

TENNESSEE CLEAN WATER NETWORK

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FACSIMILE

TO: Judge Thomas G. Stovall
615-741-4472

FROM: Stephanie Matheny
865-522-7007 x 102

DATE: August 16, 2011

RE: Petition to Intervene
In the Matter of: Jordan Ridge Refuse Area
NPDES Permit No. TN0062961
Docket No. 04.30-113425

Please find enclosed a Petition to Intervene in the above-referenced matter. The original will follow by first class mail.

BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:)	
)	
JORDAN RIDGE REFUSE AREA)	
NPDES PERMIT NO. TN0062961)	
)	
NATIONAL COAL CORPORATION)	Docket No. 04.30-113425
)	
<i>Petitioner,</i>)	
)	
v.)	
)	
TENNESSEE DEPARTMENT OF)	
ENVIRONMENT AND CONSERVATION,)	
)	
<i>Respondent.</i>)	
)	
SIERRA CLUB, STATEWIDE)	
ORGANIZING FOR COMMUNITY)	
EMPOWERMENT, INC., TENNESSEE CLEAN)	
WATER NETWORK, and UNITED MOUNTAIN)	
DEFENSE,)	
)	
<i>Intervenors (Petition Pending).</i>)	

SIERRA CLUB, STATEWIDE ORGANIZING FOR COMMUNITY
EMPOWERMENT, TENNESSEE CLEAN WATER NETWORK, AND
UNITED MOUNTAIN DEFENSE'S PETITION FOR LEAVE TO INTERVENE

Pursuant to Tenn. Code Ann. § 4-5-310 and Tenn. Comp. R. & Regs. 1360-4-1-.12, the Sierra Club, Statewide Organizing for Community eMpowerment, Tennessee Clean Water Network, and United Mountain Defense (collectively, "Environmental Intervenors") hereby petition for leave to intervene as parties in the above-captioned proceeding, which concerns the appeal of National Pollutant Discharge Elimination System ("NPDES") permit number TN0062961. In support of their position, Environmental Intervenors state:

1. The National Coal Corporation (“Petitioner”) operates the Jordan Ridge Refuse Area for disposal of coal wastes from its mining operations in Scott County, TN. Petitioner discharges water containing pollutants from Outfall 001 to Cross Creek, from Outfalls 002 & 003 to an unnamed tributary to the New River, and from Outfall 004 to a tributary of Old House Branch.

2. On March 25, 2009, the Tennessee Department of Environment and Conservation (“Respondent”) issued a public notice for the renewal of the NPDES permit for Jordan Ridge. At the request of United Mountain Defense (“UMD”), Respondent held a public hearing on July 16, 2009 regarding the permit renewal. Matt Landon and Sarah McManus, both members of UMD, testified at this formal hearing on the draft permit, calling for biological monitoring, stating that UMD had sampled water in the area of the Jordan Ridge discharge that contained elevated levels of selenium, and calling on Respondent to do more selenium sampling as part of the permitting process.

3. Respondent issued the final permit to Petitioner on September 28, 2009 (the “2009 Permit”). Unlike the permit it replaced, the 2009 Permit includes a limit—20 micrograms per liter ($\mu\text{g/L}$)—on total selenium at Outfall 003, requires a biological assessment to be conducted during the permit term, and requires monitoring during certain precipitation events. 2009 Permit at 2. These terms are particularly important to Environmental Petitioners because selenium bioaccumulates in aquatic systems and is toxic to fish and wildlife.

4. On October 23, 2009, Petitioner appealed the 2009 Permit. Petitioner challenged the selenium limit, the biological monitoring requirement, and the requirements for monitoring during certain precipitation events.¹

¹ Petitioner also appealed Part I.A.9.a. of the 2009 Permit. Environmental Intervenors agree with Petitioner that this provision appears to be a typographical error.

5. Nearly two years have passed since this appeal was filed, and neither Petitioner nor Respondent has taken any action to initiate discovery or set the permit for a hearing. Respondent had not referred this case to the Administrative Procedures Division until Environmental Intervenors requested it do so for the purpose of filing this petition.

6. During this time, Petitioner has reported five discharges of selenium from Outfall 003 that exceed Tennessee's chronic instream criterion of 5 µg/L, including two discharges that exceed the daily maximum criterion of 20 µg/L.

7. On June 9, 2011, Respondent issued a Notice of Violation regarding these selenium discharges. The Notice states the recent selenium samples document the reasonable potential to exceed instream water quality standards. This conclusion demonstrates the need for the permit to have a water quality-based effluent limit for selenium in the permit, yet the Notice also states that "[a]t present, selenium is not an effluent limitation for this outfall." Respondent thus appears to take the position that the 2009 Permit's selenium limit is not in effect due to Petitioner's appeal. *See* Tenn. Code Ann. § 4-5-320(b) (for activities of a continuing nature, "the existing license does not expire until the new application has been finally determined by the agency"). As a result, Respondent apparently will not enforce the 2009 Permit's numeric selenium limit until this permit appeal is resolved.

