

IN THE CIRCUIT COURT OF FAYETTE COUNTY  
WEST VIRGINIA

SIERRA CLUB and ANSTED  
HISTORIC PRESERVATION  
COUNCIL, INC.,

Petitioners,

v.

Administrative Appeal No. \_\_\_\_\_

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

Respondent,

and

POWELLTON COAL COMPANY, LLC,

Intervenor-Respondent.

**PETITION OF SIERRA CLUB AND ANSTED HISTORIC PRESERVATION COUNCIL,  
INC., FOR JUDICIAL REVIEW OF THE FINAL ORDER OF  
THE SURFACE MINE BOARD**

**STATEMENT OF THE CASE**

Petitioners seek review of the June 30, 2009 Final Order of the West Virginia Surface Mine Board (“SMB” or “the Board”) that affirmed, but modified, the West Virginia Department of Environmental Protection’s renewal of Powellton Coal Company, LLC’s Surface Mining Permit No. S-3003-01. A copy of that final order is appended to this Petition as Exhibit A.

The Board affirmed the renewal of Permit No. S-3003-01, 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. The renewed permit authorizes Powellton's operations at its Bridge Fork West Surface Mine in Fayette County, West Virginia, located between the New and Gauley Rivers. The region in which Powellton's mine is located is one of West Virginia's tourism gems, and the New and the Gauley are the premier whitewater rafting rivers in the East. Rich Creek of the Gauley River, in whose watershed Powellton operates the Bridge Fork West Surface Mine, is a known trout stream. Powellton, however, discharges waste into those streams in continuing violation of its mining permit, and the water pollution violations at the Bridge Fork West Surface Mine are getting worse. WVDEP renewed Permit No. S-3003-01, and the Board affirmed that renewal, despite Powellton's clear record of noncompliance and in contravention of the federal and state surface mining statutes and regulations. Petitioners seek the reversal of the Board's erroneous affirmation.

### **JURISDICTION AND VENUE**

This petition is filed as a matter of right pursuant to W. Va. Code § 22B-1-9, which provides that "[a]ny person . . . adversely affected by an order made and entered by a board after an appeal hearing . . . is entitled to judicial review thereof." This petition is timely filed within 30 days of the entry of the Final Order of the Surface Mine Board. W. Va. Code § 29A-5-4. Venue is proper in the Circuit Court of Fayette County because the surface mining operation at issue is located in Fayette County. W. Va. Code § 22B-4-3.

### **WEST VIRGINIA RULES OF PROCEDURE FOR ADMINISTRATIVE APPEALS**

Consistent with Rule 2(c) of the West Virginia Rules of Procedure Governing Administrative Appeals, Petitioners provide the following:

**1. Title of the contested case as it was before the agency**

BEFORE THE WEST VIRGINIA SURFACE MINE BOARD

SIERRA CLUB and ANSTED  
HISTORICAL PRESERVATION  
ASSOCIATION, INC.,<sup>[1]</sup>

Appellants,

v.

Appeal No. 2009-01-SMB

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

Appellee,

and

POWELLTON COAL COMPANY, LLC,

Intervenor.

**2. The kind of proceeding and nature of the ruling by the Surface Mine Board**

The West Virginia Department of Environmental Protection (“WVDEP”) renewed Powellton Coal Company, LLC’s Surface Mining Permit No. S-3003-01 for its Bridge Fork West Surface Mine on or about March 16, 2009. Petitioners filed their notice of appeal of the renewal of Permit No. S-3003-01 to the Surface Mine Board on April 16, 2009. Petitioners objected to WVDEP’s renewal of the permit and argued, among other things, that State and federal law prohibited WVDEP from renewing the permit because of the permittee’s continuing violations of the environmental performance standards under West Virginia’s statutory and regulatory requirements for surface mining operations. The permittee, Powellton Coal

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<sup>1</sup> Due to clerical error, Petitioner Ansted Historic Preservation Council, Inc., was identified in the proceedings below as the “Ansted Historical Preservation Association, Inc.” Petitioner’s legal name, as registered with the Secretary of State, is Ansted Historic Preservation Council, Inc., as reflected in the caption for this administrative appeal.

