

# Clay mining permit badly flawed

## OSM report says

State DEP won't be asked to correct it

By Ken Ward Jr.  
SUNDAY GAZETTE-MAIL

A new Clay County mining permit approved last week by the U.S. Environmental Protection Agency is riddled with serious errors, according to an internal government report.

Engineers and other experts from the federal Office of Surface Mining found that the Vandalia Resources permit didn't comply with state and federal water quality rules, according to the report.

OSM officials concluded that the state Division of Environmental Protection did not adequately study how the Vandalia permit and other mining in the area will affect water quality.

In a 50-page report, OSM said a cumulative hydrologic impact report, or CHIA, prepared by DEP "did not address the impacts of multiple operations on a larger scale than just the permit area, as required by the regulations."

Roger Calhoun, director of the Charleston OSM field office, said the report found that the Vandalia permit was deficient in a variety of ways. But, Calhoun said, OSM has no plans to make DEP do anything about it.

"We looked at that permit in trying to explain to both myself and the DEP folks what we would do different and might ask for differently in state permits if we were actually looking at the permits," Calhoun said.

Calhoun said OSM wants DEP to make changes in its permitting process over the long-term, but doesn't plan to force improvements

### Not up to standards

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in the Vandalia mine.

"On that particular permit, I don't know of improvements the state might make," he said. "I don't intend to make the state do anything more on Vandalia."

Lewis Halstead, assistant chief for permitting at the DEP mining office, said the agency is still reviewing the OSM report.

"We are taking steps to rectify some of those things," Halstead said.

The Vandalia permit was issued just a week after federal regulators were called on the carpet by Sen. Robert C. Byrd and Rep. Nick Rahall, both D-W.Va., for being too slow to release mining permits in the state.

Vandalia, a Pittston Coal subsidiary, already operates a mining complex on a 640-acre permit in the Bickmore area, near the Clay-Nicholas County line. About 230 miners produce 2.8 million tons of coal a year for nonunion Vandalia.

The company wants to expand the operations with 336- and 462-acre permits requested from the DEP Office of Mining and Reclamation. The new mines would involve contour and auger mining, as well as area mining, a technique similar to mountaintop removal.

In February, DEP Director Michael Miano issued the 336-acre

permit for mining along Bullpen Fork.

EPA Region III Administrator Michael McCabe initially rejected the state's efforts to issue a separate water pollution permit for the mine. Ongoing federal court litigation over mountaintop removal had stalled a third permit from the U.S. Army Corps of Engineers.

Last week, McCabe and the Corps backed off. They allowed issuance of both the water pollution permit and the Corps' "dredge and fill" permit for the operation.

In a news release, McCabe praised Pittston for reducing the size of its major valley fill from a drainage area of 340 acres to one of 291 acres.

"This mine underwent very close scrutiny," McCabe said. "Pittston modified its application to reduce the size of fills, reduced stream impacts by 20 percent, agreed to channel clean water through the mine from the hill above, and will improve the instream sedimentation pond. These measures provided a considerable measure of environmental protection."

However, the Vandalia permit appears to violate a court settlement that required all mines with valley fills in streams draining more than 250 acres to receive more stringent "individual" permits from the Corps.

The Vandalia permit was authorized through a less rigorous, general "nationwide" permit.

Under the Clean Water Act, min-

ing can only be authorized through nationwide permits if regulators determine that the mining's cumulative adverse impacts on water quality will be minimal.

The OSM report states that DEP did not properly study the Vandalia permit's potential cumulative impacts.

To contact staff writer Ken Ward Jr., call 348-1702.

# Massey mining permit inadequate, OSM says

By Ken Ward Jr.

SUNDAY GAZETTE-MAIL

Federal reviewers have found numerous problems with an A.T. Massey Coal Co. mountaintop removal permit under consideration by the state Division of Environmental Protection.

In a new report, the U.S. Office of Surface Mining concluded that the pending permit for Massey subsidiary Road Fork Development does not comply with federal and state strip-mining regulations.

Road Fork wants a permit to mine 1,300 acres in Logan County. The operation would be along Island Creek, Rockhouse Branch, Rich Creek and Middle Fork, southeast of Omar. Richmond, Va.-based Massey hopes to produce 12.2 million tons of coal over the nine-year life of the mine.

The 27-page OSM report, dated April 9, lists the following problems that would need to be fixed before the Road Fork permit could be approved:

▲ The permit asked for a variance from the approximate original contour reclamation requirement. But Road Fork did not ensure that the final grading of the top plateau is not inward draining, a requirement for the AOC variance.

▲ The permit asked for a variance from the federal mining law's contemporaneous reclamation requirements. But a variance is only allowed if mining companies propose contour mining along with mountaintop removal. Road Fork did not propose any contour mining.

▲ The permit application's discussions of the probable hydrologic consequences "fail to provide an analysis of the potential impacts which could result from the mining of the proposed operation."

The application does not consider possible damage to public water supplies and groundwater supplies, toxic discharge from the mine, or loss of water quantity because of valley fills.

▲ The application requested a variance from the 100-foot stream buffer zone rule, but did not satisfy the requirements for receiving the variance.

▲ The permit application proposed a post-mining land use of commercial woodlands, but did not demonstrate — as required by law — that the flat land created by mountaintop removal was necessary for timbering to occur.

Bill Marcum, a spokesman for Massey Coal, said company officials are reviewing the OSM report and hope to resolve the issues raised.

Marcum added that, "We're concerned that the involvement of different agencies in the process needs to be well coordinated to avoid more needless delays. Such delays not only cause unnecessary expense, but also threaten the jobs of our workers."

An earlier OSM report on a permit for Vandalia Resources Inc. found problems similar to those in the Road Fork permit application.

DEP issued that permit. OSM did nothing to make the state fix the problems identified in the federal report. The U.S. Environmental Protection Agency also approved the Vandalia mine. EPA Region III Administration Michael McCabe issued a news release praising it.

John Ailes, chief of the DEP Office of Mining and Reclamation, said his staff is reviewing the OSM report on Road Fork Development.

"We're looking at the OSM report," Ailes said. "The logical conclusion is that we will deal with any of the issues that they raised."

Roger Calhoun, director of the Charleston OSM field office, said, "We're going to work with the state to make corrections. I think we're honestly working with the state before they get too far along with an issued permit."

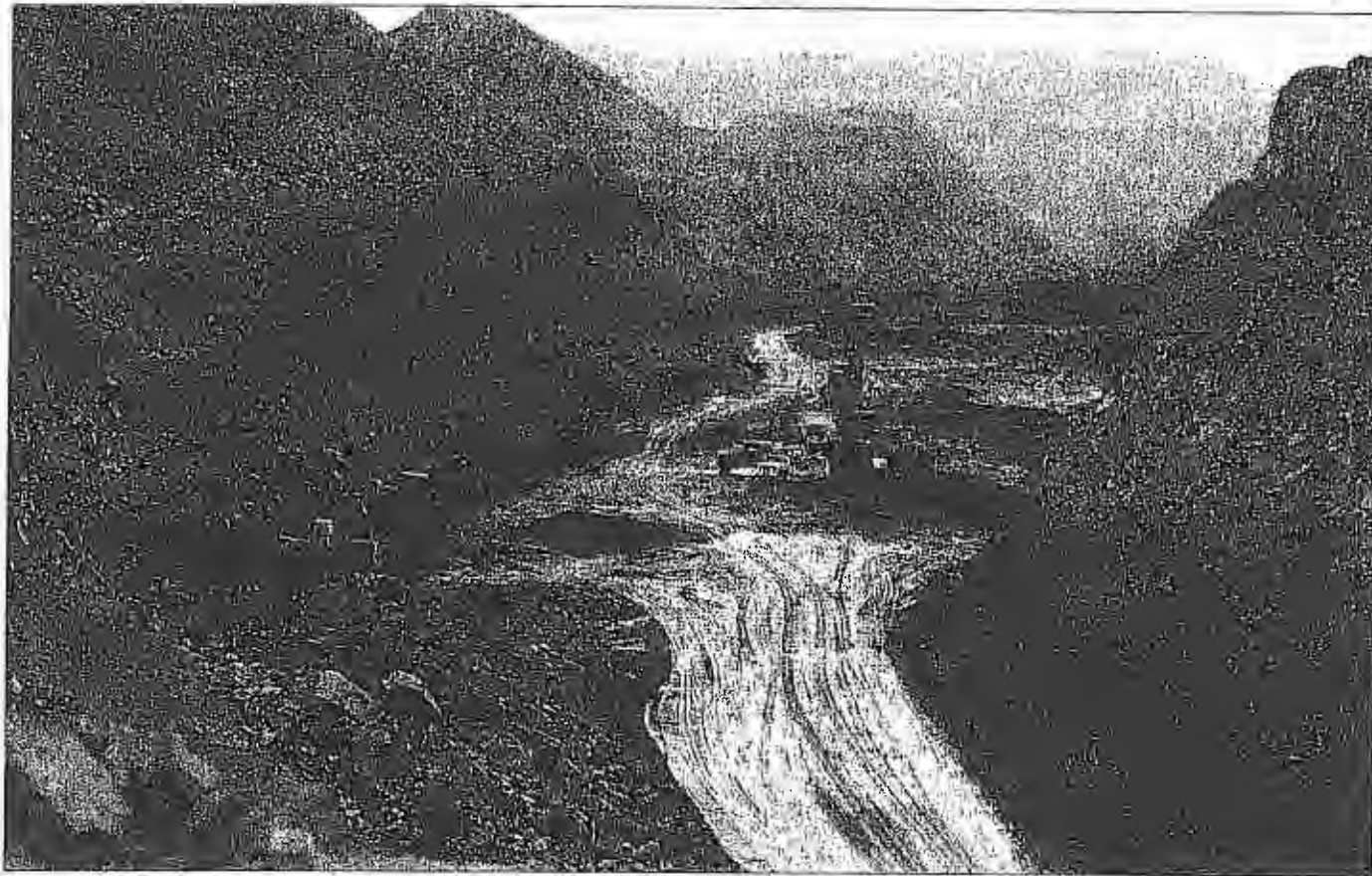
Cindy Rank, mining chairwoman of the West Virginia Highlands Conservancy, praised the OSM staff who reviewed the Vandalia and Road Fork permit applications.

