

Black Warrior RIVERKEEPER®
712 37th Street South
Birmingham, AL 35222
Tel: (205) 458-0095
Fax: (205) 458-0094
edillard@blackwarriorriver.org
www.BlackWarriorRiver.org



August 25, 2010

Dr. Randall Johnson, Director
Alabama Surface Mining Commission
P. O. Box 2390
Jasper, AL 35502-2390

**Re: Poplar Springs Mine
ASMC Permit Renewal Application P-3873**

Dear Dr. Johnson:

Thank you for the opportunity to provide public comments with regard to a proposed permit renewal for National Coal of Alabama to surface mine coal at Poplar Springs Mine (ASMC Permit P-3873). We are writing to provide comments on behalf of Black Warrior Riverkeeper, a non-profit organization dedicated to protecting and restoring the Black Warrior River and its tributaries. We are concerned with the proposal to renew the surface coal mining permit for the Poplar Springs Mine because both the operator and this specific mine have an extremely poor environmental compliance record. The Poplar Springs Mine would potentially discharge wastewater to the following tributaries and creeks in the Black Warrior River watershed: Black Creek and unnamed tributaries of Black Creek, which flow into Clear Creek, a tributary of the Sipsey Fork of the Black Warrior River; Indian Creek, unnamed tributaries of Indian Creek, an unnamed tributary of Water Branch, Little Blackwater Creek, unnamed tributaries of Little Blackwater Creek, Bunkum Creek, and unnamed tributaries of Bunkum Creek, all of which flow into Blackwater Creek, a tributary of the Mulberry Fork of the Black Warrior River. These discharges will severely harm the water quality of the Sipsey and Mulberry Forks of the Black Warrior River.

This anticipated harm is not theoretical. The streams threatened by Poplar Springs Mine provide extraordinary recreational opportunities for swimmers, paddlers and fisherman. For example, the Episcopal Diocese of Alabama's beloved Camp McDowell is located downstream on Clear Creek and hosts fishing, hiking, camping and (seasonal) swimming for its many users. The Boy Scouts have an outpost on Blackwater Creek where scouts canoe, fish and swim. These are but two of the many groups and organizations, not to mention individuals, who use and enjoy these streams for much of the year.

At the outset, we would like to note National Coal's past compliance record at Poplar Springs Mine. *In 2008-2009 alone, National Coal compiled an astounding 1,747 NPDES permit violations at Poplar Springs Mine.* (See Exhibit A, National Coal Permit Violations 2008-09). Moreover, a review

of ADEM's "eFile" site demonstrates that those chronic permit violations continue through the first half of 2010.

On January 25, 2010, National Coal filed an NPDES Permit Noncompliance Report for Poplar Springs which notes five permit violations for Total Suspended Solids ("TSS"). On February 5, 2010, National Coal filed another Noncompliance Report for the facility, identifying one permit violation (TSS). On February 9, 2010, National Coal filed another Noncompliance Report noting two permit violations (TSS and Fe). On February 26, 2010, National Coal filed a Noncompliance Report detailing two more permit violations (TSS and Fe). On March 12, 2010, National Coal filed a Noncompliance Report for one violation (pH). On April 27, 2010, National Coal filed a Noncompliance Report identifying two violations (TSS and Fe). On May 14, 2010, National Coal filed a Noncompliance Report for two more violations (TSS and Fe). Notably, these violations are from Noncompliance Reports and only report daily permit violations. These violations will certainly result in monthly violations as well, exponentially increasing the number of violation-days accounted for on the Noncompliance Reports. *There are no 2010 discharge monitoring reports ("DMRs") for Poplar Springs Mine currently available on ADEM "eFile."* Why is this operator failing to file required DMRs? If past is prologue, you can rest assured that these missing DMRs will yield even more permit violations at Poplar Springs Mine.