Company, LLC (“Powellton”), intervened in the matter.

The Surface Mine Board conducted a hearing on Petitioners’ appeal on June 9, 2009. The Petitioners, Respondent, and Intervenor were all represented by counsel at the hearing. Petitioners presented the testimony of five witnesses, include expert testimony. Neither Respondent nor Intervenor called any witnesses. Petitioners offered arguments and evidence in support of their claims.

On June 30, 2009, the Surface Mine Board entered a Final Order that affirmed WVDEP’s decision to renew Permit No. S-3003-01 with two modifications. 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.

### **3. Statement of the facts of the case**

Powellton’s Bridge Fork West Surface Mine in Fayette County, West Virginia, is a 463.8 acre operation located between the New and Gauley Rivers that discharges effluent into the headwater tributaries of Rich Creek of the Gauley River—a known trout stream. On October 24, 2008, Powellton submitted to WVDEP an application to renew Surface Mining Permit No. S-3003-01, which authorizes it to conduct surface mining operations at its Bridge Fork West Surface Mine near the towns of Jodie and Ansted.

WV/NPDES Permit Number WV1019449, issued under the West Virginia Water Pollution Control Act, places effluent limits on the quantity of suspended solids and iron that

Powellton may discharge from its Bridge Fork West Surface Mine into unnamed tributaries of/and Bridge Fork of Rich Creek of the Gauley River of the Kanawha River. Powellton routinely violates those limits. Because of its ongoing violations of WV/NPDES Permit WV1019449, Powellton is the defendant in a Federal Clean Water Act and Surface Mining Control and Reclamation Act enforcement action pending in federal court in the United States District Court for the Southern District of West Virginia. Powellton's noncompliance with WV/NPDES Permit WV1019449 also subjected it to an administrative enforcement action by WVDEP, which resulted in the assessment of administrative civil penalties via a Consent Order in October 2008.

Despite that Consent Order, and its requirement that Powellton "immediately take all measures to initiate compliance with all terms and conditions of the permits," Powellton's violations got worse while it was seeking permit renewal. In fact, Powellton violated its effluent limits at the Bridge Fork West Surface Mine 32 times in the five-month period between November 1, 2008, and March 31, 2009—the period during which its renewal application was pending. In contrast, Powellton violated those limits 18 times in the previous 19-month period. The severity of Powellton's exceedances increased during the renewal period as well.

During the public comment period on Powellton's renewal application, WVDEP received at least 17 letters of comment. Included among those letters were: (1) a letter opposing the renewal from Don Striker of the National Park Service, in his capacity as the Superintendent of the New River Gorge National River, the Gauley River National Recreation Area, and the Bluestone National Scenic River; (2) a letter opposing the renewal signed by 3,625 individuals from across the country, and (3) a letter opposing the renewal from Petitioners. In their comment letter, Petitioners requested an informal conference on the renewal application.

On February 12, 2009, WVDEP conducted an informal conference on the permit renewal at the Ansted Middle School. Over one hundred people attended the conference; not one person spoke in favor of the renewal. Among the issues discussed at the informal conference were Powellton's repeated water pollution limit exceedances at its Bridge Fork West Surface Mine.

By letter dated March 16, 2009, WVDEP informed Petitioners, through their counsel, that the agency had renewed Surface Mining Permit No. S-3003-01. On March 18, 2009, WVDEP sent notification via certified mail to Powellton that Permit Number S-3003-01 had been renewed. On April 16, 2009, Petitioners appealed the renewal to the SMB.