"I think it's wonderful that they're putting this information down on paper to show how idiotic this process is," Rank said Friday. "The reports are confirming our assertions that just about every part of the permitting process is flawed, if not terrible."

To contact staff writer Ken Ward Jr., call 348-1702.

**MINING THE MOUNTAINS:** Industry, critics look for mountaintop removal alternative

# *Is there another way?*



By Ken Ward Jr.  
SUNDAY GAZETTE-MAIL

**S**INCE late 1997, when mountaintop removal first made headlines, Arch Coal Inc. officials have argued that they can't make money mining in steep mountain terrain unless their draglines operate full tilt, and unless they are allowed to bury miles of streams.

Can Southern West Virginia coal be mined without such extreme measures?

At numerous public hearings, mountaintop removal critics asked companies to scale back, to tear down fewer mountains, or not to fill in so many creeks.

Industry officials always replied that if mountaintop removal were limited, the Appalachian coal industry would die. Coal seams in Boone and Logan counties are too thin, they said. Competition from larger Wyoming surface mines is too tough, and the global economy too brutal.

"If somebody could tell me how to mine this much coal with picks and shovels, I'd be glad to hear it," said United Mine Workers President Cecil Roberts. "But it can't be done."

## **MINING**



### **THE MOUNTAINS**

*Last in an occasional series.*

**ABOVE:** Small dozers and trucks haul coal out of an active mining pit at Arch Coal Inc.'s Samples Mine on Cabin Creek in eastern Kanawha County. The mountaintop removal operation produced about 5 million tons of coal in 1998.

**RIGHT:** Chief U.S. District Judge Charles Haden (left) asks mining engineer John Morgan a question about mountaintop removal mine plans during a tour in February. Morgan, who works for the West Virginia Highlands Conservancy, has proposed alternatives to full-scale mountaintop removal mining.



LAWRENCE PIERCE photos/Sunday Gazette-Mail

On March 3, Chief U.S. District Judge Charles Haden II temporarily blocked Arch Coal's plan to open its 3,100-acre Spruce No. 1 Mine, the largest mountaintop removal operation in state history.

Haden said he wanted to get to the bottom of arguments that mountaintop removal and valley fills violate federal water pollution and mining rules. The judge scheduled a trial to start July 13.

Twice since Haden issued his injunction, hundreds of miners gathered on the state Capitol steps to protest the decision. At one of those rallies, Roberts joined hands with coal industry lobbyists and Gov. Cecil Underwood to show support for full-scale mountaintop removal.

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# MINING

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"The environmental extremists do not want to listen to our ideas for compromises, because their goal is simply to shut down the nation's coal industry," Roberts said.

Behind the scenes, something very different was happening. The coal industry was getting scared and starting to back away from its all-or-nothing posture.

If Haden continued to rule with environmentalists, all valley fills might be outlawed. Mountaintop removal could be severely cut back or banned. Underground mining might be hurt as well. Deep mines also fill streams when companies dispose of preparation plant waste.

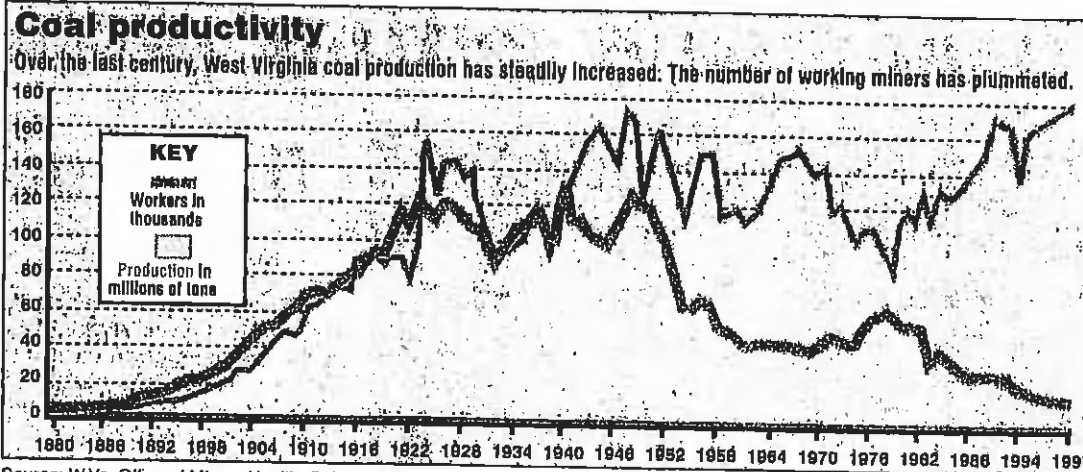
Since mid-March, company lawyers have been sitting down to talk with environmentalists to try to find a compromise. Coal operators offered to do more to protect the environment, if they could count on getting a steady flow of new permits.

### Committed to restarting

In secret meetings over the last three months, lawyers on all sides — industry, environmental groups, regulators and the UMW — have negotiated to find an alternative to all-out mountaintop removal.

Everyone is looking for a middle ground between giant earth-moving machines operating at peak capacity and miners toting picks and shovels:

▲ A week after Haden ruled that Arch Coal could not open its mine in Logan County, UMW lawyers filed a motion to intervene. The union hired a mining



Source: W.Va. Office of Miners Health, Safety and Training

Sunday Gazette-Mail

"The UMWA is committed to exploring every possible avenue to resolve this dispute," Roberts said later.

▲ A week after that, the U.S. Office of Surface Mining announced a new mountaintop removal policy: Coal companies could continue to tear down mountains. But they would have to rebuild them, by putting less rock and earth into valley fills and more back onto hilltops.

Rep. Nick Rahall, D-W.Va., a frequent OSM critic, said: "The success of this proposal could also create an environment in which the environmental plaintiffs could find it beneficial to seek a settlement with [the state Division of Environmental Protection] on the outstanding [Surface Mining Control and Reclamation Act] issues in their lawsuit."

▲ In mid-April, another mining expert, hired by the West Virginia Highlands Conservancy, gave Haden a report which describes how coal operators could mine the area and do less damage to hills and streams.

"The creative mix of mining methods and maximizing the use of excess spoil disposal areas could create a radically different mine plan," the engineer's report said.

▲ Also in mid-April, Arch Coal filed a request for an "individual" valley fill permit from the U.S. Army Corps of Engineers for its new mine.

Previously, Arch Coal wanted the mine authorized under a "nationwide permit." Under the nationwide permit, Arch Coal would promise to follow a set of mining conditions. Regulators would not review the specifics.

If Arch Coal applied for an individual permit, regulators would go through the application closely. They might make the company reduce the size of the mine. The permit could take much longer to get.

Today leaders on both sides say a settlement before the July 13 trial is possible — perhaps not likely, but at least possible.

"I think there is a way to get to that point," said Bill Raney, president of the West Virginia Coal Association.

"They're going through long meetings and pretty good meet-

ings," Raney said late last week. "I understand things are going pretty well."

In a recent interview, Arch Coal Executive Vice President Ken Woodring said, "We're certainly anxious to come up with a solution, and we'll do everything we can to get to that point."

In court papers, lawyers for DEP Director Michael Miano said they are taking steps to make sure future mining permits comply with the law and minimize environmental damage.

"When all is said and done, plaintiffs' attacks on the state's processes, designed to halt permitting and mining, have been or will be substantially negated," DEP lawyers told Haden in late May.

"Improvements in mining methods have been suggested," said Cindy Rank, mining chairwoman of the West Virginia Highlands Conservancy.

"Whether or not they are enough, and will resolve all of the issues that are out there regarding impacts to the environment and the communities, I don't know."

### The future of Pigeonroost

Pigeonroost Hollow is a narrow, tree-lined valley near Blair Mountain in Logan County.

If Haden hadn't issued his injunction, Arch Coal subsidiary Hobet Mining would already have expanded its huge Dal-Tex mountaintop removal mine into the hollow.

Explosives would blast hill-tops into rubble. Smaller electric shovels and dozers would already be removing the first layer of rubble, down to the first coal seam. Coal from that seam would be mined and trucked away. Dozers would level a flat plain, where the dragline can sit.

