintop-removal mining found repeated violations of water quality limits for selenium. The following year, a U.S. Fish and Wildlife Service report warned of more selenium problems downstream from major mining operations. One report by a top selenium expert has warned the pollution from the Hobet 21 complex has left the Mud River ecosystem "on the brink of a major toxic event."

Patriot's Hobet 21 and Ruffner operations have been the focus of a complicated series of lawsuits, made more complex by moves by the Legislature and the Manchin administration to ease compliance deadlines and head off lawsuits by citizens groups.

In this week's ruling, Chambers ordered Patriot subsidiary Apogee Coal to install a "fluidized bed reactor" - using biological treatment in which bugs basically eat the selenium -- to treat three water discharges at its Ruffner operation. Chambers gave the company until March 1, 2013, to cease violating its selenium permit limits at those outlets.

The judge also ordered Patriot subsidiary Hobet Mining LLC to build a treatment system for one pollution outfall on its Hobet 22 permit, which is part of the much larger Hobet 21 complex. Chambers gave the company until May 1, 2013, to comply with selenium limits there.

Chambers also ordered St. Louis-based Patriot to file with the court a \$45 million letter of credit to guarantee treatment funding. The judge also said he is likely to appoint a special master to oversee the projects.

In a news release, Patriot estimated initial costs of building the treatment systems at \$50 million and said it would also have to spend \$3 million a year on operating costs for those systems.

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But the court case involved just four water pollution outlets, and court records indicate Patriot has selenium problems at another 74 outlets -- meaning the eventual costs to comply with selenium limits could easily run into hundreds of millions of dollars.

One financial disclosure by Patriot put its corporate-wide selenium treatment costs at nearly \$400 million over 30 years. Testimony in the case before Chambers questioned whether that number was far too low.

"For future sites, it means that selenium-contaminated sites should not be permitted at all, because it is very expensive to treat selenium and treatment becomes a long-term responsibility that could outlive the coal companies and then fall on the public," said Jim Hecker, a Public Justice lawyer who represented citizen groups who sued over Patriot's selenium violations.

"For those sites that have already been permitted, it means that the coal companies can no longer seek indefinite compliance extensions by claiming that there is no feasible way to treat selenium."

In Patriot's news release, Whiting said the company had "dedicated significant resources over the last several years to take an industry-leading position in identifying viable treatment technology to address selenium discharges."

But Chambers held Patriot in contempt for missing an April 2010 deadline to end violations at the Ruffner Mine. The judge said that he had tried to give Patriot "as much leeway as possible," but that the company "has not exercised reasonable diligence in trying to comply" with that court-approved deadline.