**4. The assignments of error relied upon on appeal and the manner in which they were decided by the state agency**

**The Surface Mine Board erred as a matter of law in affirming the WVDEP's renewal of Permit No. S-3003-01 because a surface mining permit cannot be renewed when the permit holder is not in compliance with its effluent limitations.**

**5.1 Points and authorities relied upon**

**CASES**

C&H Taxi Co. v. Richardson, 194 W. Va. 696, 701, 461 S.E.2d 442 (1995)  
Canestraro v. Faerber, 179 W. Va. 793, 374 S.E.2d 319 (1988)  
DK Excavating, Inc. v. Miano, 209 W. Va. 406, 549 S.E.2d 280 (2001)  
Martin v. Randolph County Bd. of Edu., 195 W. Va. 297, 304, 465 S.E.2d 399 (1995)  
State ex rel. Hoover v. Berger, 199 W. Va. 12, 16, 483 S.E.2d 12 (1996)  
Stewart v. West Virginia Bd. of Examiners for Registered Professional Nurses, 197 W. Va. 386, 389, 475 S.E.2d 478 (1996)  
Tennant v. Callaghan, 200 W. Va. 756, 490 S.E.2d 845 (1997)  
W. Va. Human Rights Comm'n v. Garretson, 196 W. Va. 118, 128, 468 S.E.2d 733 (1996)

C & K Coal Co. v. Commonwealth of Penn. Dep't of Env't'l Res., EHB Docket No. 85-396-W, 1988 WL 160885 (Pa. Env. Hrg. Bd. Feb. 16, 1988).

**STATUTES**

30 U.S.C. § 1251 et seq.  
30 U.S.C. § 1256  
30 U.S.C. § 1256(d)(1)(B)  
33 U.S.C. § 1311(a)

33 U.S.C. § 1342  
33 U.S.C. § 1362(11)  
W. Va. Code § 22-3 et seq.  
W. Va. Code § 22-3-13(a)  
W. Va. Code § 22-3-13(b)(10)  
W. Va. Code § 22-3-19(a)(1)  
W. Va. Code § 22B-1 et seq.  
W. Va. Code § 22B-1-9  
W. Va. Code § 22B-4 et seq.  
W. Va. Code § 22B-4-3  
W. Va. Code § 29A-5-4

**RULES**

30 C.F.R. § 774.15(c)(1)(ii)  
30 C.F.R. § 816.42  
30 C.F.R. § 817.42  
30 C.F.R. § 948.10  
38 C.S.R. § 2-1 et seq.  
38 C.S.R. § 2-3.27  
38 C.S.R. § 2-14  
38 C.S.R. § 2-14.5.b

**5.2 Discussion of law**

The West Virginia Administrative Procedures Act provides the standard of review that this Court is to apply:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g). This Court reviews questions of law de novo. See C&H Taxi Co. v.

Richardson, 194 W. Va. 696, 701, 461 S.E.2d 442 (1995); see also Martin v. Randolph County

Bd. of Edu., 195 W. Va. 297, 304, 465 S.E.2d 399 (1995). This Court can only reverse evidentiary findings of fact that are clearly wrong or not supported by substantial evidence or by a rational basis. See Martin, 195 W. Va. At 304; see also Stewart v. West Virginia Bd. of Examiners for Registered Professional Nurses, 197 W. Va. 386, 389, 475 S.E.2d 478 (1996).

The Surface Mining Control and Reclamation Act (“SMCRA”) is the comprehensive federal statute governing the surface mining of coal. Section 506 of SMCRA prohibits surface coal mining operations without a permit from the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) or from an approved state regulatory authority. 30 U.S.C. § 1256. West Virginia administers such an approved surface mining regulatory program through WVDEP. See 30 C.F.R. § 948.10. Renewals of permits issued under the West Virginia program are governed by W. Va. Code § 22-3-19(a)(1).

Among the performance standards mandated by SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) is the requirement that mining discharges “shall not violate effluent limitations or cause a violation of applicable water quality standards.” 30 C.F.R. §§ 816.42 & 817.42; 38 C.S.R. § 2-14.5.b. The State performance standard further provides that the relevant effluent limitations are “the standards set forth in an NPDES permit issued pursuant to W. Va. Code s 22-11 et seq., the Federal Water Pollution Control Act as amended, 33 U.S.C. 1251 et seq., and the rules and regulations promulgated thereunder.” 38 C.S.R. § 2-14.5.b.

The Federal Water Pollution Control Act, or “Clean Water Act,” prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of a permit. 33 U.S.C. § 1311(a). One such permit is a National Pollution Discharge Elimination System (“NPDES”) permit issued by the United States Environmental Protection

Agency (“EPA”) or an authorized state under Clean Water Act Section 402. Id. § 1342.

