

**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.

**PETITIONERS' RESPONSE IN OPPOSITION TO POWELLTON COAL COMPANY,
LLC'S MOTION TO DISMISS FOR LACK OF JURISDICTION**

INTRODUCTION

Powellton Coal Company, LLC ("Powellton") has filed a motion with this Court that requests dismissal of this administrative appeal on the ground that the Court lacks subject matter jurisdiction. Specifically, Powellton argues that Petitioners lack standing to bring this action because, as Powellton sees it, this Court cannot grant any relief to Petitioners that would redress their injuries. Petitioners disagree.

PROCEDURAL BACKGROUND

This case is an administrative appeal of an order in a contested case from the West Virginia Surface Mine Board ("SMB" or "the Board"). That June 30, 2009 Final Order affirmed, but modified, the West Virginia Department of Environmental Protection's

("WVDEP") renewal of Powellton Coal Company, LLC's Surface Mining Permit No. S-3003-01. The Board affirmed the renewal of Permit No. S-3003-01 for Powellton's Bridge Fork West surface mine, despite Powellton's well-established, repeated, and ongoing violations of the environmental performance standards of the West Virginia Surface Coal Mining and Reclamation Act, and in violation of the prohibition against renewing permits that are not in compliance with such standards. See Tr. at 355 (statement of Board Chairman Michael describing Powellton's violations as "continuing and continuing and continuing"). The Board's order, however, modified the renewed permit with two conditions. Those two conditions were as follows:

- (1) The Reclamation Agreement, dated May 11, 2009 as admitted in this proceeding as Intervenor's Exhibit 2 shall be part of the permit. If its terms are not followed the Intervenor will be subject to violations; and
- (2) The Intervenor will not be permitted to perform any coal removal in the permit area, unless it submits a written plan to the WVDEP that shows that the Intervenor can extract coal in a manner that will not cause violations of its effluent limits. The WVDEP must approve the aforementioned written plan before any further mineral removal can proceed.

Final Order at 2.

ARGUMENT

Powellton contends that, because the Board modified its permit to prohibit coal removal in the permit area at issue unless Powellton submits a compliance plan, Petitioners cannot establish standing to appeal the Board's order. In other words, according to Powellton Petitioners obtained all the relief to which they are entitled from the Board. As Powellton observes, the West Virginia Constitution requires that a litigant have standing to bring a judicial action.¹ Coleman v. Sopher, 194 W.Va. 90, 96 n. 6, 459 S.E.2d 367 (1995); Bd. of Educ. Of

¹ Powellton cites Article VIII, Section 3 of the West Virginia Constitution as the source of the standing requirement. That section addresses the jurisdiction of the West Virginia

Monongalia County v. Starcher, 176 W. Va. 388, 392, 343 S.E.2d 673 (1986). Standing to invoke the court's jurisdiction requires three elements: (1) injury, (2) causation, and (3) redressability. Coleman, 194 W. Va. at 96 n. 6. Powellton does not contend that Petitioners are not injured by the renewal of Surface Mining Permit No. S-3003-01. Rather, it asserts only that Petitioners' injuries are not redressable by any relief available from this Court.²

The West Virginia Supreme Court of Appeals has looked to the United States Supreme Court's federal standing jurisprudence in setting out the standing requirements under the West Virginia Constitution. Coleman, 194 W. Va. at 96 n. 6 (citing Lujan v. Defenders of Wildlife,

Supreme Court of Appeals. The constitutional provision requiring standing before a Circuit Court is Article VIII, Section 6 of the West Virginia Constitution. Bd. of Educ. Of Monongalia County v. Starcher, 176 W. Va. 388, 392 n. 6, 343 S.E.2d 673 (1986). With either provision, the test for standing is the same.