While the ASMC may believe (mistakenly) that the NPDES violations fall outside of the Commission's jurisdiction, the volume and consistency of these violations indicate problems with either the design or the construction of the mine's drainage structures and/or surface impoundments, which fall squarely under the ASMC's purview. Prior to making a decision on the reissuance of the surface mining permit the ASMC can address these problems in one of two possible ways.

First, the ASMC must reevaluate the pond designs and analysis submitted with the initial permit application in order to ensure that the ponds have been designed properly to treat the mining wastewater. If the ASMC determines that these initial pond designs were insufficient, then the permit should not have been issued in the first place and therefore cannot be reissued. Second, if the pond designs are determined to have been sufficient to adequately treat the wastewater and avoid NPDES violations, then it is only logical to assume that the ponds have not actually been built in accordance with the plans provided to the ASMC. If this is the case, the ASMC must inspect the actual pond structures on-site at the mine to determine whether or not they have been built in accordance with the design specifications. If the ponds do not meet the design specifications, then ASMC must rule that the mine is in significant violation of its initial permit, deny the application for reissuance, and demand immediate reclamation of the ongoing mining operations. In any event, the ASMC should not consider permitting the mine unless and until these critical, ongoing compliance issues have been evaluated and fixed.

Sadly, National Coal's poor oversight of Poplar Springs Mine is the rule of how the company operates in the state, not the exception. A compliance evaluation of National Coal's other Alabama

mines conducted through ADEM's "eFile" system indicates a pervasive pattern of permit violations by the company. (See Exhibit A, National Coal Permit Violations 2008-09). Hickory Grove Mine (Winston County) (AL0052787); Davis Creek Mine (Tuscaloosa County) (AL0077127); Crescent Valley Mine (Walker County) (AL0078751); L. Massey Mine (Winston County) (AL0071421); Hickory Grove North Mine (Winston County) (AL0074934); and L. Massey West Mine (Marion County) (0075850) all document consistent water quality violations for total suspended solids and iron (and periodically for pH) in their DMRs. The Hickory Grove Mine enforcement file contains at least *thirteen* NPDES Permit Noncompliance Reports for the last twelve months. Davis Creek has at least *two* Noncompliance Reports during the same period and Crescent Valley has *seven*. L. Massey has *three*; Hickory Grove North, *ten*; and L. Massey West a total of *thirteen* Noncompliance Reports during the last twelve months. *In sum, National Coal has admitted to a continuing pattern of significant violations at all of their active mines in Alabama. Under these circumstances, National Coal should be issued a cessation order under Ala. Admin. Code § 880-X-11C-.02 "for causing . . . significant, imminent environmental harm to . . . water resources," rather than be handed another ASMC permit to continue its slipshod operations.*

Every time National Coal discharges pollutants in excess of permit limits it violates both the FWPCA and the AWPCA, see Ala. Admin. Code § 335-6-6-.12(a). Recently, ADEM took long overdue enforcement action against National Coal to address these multiple violations of law; however, the negligible penalties imposed in no way reflect the true harm being done by National Coal to Alabama's water resources nor the significant economic benefits the operator reaps from noncompliance. In a Consent Order dated August 4, 2010 ADEM cited National Coal for 545 instances of discharging pollutants in violation of their permit limits at its various mines in Alabama.¹ ADEM also disciplined National Coal for failing to submit certain required monitoring results and for failing to submit a timely permit renewal application at one of its mines. Finally, National Coal was specifically cited and fined for failing to provide adequate containment for petroleum products at Poplar Springs.²

In assessing a total penalty of \$87,200.00, ADEM noted that a number of the violations were "nontechnical" and "easily avoidable." As a part of the order, National Coal is required (finally) to submit an Engineering Report containing a Compliance Plan that at a minimum, will address the need for changes in the maintenance and operating procedures at its Alabama mines. Moreover, National Coal must modify its existing treatment works and address the needs for new or additional treatment

¹ The discrepancy in the number of violations calculated by Black Warrior Riverkeeper and ADEM is explained as follows. Black Warrior Riverkeeper calculates permit violations according to federal case law interpreting the Clean Water Act, 33 U.S.C. § 1319. Under prevailing law, violations of monthly average permit limitations are counted as 30 or 31 days of violation, rather than one day of violation. *See, e.g., Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990).* Inexplicably, ADEM counts the violation of monthly permit limitations as just one violation.