That section authorizes the permitting authority to issue a NPDES permit that allows the discharge of pollutants on the condition that such discharge will comply with all Clean Water Act requirements. Id. § 1342(a). Among the limitations prescribed in NPDES permits are effluent limitations. “Effluent limitations” are “any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters . . . , including schedules of compliance.” Id. § 1362(11).

EPA has authorized the State of West Virginia to administer a NPDES program to regulate the discharges of pollutants into West Virginia’s waters. Permits issued under this program are known as “WV/NPDES” permits. WVDEP administers the WV/NPDES program for the State.

The Surface Mine Board’s Final Order affirming with modification WVDEP’s renewal of Permit No. S-3003-01 was in violation of statutory provisions, in excess of statutory authority or jurisdiction, otherwise affected by errors of law, and/or arbitrary and capricious, because the relevant statutes and regulations prohibit the renewal of a surface mining permit when the permittee is not in compliance with the effluent limitations in its WV/NPDES Permit. The record clearly establishes that Powellton was in continuing violation of the effluent limitations in its WV/NPDES permit at the time that WVDEP renewed Permit No. S-3003-01. Consequently, this Court should reverse the Board’s decision.

**A. The Surface Mine Board’s Final Order Was in Violation of Statutory Provisions and/or Otherwise Affected By Errors of Law.**

The Surface Mine Board committed legal error in its Final Order affirming WVDEP’s renewal of Permit No. S-3003-01 because State law prohibits the renewal of a surface mining

permit when the permittee is not in compliance with applicable environmental performance standards. Although W. Va. Code § 22-3-19(a)(1) grants permittees a “right of successive renewal,” that right is not absolute. Indeed, where it is established that a permittee is “not in compliance with the applicable environmental protection standards of this article,” the Director must make findings to that effect and deny the renewal application. W. Va. Code § 22-3-19(a)(1); Tennant v. Callaghan, 200 W. Va. 756, 758, 490 S.E.2d 845 (1997).

The West Virginia provision prohibiting the renewal of a surface mining permit where the permittee is in violation of the terms and conditions of its existing permit and environmental performance standards mirrors the similar requirements set out in Section 506(d)(1) of the Federal Surface Mining Control and Reclamation Act (“SMCRA”) and the implementing regulations at 30 C.F.R. § 774.15(c)(1)(ii).<sup>2</sup> The West Virginia Supreme Court of Appeals has

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<sup>2</sup> Section 506(d)(1)(B) of SMCRA provides:

Any valid permit issued pursuant to this chapter shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal and such renewal shall be issued (provided that on application for renewal the burden shall be on the opponents of renewal), subsequent to fulfillment of the public notice requirements of sections 1263 and 1264 of this title unless it is established that and written findings by the regulatory authority are made that—

.....

(B) the present surface coal mining and reclamation operation is not in compliance with the environmental protection standards of this chapter and the approved State plan or Federal program pursuant to this chapter[.]

30 U.S.C. § 1265(d)(1)(B). The federal regulation implementing that provision states that

The regulatory authority shall approve a complete and accurate application for permit renewal, unless it finds, in writing that--  
(ii) The present surface coal mining and reclamation operations are not in compliance with the environmental protection standards of the Act and the regulatory program[.]

explained that the legislature intended the West Virginia Surface Coal Mining and Reclamation Act to be at least as stringent as the federal SMCRA itself. See Canestraro v. Faerber, 179 W.Va. 793, 794-95, 374 S.E.2d 319 (1988); see also DK Excavating, Inc. v. Miano, 209 W. Va. 406, 411, 549 S.E.2d 280, 285 (2001). Consequently, the State act must be interpreted as such.

