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August 13, 2009

Danny Wright
Fayette County Circuit Clerk
100 Court Street
Fayetteville, WV 25840

Re: *Sierra Club, et al. v. Clarke, et al., Administrative Appeal No. 09-AA-2(B)*

Dear Mr. Wright:

Enclosed for filing is POWELLTON COAL COMPANY, LLC'S MOTION TO DISMISS FOR LACK OF JURISDICTION. As evidenced by the Certificate of Service, all counsel of record have been served.

Sincerely yours,

A handwritten signature in black ink that reads 'Robert G. McLusky'.

ROBERT G. McLUSKY

RGM/sab
Enclosure

cc: The Honorable Paul M. Blake, Jr., w/enc.
Derek O. Teaney/Joseph M. Lovett, w/enc.
A. W. "Fenway" Pollack, w/enc.

**IN THE CIRCUIT COURT OF
FAYETTE COUNTY, WEST VIRGINIA**

**SIERRA CLUB and ANSTED HISTORIC
PRESERVATION COUNCIL, INC.,**

Petitioners,

v.

Administrative Appeal No. 09-AA-2(B)

**TOM CLARKE, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,**

Respondent,

and

POWELLTON COAL COMPANY, LLC,

Intervenor-Respondent.

**POWELLTON COAL COMPANY, LLC'S
MOTION TO DISMISS FOR LACK OF JURISDICTION**

Powellton Coal Company, LLC ("Powellton") hereby moves to dismiss the appeal filed by Sierra Club and Ansted Historic Preservation Council, Inc. ("Sierra Club") for lack of jurisdiction. The basis of this Motion is that the harm of which Sierra Club complains cannot be redressed in any action that this Court might take in this case and, therefore, the Sierra Club lacks standing to pursue the appeal, and this Court lacks jurisdiction to entertain it.

This case below involved an appeal by the Sierra Club to the State Surface Mine Board ("SMB") from a permit renewal issued by the West Virginia Department of Environmental Protection ("WVDEP") pursuant to the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA"), W.Va. Code §§ 22-3-1 to -32a. The order issued by WVDEP

simply renewed an existing surface mining permit¹ held by Powellton for coal reserves located in the Rich Creek drainage of Fayette County. There is no active coal removal occurring within the permitted area, and Powellton has no current plans to reactivate the mine. *See* Surface Mine Board (“SMB”) Tr., 95-97 (testimony of Mr. Isabell concerning the Bridge Fork West permit at issue). The only activities ongoing at the site are reclamation activities. *Id.*

There has been no active coal removal on this permit since approximately the third quarter of 2007. *Id.* at 99. Instead, Powellton has been engaged exclusively in reclamation activities since that time and is obligated under the terms of both its surface mining permit and the West Virginia Surface Coal Mining and Reclamation Act to fully reclaim the property in accordance with its permit and that statute.

In the proceedings before the SMB,² the Sierra Club argued that WVDEP should not have renewed Powellton’s surface mining permit because Powellton continues to violate the “effluent limitations” in its water discharge permits issued pursuant to the West Virginia Water Pollution Control Act, W.Va. § 22-11-1 to -28. The SMB affirmed the renewal of the surface mining permit, but modified Powellton’s permit to prohibit any coal removal in the permit area until it submits, and WVDEP approves, a plan demonstrating that Powellton can extract the remaining coal on the property in a manner that will not violate the effluent limits of its water discharge permit. *See* SMB Order of 6/30/09, p. 2, ¶(2) (copy attached as Appendix 1). Thus, absent the issuance of an appealable order by WVDEP authorizing coal extraction, Powellton may not conduct additional coal removal. The only activities that it will be permitted to conduct

¹ The permit at issue is No. S-3003-01 for Powellton’s Bridge Fork West surface mine. Surface Mine Board (“SMB”) Tr., 34 (testimony of Powellton’s Mike Isabell)

² The Surface Mine Board is a seven-member board appointed by the Governor to hear appeals from permit and enforcement decisions by WVDEP in its implementation of the West Virginia Surface Coal Mining and Reclamation Act. The SMB is comprised of members from different backgrounds and hears cases *de novo* in a trial-type setting. *See* W.Va. Code § 22B-4-1(b).

pursuant to its permit will be reclamation. Pursuant to the WVSCMRA, reclamation activities can and must proceed **regardless** whether there is an active mining permit in place for a site. See WVCSR § 38-2-3.27 (authorizing WVDEP to waive permit renewal where no further coal extraction will occur); 54 Fed. Reg. 13814, 13814-13815 (April 5, 1989) (federal Office of Surface Mining,³ construing parallel federal Surface Mining Control and Reclamation Act, determines that reclamation obligation survives permit expiration and that no surface mining permit is required to conduct only reclamation activities).

This means that: (1) no coal mining can occur under the current permit absent an additional and appealable action by WVDEP; and (2) reclamation can and will continue regardless of whether a permit is in place. As a result, the only activities currently authorized by the permit—reclamation—will continue unabated regardless of whether Powellton’s surface mining permit is in place. Accordingly, the only activities authorized as a result of the SMB’s order—reclamation—will continue to occur even if this Court grants the relief sought by Sierra Club. Consequently, whatever harm the Sierra Club claims to have suffered as a result of WVDEP’s decision to renew Powellton’s surface mining permit is not redressable by any order that this Court could enter.

Section 3 of Article VIII of the West Virginia Constitution requires that a litigant have “standing” to challenge the action sought to be adjudicated on appeal. See *Coleman v. Sopher*, 459 S.E.2d 367, 372-73 n.6 (W.Va. 1995). One element of standing is redressability—the ability of the forum in which a case or controversy is pending to render relief to abate the claimed harm. *Findley v. State Farm Mutual Aut. Ins. Co.*, 576 S.E.2d 807, 821 (W.Va. 2002). Here, the SMB has already modified the permit and restricted it to the one activity that can

³ West Virginia’s surface mining program is required to be maintained “in accordance with” the provisions of OSM’s program under the federal Mine Control and Reclamation Act. See 30 U.S.C. § 1253(a)(1).

proceed regardless of whether Powellton holds a permit. An order from this Court reversing the SMB and vacating the permit can, therefore, have no effect on the activities authorized to occur on the ground.

Respectfully submitted,

POWELLTON COAL COMPANY, LLC
By Counsel



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CERTIFICATE OF SERVICE

I, Robert G. McLusky, do hereby certify that a true and exact copy of the foregoing POWELLTON COAL COMPANY, LLC'S MOTION TO DISMISS FOR LACK OF JURISDICTION was caused to be served upon the following via United States mail, postage pre-paid, this 13th day of August, 2009.

Derek O. Teaney
Joseph M. Lovett
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Economy & the Environment
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ROBERT G. McLUSKY