



October 14, 2011

Permit Supervisor
West Virginia Department of Environmental Protection
254 Industrial Drive
Oak Hill, West Virginia 25901

RE: Renewal of Article 3 Permit Number S-3015-99 for Horse Creek Surface Mine

Dear Permit Supervisor:

The Environmental Justice Advocates (EJA) at Lewis and Clark Law School in Portland, Oregon, write to express our concern regarding your agency's (WVDEP) proposed renewal of Article 3 Permit Number S-3015-99 which would allow Pioneer Fuel Corporation (Pioneer) to continue operation of the Horse Creek Surface Mine.

EJA is a student organization at Lewis and Clark Law School dedicated to empowering and aiding underserved communities self-determine their own environmental values, particularly with regard to equitable distribution of environmental burdens and benefits, human health, and public welfare. EJA's mission is to work with community organizations, students, professors, and state agencies on issues of Environmental Justice. EJA believes that mountain top surface mining is an Environmental Justice issue because it disproportionately affects lower-income communities throughout Appalachia.

Coal mining has continually subjected West Virginia's low-income communities to activities that harm environmental and human health. The approval of Article 3 Permit Number S-3015-99 to continue surface coal mining on Paint Creek Mountain will exacerbate the Environmental Justice problem in West Virginia by stressing local communities and exposing them to unnecessary environmental injuries. EJA asks that the WVDEP take the following issues into consideration when deciding whether to issue the permit:

I. The Horse Creek Surface Mine has a history of environmental violations.

The renewal of Pioneer's Horse Creek Surface Mine permit presents several concerns based on the mine's previous violations. These violation spills changed "the prevailing hydrologic balance of Horse Creek and Clear Fork" (WVDEP Permit Violation, 2007) and that of White Oak Creek of Clear Fork of the Coal River (WVDEP Permit Violation, 2010). These spills dumped black water discharge into creeks that provide a water supply and recreation for residents and visitors, as well as fisheries and wildlife habitat. The WVDEP should scrutinize possible renewal of the Horse Creek Mine permit in light of these permit violations.

The 2007 and 2010 black water spill violations demonstrate the precarious balance between valley filling and clean water. The 2007 violation resulted from valley filling and water load that breached an adjacent



inactive deep mine, while the 2010 violation cited discharge from a National Pollutant Discharge Elimination System (NPDES) permitted location. Both violations indicate Pioneer's inattention to managing the discharge from these operations or an indifference to meeting permit guidelines. It is particularly concerning that the 2010 spill was first reported by an anonymous caller rather than by Pioneer. These violations raise questions about Pioneer's control and monitoring of its discharge activities.

The size of both the 2007 and 2010 spills raise concerns for the health and livability of the area. Following the 2007 spill, the DEP documented contamination of Horse Creek and Clear Fork 2.6 miles from the mine, and according to the permit, no remediation efforts were made to eliminate contamination along the creek. The cessation order simply required that Pioneer valley fill on a different side of the same valley, with the apparent hope that no new breaches would happen.

WVDEP should consider the following questions regarding the 2007 spill in the decision to issue the permit:

1. Is there any research showing that the other side of valley fill #4 will not allow a breach into the inactive deep mine shaft?
2. Has valley fill #4 been stabilized?
3. What research has been conducted to evaluate the long-term effects of the spill on fish habitat, spawning grounds, turbidity, water temperature, chemical balance on the creeks following the breach?
4. What research has been conducted on the long-term drinking water quality of Horse Creek and Clear Fork following this breach?
5. Did Pioneer provide assistance to Whitesville and its residents to ensure safe drinking water?

The 2010 violation further demonstrated black water containment problems on the project. The sediment structure breach allowed measurable black water discharge over 2.5 miles down Clear Creek. The spill was so severe that DEP notified the City of Whitesville, a city over four miles away, regarding risks to the drinking water supply. This notification indicates that, while the spill may have been short-term, it was very high volume. The violation order indicates that containment was re-established fairly quickly but not before major damage was done.

WVDEP should consider the following questions regarding the 2010 spill in the decision to issue the permit:

1. How long did the spill go on and why was it initially anonymously reported?
2. Is there on-going monitoring of the structure that breached?
3. What measures have been taken to ensure future breaches like this one will not take place?
4. What research has been conducted to evaluate the long-term effects of the spill on fish habitat, spawning grounds, turbidity, water temperature, and chemical balance on the creeks and river?
5. What research has been conducted on the long-term drinking water quality of the creeks and river following this breach?
6. Did Pioneer provide assistance to Whitesville and its residents to ensure safe drinking water?



At both spill locations, the contaminated creeks create a vital network of water flow through the area and into the Coal River. WVDEP is strongly encouraged to consider these violations' impacts on the residents and visitors to the area, as well as the environmental integrity of Coal River and its tributaries, before approving permit renewal.

II. The Horse Creek Surface Mine is located in close proximity to communities and contributes to local environmental degradation.

The location of the Horse Creek Surface Mine presents environmental concerns to West Virginia communities. Communities in close proximity to mine must bear the risk of environmental harm, and in the possibility of another spill or discharge violation, increased flooding, and widespread contamination of water and soil. The communities of Whitesville, Artie, and Clear Creek are of particular concern due to their proximity to the mine.

The Horse Creek Surface Mine's activities have the potential to dramatically affect the life and health of local communities. WVDEP should be particularly concerned with effects on health from contaminated drinking water because local citizens receive their drinking water from supplies in close proximity to the mine. Whitesville lies directly downstream from the black water spill that occurred in Clear Fork. The Boone Raleigh PSD Water Plant also lays downstream and provides drinking water to these same citizens. Citizens of these communities are at risk to exposure to contaminants should another spill or discharge violation occur.