² Significantly, this violation was noted during an announced, not a surprise, inspection.

works at all of its mines. It is important to point out that the compliance evaluation that led to the Consent Order came not entirely at ADEM's own initiative but rather was the result of requests made and information developed by the Smith Lake Environmental Preservation Committee and Black Warrior Riverkeeper during the ASMC permit process for National Coal's Brushy Pond Mine.³

Two of the dysfunctional mines addressed by the Consent Order, Hickory Grove (Winston Co.) and Hickory Grove North (Winston Co.), are in the Sipsey Fork subwatershed of the Black Warrior River just like Poplar Springs. The Sipsey Fork is Alabama's only federally designated Wild and Scenic River. Its headwaters originate in the 24,922-acre Sipsey Wilderness within Bankhead National Forest. The Sipsey Wilderness was the first wilderness area created east of the Mississippi River, thus starting the Eastern wilderness movement. It remains the largest wilderness area east of the Mississippi. Each of these three mines borders the Bankhead National Forest.

The Crescent Valley Mine is on the Mulberry Fork of the Black Warrior River; the Davis Mine is on Davis Creek along Holt Lake in the upper Black Warrior River watershed. With around 95 active coal mines in the Black Warrior River watershed, coal mining is one of the biggest threats to water quality at this time. The cumulative effect of these numerous noncompliant mines is a threat not only to general water quality, but also to wildlife habitat, recreational uses and drinking water. The Black Warrior River and its tributaries are a major source of drinking water for many cities including Jasper, Cullman, Oneonta, Birmingham, and Tuscaloosa.

Finally, for additional technical and substantive reasons, we believe that the permit renewal application is fatally deficient on its face and should be denied. In Part I.D.7 of the application, National Coal is required to provide NPDES permit information. Not only is an NPDES permit a requirement for the mine, that permit information provides a valuable way for the public to gather and review information about the mine and its compliance history. Instead of providing the correct NPDES permit number (AL0077348), National Coal substitutes another NPDES permit number (AL0075850) which is actually for L. Massey West Mine in Marion County. The submission of the wrong NPDES permit number by National Coal is no minor clerical error; without that critical information, potentially affected members of the public are denied a meaningful opportunity to review important information relevant to the permitting process. If you access ADEM's "eFile" system without the correct NPDES permit number, enter "Poplar Springs" in the "facility" line to search for information about the NPDES permit, no documents are returned. That could lead affected members of the public to mistakenly believe that the mine has no compliance file or no violations. If the comment period is supposed to allow members of the public a meaningful opportunity to educate themselves and weigh in on the permit renewal, the failure to include a valid NPDES permit number is fatal to the fairness of the process.

Similarly, National Coal is required to get approval from the responsible government entity if their mining activities will cause a disturbance within 100 feet of public road or right of way or cause a

³ That permit was denied by the ASMC on June 23, 2010 for "numerous deficiencies" in the application.

public road to be relocated. Yet there is no supporting approval or authorization from ALDOT in the application file “for the deadhead crossing Alabama 118” and the applicant states that the approval “will be submitted later.” National Coal should be required to provide a complete permit application *before* review by the public or a decision by the ASMC. However, the comment period is closing today yet that required application information is not part of the public permit file.