A dragline is a huge, cranelike earth-moving machine, sometimes 20 stories tall and weighing 4,000 tons. Its shovel-bucket digs 75 cubic yards or more in one bite.

The dragline would scoop out the rest of the rock and earth. A dozen coal seams would be dug out along the way.

Much of the rubble would be dumped into nearby valleys, burying streams beneath valley fills. Nearly 5 square miles of rugged Logan County hills would have been stripped.

More than 4 miles of streams would be buried with enough rock and earth to fill 28 million railroad cars. Valley fills would cover 1½ miles of Pigeonroost Branch, and 1 mile each of White Oak Branch, Old House Branch and the Right Fork of Seng Camp Creek.

Over the next 15 years, Hobet Mining would haul 80 million tons of coal, worth about \$2 billion, out of Pigeonroost Hollow.

When he issued his injunction, Haden ruled the mining would do "permanent and irreversible" damage to Pigeonroost Hollow.

"If the forest canopy of Pigeonroost Hollow is leveled, exposing the stream to extreme temperatures, and aquatic life is destroyed, these harms cannot be undone," Haden wrote in a 47-page opinion. "If the forest wildlife are driven away by the blasting, noise, and the lack of safe nesting and eating areas, they cannot be coaxed back."

### 'State of the art' mining

In July 1998, when the High-

lands Conservancy filed a lawsuit to curb mountaintop removal, the group's lawyers hired John Morgan to be their expert witness.

A British citizen and graduate of the London School of Mines, Morgan now operates his consulting firm, Morgan Worldwide Mining Consultants Inc., out of Lexington, Ky.

Over the last 20 years, Morgan has traveled all over the world to design mines: gold mines in Indonesia, granite mines in the Ukraine, diamond mines in Arkansas. But Morgan doesn't like what Hobet Mining proposed to do to Pigeonroost Branch.

In a November 1998 report to Haden, Morgan concluded, "The approach utilized by Hobet does not reflect the 'state of the art' of the industry."

Since he wrote that, Morgan

has reviewed other West Virginia mountaintop removal proposals. He's convinced it can be done better. Mining companies can produce almost as much coal and make almost as much money. At the same time, they can tear down fewer mountains and bury fewer streams, Morgan says.

"Simply reverting to the mantra that its design is the best and allows for the maximum coal extraction negates the ability to review alternatives," Morgan said in an April report filed with the U.S. District Court in Charleston.

"An alternate design might now be optimum for Hobet, but it would comply with legal and regulatory requirements and still allow for profitable mining."

According to his report, Morgan thinks mountaintop removal in West Virginia has gotten out of hand. Here's why:

Operators use much larger equipment. In the early 1980s, 85-ton trucks were the largest used in West Virginia mining. Back then, strip mines and valley fills were much smaller. Generally, fills contained less than 250,000 cubic yards of rock and dirt.

Today, mountaintop removal mines use 240-ton trucks. Valley fills sometimes measure 100 million cubic yards or more.

Larger equipment isn't very mobile, and it costs a lot to move. Companies want to permit contiguous mines, so equipment can move easily from one site to the next.

Operators also concentrate several groups of large equipment (a large shovel with a fleet of trucks, with a loader and a fleet of trucks, for example) together on

one mining complex. These complexes must be very large, so the groups of equipment have their own operating areas and don't interfere with each other.

"In summary, the trend to larger equipment will result in the demand for larger permits," Morgan wrote in his report.

### Driving the dragline

At most mountaintop removal mines in Southern West Virginia, draglines drive everything.

Draglines cost \$25 million or more. They must be transported in parts, and take years to assemble. Once a company brings in a dragline, they want to make the most of their investment.

They run the dragline 24 hours a day, every day, at full capacity.

Mine trucks and shovels are chosen based on whether they work well with the dragline. Pro-

duction schedules are designed to the dragline's capacity.

Draglines are huge. Some have circular bases that are 60 feet or more in diameter. Because they are so big, draglines need wide, flat areas — often 120 feet or more — to sit on to operate at full speed.

So companies cut off huge slices of mountains to create those flat areas. These cuts, known as pre-stripping, create huge amounts of leftover rock and dirt. Companies need somewhere to put this material. That's one major reason they build bigger valley fills.

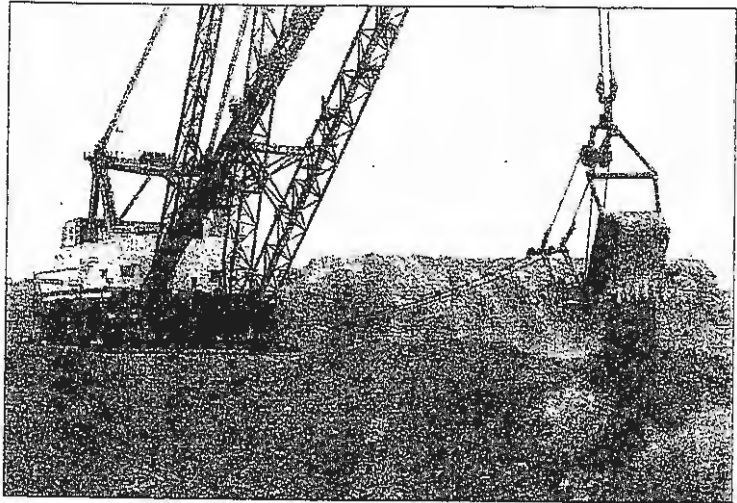
This means draglines end up operating far behind pre-strip equipment. Large areas of the mine are left disturbed for months as the dragline catches up to the pre-stripping.

"The separation of the mining operation into pre-stripping and dragline tasks increases the overall footprint of the active mining area," Morgan said in his report. "This additional area makes operation easier, but is not critical for the operation of the equipment."

Morgan suggests companies reduce the size of the pre-strip cuts and work draglines and pre-strip equipment closer together.

This is called contemporaneous reclamation. Under this practice, operators reclaim mines as they go, rather than leaving larger amounts of disturbed area between the pre-stripping and dragline operations.

Proper contemporaneous reclamation minimizes dust and erosion and reduces the potential reclamation costs if an operator goes belly up. It also limits the



LAWRENCE PIERCE/Sunday Gazette-Mail

The Samples Mine dragline dumps one of its 110-cubic-yard loads of rock and earth. Draglines like this one drive modern mountaintop removal mining.

## Coal competition

Over the last decade, coal from the Powder River Basin in Wyoming has cut into the Appalachian coal market.

Region	1998*	1988	change
Northern Appalachia	159	157	+2
Central Appalachia	286	258	+28
Midwest	109	130	-21
Powder River Basin	319	181	+138
Other	230	220	+10
Total U.S.	1,103	946	+157

\* Production in millions of tons

Source: Fieldston Consulting

ALETHIA L. STOLLINGS/Sunday Gazette-Mail

size of valley fills.

In his report, Morgan says contemporaneous reclamation is like laying pipe:

First, assume that pipe is only available in 10-yard pieces. To lay this pipe, you would dig a 10-yard-long trench, and place the dirt from it at one end of the trench. Then you would lay the pipe in the trench and dig another 10-yard hole at the other end of the first trench. The dirt from the second trench would be used to cover the pipe in the first trench.

In this example, a total of 20 yards would be dug up at any one time (10 yards from each of the two trenches). Also, you would be left with nowhere to put the 10 yards of dirt from the first trench. (The second trench would be filled with dirt from the third trench, and so on.)

If this were a mountaintop removal mine, that leftover dirt from the first trench would be the material from the first pre-strip cut. It would have to be dumped into a valley fill.

But if you could use 5-yard-long pieces of pipe, only 10 yards of land would be disturbed at any one time (5 yards each from two trenches). And the amount of leftover dirt you would have nowhere to put would be cut in half, to 5 yards.

"The same principal applies to surface mining," Morgan wrote. "A smaller mining area will decrease the overall disturbed area. More importantly, it will decrease the amount of material placed in excess spoil disposal areas."

### The long haul

Under federal law, strip mines must generally be restored to their "approximate original contour." Unless they plan to develop flattened land, companies are supposed to rebuild the mountains they tear down.

In West Virginia, this hasn't happened. Companies have removed mountains and flattened land, but never developed factories, schools or subdivisions. At the same time, because companies didn't have to rebuild mountains, they simply dumped the rock and dirt into streams.

"Historically, the mining companies have tried to reduce the elevation of the overburden back-filled on the mined-out area because this reduces their mining costs," Morgan wrote in his report.

"The costs are increased as the distance that the material has to be hauled increases," he wrote. "Costs are also increased if the trucks have to haul uphill to place the excavated overburden on the upper portions of the backfill. It is cheapest to haul short and level."

In mid-March, DEP and OSM announced a plan that could fix this problem.

Under the plan, coal operators will have to pile most of the rock and earth they blast or dig up back onto the hilltops they mine. The only material that could be dumped into valley fills would be that which can't be placed back on hilltops because of rules on stability, drainage or sediment control, and access to and maintenance of mined areas.

In his report, Morgan found that if Hobet Mining had to follow the new OSM guidelines, it "could and should have maximized the backfill" and proposed smaller valley fills.