The Horse Creek Surface mine also puts local property ownership at risk. Environmental degradation has the potential to unfairly lower property values for those that live in an area affected by the mining operation. Contamination could cripple West Virginians financially while also putting their health at risk. These costs to local citizens should be considered in WVDEP's consideration of permit renewal.

III. Continued mining operations on Horse Creek Surface Mine will adversely affect the aquatic ecosystem of the Clear Fork of the Big Coal River, in direct conflict with WV Water Quality Standards.

West Virginia's narrative water quality criterion prohibits "significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems."¹ Additionally, all EPA-required Environmental Assessment Statements authorized as part of the permitting process must take into account the "cumulative impacts" of the project in question.

These two criterion mean that while individual operational mines may meet their required standards, or may only violate occasionally, the presence of mining operations and their subsequent violations should be considered cumulatively and with a broad view of the ecological health of the entire watershed. The Horse Creek Surface Mine does not meet these criterion as the overall aquatic health of the Clear Fork remains impaired and cumulative impacts continue to degrade the river.

¹ Requirements Governing Water Quality Standards, 47 CSR 2-3.2.i (WV, 2011)



The Clear Fork, along with many of its tributaries, is on the Clean Water Act's 303(d) list of impaired waters, triggering a 2010 determination of Total Maximum Daily Loads (TMDLs) "that can allow the waters to support aquatic life uses."² Mining is a major contributing factor identified in the EPA's 2010 study, which is degrading the chemical, physical, hydrologic, and biological composition of the Clear Fork.³ In particular, White Oak Creek has currently has poor water quality⁴, with ionic stress in the form of conductivity and sulfates likely caused by surface mining.⁵

Ongoing violations further threaten the aquatic health of the Clear Fork.⁶ With this history of violations, any cumulative impacts considered under the initial Environmental Impact Statement (EIS) are worse than expected. These actions further degrade the ecological health of the river beyond what is permitted under NPDES. Further, violations are rampant in other surface mines as well, creating a huge cumulative impact beyond the scope of any EIS yet completed. With data on these violations, a new EIS can be produced or new permits adjusted to allow for less overall pollution to account for potential violations.

WVDEP should consider denying the permit renewal because of the cumulative impacts and water quality threats of continued mining. The permit should be reconsidered because the Horse Creek Surface Mine contributes to the overall degradation of an already impaired stream, the Clear Fork. If not revoked, the permit should be delayed until permit revisions account for and ameliorate these cumulative and worsening ecological harms.

IV. The Horse Creek Surface Mine has deteriorated the environmental viability of the mine site and continued operation will prevent the implementation of an ecological use reclamation plan.

WVDEP should not renew the permit for the Horse Creek Surface Mine before further reviewing the reclamation standards that Pioneer has proposed and is capable of complying with. The Horse Creek Surface Mine site on Paint Creek Mountain was once prime ramps, mushroom, ginseng and hunting land, but the mine has reduced the land to a condition which makes it incapable of supporting traditional uses. The WVDEP should promote an ecologically healthy reclamation site rather than supporting non-native and likely more destructive, less sustainable uses.

W. Va. Code § 22-3-10(a)(3)(A) requires that "[t]he post-mining land use proposed in any reclamation plan for lands proposed to be mined by surface mining methods shall comport with the land use that is specified in the approved master land use plan for the area." Raleigh County, where the Horse Creek Surface Mine is located, has declined to identify a proposed use for the county in its Executive Summary of the Raleigh County Land Use Master Plan (2003). The Executive Summary states that Raleigh County will identify the proposed use when coal companies seek a modification of existing permit or

² Gerritsen, J., L. Zheng, J. Burton, C. Boschen, S. Wilkes, J. Ludwig, and S. Cormier. 2010. *Inferring Causes of Biological Impairment in the Clear Fork Watershed, West Virginia*. U.S. Environmental Protection Agency, Office of Research and Development, National Center for Environmental Assessment, Cincinnati, OH. EPA/600/R-08/146, 10 (2010).

³ *Id.*

⁴ *Id.* at 7.

⁵ *Id.* at 39.

⁶ See WVDEP Permit Violations, 2007-2010, including two illegal surface water discharges, downslope soil disposal, and blasting issues. http://apps.dep.wv.gov/WebApp/_dep/search/Permits/ViolationsDetailsQuery.cfm?permit_id=S301599&dep_office_id=OMR (accessed October 6, 2011).



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apply for a permit. This lenience gives Pioneer a way to ignore ecologically valuable uses while continuing destructive behavior. Instead, Pioneer should attempt to reclaim the mine land to a natural state, and WVDEP should require Pioneer to do so before further mining operations are permitted.

W. Va. Code § 22-3-10(a)(3) lists several possible uses for reclaimed mine lands, including renewable and alternative energy uses, residential uses, highway uses, industrial uses, commercial uses, agricultural uses, public facility uses, or recreational facility uses. However, any post-reclamation use Pioneer may propose will most likely not be as environmentally valuable as the land's traditional use, which supported ecologically and culturally important flora and fauna now nonexistent in the area. WVDEP should consider denying the permit in order to prevent further environmental degradation of the mine lands. Alternatively, if Pioneer is allowed to continue mining, WVDEP should urge Pioneer to limit flora and fauna impacts as much as possible and consider an ecologically restorative reclamation plan utilizing the best current reclamation sciences.

Thank you on behalf of EJA for your time and consideration on this important issue. Please keep us informed of the progress of this project and if you have any questions, do not hesitate to contact us at mlawson@lclark.edu or torieb@lclark.edu.

Sincerely,

Mackenzie Lawson
Torie Jarvis
Matt Crawford
Veronica Keithley
Student Volunteers