Neither the applicable West Virginia regulations nor the relevant case law allow WVDEP or the Surface Mine Board to create exceptions to the statutory prohibition against approving a permit renewal when the permittee is in violation of its effluent limitations. The duty of WVDEP and the Surface Mine Board to deny such permit renewal applications is not contingent on the specific type of operation the permit renewal applicant intends to carry out under the renewed permit. Instead, as the West Virginia Supreme Court of Appeals has explained, where “the opponent of the renewal proves that . . . the present surface-mining operation is not in compliance with the applicable environmental protection standards,” WVDEP must deny the renewal application. Tennant v. Callaghan, 200 W. Va. 756, 758, 490 S.E.2d 845 (W. Va. 1997). Moreover, based on a Pennsylvania statute similar to W. Va. Code § 22-3-19(a)(1), the Pennsylvania Environmental Hearing Board has held that “[t]here is no doubt that [a surface mining regulatory authority] is explicitly prohibited from permitting or renewing the permit of a mine not currently meeting its effluent standards.” C & K Coal Co. v. Commonwealth of Penn. Dep’t of Env’tl Res., EHB Docket No. 85-306-W, 1988 WL 160885 at \*2 (Pa. Env. Hrg. Bd. Feb. 16, 1988).

W. Va. Code § 22-3-13 sets out the general environmental protection performance standard that operators must follow. The standards implicated by the renewal of Permit No. S-3003-01 are:

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30 C.F.R. § 774.15(c)(1)(ii).

- a. W. Va. Code § 22-3-13(a), which provides that permittees must “meet all applicable performance standards of this article and other requirements set forth in legislative rules[;]” and
- b. W. Va. Code § 22-3-13(b)(10), which requires that an operator “[m]inimize disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and groundwater systems both during and after surface-mining operations and during reclamation.”

The West Virginia Surface Mine Reclamation Rule sets out other environmental performance standards with which operators must comply. 38 C.S.R. § 2-14. The performance standard implicated by the renewal of Permit No. S-3003-01 is 38 C.S.R. § 2-14.5(b), which requires that “[d]ischarge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards.”

The Board should have reversed WVDEP’s renewal of Permit No. S-3003-01 because Powellton is not in compliance with the applicable environmental performance standards. See W. Va. Code § 22-3-19(a). The performance standard requiring compliance with effluent limitations specifies that those effluent limitations are set by the applicable NPDES permit. 38 C.S.R. § 2-14.5(b). WV/NPDES Permit Number WV1019449 places effluent limits on the quantity of suspended solids and iron that Powellton may discharge from its Bridge Fork West Surface Mine into unnamed tributaries of/and Bridge Fork of Rich Creek of the Gauley River of the Kanawha River. As Petitioners established at the June 9, 2009 hearing in this matter, Powellton routinely violates those limits and was in continuing violation when WVDEP renewed the permit.

At the June 9, 2009 Surface Mine Board hearing, Petitioners called as a witness Mike Isabell, the Manager of Engineering for Powellton's Bridge Fork West Surface Mine. Tr. at 38. In an effort to obtain the renewal of Permit No. S-3003-01, Mr. Isabell signed two sworn statements that the Powellton Bridge Fork West Surface Mine operation was in compliance with all applicable environmental performance standards, despite his knowledge of Powellton's violations of its effluent limits in WV/NPDES Permit WV1019449. Tr. at 74. At the hearing, Mr. Isabell candidly admitted that Powellton is "sporadically" violating its iron and suspended solids effluent limits at the Bridge Fork West Surface Mine. Tr. at 60.

Indeed, at the hearing, Petitioners introduced and the Board admitted an exhibit setting out 50 violations of Powellton's iron and suspended solids effluent limits at the Bridge Fork West Surface Mine that occurred between June 1, 2007, and March 31, 2009. Appellants' Hearing Ex. 12. Petitioners' counsel reviewed that exhibit closely with WVDEP's Chief Inspector of Environmental Enforcement, Mike Zeto, whom the Board recognized as an expert in environmental enforcement. Tr. at 163-68. Specifically, Petitioners' counsel asked Mr. Zeto to review each violation that occurred between November 1, 2008, and March 31, 2009—the period of time during which Powellton's renewal application was pending. Mr. Zeto identified 19 "moderate" exceedances of the effluent limits and 13 "minor" exceedances. Tr. at 176-185.<sup>3</sup> In contrast, between June 1, 2007, and December 31, 2007, Powellton committed 8 moderate and 4 minor exceedances. Tr. at 173. Based on his review of the renewal period exceedances, Mr.