Recently, OSM inspectors applied the new guidelines to two other mountaintop removal applications filed with the state. In each case, they found that, by complying with the guidelines,

operators could rebuild more of the mountains and dump less waste into streams. "It appears the fill volume could be significantly reduced," an internal OSM study reports.

Morgan also found that most valley fills in West Virginia are built from the top down. Trucks dump rock and dirt over hillsides, and gravity carries the material into the fill.

Industry engineers praise this approach. For one thing, it's cheaper. Trucks don't have to go as far. Dozers aren't needed to move material around at the bottom of the fill. For another, gravity automatically sends larger rocks falling to the bottom, creating a rock underdrain for the fill.

But this method also makes fills bigger. Rocks and dirt don't always compact as much as they could. Fills are not stacked as high as they could be because it costs more to truck uphill.

In his report, Morgan suggests that fills could be smaller if they were built from the bottom up.

"The environmental effects of end-dump durable rock fills can be reduced if the fill is placed in a controlled manner by hauling with trucks plus leveling and compaction with a dozer," Morgan wrote.

He also suggests that fills could be stacked higher. "This increase in elevation will result in the decrease in the length of the fill and a decrease in the amount of stream buried."

Morgan concluded: "Mine planning seldom has been a blank canvas on which to work, and historically the development of mining operations has adjusted to the conditions in which it wants to operate.

"The solution ... is creative thinking and acknowledgment that environmental and regulatory constraints are a critical component of mine design."

Since he filed his report two months ago, Morgan has tried to convince the West Virginia coal industry that he's right. Some of them are starting to come around, at least a little.

"I think he's got some good ideas," said Raney of the Coal Association. "We can talk this thing out."

Arch Coal's Woodring said, "We've had a lot of discussions, and we've exchanged a lot of information."

"Right now, we're getting some input from those discussions but can't really say right now whether we are learning anything of any value."

Rank said that even if a settlement is reached, government regulators need to do more to scrutinize the effects of mountaintop removal.

"There are ongoing discussions," Rank said. "The engineering proposals would minimize the effects of removing the same amounts of coal by the same methods."

"There's something between the pick and shovel and removing every ounce of coal that's out there," Rank said. "I'm not sure we're really in the process of looking at these alternatives the way an environmental impact study or the permit process should."

"Does the law dictate the permits, or does the technology and the will of industry dictate what the regulations will say? The laws are there, but with little will by agencies to enforce them, citizens have to go to court and get some judge to enforce the laws."

To contact staff writer Ken Ward Jr., call 348 302.

# Valley fill mining outlawed

## Landmark ruling prohibits mountaintop coal operators from burying state streams

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 per-

mits 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."



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

Judge Haden

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

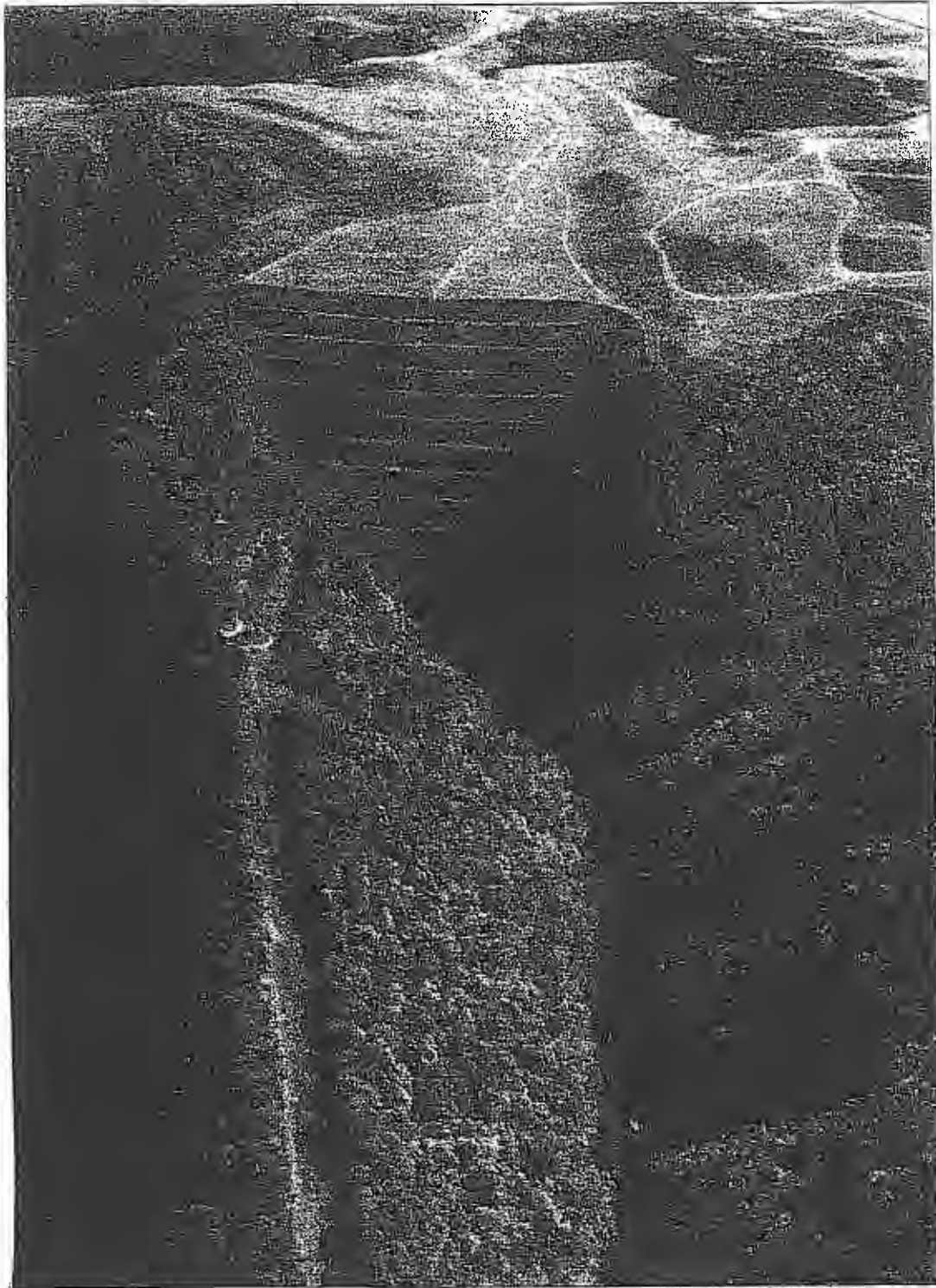
Cindy Rank, mining chairwoman of the West Virginia Highlands Conservancy, praised Haden.

"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

October 21, 1999 The State Newspaper—Our 127th Year

the Charleston Gazette



Examiner photo by CHRIS DORST

**Valley fills such as this Southern West Virginia example are illegal under a ruling issued Wednesday by a federal judge.**

# MINING

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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 unspoiled, 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 reg-

ulator 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 [kward@wvgazette.com](mailto:kward@wvgazette.com).

# What now for coal?

Dire predictions may be overblown, records indicate

By Ken Ward Jr.  
SUNDAY GAZETTE-MAIL

What is an ephemeral stream? How big are ephemeral streams? And how many of them are there in West Virginia's southern coal fields?

State and federal regulators say they don't know.

Until they find out, no one will know how last week's mountaintop removal ruling by a federal judge will hurt the coal industry.

But the impact will not be as devastating as elected officials and coal industry lobbyists predict, according to federal court records and interviews.

Last Wednesday, Chief U.S. District Judge Charles H. Haden II said that a federal stream buffer zone rule prohibits valley fills in all perennial and intermittent streams.

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

Haden said the buffer zone valley fill ban does not apply to ephemeral streams. They can still be filled. The judge defined ephemeral streams as streams which flow only when it rains or when snow melts, and which have channel bottoms above the local water table.

During a Thursday morning news conference, a reporter asked Gov. Cecil Underwood if the ruling would end all strip mining in West Virginia.

"Yes," the governor responded. That's not true, according to officials from the state Division of Environmental Protection. DEP officials say they really don't know yet what the ruling means, but that mining will certainly continue.

"They cannot keep mining like they are," said one DEP official who asked not to be named. "But remember, for every intermittent stream, there is one or more ephemeral streams."

Under Haden's ruling, coal operators will still be able to dump large amounts of waste rock and earth into sizable streams, according to expert testimony filed with Haden during the course of the mountaintop removal case.

No statewide studies have examined how much mining could be done if only ephemeral streams were filled.

Only one such study on an individual permit has been made public.

It found that Arch Coal Inc. could dump nearly 30 million cubic yards of rock and earth into streams at its proposed Dal-Tex extension if only ephemeral stream fills were allowed, according to court records.

"There can still be coal mining," said Cindy Rank, mining chairwoman of the West Virginia Highlands Conservancy. "It just can't be as big."

In mountaintop removal, coal operators use explosives to blast off entire hilltops to uncover valuable, low-sulfur coal reserves. Huge trucks, shovels and dozers dump

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## MINING

Continued From Page 1A

leftover rock and earth — what used to be the mountain — into nearby valleys, burying streams.

Since passage of the 1977 Surface Mining Control and Reclamation Act, mountaintop removal has become a bigger and bigger part of the Appalachian coal industry.

