

Valley fill mining outlawed

Landmark ruling prohibits mountaintop coal operators from burying state streams

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By Ken Ward Jr. STAFF WRITER

Mountaintop removal coal operators cannot bury streams under millions of tons of waste rock and earth, a federal judge ruled Wednesday.

Chief U.S. District Judge Charles H. Haden II said that valley fill waste piles are not allowed in streams that flow year-round or part of the year.

Fills are legal only in smaller streams that flow when it rains or when snow melts, the judge said.

In a landmark ruling, Haden concluded that valley fills in perennial and intermittent streams violate federal and state mining rules and the federal Clean Water Act.

Perennial streams flow all year. Intermittent streams flow at least six months of the year.

"When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments," Haden wrote in a 49-page order filed Wednesday afternoon.

"The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect," the judge said.

"If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated," he said. "No effect on related environmental values is more adverse than obliteration."

"Under a valley fill, the water quality of the stream becomes zero," he wrote.

"Because there is no stream, there is no water quality."

Haden ordered the state Division of Environmental Protection not to issue any more permits that allow valley fills in perennial and intermittent streams.

"I am issuing a director's order [today] that no new fill permits will be issued," said Michael Castle, state Division of Environmental Protection director. "No existing fills or permitted fills can be advanced."

Cindy Rank, mining chairwoman of the West Virginia Highlands Conservancy, praised Haden.

"That's wonderful," Rank said, when told of the ruling. "We're grateful that Judge Haden has ruled in our favor. We think it's a right and justifiable position, or we wouldn't have taken this to court in the first place."

Doug Gibson, spokesman for the United Mine Workers, said union lawyers would read the ruling and issue a statement later. Bill Raney, president of the West Virginia Coal Association, did not return phone calls Wednesday.

Gov. Cecil Underwood scheduled a news conference for 9:15 a.m. today to discuss the ruling.

"We have not had a chance to review any details of the ruling at this time," said Dan Page, spokesman for the governor. "However, the initial reading suggests that this is a devastating ruling to the coal industry and the people who work in it, and imperils the entire economy of West Virginia."

Ben Bailey, a lawyer for DEP, said the agency will file an immediate appeal.

Haden spoke to one key issue in a complicated federal court lawsuit over mountaintop removal: Whether valley fills violate a rule which bans strip mining within 100 feet of streams.

Lawyers for the coal industry, the state and citizen groups have proposed to settle other issues in the July 1998 lawsuit. They said they couldn't reach agreement on the buffer zones and asked the judge to resolve it.

Haden has not decided whether he will approve the settlement of other issues in the case. A hearing on the settlement is scheduled for Oct. 27 in Charleston.

In mountaintop removal, operators use explosives to blast off entire hilltops to uncover valuable low-sulfur coal reserves. Huge shovels and dozers dump leftover rock and earth into nearby valleys, burying streams.

More than 470 miles of West Virginia streams have been buried, or proposed to be buried, in permits issued since 1986, according to an October 1998 report by the U.S. Fish and Wildlife Service.

Federal and state mining laws generally prohibit mining within 100 feet of streams. This "buffer zone" rule can be ignored if companies show the mining will not hurt

streams or aquatic life. To approve these buffer-zone variances, the state Division of Environmental Protection is required to make a series of findings about the proposed mining's potential effects.

In their July 1998 suit, the West Virginia Highlands Conservancy and a group of other citizens accused the DEP of a "pattern and practice" of issuing valley fill permits that did not contain the required variance findings.

They also allege that DEP could not legally approve valley fills through such findings, because the fills destroy streams.

Haden noted that DEP lawyers argued the buffer zone rule applied to entire stream systems, as opposed to specific segments, "so that one part of a stream, usually the headwaters and upper reaches, may be filled, i.e., covered by a valley fill, as long as stream quantity and quality are not adversely affected downstream.

"This interpretation, however, leads to the *reductio ad absurdum* [reduction to absurdity] that miles of streams could be filled and deeply covered with rock and dirt, but if some stretch of water downstream of the fill remains undiminished and unsullied, the stream has been protected," Haden wrote.

"Nothing in the statute, the federal or state buffer zone regulations ... suggests that portions of existing streams may be destroyed so long as [some portion of] the stream is saved," Haden wrote.

Coal lobbyist Ben Greene argued Wednesday that, "If you literally apply [the judge's ruling], you will bring to a halt any kind of construction activity, not just in West Virginia, but across the country."

But Haden explained that burying streams for mountaintop removal valley fills is different than filling a stream or wetland to build a shopping center or road. In doing so, the judge reopened an issue that the parties had settled in December 1998: Whether rock and earth from mining is "waste" that cannot be dumped into streams under U.S. Army Corps of Engineers "dredge and fill" permits.

Citizen group lawyers alleged in their original lawsuit that mining fill was waste, and could not be permitted by the Army Corps under a dredge and fill authorization. But they dropped that claim in exchange for a promise that federal agencies would more closely scrutinize mountaintop removal permitting.

Haden answered the question anyway.

"The Court finds and concludes that overburden or excess spoil, being a pollutant and waste material, is not 'fill material' subject to Corps authority under Section 404 of the [Clean Water Act] when it is discharged into waters of the United States for the primary purpose of waste disposal," Haden wrote.

"The Corps' 404 authority to permit fills in the waters of the United States does not include authority to permit valley fills for coal mining waste disposal."

Haden rejected an August agreement in which federal agencies outlined how they would permit valley fills, despite the buffer zone rule. The judge said the agreement, "substitutes a more lenient, less protective standard" than required by the 1977 Surface Mining Control and Reclamation Act.

In a final section of his ruling, titled "Observation," Haden also commented on coal industry complaints that a ruling against operators on the buffer zone issue would shut down all mining.

The judge recalled that the U.S. Office of Surface Mining, when it wrote the buffer zone rules in 1979, considered similar complaints and rejected them.

"Thus, coal production and surface mining were considered when the regulations were promulgated," Haden wrote. "The regulator OSM nevertheless concluded that destruction of streams below natural drainways was illegal.

"The Court is called upon to interpret the law and the regulations," the judge wrote.

"To the extent misapprehension of the buffer zone rule was fostered by the Director or other agencies, the public and the remaining parties have been done a disservice," he wrote.

"However, if application of the buffer zone rule, a regulation under federal law, prevents surface area coal mining or substantially limits its application to mountaintop removal in the Appalachian coalfields, it is up to Congress and the Legislature, but not to this Court to alter that result."

To contact staff writer Ken Ward Jr., call 348-1702, or e-mail kw...@wvgazette.com.