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<sup>3</sup> For purposes of assessing civil penalties, WVDEP distinguishes the severity of a violation based on the percentage by which the discharged concentration exceeds the effluent limit. Tr. at 169; C.R. at 452. So-called "minor" violations of the effluent limits are, nonetheless, violations of state and federal law, as well as violations of the applicable environmental performance standards for purposes of the West Virginia surface mining program. There is no exception to the prohibition against renewing a surface mining permit when the permittee is not in compliance with the applicable environmental performance standards based on the severity of the noncompliance.

Zeto testified that Powellton's post-Consent Decree more frequent and more severe than its post-Consent Decree exceedances. Tr. at 185-86.

At the close of the June 9, 2009 hearing, the Chairman of the Surface Mine Board prefaced the Board's oral ruling by stating that

[t]he Board was most persuaded by the evidence of effluent violations that were continuing and continuing and continuing, and it's fair to say that this Board would have no trouble denying a permit to continue mining for a company with that record. Why should they keep on mining and keep on polluting?

Tr. at 355-56. Despite that finding, the Board affirmed the renewal of Permit No. S-3003-01. Final Order at 2. That affirmation constitutes legal error because a permit cannot be renewed when the permittee is not in compliance with applicable environmental performance standards such as its effluent limits.

The Board could not lawfully affirm the renewal of Permit No. S-3003-01 because it found, based on uncontradicted evidence, that Powellton was in "continuing and continuing and continuing" violation of its effluent limits. Those violations place Powellton in violation of the environmental performance standard codified in 38 C.S.R. § 2-14.5.b. The Board's finding of non-compliance, therefore, required it to reverse WVDEP's decision to renew Permit No. S-3003-01. It committed legal error by doing otherwise. Consequently, its Final Order is in violation of statutory provisions and/or is otherwise affected by legal error.

**B. The Surface Mine Board's Final Order was in Excess of Statutory Authority**

The Board's explicit justification for affirming the renewal of Permit No. S-3003-01 was that it wanted Powellton to have its permit to complete reclamation. In its Order, the Board expressly found "determinative the fact that this permit renewal is to allow reclamation to be completed. . . . The Board . . . has no difficulty renewing a permit to allow reclamation to be

completed.” Final Order at 1-2.

That justification is wholly without any legal basis. Nothing in the governing statute, W. Va. Code § 22-3-19(a), nor the relevant case law, provides any exception to the prohibition against renewing permits when the permittee is not in compliance with applicable environmental performance standards. In particular, the law provides no exception based on the nature of the operations the permittee intends to carry out under the renewed permit. Nonetheless, the Board made an unauthorized policy decision to provide just such an exception in this case.

The Board, like all administrative agencies, is a creature of statute, meaning it has no greater authority than that which is conferred upon it under its governing statutes. State ex rel. Hoover v. Berger, 199 W. Va. 12, 16, 483 S.E.2d 12 (1996). See also W. Va. Human Rights Comm’n v. Garretson, 196 W. Va. 118, 128, 468 S.E.2d 733 (1996) (“[A]gencies possess only the power to act given them by the Legislature.”). Here, the Board’s organic statutes, W. Va. Code §§ 22B-1 and 22B-4, are devoid of any authorization for the Board to create exceptions to the prohibition against renewing non-compliant surface mining permits. The West Virginia Legislature and the United States Congress set the applicable policy—no renewal for noncompliant permittees. W. Va. Code § 22-19-3(a); 30 U.S.C. § 1256(d)(1)(B). The Board acted ultra vires in its attempt to set its own policy regarding permit renewal for reclamation only.

In all events, such a policy is wholly unnecessary. The West Virginia Surface Mining Reclamation Rule provides that “the Secretary shall waive the requirements for renewal if the permittee certifies in writing that all coal extraction is completed, that all backfilling and regrading will be completed and reclamation activities are ongoing.” 38 C.S.R. § 2-3.27. Consequently, Powellton does not need to renew Permit No. S-3003-01 if all it truly intends to

do is reclaim the permit area.