During all of the 1980s, the state issued 44 mountaintop removal permits that covered 9,800 acres. Between 1995 and 1997, the state permitted 38 new mountaintop removal mines that covered nearly 27,000 acres, according to a computer analysis of DEP records.

As mountaintop removal mine sites grew, coal operators also filled in more streams, larger streams, and longer stream lengths.

Traditionally, fills were placed only in extreme headwaters of streams. These "head-of-hollow" fills affected only ephemeral streams, according to an October 1998 report by the U.S. Fish and Wildlife Service. The volume of these fills was generally less than 250,000 cubic yards each, the report said.

Today, valley fills can measure more than 100 million cubic yards each. A single valley fill often buries two miles or more of a stream.

## COAL INDUSTRY'S IMPACT ON WEST VIRGINIA

**Employment:** 16,000 coal miners. Penn State study says eight spinoff jobs are created for every direct mining job.

**Production:** About 181 million tons in 1998. About 126 million tons came from underground mines; 55

million tons came from surface mines. West Virginia is the second largest coal producer in the nation, with about 16 percent of U.S. production.

**Wages:** The average West Virginia coal miner makes about \$860

a week, twice the statewide average for all private sector workers. Coal industry employees make about \$2 billion a year in direct wages.

**Taxes:** The coal industry and electric utilities account for about 60 percent of West Virginia's business

taxes. More than \$180 million in severance taxes are paid annually to the state, counties and municipalities.

**Overall Impact:** Coal is responsible for 13 percent of the annual gross state product, or about \$3.6

billion. Coal is responsible for more than \$17 billion annually in overall economic impact.

**SOURCES:** West Virginia Mining and Reclamation Association, state Office of Miners' Health, Safety and Training, state Bureau of Employment Programs

Since 1986, valley fills buried more than 470 miles of West Virginia streams, according to the Fish and Wildlife Service.

In a 49-page ruling issued Wednesday, Haden said that, in the future, valley fills could be placed only into ephemeral streams. The judge said perennial and intermittent streams are protected by the federal strip mine law's 100-foot buffer zone regulation.

On Thursday, DEP Director Michael Castle issued a one-page order that said no new permits would be issued for valley fills in perennial or intermittent streams. Castle also said coal operators were instructed not to advance already permitted fills farther downstream.

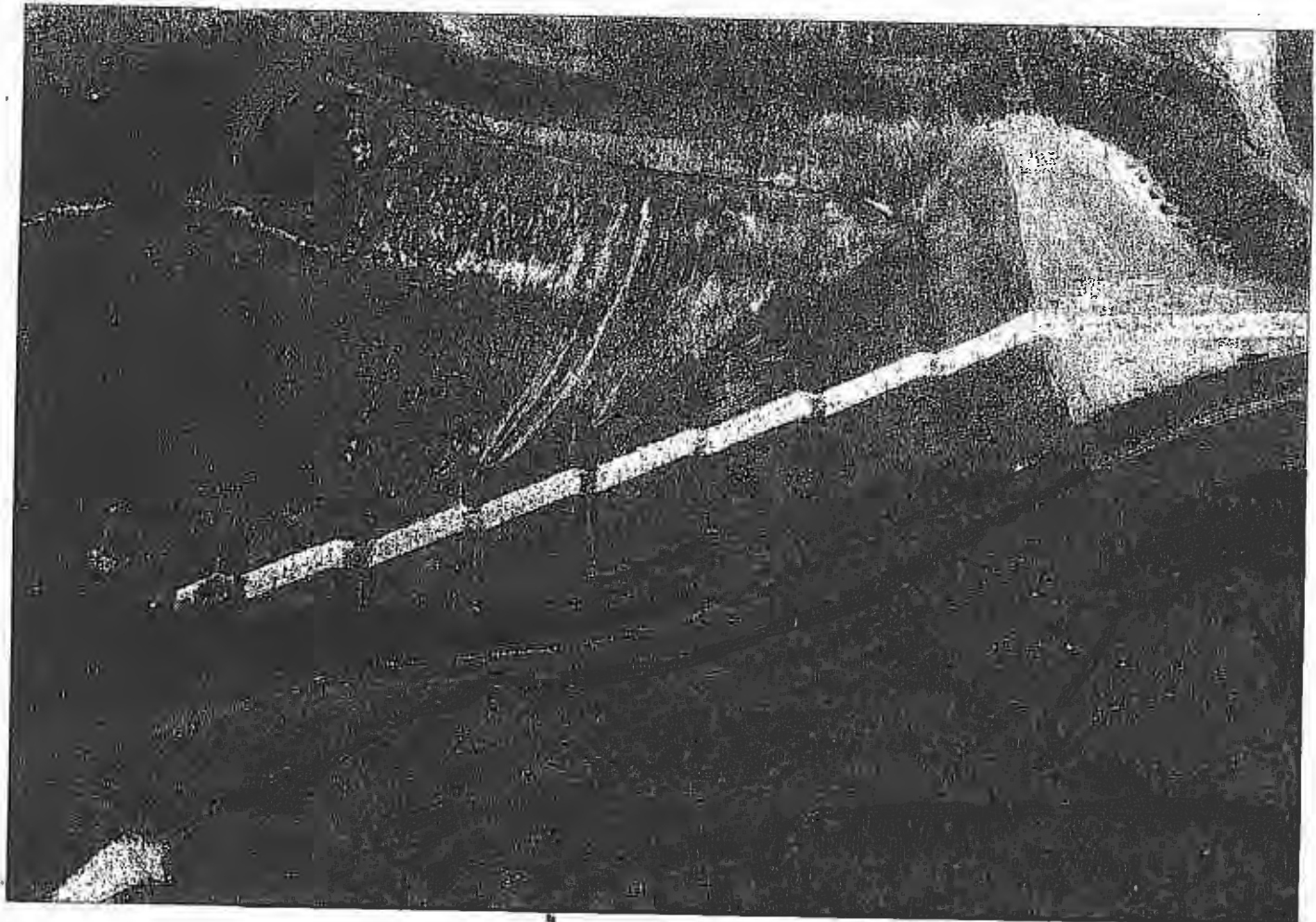
In a two-page memo issued with the order, Castle said his agency, "believes that most of the valley fills, because of their size, involved intermittent streams, and therefore are banned under Judge Haden's order."

But Castle also said, "At this point, the DEP cannot say exactly how many operations will be affected, or how soon. The DEP is attempting to determine how many of these valley fills are permitted now for ephemeral streams."

John Ailes, chief of the DEP Office of Mining and Reclamation, said that his staff doesn't have data yet to back up any estimate of the ruling's impacts.

"It's not something you can just pluck out," Ailes said. "I know it's significant, but I just don't know how significant."

"We're just trying to identify the meaning of this thing," he said. "We're trying



The growth of mountaintop removal mining has buried hundreds of streams under valley fills like this one in Southern West Virginia. A judge's ruling will restrict fills to smaller, wet-weather streams.

CHRIS DORST/Sunday Gazette-Mail

to get it figured out. It's too early for me to make a good, intelligent guess."

In February and March, arguments in Haden's courtroom focused on Arch Coal's proposal to expand its Dal-Tex mine near Blair onto a 3,100-acre permit along Pigeonroost Branch.

Originally, Arch Coal subsidiary Hobet Mining Inc. wanted to dump nearly 150 million cubic yards of rock and earth into 7.8 miles of Logan County streams.

In December 1998, the company agreed to reduce the size of its fills by about 40 percent. Later, the company submitted another proposal to reduce the fills further. Under that plan, about 63 million cubic yards of rock and earth would have been dumped into fills.

As part of the lawsuit, citizen groups, industry and the state hired experts to examine the Dal-Tex expansion permit and mine site.

Among other things, the experts provided information about how many fills would be possible if only ephemeral streams could be filled. Copies of the experts' reports are filed in U.S. District Court in Charleston.

Eugene Kitts, a mining engineer testifying for the industry and the state, said that all valley fills in West Virginia "encroach upon streams that would be des-

ignated as intermittent or perennial streams."

Kitts did not provide Haden with any data or studies to back up that assertion.

Kitts' written report said that, "the West Virginia DEP classifies streams as intermittent or perennial if it discovers certain forms of life, such as Mayflies, in the streams. As a practical matter, this results in streams in the uppermost reaches of valleys and hollows being classified as intermittent or perennial."

Based on Kitts' report, DEP lawyers Ben Bailey and Brian Glasser argued that the buffer zones, if applied to valley fills, would end all coal mining in West Virginia.

"Because valley fills and refuse disposal structures are needed in all types of mining, outlawing these structures would outlaw mining," Bailey and Glasser told Haden in an Aug. 9 brief.

Under state law, however, stream definitions are based on hydrogeology — how, where and when water flows — and not on biology — what type of life is in the stream.

Charles Norris, a hydrogeologist working for citizens groups, found that, under the definition in state law, there are 2,073 acres of ephemeral streams within the area proposed for the Dal-Tex expansion.

John Morgan, a mining engineer hired by the citizens, concluded that there is room in those streams for Hobet Mining to dump 29.8 million cubic yards of mining waste.