² In their Notice of Appeal that commenced the proceeding below, Appellants alleged the following injuries due to the renewal of Surface Mining Permit No. S-3003-01:

Appellants' members suffer injuries to their aesthetic, recreational, environmental, and/or economic interests as a result of Appellee's renewal of Powellton's Surface Mining Permit No. S-3003-01. Plaintiffs' [sic] members fish, swim, and otherwise use the waters affected by Powellton's discharges and are harmed by Powellton's unlawful mining practices. Appellants' members refrain from swimming, wading, and/or fishing in the streams affected by Powellton's discharges to avoid exposure to pollutants. Appellants and their members are aggrieved by Appellee's renewal of Surface Mining Permit No. S-3003-01 because that renewal allows Powellton to continue its unlawful mining practices, further injuring Appellants' members aesthetic, recreational, environmental, and/or economic interest.

Sierra Club et al. v. Clarke, Appeal No. 2009-01-SMB, Notice of Appeal at 3 (April 16, 2009). Rather than challenging Petitioners' standing below, Powellton and Respondent stipulated that Petitioners indeed had standing. Tr. at 6, 8. For that reason, the factual record below is not developed on this subject. To the extent that the Court would like to hear more about Petitioners' injuries or causation to satisfy itself of Petitioners' standing, Petitioners respectfully request the opportunity to present evidence on that issue at any hearing held on Powellton's motion. See Friends of Eugene v. City of Eugene, 195 Or. App. 20, 28-29, 96 P.3d 1256, 1261 (2004) (holding that, because the need to demonstrate constitutional standing arises for the first time on judicial review, a party may submit and court should accept evidence of constitutional standing at that time).

504 U.S. 555, 560 (1992)). Consequently, this Court can look to federal law to determine the scope of the redressability requirement. In Massachusetts v. EPA, 549 U.S. 497 (2007), the United States Supreme Court made clear that establishing redressability is not onerous. In that case, the State of Massachusetts and others challenged EPA’s failure to regulate carbon dioxide under the Clean Air Act. Id. at 505. EPA argued that any relief provided by the Court could not redress the petitioners’ injuries. Id. at 525. The Supreme Court rejected that argument, explaining that

[w]hile it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it. See also Larson v. Valente, 456 U.S. 228, 244, n. 15, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982) (“[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury.”).

Id. (emphasis original). The Supreme Court reasoned that, because a small probability of injury is sufficient to create a case or controversy, if a court order could reduce that probability even marginally, redressability is established. Id. at 525 n. 23 (citing Village of Elk Grove Village v. Evans, 997 F.2d 328, 329 (7th Cir. 1993)). Consequently, if an order from this Court could even marginally reduce the probability of injury to Petitioners, they have standing to prosecute this appeal.

The fundamental flaw in Powellton’s motion and underlying theory is that it inaccurately represents the record and reality. Powellton repeatedly and erroneously asserts in its motion that the “only activities currently authorized by the permit”—in light of the Board’s modifications—are “reclamation.” Motion to Dismiss at 3. That is false. As explained below, the permit authorizes, in addition to reclamation, (1) blasting, (2) coal haulage from an adjacent mine, (3) the disposal of excess spoil from an adjacent mine, and (4) access to a proposed deep mine. Any

one of those currently permitted activities would cause injury to Petitioners' interests. Moreover, in order to resume removal of the remaining 400,000 tons of coal left on the Bridge Fork West permit, Powellton need only obtain WVDEP approval of a plan to prevent effluent violations while mining. Although Powellton represents to this court that such an approval would be "an appealable order," the Board's order is ambiguous on that point in light of its rejection of language that Petitioners' proposed to clarify that point. Furthermore, approval of a compliance plan is hardly a substitute for the full permit review—including a cumulative hydrologic impact analysis—that would occur if Powellton were forced to reapply for its permit prior to resuming coal extraction. Petitioners are seeking relief from this Court now because the Court has the jurisdiction and authority to redress Petitioners' imminent injury by directing the Board to remand the renewal of S-3003-01 to WVDEP to reject Powellton's application on the ground that Powellton is not in compliance with all applicable environmental performance standards, and thereby to prohibit any surface mining activities at the mine site.

