

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

ELK RUN COAL COMPANY,

Appellants,

v.

**HAROLD WARD
Acting Director, Division of
Mining and Reclamation
West Virginia Department
of Environmental Protection,**

Appellee.

Appeal No. 14-11-EQB



MOTION TO INTERVENE

Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, and Sierra Club (collectively “the Groups”), by counsel, respectfully move this Board to allow the Groups to intervene in the above captioned proceeding.

Statement of Facts

1) Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members nationwide and approximately 2,000 members who reside in West Virginia and belong to the West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth’s resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club’s concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia.

- 2) Ohio Valley Environmental Coalition is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1,500 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.
- 3) West Virginia Highlands Conservancy, Inc. is a nonprofit grassroots membership organization whose volunteer board and approximately 1,600 members work for the conservation and wise management of West Virginia's natural resources. Incorporated in West Virginia in 1967 it is one of the state's oldest environmental advocacy organizations and for over four decades has been a leader in citizen efforts to protect West Virginia's people, land and water resources from the harmful effects of coal mining.
- 4) The Groups' members use and enjoy the area and streams near the Chess Processing Refuse Disposal Area, including the streams that will receive discharges from the outlets covered by the associated NPDES permit. Their aesthetic environmental and recreational interests will be adversely affected by the mine's selenium discharges. They are concerned about the selenium discharges' effects on aquatic life and have restricted their activities as a result of the pollution.
- 5) The West Virginia Department of Environmental Protection ("WVDEP") issued the renewal of WV/NPDES Permit WV0050903 ("the Permit") to Elk Run Coal Company, Inc. ("Elk Run") on August 21, 2012.
- 6) The reissued permit did not contain selenium limits or monitoring for outfalls 001, 002, 003, 005, 006, 015, 019, and 020.

- 7) The data submitted by Elk Run with the reissuance application included a water sample showing a selenium concentration of 5.77 µg/L from outfall 005.
- 8) Two of the Groups, Ohio Valley Environmental Coalition and Sierra Club, appealed the reissuance of WV/NPDES Permit WV0050903 for its failure to include without final and effective selenium limits to ensure compliance with applicable state water quality standards on September 19, 2012. The Groups' appeal was assigned Appeal No. 12-32-EQB
- 9) WVDEP agreed that the Permit should not have been issued without selenium limits.
- 10) WVDEP modified WV/NPDES Permit WV0090503 on April 30, 2014. That modification is known as Modification #32.
- 11) The modified permit included report only selenium limits on Outlets 005 and 019 until April 30, 2015. The modified permit also included selenium limits of 4.70 µg/L monthly average and 8.20 µg/L maximum daily on Outlets 005 and 019 starting on May 1, 2015.
- 12) After receiving a copy of the modified permit, the Groups withdrew their appeal on May 8, 2014.
- 13) Elk Run appealed Modification #32 on June 4, 2014, arguing that the compliance schedule for selenium on outfalls 005 and 019 was unreasonably short.
- 14) WVDEP does not oppose the Groups' intervention.

Legal Analysis

The Board's procedural rules do not contain their own provision for the intervention of third parties, outside of permit holders. Instead, the procedural rules provide that, "the appropriate Rule of Civil Procedure will guide the appeals process before the board." 46 CSR 4-6.13. Under the West Virginia Rules of Civil Procedure:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this State confers an unconditional right to intervene; or (2)

when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

W. Va. R. Civ. Proc. 24. Elk Run is appealing Modification #32 of its WV/NPDES Permit. Modification #32 came about because of the Groups' appeal of a prior version of the permit. The Groups only dismissed that appeal because Modification #32 resolved their claims. The present appeal is really a continuation of the previous appeal. The Groups therefore have an interest in Modification #32—the transaction which is the subject of Elk Run's appeal—and have a right to intervene.

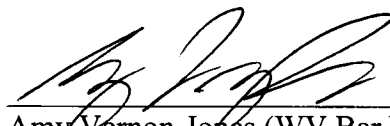
In addition, the Board has the authority to allow any party that is affected by a matter pending before the Board to intervene in that matter. WV Code 22B-1-7(e). The Groups have members who use the streams that receive selenium discharge from the Chess Processing Refuse Disposal Area. Their aesthetic and recreational enjoyment of those streams is diminished by Elk Run's selenium discharges. Their injuries from the selenium pollution will be lessened if the discharges come into compliance with state water quality standards in accordance with Modification #32. Their harm would be extended if Elk Run is permitted to prolong its compliance schedule.

The Groups' application to intervene is timely. WVDEP issued Modification #32 on April 30, 2014. The conditions of that permit were acceptable to the Groups'. Elk Run appealed Modification #32 on June 4, 2014. The evidentiary hearing in Appeal No. 14-11-EQB is set for August 14, 2014. No delay will be required as a result of the Groups' intervention. No party will suffer prejudice by this intervention.

The Groups' interests are not adequately protected by Elk Run or the WVDEP. Outfalls 005 and 019 of WV/NPDES Permit WV0090503 only have a compliance schedule for selenium because of the action of the Groups. Without the Groups' appeal (12-32-EQB) WVDEP would have left those outfalls without selenium reporting requirements or limits. WVDEP has not shown that it can protect the Groups' interests. Elk Run opposes the selenium limits that the Groups support. Therefore a disposition of this matter in the Groups' absence will impair their interests.

Conclusion

Based on the foregoing reasons, the Groups respectfully request that the Board grant their Motion to Intervene.



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CERTIFICATE OF SERVICE

I, Amy Vernon-Jones, hereby certify that I served a copy of the foregoing Motion to Intervene on July 1, 2014, for the above-referenced matter via electronic mail and the United States Postal Service, first class mail, to the addresses listed below:

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