"Although not large enough to satisfy [the coal industry], these are very large fills," citizen group lawyer Joe Lovett of Mountain State Justice Inc. wrote in his legal arguments. "Until recently, only the largest fills exceeded this size."

"Enforcement of the buffer zone rule will not prevent valley fills or mountain-top removal mining, although it will reduce the size of the larger fills currently being approved," Lovett told Haden in a brief filed Aug. 23.

In an Aug. 30 brief, Lovett added, "There is, in Southern West Virginia, significant room for the placement of spoil in stream reaches above the intermittent [streams]."

"Very large valley fills may be located in those reaches," he wrote.

On Friday, the Highlands Conservancy's Rank said, "People need to understand that this is not as draconian as the governor would have us believe."

"This doesn't end coal mining," Rank said. "It would change, but it wouldn't end."

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# Industry didn't break buffer deal, lobbyist says

By Ken Ward Jr.  
SUNDAY GAZETTE-MAIL

The president of the West Virginia Coal Association has denied that industry negotiators backed out of a deal that would have avoided a ruling that bans valley fills in many streams.

Bill Raney, the industry's chief lobbyist, said Friday that the widely reported story never happened.

Raney could not explain why he did not object to reports of the collapsed lawsuit

settlement when they were published in June.

In June, efforts to resolve the buffer zone issue fell apart. Negotiations were conducted privately by lawyers for citizens groups, the state and the coal industry.

Industry negotiators had proposed tougher restrictions on mine blasting and a costly plan for companies to turn land over to a trust for public uses, according to sources on both sides of the talks.

In exchange, the industry wanted the West Virginia Highlands Conservancy to

drop its claims that filling in creeks with millions of tons of rock and earth valley fills violates the federal stream buffer zone rule.

The conservancy board voted to keep talking about the proposal, but coal industry negotiators pulled out of key parts of the potential deal, according to the sources.

In particular, the industry would not agree to the land trust proposal in exchange for citizen groups dropping their buffer zone claims, the sources said.

Under the land trust, companies would have paid "enhanced mitigation" by donating land to a new land trust that would protect parts of the state from mining or other environmental damage.

Industry officials, including Arch Coal Inc. lawyer Blair Gardner, refused to agree to the proposal because they said it was too expensive, according to sources involved in the negotiations.

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# MOUNTAINTOP CHRONOLOGY

THE ASSOCIATED PRESS

Here is a chronology of developments in the dispute over mountaintop removal strip mining.

**April 8, 1998:** Over the objections of the federal Environmental Protection Agency and his own state regulators, Gov. Cecil Underwood signs a bill that relaxes rules allowing coal companies to fill stream beds with strip mine waste.

**May 1, 1998:** Michael Miano, a former coal industry executive appointed by Underwood, takes over as head of the state DEP.

**July 16, 1998:** The West Virginia Highlands Conservancy and 400 coalfield residents file suit in U.S. District Court in Charleston against the DEP and the Army Corps of Engineers, accusing them of approving strip mine permits that violate federal law.

**July 19, 1998:** A DEP official warns a governor's task force on mountaintop removal that as many as two-thirds of the state's strip mine permits may violate federal reclamation standards on post-mining land use.

**Aug. 11, 1998:** Army Corps of Engineers suspends issuance of mountaintop removal mine permits.

**Aug. 24, 1998:** The DEP asks a federal agency to approve a rule change that would ease reclamation requirements for mountaintop removal strip mines.

**Sept. 4, 1998:** U.S. District Judge Charles Haden II agrees that coal companies and trade associations may intervene as defendants in the mountaintop removal lawsuit. The industry contends the lawsuit will wipe out mining in the state.

**Oct. 10, 1998:** Haden refuses request to dismiss the conservancy's lawsuit.

**Oct. 30, 1998:** Arch Coal Inc. issues a 60-day warning notice of possible layoffs to 387 employees of its Dal-Tex operation, located adjacent to a proposed 3,000-acre mine. The permit for the Spruce No. 1 mine has been held up by the Army Corps of Engineers decision to stop issuing permits.

**Nov. 4, 1998:** The DEP gives its approval to the Spruce No. 1 mine, acknowledging that this is a "political" move it hopes will spur the federal government to act. State DEP Director Miano says it "will not cause permanent damage to the state."

**Nov. 9, 1998:** Haden agrees not to rescind the permit after Arch Coal offers to delay mining until all legal issues are resolved and gives a one-week notice to all parties before mining starts.

**Dec. 23, 1998:** Federal agencies and environmentalists agree to a proposed settlement of parts of the conservancy's lawsuit. Coal companies proposing to strip mine large tracts of land will be required to conduct extensive environmental reviews to obtain permits.

**Feb. 3, 1999:** Haden issues a temporary restraining order to block the start of work on Arch Coal Inc.'s Spruce No. 1 mine, which would be the largest mountaintop removal mine in West Virginia.

**March 3, 1999:** Haden files that there are "serious, substantial ... questions" about the legality of mountaintop removal strip mining, and he blocks the start of work on the state's largest strip mine until a full trial can be held.

**March 13, 1999:** State Legislature adjourns after rescinding the bill that started the dispute on mountaintop removal mining. Lawmakers restored previous limits on the size of valley fills and set up a new state office to oversee coal mine blasting. They also set up a new office to require coal companies to do more economic development in coalfield counties.

**June 17, 1999:** Haden approves a settlement presented to him in December that would resolve most of the issues between federal regulators and the conservancy. The order clears the way for a trial to focus on remaining complaints against the DEP and plans for the Spruce No. 1 mine.

**June 22, 1999:** Ashland Inc. says it is exploring "alternatives" for its investment in Arch Coal Inc., including the possible sale of its 58 percent stake in the coal company, whose earnings have been hampered by environmental disputes.

**June 25, 1999:** The Corps of Engineers withdraws an earlier blanket nationwide permit granted to Arch Coal Inc. and says the company will have to seek a more time-consuming, individual permit if it wants to develop its Spruce No. 1 mine.

**July 14, 1999:** A proposed out-of-court settlement covers all but the single thorniest issue of the mountaintop removal lawsuit. The parties in the case agree that Judge Haden will have to resolve the issue of whether valley fills are subject to a stream buffer zone rule.

**July 23, 1999:** The last day of work for most employees of Arch Coal Inc.'s Dal-Tex mine in Logan County.

**July 26, 1999:** Parties in the lawsuit give to Judge Haden a proposed consent decree that settles most issues in the mountaintop removal lawsuit. Still pending is the issue of whether stream buffer zones must apply to strip mine valley fills.

**July 29, 1999:** Arch Coal Inc., which volunteered as a defendant and took part in talks to resolve the lawsuit challenging mountaintop removal strip mining, now says it is not bound by a settlement agreement.

**July 30, 1999:** Haden lectures the parties in the suit, telling them that their proposed settlement has not come close to resolving the dispute. "It is inappropriate to characterize this as a settlement," Haden says.

**Oct. 20, 1999:** Haden issues a ruling declaring that valley fills in some streams violate the stream buffer zone rule. "If application of the buffer zone rule ... prevents surface area coal mining ... it is up to Congress and the Legislature, but not this court, to alter that result," Haden rules.

# Fills bigger, more numerous

Length of streams affected has tripled since '77, analysis shows

By Ken Ward Jr.  
SUNDAY GAZETTE-MAIL

The total miles of West Virginia streams permitted to be buried by valley fills each year has tripled since Congress passed a federal strip mining law 22 years ago, according to a new analysis of state Division of Environmental Protection data.

In 1977, coal operators received permits for 50 valley fills. Those fills would bury about 20 miles of streams.

In 1997, operators received permits from the DEP for 121 valley fills. Those fills would bury more than 71 miles of streams, according to DEP data.

Coal industry lobbyists often ask why environmentalists protest against moun-

tain-top removal mining. They say the technique is nothing new. Hilltops have been removed, and valleys filled, for more than 20 years, they say.

Environmentalists have responded that the fills are getting bigger. More streams are buried, they say, so there's more cause for concern.

But nobody had proof. Now they do.

DEP officials have had the evidence for more than a year. But nobody at the agency charged with regulating West Virginia's strip mines analyzed the information, or released it to the public in a meaningful way.

In spring 1998, DEP inspectors assembled a list of all valley fills permitted in the state. In August 1998, agency officials gave the list to members of a

task force appointed by Gov. Cecil Underwood to investigate mountaintop removal.

The list was a 60-page computer printout that identified permit numbers, company names, streams proposed for filling, and length of fill proposed.

DEP officials added up the total length of streams filled.

But they never assessed the numbers in any other way. They didn't, for example, try to document how fill size increased over the years.

"We have not looked at the data that way," said John Ailes, chief of the DEP Office of Mining and Reclamation. "If somebody asked me, I would say it shows an increase [in fill size] over time. It only makes sense."

## Valley fills through the computer

Last week, the Sunday Gazette-Mail obtained the computer file that DEP used to create its printout. Using a standard spreadsheet and database manager; the Gazette-Mail conducted a computer-assisted analysis of the DEP data.

Among the findings:

▲ The amount of streams permitted for fills is much greater than previously thought.

In September 1998, a U.S. Fish and Wildlife Service report estimated that about 470 miles of West Virginia streams had been approved for fills.