A. Surface Mining Permit No. S-3003-01 Authorizes More Than Reclamation at the Bridge Fork West Surface Mine

In its motion, Powellton concedes that it does not need a surface mining permit to conduct reclamation activities and that such activities must occur whether or not Permit Number S-3003-01 is renewed.³ Motion to Dismiss at 3. Petitioners have no interest in preventing Powellton from reclaiming the Bridge Fork West surface mine. Rather, they seek to compel the WVDEP to impose on Powellton the consequences of its failure to comply with the law: the inability to renew its surface mining permit or to continue surface mining operations.

The West Virginia Surface Coal Mining and Reclamation Act's definition of the term

³ Powellton's current position is different from the one it took at the evidentiary hearing, which was that it was required to renew its permit even for reclamation. Tr. at 35, 135-36.

“surface mining operations” is not limited to coal extraction. W. Va. Code § 22-3-3(u). Consequently, a surface mining permit authorizes a permittee to do more than simply take the coal from the ground in the permit area. Specifically, surface mining operations also include “the uses of explosives and blasting,” coal haulage, the disposal of excess spoil, and access to a minesite. Id. In addition, the provision of the West Virginia Surface Coal Mining and Reclamation Act that prohibits DEP from renewing a surface mining permit where there are outstanding violations of environmental protection standards prohibits renewal of the entire permit, not just those portions directly related to those violations or to current activities at the mine site. See W. Va. Code § 22-3-19(a)(1).

The Federal Register document that Powellton cites to support the proposition that no surface mining permit is required to conduct only reclamation activities also makes clear that a permit must be renewed to continue “surface mining operations” as that term is defined in the federal Surface Mining Control and Reclamation Act. 54 Fed. Reg. 13814, 13817 (“[A] permit is required to authorize surface coal mining operations as defined in section 701(28).”). The State definition of “surface mining operations” is consistent with the federal definition. Compare W. Va. Code § 22-3-3(u) with 30 U.S.C. § 1291(28). Consequently, because Permit Number S-3003-01 remains valid, Powellton is authorized to conduct blasting, haul coal, dispose of excess spoil, and access other mines on the Bridge Fork West permit area. Those activities injure Petitioners’ aesthetic, recreational, and environmental interests. Accordingly, an order from this Court requiring that the renewal application be denied can redress Petitioners’ injuries by preventing Powellton from blasting, hauling coal, disposing of excess spoil, or accessing other mines under the Bridge Fork West permit.

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1. Powellton Intends to Continue Blasting Activities, Notwithstanding the Prohibition Against Coal Extraction

In order to terminate an outstanding Notice of Violation it received from the WVDEP prior to the action at hand, Powellton entered into a “Reclamation Agreement” with the agency. Intervenor’s Hearing Ex. 2. Under the Board’s final order, that Reclamation Agreement has been incorporated into the permit. Final Order at 2. The agreement provides that “several point removal areas are remaining and will contribute volume to complete wall elimination.” Id. at 4 (pages unnumbered). At the evidentiary hearing before the Board, Mike Isabell—Powellton’s manager of engineering—testified as follows regarding that provision of the Renewal Agreement:

Q Several point removal areas are remaining?

A Uh-huh (affirmative).

Q. Are you going to use blasting materials to blast remaining points, take that material and reclaim highwalls?

A There are two – mining has already taken place on the point. It may require that a blast be used to do the final breakdown of those points. Any excess material from them will be used to reclaim highwall somewhere else. Yes, sir.

.....

Q So you’re going to go and do blasting for the purpose of obtaining backfill material?

A Yes.

Tr. at 154. Consequently, the record establishes that Powellton intends to blast upland areas for the purposes of generating fill dirt to place against its highwalls.

Such blasting is a surface mining operation under W. Va. Code § 22-3-3(u)(1). Consequently, it is not a “reclamation” activity that Powellton can conduct without a surface mining permit. 54 Fed. Reg. at 13817. Because such blasting would injure Petitioners’

members' interests, and that injury could be redressed by an order of this Court stripping Powellton of its permit, Petitioners have standing to prosecute this appeal.