National Coal still has not obtained the necessary legal rights to conduct surface mining activities on the vast majority of the land proposed under this permit. According to Section I.C.1 of the permit application, National Coal of Alabama still has not obtained the Rights of Entry necessary to conduct surface mining activities for 36 of the 39 parcels of land described for the proposed mine. National Coal describes its Right of Entry as “Lease Pending” for these 36 parcels, meaning that actual leases for these portions of the proposed mine presumably have not yet been signed. What assurance does ASMC have that these property owners actually plan to lease their property to National Coal? It is not sufficient for National Coal to claim that they have leases pending for the proposed mine, with no supporting information. If they are unable to obtain the rights to mine the property, the permit will be rendered moot, meaning that the ASMC will have wasted its time evaluating the rest of the application. Confirmation of the Rights of Entry should be a bare minimum requirement for submitting a surface mining application. As such, ASMC must deny the reissuance until National Coal can confirm that they actually have the legal right to perform surface mining activities in the area described by the application.

Ordinarily, “a valid permit, issued pursuant to an approved regulatory program, shall carry with it the right of successive renewal, within the approved boundaries of the existing permit.” Al. Admin. Code r. 880-X-.07. However, the circumstances presented by National Coal in its Poplar Springs permit renewal application are anything but ordinary. National Coal has consistently failed to meet its environmental compliance responsibilities. With the large number of permit violations noted at Poplar Springs, the “terms and conditions of the existing permit are not being satisfactorily met,” Al. Admin. Code r. 880-X-8M-.07(a)(1). As the facts recited in this letter amply demonstrate, the “present surface coal mining and reclamation operations are not in compliance with the environmental protection standards of the Act and the regulatory program,” Admin. Code r. 880-X-8M-.07(a)(2). Accordingly, National Coal’s permit renewal application to continue operations at Poplar Springs Mine should be DENIED.

For the river,



Nelson Brooke
Riverkeeper



John Kinney
Enforcement Coordinator



Eva Dillard
Staff Attorney

cc: Sherry Wilson, Director
Birmingham Field Office
Office of Surface Mining Reclamation and Enforcement

James D. Giattina, Director
Water Protection Division
EPA Region 4

Johnson, Randall

From: DebbieCBerry@aol.com
Sent: Thursday, August 26, 2010 12:30 PM
To: Johnson, Randall
Subject: Poplar Springs permit renewal P 3873

Dr. Randall Johnson, ASMC

I have been following the ASMC web site for info on National Coal of AL and others discharging to the Smith Lake watershed and noticed that Poplar Springs has applied for a renewal to continue their non compliant operations at this mine. The web site lists Marion County but the permit P-3873 public notice says Walker and Winston County.

Although misleading on the web site, I assume that the permit public notice is correct showing Walker and Winston counties. As you know Poplar Springs, and other National Coal of AL mines, have had numerous water quality violations that they either did not or could not correct over the last two years. As you know from my comments on the Brushy Pond permit application, this company appears to be a shoddy operator and I would like to see ASMC pull their license to mine in Alabama and require that they stop mining in Alabama, however, at a minimum I look forward to ASMC taking the lead in bringing National Coal of AL and Poplar Springs into compliance. Since ADEM appears unwilling or unable to do so with their lack of oversight and wimpy penalties, ASMC is our last real hope to stop the ongoing damage.

I have great confidence that you will thoroughly review and consider all comments on this permit renewal and since the comments from the Black Warrior River Keeper covered the pertinent facts I will not take up your time repeating their concerns, however, as you know I too am very concerned about the damage this company continues to spread around our state in general and to Smith Lake specifically.

Thanks for the opportunity to share my thoughts and obviously I do not believe that any permits or permit renewals should be issued to this company at least until they can comply with the rules established by ASMC for all of their mines.

FYI---I have heard that a lawsuit has been filed against Poplar Springs (National Coal) and its blasting company for off site impacts; I believe the case was filed in Winston County. If National Coal of AL says they do not any lawsuits pending that is probably yet another incorrect statement.

Sincerely,

Deb Berry, President
Smith Lake Environmental Preservation Committee
860 Alford Avenue
Hoover, AL 35226
205 823-0015
cell 205 915-8830