The DEP data shows that, since 1971, the state has authorized at least 1,600 val-

Please See **FILLS**, Page 2C

# FILLS

Continued From Page 1C

ley fills as part of 650 mining permits. Those fills, as permitted, would bury nearly 750 miles of streams.

▲ The total amount of streams permitted annually for fills has skyrocketed.

During the 10 years between 1977 and 1986, the state permitted about 284 miles of fills. Between 1987 and 1996, DEP permitted about 368 miles of fills, an increase of 30 percent over the previous decade.

In 1977, the year Congress passed the Surface Mining Control and Reclamation Act, the state permitted about 20 miles of fills. By 1996, the annual length of fills permitted had increased to 48 miles.

Over that same period, West Virginia coal production roughly doubled, and employment in the coal industry plummeted.

In 1977, the state mined 95 million tons of coal. There were 62,000 miners working in the state.

In 1996, West Virginia produced 174 million tons of coal, according to the state Office of Miners' Health, Safety and Training. There were 21,000 miners working.

▲ The size of an average valley fill in West Virginia has increased significantly.

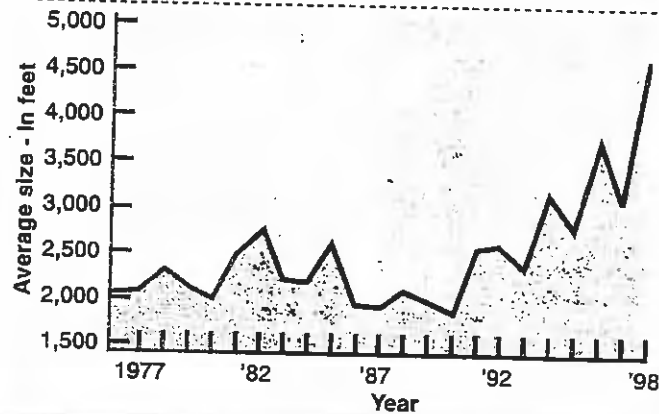
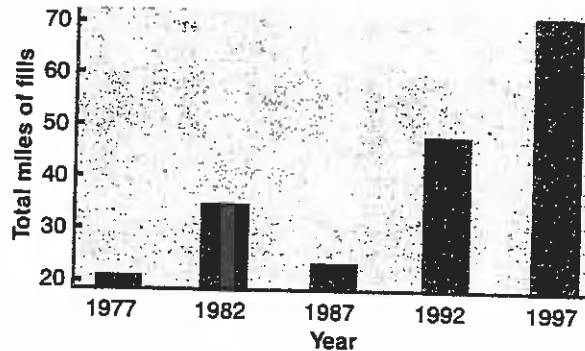
In 1977, the average valley fill was about 2,100 feet long. By 1997, the average fill had grown to 3,100 feet, an increase of about 44 percent.

The DEP data includes permits issued through April 28, 1998. Through that date, DEP issued permits for five valley fills that would bury a total of 4.4 miles of streams. The average size of those fills was 4,670 feet, an increase of 51 percent over the 1997 average.

▲ Boone County had the most permitted fills, with about 127 miles. Logan County had 100 miles, Mingo had 83 miles,

## Growth of valley fills

The number of West Virginia streams permitted annually for valley fills has tripled since the federal surface mining law was passed in 1977.



Source: Sunday Gazette-Mail analysis, W.Va. DEP Office of Mining and Reclamation

ALETHIA L. STOLLINGS  
Sunday Gazette-Mail

Nicholas 70 miles and Fayette 59 miles.

### Burying two miles of stream

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.

For 20 years after Congress passed the federal surface mine law, no state or federal agencies conducted detailed studies of mountaintop removal or its environmental effects. Last year, agencies began those examinations after citizen protests, lawsuits and newspaper reports repeatedly brought public atten-

tion to the issue.

In its September 1998 report, the Fish and Wildlife Service said that, traditionally, valley fills were placed only in extreme headwaters of streams. These "head-of-hollow" fills affected only ephemeral streams, or those that flow only when it rains.

Generally, the volume of those fills was less than 250,000 cubic yards of rock and earth each. But in the mid-1980s, the size and number of mountaintop removal operations increased, especially in Southern West Virginia.

Today, some valley fills contain more than 100 million cubic yards of rock and dirt, and bury two miles or more of a stream. In 1977, the state permitted

one valley fill that was a mile or more long, according to the DEP data. In 1996, the state permitted a dozen fills that measured a mile or more.

Both the Fish and Wildlife study and the DEP data have some holes.

For example, in West Virginia, Fish and Wildlife scientists reviewed only mining permits in Logan, Lincoln, Boone, Wayne and Mingo counties.

Both agencies looked only at fills as they were proposed in permit applications. Regulators do not keep track of whether permitted fills are actually built or, if they are, how big they become.

Under federal law, the U.S. Office of Surface Mining is supposed to oversee the DEP's enforcement of strip mine regulations.

Roger Calhoun, director of the OSM field office in Charleston, served on the governor's mountaintop removal task force and received a copy of the DEP fill list.

OSM has never analyzed the list to try to document the growth of valley fills.

A cover sheet issued with the DEP list said: "A project is underway in cooperation with OSM to use satellite imagery and digitized maps to generate a report on estimated stream loss.

"The project will take some time to complete and is expected to provide more definitive data," the cover sheet said.

Neither DEP nor OSM has publicly released any results of that project.

#### **'You need bigger valley fills'**

Ben Greene, president of the West Virginia Mining and Reclamation Association, said that the increased size of strip mining equipment — especially the use of draglines — has driven the growth of valley fills.

Draglines are huge, cranelike machines with big shovel-buckets on the end of their booms. Some have circular bases that are

### **Top 10 fills**

Some mining permits call for five, six or a dozen valley fills. This is a list of the permits that proposed the largest fills.

Company	County	Permit	Fills	Fill length
Hobet Mining	Boone	S501692	7	11.5 miles
Lodestar Energy	Raleigh	S302195	9	11.3
Hobet Mining	Boone	S500396	7	10.7
Marrowbone Development	Boone	S003985	13	9.8
New Land Leasing	Fayette	S303991	18	7.8
Independence Coal	Boone	S502396	3	7.7
Consolidation Coal	McDowell	S007282	8	6.8
Appalachian Mining	Kanawha	S008082	1	6.6
Hobet Mining	Boone	S003285	12	6.3
Peerless Eagle	Nicholas	S302193	13	6.2

Source: W.Va. DEP Office of Mining and Reclamation

60 feet or more in diameter. Because they are so big, draglines need wide, flat areas, often 120 feet or more, to sit on to operate at full speed.

So companies cut off huge slices of mountains to create those flat areas. These cuts, known as pre-stripping, create huge amounts of leftover rock and dirt. Companies need somewhere to put this material. That's one major reason they build bigger valley fills.

"These machines came on line in the 1990s, and you had to have all that pre-strip to create the level areas for draglines, and that means you need bigger valley fills," Greene said Friday.

"As long as you have good design and engineering, it doesn't really matter to me," he said. "What's really the difference whether it is a million cubic yards or 50 million cubic yards, other than size?"

Last month, Chief U.S. District Judge Charles H. Haden II disagreed.

In a landmark ruling Oct. 20, Haden said that valley fills are only allowed in the smaller, ephemeral streams.

Haden said that larger fills in perennial or intermittent streams violate a federal "buffer zone" regulation that prohibits mining activities within 100 feet of streams.

"When valley fills are permitted in intermittent and perennial streams, they destroy those

stream segments," Haden said in his 49-page ruling.

"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."

Lawyers for the Underwood administration are appealing Haden's ruling to the 4th U.S. Circuit Court of Appeals. The West Virginia congressional delegation, led by Democratic Sen. Robert C. Byrd, is pushing for legislation to overturn the Haden decision.

Cindy Rank, mining chairwoman for the West Virginia Highlands Conservancy, hopes the appeal and the legislative push do not succeed.

"Fills are getting bigger and bigger and bigger," Rank said last week. "That's why we were looking to the judge to make [DEP] follow the law and pull them back again.

"I'm greatly disappointed that the congressional delegation decided to respond to the fear-mongering, rather than to the judge's reasonable suggestion to review the regulatory decisions that have allowed hundreds of miles of streams to be filled."

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# Would ruling silence all W.Va. mines?

Evidence slim in court records

By Ken Ward Jr.

SUNDAY GAZETTE-MAIL

After Chief U.S. District Judge Charles H. Haden II issued his ruling on mountaintop removal mining a month ago, Gov. Cecil Underwood, coal company lobbyists and the United Mine Workers resurrected the argument that valley fill permits would halt all mining in West Virginia.

In the courtroom, Haden gave the state's lawyers five chances to back up the argument.

Each time, the lawyers presented Haden with briefs that stated that all mining in the state would stop if the judge prohibited operators from filling certain streams.

They never offered engineering studies, expert reports or detailed testimony to support their arguments, court records show. The lawyers gave Haden one short affidavit from a coal industry consultant. The consultant cited no data to prove his opinions.

Haden rejected the lawyers' arguments.

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*In the courtroom, Judge Charles H. Haden II gave the state's lawyers five chances to back up the argument.*

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"Their assertions ... present the court with an insufficient basis upon which to determine" whether the state economy would be irreparably harmed, the judge said.