8. Intervention in an administrative hearing is governed by Tenn. Code Ann. § 4-5-310 and Tenn. Comp. R. & Regs. 1360-4-1-.12, not by Tenn. R. Civ. P. 24. *Wood v. Metropolitan Nashville & Davidson Cty. Gov't*, 196 S.W. 3d 152 (Tenn. Ct. App. 2005). Intervention should be granted based on the following factors:

- (a) Whether the petitioner claims an interest relating to the case and that he or she is so situated that the disposition of the case may as a practical matter impair or impede his ability to protect that interest;

- (b) Whether the petitioner's claim and the main case have a question of law or fact in common;
- (c) Whether prospective intervenor interests are adequately represented;
- (d) Whether admittance of a new party will render the hearing unmanageable or interfere with the interests of justice and the orderly and prompt conduct of the proceedings.

Tenn. Comp. R. & Regs. 1360-4-1-.12.

9. Environmental Intervenors all have an interest in protecting water quality from discharges related to coal mining:

a. The Sierra Club is a nonprofit corporation incorporated in California, with more than 1.3 million members and supporters nationwide and almost 6,500 members who reside in Tennessee and belong to its Tennessee 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 Tennessee.

b. Statewide Organizing for Community eMpowerment, Inc. ("SOCM") is a Tennessee nonprofit corporation with more than two thousand members working for environmental, social, and economic justice. SOCM grew out of the coalfields in East Tennessee and is dedicated to giving its members a voice in the quality of life in their communities.

c. Tennessee Clean Water Network ("TCWN") is a Tennessee nonprofit corporation headquartered in Knox County. TCWN is a membership organization that organizes Tennesseans to claim their right to clean water and healthy communities by fostering civic engagement, building coalitions and advancing water policy for a sustainable future.

d. United Mountain Defense is a Tennessee nonprofit corporation dedicated to protecting Tennessee's watersheds, air, mountains and people. UMD is a volunteer-driven organization focused on the issue of mountaintop removal coal mining in Tennessee. UMD conducts activities in three principle areas: scientific monitoring and data collection, community organizing, and data collection and analysis from federal and state agencies.

10. Environmental Intervenors have members who live and/or recreate in the area and who suffer injuries to their aesthetic, recreational, environmental, economic, and/or procedural interests as a result of Petitioner's ongoing discharges of selenium from the Jordan Ridge Refuse Area, and Respondent's failure to timely resolve the appeal by defending the selenium limits in the 2009 Permit. For example, SOCM member Gary Ward has lived at 9020 Stoney Fork Road, Huntsville, TN 37756 for approximately 12 years. His property includes one half mile of riverfront on the New River near the Jordan Ridge discharge. He enjoys viewing the wildlife that use the river and his dogs swim in the river almost daily. Environmental Intervenors seek the prompt resolution of this contested case so Petitioner will be required to comply with the new, more stringent limits in the 2009 Permit as soon as possible to better protect water quality.

11. Environmental Intervenors seek to address precisely the same questions of law and fact raised in Petitioner's appeal.

12. Respondent's failure to act on this contested case in the nearly two years since the appeal was filed demonstrates that Respondent does not adequately represent the interests of Environmental Intervenors.

13. Granting intervention would promote the orderly and prompt resolution of this matter. If intervention is granted, Environmental Intervenors would seek to work with the other parties to promptly schedule any necessary discovery and to set the matter for a hearing in a timely

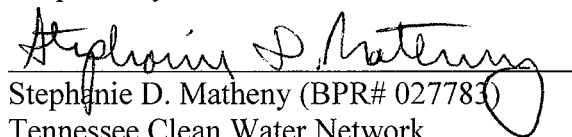
manner. Environmental Intervenors would also combine their participation in the contested case as contemplated by Tenn. Code Ann. § 4-5-310(c)(3).

14. Environmental Intervenors have consulted with counsel for Petitioner and Respondent about their position on this petition. Counsel for Respondent stated that Respondent does not oppose this petition. Counsel for Petitioner did not indicate whether Petitioner would oppose this petition.

For the foregoing reasons, Environmental Intervenors' petition for leave to intervene should be granted.

Date: August 16, 2011

Respectfully Submitted,



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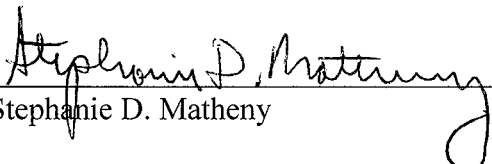
*Counsel for Petitioners Sierra Club, Statewide Organizing
for Community eMpowerment, Tennessee Clean Water
Network, and United Mountain Defense*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on August 16, 2011 by mailing a copy thereof by First Class Mail to:

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