Powellton, rather, seems to want to have its cake and eat it too. Mr. Isabell testified at the hearing that Powellton had no immediate intentions to extract coal from the Bridge Fork West Surface Mine. Tr. at 96. Nonetheless, he confessed that if market conditions changed, nothing would prevent the company from conducting further coal removal. Tr. at 96, 136. Moreover, both Mr. Isabell and enforcement authorities from WVDEP testified that Powellton needs a valid Permit No. S-3003-01 in order to haul coal from an adjacent permit. Tr. at 97-89, 161, 262-63, 281-82. That is, Powellton hauls coal from its Gauley Knob Surface Mine across the Bridge Fork West Surface Mine permit area to get it to market. Tr. at 262-63, 281-82. It should also be noted that Powellton could transfer or sell the permit to another company under 38 C.S.R. § 2-3.25, and that Powellton acknowledges that possibility. Tr. at 158. Finally, Powellton has to maintain a valid permit because of obligations to the landowner. Tr. at 162. In particular, Powellton is obligated to the landowner to apply for a permit to open a deep mine near the Bridge Fork West Surface Mine, and coal from that mine may have to be hauled across the area regulated by Permit No. S-3003-01. Tr. at 37-38.<sup>4</sup>

In short, the justification the Board gave for affirming WVDEP's renewal of Permit No. S-3003-01 is not grounded in any legal principle, and is either unnecessary (if reclamation is all that is going to occur) or illusory (based on Powellton's intended use of the permit area for coal haulage). Consequently, renewing the permit for reclamation purposes was in excess of the Board's statutory authority.

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<sup>4</sup> For the reasons expressed in this paragraph, the substantial rights of petitions have been prejudiced for purposes of W. Va. Code 29A-5-4. Additional mining in this area would likely lead to further environmental degradation.

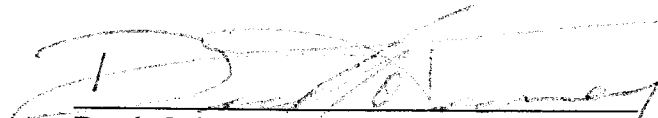
**C. The Board's Final Order Was Arbitrary, Capricious, and an Abuse of Discretion**

In all events, the Board's affirmation of the renewal of Permit No. S-3003-01 was arbitrary, capricious, and an abuse of discretion, even if not strictly prohibited by law. That is, on this record it was wholly unreasonable for WVDEP and the Board to renew Permit No. S-3003-01.

**5.3 Relief prayed for**

Based on the foregoing, Petitioners respectfully request that the Court reverse the final order of the Surface Mine Board in Appeal No. 2009-01-SMB and remand the matter to the Surface Mine Board with instructions to vacate and remand the renewal of S-3003-01 to WVDEP to reject Powellton's renewal application on the ground that Powellton is not in compliance with all applicable environmental performance standards.

Respectfully submitted,



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Attorney for Petitioners Sierra Club and Ansted  
Historic Preservation Council, Inc.

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

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

**Petitioners,**

**v.**

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

**Respondent,**

**and**

**POWELLTON COAL COMPANY, LLC,**

**Intervenor-Respondent.**

**CERTIFICATE OF SERVICE**

I, Derek O. Teaney, do hereby certify that a copy of the foregoing PETITION OF SIERRA CLUB AND ANSTED HISTORIC PRESERVATION COUNCIL, INC., FOR JUDICIAL REVIEW OF THE FINAL ORDER OF THE SURFACE MINE BOARD was served upon the following via certified United States mail, return receipt requested, on this 28th day of July, 2009.