In Congress, members of West Virginia's delegation, led by Sen. Robert C. Byrd, D-W.Va., revived the argument to defend their push for federal legislation to overturn Haden's ruling.

"This court ruling will take away the right of thousands of coal miners and truckers and railroad workers and barge operators to earn their bread in the sweat of their brow," Byrd said Thursday in a Senate floor speech.

Late Thursday night, Byrd was defeated in his effort to attach to government budget bills language to override Haden.

Now, lawyers for the Underwood administration will take their case against Haden's ruling to the 4th U.S. Circuit Court of Appeals in Richmond, Va.

What proof have the lawyers offered that mining could not continue if valley fills were limited to smaller, wet-weather streams? What evidence did Haden consider about lost jobs,

reduced coal production and diminished state revenues?

## Buffer zone battle

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

In July 1998, the West Virginia Highlands Conservancy and a handful of citizens filed a federal court lawsuit against the state Division of Environmental Protection, to try to limit the size and number of streams that are buried.

Joe Lovett was lead lawyer for the citizens. Lovett is on the staff of Mountain State Justice, a nonprofit law firm that represents low-income clients in cases involving environmental issues, government education and benefit programs, and consumer disputes.

In court papers, Lovett told Haden that a federal "buffer zone" regulation prohibits mining activities within 100 feet of perennial or intermittent streams.

Perennial streams flow all year. Intermittent streams flow part of the year, and receive water from rain runoff and from groundwater discharges. Ephemeral streams flow only when it rains, and do not receive water from groundwater.

Valley fills violate that buffer zone rule, Lovett said, and are only allowed in smaller, ephemeral streams. He asked the judge to prohibit DEP from issuing new permits to fill perennial or intermittent streams.

Ben Bailey and Brian Glasser represented DEP. Bailey and Glasser are private lawyers in Charleston. Underwood aide Corky DeMarco picked them to defend the state's practice of permitting mountaintop removal.

Lawyers for coal industry trade groups, large land companies and the United Mine Workers also signed the briefs Bailey and Glasser filed.

In their first detailed response to Lovett, Bailey and Glasser argued that, "This court must ...

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reject Plaintiff's claims because they would end all coal mining in West Virginia.

"These valley fills are necessary not only in mountaintop removal mining, but in all types of coal mining," they wrote in an Aug. 9 brief.

"Because valley fills and refuse disposal structures are needed in all types of mining, outlawing these structures would outlaw mining."

## What's an ephemeral stream?

Bailey and Glasser gave Haden a sworn statement from Eugene Kitts, a former A.T. Massey Coal Co. executive who now works as a mining consultant.

Kitts said that all valley fills in West Virginia "encroach upon streams that would be designated as intermittent or perennial streams." He did not provide any data or studies to back up that statement.

He said that "the West Virginia DEP classifies streams as intermittent or perennial if it discovers certain forms of life, such as mayflies, in the streams.

"As a practical matter, this results in streams in the uppermost reaches of valleys and hollows being classified as intermittent or perennial. I estimate that this occurs with respect to nearly 100 percent of valley fills and refuse impoundments."

Lovett objected. He told the judge that Kitts and the DEP incorrectly classify streams by the type of fish, bugs or other life in the streams. That's how the federal Clean Water Act classifies streams.

Lovett explained that the buffer zone rule was based on the 1977 Surface Mining Control and Reclamation Act, or SMCRA. In that law, Congress told the U.S. Office of Surface Mining to write rules to keep mining from damaging streams. OSM wrote the buffer zone rule.

Under SMCRA, streams are classified based on their hydrogeology — how, where and when water flows — not by the kind of life in the streams.

"For the purposes of this motion, the reach of intermittent and perennial streams must, therefore, be determined by applying SMCRA's hydrogeological definitions of streams types," Lovett said in an Aug. 23 brief. "SMCRA does not define stream types according to biological criteria."

Lovett gave the judge studies by a hydrogeologist, Charles Norris, and a mining engineer, John Morgan.

Norris and Morgan used the SMCRA stream definitions to examine Arch Coal Inc.'s proposal to expand its Dal-Tex mountaintop removal mine in Logan County. They found that there were 7 miles of ephemeral streams on the proposed mine site. Under the buffer zone rule, Arch Coal could fill those 7 miles of streams, they told the judge.

"Although not large enough to satisfy [coal companies], these are very large fills," Lovett said in an Aug. 23 legal brief. "Until recently, only the largest fills exceeded this size."

On Oct. 20, Haden banned new valley fills in perennial and intermittent streams. The judge said that fills were still allowed in ephemeral streams.

Haden wrote a 49-page opinion. He noted that, when OSM wrote the buffer zone rule in 1979, the coal industry argued that the rule would make mining uneconomical. OSM rejected the argument.

"Coal production and surface mining were considered when the regulations were promulgated," the judge said. "The regulator OSM nevertheless concluded that destruction of [ephemeral



CHRIS DORST/Sunday Gazette-Mail

**The Dal-Tex strip mine in Logan County is the type of mine whose future is in question as a result of a recent federal court ruling limiting mountaintop removal mining. But state and federal officials say that all coal mining will cease in West Virginia because of the judge's decision.**

streams] was illegal.”

The judge added that “to the extent misapprehension of the buffer zone was fostered by the [DEP] director or other agencies, the public and the remaining parties have been done a dis-service.”

### Seeking a stay

After Haden ruled, lawyers for the state, coal companies and the miners got another chance to make their case.

On Oct. 25, they asked the judge to suspend his ruling, until they could appeal to the 4th U.S. Circuit Court of Appeals.

Bailey and Glasser gave the judge a stack of sworn statements from state government and coal industry officials. They said that Haden’s order would halt future mining permits, cause widespread jobs losses and slash state and local tax revenues.

Lewis Halstead, an assistant chief at the DEP Office of Mining and Reclamation, said that 59 of 62 pending permit applications proposed to fill perennial or intermittent streams. Those applications would be denied because of the ruling, Halstead said.

Mark Muchow, director of research and development for the tax department, said that a 10 percent decline in coal production would cost state and local governments \$40 million in taxes.

“Therefore, a 50 percent reduction or a 75 percent reduction in production could reduce West Virginia state and local tax collections by at least \$200 million and \$300 million respectively,” Muchow said.

Greg Wooten, president of the Logan County Board of Education, said that his county would not be able to replace the \$6 million deficit “which would result from a loss [of] the taxes on coal mining and mining-related businesses.”

On Oct. 29, Lovett responded.

He told the judge that the 59 permits Halstead talked about could be issued if operators rewrote their plans to fill only ephemeral streams. “None of the affidavits demonstrate that such a reconfiguration is either impossible or infeasible.”

Lovett said that Muchow “simply pulls an assumed [coal production] reduction of 50 percent or 75 percent out of thin air; without any basis for such a number.” He said that Wooten’s “analysis of the Logan County school budget similarly assumes that the county will lose all of its \$6 million [in] taxes on coal mining and coal-related businesses, without any basis for such a projection.”

“The permanent injunction does not ban all valley fills,” Lovett wrote. “It only bans valley fills to the extent that they bury intermittent and perennial streams.

“A significant amount of mining spoil could still be placed in valley fills upstream from those

stream reaches,” he said. “The size of those fills depends on the size of ephemeral streams, which have never been measured by DEP.

“Such an assessment is the essential first step in any objective analysis of harm.”

### Reasoned decisions

Late on Oct. 29, Haden suspended his injunction.

The judge said that he was not convinced by DEP or the coal companies. He said that their “dire predictions” were partly based on what he called, “at best, misunderstandings and, at worst, egregious misrepresentations” of his ruling.

But the judge said that he “believes it preferable to attempt to defuse invective and diminish irrational fears so that reasoned decisions can be made with deliberate speed, but with dis-

The stay didn’t satisfy Byrd. He continued to push for a speedy legislative fix.

“We have no assurances as to how long that stay will remain in place,” Byrd said. “That stay has placed a cloud of uncertainty that hangs over the mining industry in West Virginia, a cloud that is sprouting long, gray tentacles that will stretch across the skies of other states.”

DEP Director Michael Castle said that his agency planned no study of how much mining could occur — on the 62 proposed permits or on mining site statewide — with fills only in ephemeral streams.

UMW President Cecil Roberts said, “Even if some of the permit requests could be reconfigured, seeing numbers like that causes uncertainty, and in all likelihood that uncertainty could cause many businesses to abandon any further investment in West Virginia coal — or eastern coal for that matter.”

In March, the UMW hired its own mining engineer to sort out the potential impacts of the buffer zone case.

Union lawyers never provided Haden with any studies, reports or testimony from the engineer. UMW press spokesman Doug Gibson refused to comment on the engineer’s work.

On Friday, Highlands Conservancy mining chairwoman Cindy Rank said that the defeat of Byrd’s rider offers another chance for the state to examine Haden’s ruling.

“What should happen now is what should have happened on Oct. 20,” Rank said. “An objective evaluation of what the options are and what the impacts are should be done.

“We need to have knowledgeable and qualified people putting forth honest evaluations of what the options are, and not just listen to the scare tactics the industry is putting out.”

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