2. Powellton is Authorized to Continue Hauling Coal From Adjacent Permits Under S-3003-01

The Bridge Fork West mine permitted under Permit Number S-3003-01 is part of a larger surface mining operation. Adjacent to the Bridge Fork West mine is Powellton's Gauley Knob Surface Mine, permitted under Permit Number S-3002-07. Tr. at 96; Powellton's Hearing Ex. 1. Coal extracted from the Gauley Knob mine must be hauled across the Bridge Fork West surface mine in order to reach Powellton's haulroad that ultimately allows Powellton to take its coal to market. Tr. at 97-98; 160 (admission by Powellton's representative that removing any coal from the Gauley Knob permit would require a valid permit for Bridge Fork West); *id.* at 262-63; 281-82. In fact, WVDEP took the position at the evidentiary hearing that coal haulage from the Gauley Knob mine "requires that [the Bridge Fork West permit] remain active." *Id.* at 281. Coal haulage is a surface mining operation under W. Va. Code § 22-3-3(u)(2).

At the time of the hearing, Powellton was not actively mining coal on the Gauley Knob permit. *Id.* at 282. Nonetheless, the record establishes that a change in market conditions could lead Powellton, or another coal company to whom the permit is transferred, to resume mining at Gauley Knob. *Id.* at 97, 156, 263, 282. WVDEP's Environmental Inspector Supervisor, Russell Keaton, testified that "the road to Gauley Knob is still there, and they may activate it next month." *Id.* at 263. WVDEP's Assistant Director Keith Porterfield testified that Powellton was not actively extracting coal at Gauley Knob, "but unless they apply for a release – they can reactivate that permit, and because of that the Agency has to take the position that any permit that would receive coal haulage would need to be renewed and be in good standing because of that." *Id.* at 282.

Although Powellton cannot resume coal extraction on the Bridge Fork West permit area without further approval from WVDEP, no such obstacle presents itself to the resumption of coal extraction at Gauley Knob. That is, Powellton could resume mining Gauley Knob at any time. Coal extraction in this area contributes to the pollution and environmental damage that injures Petitioners' interests and that constituted the violation of "applicable environmental protection standards" that was the source of Petitioner's appeal of WVDEP's approval of Powellton's permit renewal application. Because coal extraction at Gauley Knob cannot occur without a valid permit for haulage across the Bridge Fork West permit, and because WVDEP cannot lawfully renew the Bridge Fork West permit while it is "not in compliance with the applicable environmental protection standards" (W. Va. Code § 22-3-19(a)(1)), an order from this Court invalidating Permit Number S-3003-01 would redress Petitioners' injuries.

3. Permit Number S-3003-01 Authorizes Powellton to Dispose of Excess Spoil from an Adjacent Mine Site on the Bridge Fork West Permit Area

The Reclamation Agreement incorporated into Permit Number S-3003-01 as a result of the Board's order makes clear that Powellton intends to dispose of excess spoil from the Gauley Knob Surface Mine (Permit Number S-3002-07) on the Bridge Fork West permit area.

Powellton's Ex. 2 at 4 (unnumbered pages). Indeed, Powellton obtained a revision to Permit Number S-3003-01 in 2007 for the specific purpose of authorizing the use of valley fills on the Bridge Fork West permit area to dispose of waste from the adjacent Gauley Knob permit.

Petitioners' Exhibit A.⁴

Such waste disposal is a surface mining operation that requires a valid permit. The

⁴ Petitioners obtained the document attached as Exhibit A from the WVDEP permit file for Surface Mining Permit Number S-3003-01. Although, strictly speaking, Exhibit A was not in the record before the SMB, Petitioners should be permitted to introduce evidence of standing before this court because the question of constitutional standing only arose once Petitioners sought judicial review. Friends of Eugene, 195 Or. App. at 28-29.

Office of Surface Mining, Reclamation, and Enforcement (“OSMRE”) addressed this very question in the Federal Register notice cited by Powellton. OSMRE noted that a commenter on its proposed rule

was concerned that the proposal would allow excess spoil to be dumped on an unpermitted site under the pretext of reclaiming the site. The commenter interpreted the statement in the proposal that, “it would not be necessary for an operator to obtain a permit where only reclamation activity is required,” as legalizing unregulated dumping in the name of reclamation.

