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4 mining permits blocked

U.S. judge cites 'alarming cumulative stream loss' in decision

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A federal judge blocked permits for four mountaintop removal mines late Friday, in a major ruling that could force much tougher regulation of West Virginia's coal industry.

Citing the "alarming cumulative stream loss" to valley fills, U.S. District Judge Robert C. Chambers ruled that more thorough reviews of the mines' potential impacts must be done before permits can be approved.

"Coal mining has long been part of the fabric of Appalachian life, providing jobs to support workers and their families and energy to fuel the nation," Chambers wrote in an 89-page opinion.

"Unfortunately, coal mining also exacts a toll on the natural environment," Chambers wrote. "In particular, the mining technique at issue in these permits potentially results in dramatic environmental consequences."

Chambers rescinded four permits issued to subsidiaries of Massey Energy, and sent the mine proposals back to the U.S. Army Corps of Engineers for a more detailed study.

The judge found that the Corps' methods for examining permit applications were severely lacking, especially how the corps measures the ecological loss of burying small, headwaters streams.

"The corps has evaluated the physical structure of the streams and partially considered impacts to those streams as habitat, but has given no more than lip service to the other attributes of headwaters that must be considering in assessing the structure and function of a stream," Chambers wrote.

Chambers did not order - as citizen groups had hoped he would - that the corps perform a detailed study, called an Environmental Impact Statement, or EIS, on every mountaintop removal permit application.

Still, an attorney for environmental groups who brought the lawsuit declared the ruling a major victory.

"Judge Chambers is the third federal judge in West Virginia to find that the corps' actions permitting mountaintop removal violate the Clean Water Act," said Joe Lovett, a lawyer and director of the Appalachian Center for the

Economy and the Environment. "It's clear that the corps has been permitting the destruction of Southern West Virginia without complying with the most fundamental federal environmental laws."

Officials from the corps could not be reached for comment late Friday.

Bob McLusky, a lawyer for Massey Energy, said his clients were still reviewing the decision and had no immediate comment. Officials from the West Virginia Coal Association, which had intervened in the case, did not immediately return phone calls.

The lawsuit directly affects four permits for Massey Energy subsidiaries: Aracoma Coal Co.'s Camp Branch Mine in Logan County; Elk Run Coal Co.'s Black Castle Mine and Independence Coal Co.'s Laxare East Mine, both in Boone County; and Alex Energy's Republic No. 2 Mine, along the borders of Kanawha, Fayette and Raleigh counties.

In all, the four permits would strip about 3,800 acres of hills and hollows, and bury more than 12 miles of streams, according to court records and West Virginia Department of Environmental Protection data.

Chambers ruled - after business hours Friday evening - as a deadline worked out for Aracoma to hold off mining at Camp Branch was set to expire.

On Thursday, environmental groups had filed a motion seeking an emergency order to block that operation until the judge ruled on the broader case.

Chambers' ruling has been expected for months, following a six-day trial in Huntington in October.

Over the past seven years, two federal judges in West Virginia have issued rulings to more tightly regulate mountaintop removal. Those rulings, by the late Judge Charles H. Haden II and Judge Joseph R. Goodwin, were overturned by the 4th U.S. Circuit Court of Appeals in Richmond, Va.

In mountaintop removal, coal operators blast off entire hilltops to uncover valuable, low-sulfur coal reserves. Leftover dirt and rock is dumped into nearby valleys, burying streams.

Between 1985 and 2001, more than 1,200 miles of Appalachian streams were buried or otherwise damaged by mountaintop removal, according to a federal government study. Without additional restrictions, the May 2003 study projected, a total of 2,200 square miles of Appalachian forests would be eliminated.

The case before Chambers is a follow-up lawsuit to Goodwin's ruling, which blocked the corps from reviewing valley fill proposals through a streamlined

"general permit" process.

With their new case, the environmentalists argue that the Corps was wrong to approve mining operations through more detailed "individual permit" reviews.

The case was filed by the Ohio Valley Environmental Coalition, the West Virginia Highlands Conservancy and Coal River Mountain Watch. Along with Lovett, attorneys from the Washington, D.C.-based group Earthjustice represented the groups.

Corps officials who approved the Massey permits had concluded that there were no significant adverse impacts, a finding that allowed them to avoid performing more detailed and time-consuming studies.

In his ruling, Chambers had kind words for staff members at the Corps' Huntington office, saying they "clearly devoted substantial time and effort reviewing and considering the applications." He said any criticisms in his ruling "arise more from the practices and fundamental assumptions used by the corps than from the expertise or diligence of the staff."

And the judge had plenty of criticisms, ruling for the environmental groups on almost every major issue in the case.

Chambers ruled that, absent specific guidelines that have never been written, Corps officials are entitled to deference in how they measure the structure and function of streams that are proposed for burial by mining companies.

But, the judge said, the Corps must conduct "a full assessment of the streams' ecological functions" before concluding that damage would be minimal or that damage can be offset with various "mitigation" techniques.

Chambers described in detail the positive ecological contributions of small, headwaters streams that are most often buried by coal operations.

"Headwater streams, such as those at issue here, are typically found in forested hollows," the judge wrote. "The forests supply organic material critical to the stream and life within it.

"Trees often produce a canopy covering portions of the stream, shading the water in the summer and providing organic matter," he wrote. "This organic matter is collected within the headwater streams, broken down and transported downstream where it supplied much of the energy and material which support life and other ecological functions."

Further, the judge noted, headwater streams contain a variety of unique life forms, small bugs and aquatic creatures that break down organic material so

it can feed life further downstream.

When headwater streams are buried, the judge said, all of these functions are lost.

In dismissing these losses as minimal, Corps officials "provide no analysis or explanation" for how they came to those conclusions, the judge said.

"In sum, the corps has failed to take a hard look at the destruction of headwater streams and failed to evaluate their destruction as an adverse impact on aquatic resources in conformity with its own regulations and policies," he wrote.

In addition, Chambers blasted the Corps' consistent finding that sediment ditches built on mine sites can be turned into manmade streams that adequately replace the headwaters creeks that are buried by mining.

"The scientific community is skeptical of the likelihood that important headwater stream functions will actually be achieved in manmade streams," the judge wrote. "The court finds that the corps has too little experience to support its faith in stream creation as an acceptable means of compensatory mitigation."

Further, Chambers ruled that the Corps was wrong to not include the potential impacts to "upland" valleys that are not part of the streams, but are still buried by fills.

"The terrestrial and other upland effects of the valley fills are important environmental consequences of the corps' permit action which the corps has failed to consider," the judge wrote. "The corps must gather information and assess all environmental impacts caused by the fill."

Chambers also found that the Corps did not properly consider the cumulative impacts of the proposed permits, along with existing and previous mining in the area.

"The corps does not explain how the cumulative destruction of headwater streams already affected by mining in these watersheds will not contribute to an adverse impact on aquatic resources," the judge wrote.

In sending the four Massey permits back to the Corps, Chambers said that agency "has committed substantial resources to its efforts and deserves the opportunity to reevaluate" the permits.

Chambers said the agency might decide that an environmental impact statement is needed on each one.

"Moreover," the judge wrote, "while surface mining is heavily regulated by federal and state agencies, Congress mandated that the corps 'maintain the chemical, physical and biological integrity of the nation's waters,' which may require the corps ultimately to deny the permits if the adverse impacts to the waters are significant."

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