From: Dave Bonta [SMTP:bontasaurus@yahoo.com]
Sent: Monday, February 03, 2003 7:35 PM
Subject: mountaintop removal in the news

For those who caught the Reuters version of this news item, this story from a local paper adds many details of interest, including the statistic that "without tougher regulation, mountaintop removal will eventually destroy 350 square miles of the region's forests." This ruling stands to impact Pennsylvania in at least two ways. It represents yet another strong indication of how far this administration and the courts are willing to go to undercut basic environmental safeguards and thwart the will of the American people. Plus, mountaintop removal as currently practiced in WV and KY stands to wreak bioregionally significant damage.

We need to remember that the most biodiverse temperate forest on earth, what E. Lucy Braun dubbed the Mixed Mesophytic, is already disappearing at a rapid rate due to fragmentation and replacement by pine plantations. The Cumberland Plateau is a center of diversity for this forest type--precisely where mountaintop removal is occurring.
And of course the MM does lap into southern PA at a few places, and grades into Northern Hardwood and Appalachian Oak forest types in more mesic sites (such as the Central PA hollow where I have lived for the past 31 years).

That the practice of mountaintop removal may also represent a kind of desecration verging on ecocide is, I suppose, a subjective evaluation inappropriate to a scientific forum such as this. But beyond a certain point, I wonder if our willingness to think the unthinkable doesn't warp or cripple the imagination in some fundamental way. If so, science no less than art or any other meaningful human endeavor is condemned to failure.

West Virginia Mine Ruling Tossed
By Ken Ward Jr. (Charleston Gazette)

A federal appeals court on Wednesday threw out U.S. District Judge Charles H. Haden II's second effort to strictly limit mountaintop removal coal mining. In doing so, the 4th U.S. Circuit Court of Appeals paved the way for more permits to bury Appalachian streams beneath huge valley fill waste piles.

The court overturned an injunction, issued by Haden in May 2002, that blocked the U.S. Army Corps of Engineers from authorizing valley fills not proposed as part of post-mining land development plans. In a 44-page decision, the 4th Circuit concluded that the federal Clean Water Act does not prohibit such fills. Writing for the court, Judge Paul V. Niemeyer said that Haden's ruling not only exceeded a district court's authority, but also misinterpreted the law. In a concurring opinion, Judge J. Michael Luttig criticized what he called Haden's "utterly bewildering treatment of this relatively straight-forward case. "It misses the mark to say ... that the district court's injunction was 'overbroad,'" Luttig wrote in his 11-page opinion. Judge Clyde Hamilton also took part in the case, and signed onto Niemeyer's opinion.

Wednesday's decision is the second time in as many years that the appeals court has overruled Haden in a major mountaintop removal case. The first ruling, issued by Haden in October 1999, said that a rule that prohibits mining with 100 feet of certain streams outlawed valley fills in those streams. In April 2001, Luttig and Niemeyer were part of a three-judge panel that overturned that decision. The 4th Circuit threw out that ruling on technical grounds over which court the case belonged in, and never decided if Haden was right or wrong on the merits. Both of Haden's decisions have been harshly criticized by the coal industry and many West Virginia political leaders.

Nearly two-thirds of West Virginia's coal production still comes from underground mining. But in the state's Southern coalfields, many major operators favor mountaintop removal to extract the region's valuable low-sulfur reserves. In mountaintop removal, coal companies blast off entire hilltops to uncover these reserves. Giant shovels and trucks move in to remove the coal. Leftover rock and dirt -- the stuff that used to be the mountains -- is shoved into nearby valleys, burying streams.

As part of a still-unpublished study, federal agencies found that, between 1985 and 1999, mountaintop removal buried at least 562 miles of Appalachian streams. In drafts of the study, government experts found that, without tougher regulation, mountaintop removal will eventually destroy 350 square miles of the region's forests. The West Virginia Highlands Conservancy and the Ohio Valley Environmental Coalition have aggressively fought mountaintop removal. But Haden's latest ruling involved a lawsuit filed by a Kentucky group, Kentuckians for the Commonwealth.

In August 2001, lawyers for KFTC sought to block a mining application that would bury more than 6 miles of streams in Martin County, Ky. Essentially, the group argued that valley fills are waste material, and that the corps' own Clean Water Act regulations did not allow the agency to permit waste disposal under so-called dredge-and-fill permits. When it passed the Clean Water Act, Congress gave the corps authority under Section 404 of the law to issue permits "for the discharge of dredged or fill material" into rivers and streams. Authority to permit discharges of other types of pollutants was given to the U.S. Environmental Protection Agency under Section 402.

Congress didn't define "fill material." In its own definition, the corps excluded any material that was deposited into streams mainly as a way to dispose of waste. Faced with a court challenge to new valley fill permits, the Bush administration revised a Clinton-era plan. In May 2002, the corps and EPA rewrote their regulations to specifically allow fills under Section 404. In his ruling, Haden said that the agencies' new rule-making didn't matter. Most valley fills, the judge said, were prohibited by the Clean Water Act itself. Haden said that valley fills could be approved only if they were proposed with a constructive primary purpose. The judge likened that test to the requirement that strip mines that don't restore mined land to its "approximate original contour," or AOC, must propose post-mining land development plans. In its ruling Wednesday, the 4th Circuit flatly declared that Haden was wrong.

First, the appeals court said that Congress didn't define "fill material,"and that in such situations courts should defer to administrative agencies' interpretations. The court said Haden "did not give any deference to the agency's interpretation of this regulation, nor did it explain why such deference was inappropriate." Second, the appeals court said that its own reading of the Clean Water Act and its legislative history shows that coal-mining valley fills are allowed under Section 404. "In sum, we conclude that the Corps' interpretation of 'fill material' as used in [Section] 404 of the Clean Water Act to mean all material that displaces water or changes the bottom elevation of a water body except for 'waste' -- meaning garbage, sewage and effluent that could be regulated by ongoing effluent limitations as described in [Section] 402 -- is a permissible construction of [Section] 404," Niemeyer wrote in the majority opinion.

In his own opinion, Luttig agreed that the 4th Circuit should throw out Haden's decision. But, Luttig said that the appeals court should have stopped at saying that Haden's injunction was overbroad. Haden did not block the Kentucky permit challenged in the lawsuit. Instead, he issued a broader injunction that covered all future mining permit applications considered by the corps' district office in Huntington. Luttig said that the 4th Circuit should have thrown out the injunction, but not ruled yet on the central issue of whether fills are legal. Instead, Luttig said, Haden should have been instructed to decide only the legality of the Kentucky permit. "Rather than right the palpable wrongs of the district court, and explain to the parties wherein their errors lie, the majority instead adds to those wrongs by proceeding precisely as did the district court ... simply reaching different conclusions from those reached by the district court, and aligning itself with one side of the litigation rather than the other," Luttig wrote.

"If a new judge is not to be designated, the integrity of the judicial process requires at least that we wipe the slate clean, returning these parties to where they started, and require the district court in the first instance to decide the issue presented by the complaint -- and only that issue -- after which a decision on the merits of the dispute would be in order." The 4th Circuit's decision is available online at http://pacer.ca4.uscourts.gov/opinion.pdf/021736.P.pdf. Additional information about the case is available on the Gazette's Web site at http://wvgazette.com/static/series/mining/hadenrule.html.

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Check out our nifty Friends of Rothrock poster: http://www.mccaughey.net/~sam/rothrock.html

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