State agency:

West Virginia Surface Mine Board  
601 57th Street, S.E.  
Charleston, WV 25304

Counsel for Appellee before the Surface Mine Board:

A. M. "Fenway" Pollack  
Office of Legal Services  
West Virginia Department of  
Environmental Protection  
601 57th Street  
Charleston, WV 25304

Intervenor before the Surface Mine Board:


Powellton Coal Company  
c/o CT Corporation System  
Registered Agent for Fola Coal Co., LLC d/b/a Powellton Coal Co., LLC  
707 Virginia Street East  
Charleston, WV 25301

Counsel for Intervenor before the Surface Mine Board:

Robert G. McLusky  
Jackson Kelly PLLC  
P.O. Box 553  
Charleston, WV 25322

Attorney General of West Virginia

The Honorable Darryl McGraw  
West Virginia Attorney  
State Capitol Complex  
Bldg. 1, Room E-26  
Charleston, WV 25305



DEREK O. TEANEY  
Appalachian Center for the Economy and the  
Environment

**CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES**

(Other than Domestic Relations)

In the Circuit Court, Fayette County, West Virginia

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**I. CASE STYLE:**

**Plaintiff(s)**

SIERRA CLUB and ANSTED HISTORIC

PRESERVATION COUNCIL, INC.

**Case #** \_\_\_\_\_

**Judge:** \_\_\_\_\_

**vs.**

**Defendant(s)** TOM CLARKE, Director,  
Division of Mining and Reclamation, West

Virginia Department of Env'tl. Prot.

**Street**  
\_\_\_\_\_  
**City, State, Zip**

601 57th Street, SE

Charleston, WV 25304

**Street**  
\_\_\_\_\_  
**City, State, Zip**

**Street**  
\_\_\_\_\_  
**City, State, Zip**

**Street**  
\_\_\_\_\_  
**City, State, Zip**

**Street**  
\_\_\_\_\_  
**City, State, Zip**

**Street**  
\_\_\_\_\_  
**City, State, Zip**

**Days to  
Answer**

15

**Type of Service**

Certified Mail

Original and 1 copies of complaint enclosed/attached.

PLAINTIFF: Sierra Club et al.  
DEFENDANT: Clarke

CASE NUMBER:

II. TYPE OF CASE:

- |   |  |
|---|--|
| <input type="checkbox"/> General Civil  | <input type="checkbox"/> Adoption                                |
| <input type="checkbox"/> Mass Litigation<br>(As defined in T.C.R. Rule XIX (c)) | <input checked="" type="checkbox"/> Administrative Agency Appeal |
| <input type="checkbox"/> Asbestos   | <input type="checkbox"/> Civil Appeal from Magistrate Court      |
| <input type="checkbox"/> Carpal Tunnel Syndrome                                 | <input type="checkbox"/> Miscellaneous Civil Petition            |
| <input type="checkbox"/> Diet Drugs   | <input type="checkbox"/> Mental Hygiene                          |
| <input type="checkbox"/> Environmental  | <input type="checkbox"/> Guardianship                            |
| <input type="checkbox"/> Industrial Hearing Loss                                | <input type="checkbox"/> Medical Malpractice                     |
| <input type="checkbox"/> Silicone Implants                                      |  |
| <input type="checkbox"/> Other: _____   |  |
- Habeas Corpus/Other Extraordinary Writ
- Other: \_\_\_\_\_

III. JURY DEMAND:  Yes  No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): na / \_\_\_\_\_

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY?  YES

NO

IF YES, PLEASE SPECIFY:

- Wheelchair accessible hearing room and other facilities
- Interpreter or other auxiliary aid for the hearing impaired
- Reader or other auxiliary aid for the visually impaired
- Spokesperson or other auxiliary aid for the speech impaired
- Other: \_\_\_\_\_

Attorney Name: Derek Teaney

Firm: Appalachian Center

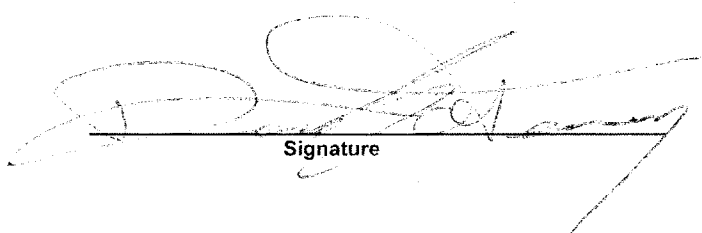
Address: POB 507, Lewisburg, WV 24901

Telephone: 304-793-9007

Dated: July 28, 2009

Representing:

- Plaintiff  Defendant
- Cross-Complainant  Cross-Defendant

  
Signature

Proceeding Without an Attorney