54 Fed. Reg. at 13819. OSMRE responded by clarifying that

[t]his final rule does not affect the requirements contained in 30 C.F.R. § 780.35 to provide permit information and receive approval for proposed excess spoil disposal sites and designs of spoil disposal structures. Neither does this rulemaking affect the recently proposed changes to 30 C.F.R. § 816.74 governing the disposal of excess spoil on pre-existing benches (53 FR 43970, October 31, 1988). These sites used to dispose of excess spoil must be permitted.

Id. (emphasis added). In other words, Powellton needs a valid permit to continue disposing of excess spoil from its adjacent mine on the Bridge Fork West permit.

The construction of valley fills injures Petitioners’ members’ aesthetic, recreational, and environmental interests. See Ohio Valley Env’tl. Coalition v. Hurst, 604 F. Supp. 2d 860, 876 (S.D. W. Va. 2009). If Powellton lacks a permit for the Bridge Fork West mine, it cannot deposit excess spoil from the Gauley Knob permit on the area permitted under Permit Number S-3003-01. The ongoing violations of environmental protection standards at the Bridge Fork West permit site – including the failure to comply with effluent limitations on discharges from areas disturbed by surface mining – indicate that additional spoil disposed on the mine site could contribute to further violations. See W. Va. Code § 22-3-19(a); 38 C.S.R. § 2-14.5(b). Limiting further spoil disposal at the Bridge Fork West mine site would make it more likely that the illegal discharges would stop and Powellton would come into compliance with applicable environmental protection standards. Consequently, this Court can offer Petitioners relief that

would redress their injuries.

4. Permit Number S-3003-01 Allows Powellton Access to a Planned Deep Mine

Powellton's representative testified at the evidentiary hearing before the Board that Powellton is going to apply in October 2009 for a deep mine permit for which Powellton will need to cross the Bridge Fork West permit area in order to access and construct the deep mine face-up. Tr. at 37. Increased coal production in the area increases the risk of water pollution and environmental damage that injures Petitioners' members' aesthetic, recreational, and environmental interests. Use of the Bridge Fork West mine permit area to access the deep mine site is not permitted under the surface mining laws in the absence of a valid surface mining permit for the Bridge Fork West mine. See W. Va. Code § 22-3-3(u). Consequently, an order from this Court requiring the denial of the renewal of S-3003-01 will redress Petitioners' injuries by increasing the scrutiny given to permits for additional coal removal in the area.

B. Before Powellton is Authorized to Resume Coal Extraction From the Bridge Fork West Permit Area, Its Operation Should be Subject to the Full Scrutiny Attendant a Re-application Process

Powellton argues that, because it cannot resume coal extraction without prior authorization of WVDEP, Petitioners have no need for further relief. That argument does not withstand scrutiny.

Powellton has approximately 400,000 tons of mineable coal left on the Bridge Fork West surface mine. Tr. at 157. Although market conditions have led Powellton to suspend coal removal at the mine, Powellton's representative admitted that if the coal market recovers Powellton could change its mind and resume mining because the permit would remain valid. Id. Under the Board's Final Order, Powellton is not

permitted to perform any coal removal in the permit area, unless it submits a

written plan to the WVDEP that shows that the Intervenor can extract coal in a manner that will not cause violations of its effluent limits. The WVDEP must approve the aforementioned written plan before any further mineral removal can proceed.

Final Order at 2. Pointing to that modification, Powellton contends that Petitioners do not have standing.

In support of that argument, Powellton suggests, without explanation, that WVDEP's approval of a compliance plan would be an appealable action. Motion to Dismiss at 2. The record does not appear to support that assertion. Petitioners submitted a proposed order to the Board on June 30, 2009, that would have expressly stated that "WVDEP and Intervenor shall treat the submission and approval of the compliance plan as a significant revision under subdivision 3.28.b of the West Virginia Surface Mining Reclamation Rule, subject to the public notice requirements of subdivisions 3.2.a and 3.2.b of that rule." Petitioners' Ex. B at 2. The Board's Final Order omitted that text, calling into question the precise nature and appealability of any action by WVDEP on a compliance plan submitted by Powellton.

More fundamentally, however, submission and approval of a plan to mine without violating effluent limitations is a far cry from what Powellton should have to do when it wants to resume coal extraction at Bridge Fork West—apply for a new permit. The penalty prescribed by federal and state law for failure to comply with all applicable environmental performance standards is the inability to renew a permit. W. Va. Code § 22-3-19(a). If Powellton were forced to accept that penalty, it would have to complete a new surface mining permit application—and endure the attendant scrutiny of its environmental impacts—once it decides to resume mining at Bridge Fork West. For example, a new application would require a new Probable Hydrologic

Consequences (“PHC”)⁵ statement and Cumulative Hydrologic Impacts Analysis (“CHIA”).⁶ 38
C.S.R. § 2-3.22.a, -3.22.e.

In its comments requesting that WVDEP deny Powellton’s renewal application, the National Park Service (“NPS”) recognized the flaws in the PHC and CHIA governing the existing Permit Number S-3003-01. Specifically, NPS stated that,

[c]onsidering the extent of violations to WV/NPDES Permit WV1019449 through operations of Bridge Fork West Surface Mine under Article 3 Permit S-3003-01 any rationale for determining “No Material Damage” to surrounding hydrology would no longer be valid since the determination would be dependent on discharge remaining within permit limits.

Letter from Don Striker, Superintendent, National Park Service, to Ed Wojtowicz, Permit Supervisor, DEP Regional Office at 2 (Jan. 22, 2009) (Certified Record at 41-42). Based on the invalidity of the key presumption underlying the prior CHIA, NPS requested that WVDEP

⁵ A Probable Hydrologic Consequences statement must be prepared by an applicant for a surface mining permit and must inform WVDEP about

whether adverse impacts may occur to the hydrologic balance; whether acid-forming or toxic-forming materials are present that could result in the contamination of surface or groundwater, and whether the proposed operation may proximately result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent areas which is used for domestic, agricultural, industrial, or other legitimate purpose; and what impact the proposed operation will have on [additional water quality and quantity characteristics.]

38 C.S.R. § 2-3.22.a.

⁶ A Cumulative Hydrologic Impact Analysis is performed by WVDEP and must determine whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Material damage to the hydrologic balance outside the permit areas means any long term or permanent change in the hydrologic balance caused by surface mining operation(s), which has a significant adverse impact on the capability of the affected water resource(s) to support existing conditions and uses.

38 C.S.R. § 2-3.22.e.

undertake a new evaluation of the cumulative impacts of the Bridge Fork West mine.

Such an analysis is exactly what would occur if the Board had appropriately reversed WVDEP's decision to renew Permit Number S-3003-01 and, accordingly, required Powellton to submit a new permit application to continue surface mining activities. In contrast, the approach adopted by the Board—requiring the submission and review of a “plan . . . that shows that [Powellton] can extract coal in a manner that will not cause violations of its effluent limits” that does not explicitly require public notice and comment or appellate review—fails to provide a reasonable substitute for the scrutiny of the process for reviewing new applications for surface mining permits.

The Board acted without statutory authority when it affirmed WVDEP's renewal of Permit Number S-3003-01. If this Court agrees, and reverses the Board's order, Petitioners' injuries will be redressed because Powellton or its successor will have to seek a new permit—which will without question be subject to public notice, comment, and appeal—when it seeks to mine the remaining 400,000 tons of coal at Bridge Fork West.

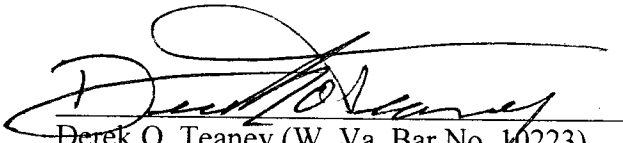
CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny Powellton's Motion to Dismiss.

Respectfully submitted,

SIERRA CLUB and ANSTED HISTORIC
PRESERVATION COUNCIL, INC.

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