

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HAROLD D. WARD, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection,

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

FILED
Cathy S. Gatson, Clerk
Kanawha County Court
MAR 26 2020

CIVIL ACTION NO. 20-C-282
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COMPLAINT

HAROLD D. WARD, solely in his capacity as the Director of the Division of Mining and Reclamation and Deputy Secretary of the West Virginia Department of Environmental Protection (“DEP”), avers as follows:

INTRODUCTION

1. This is a civil action brought by DEP, against Defendant ERP Environmental Fund, Inc. (“ERP”) pursuant to Section 17 of the Surface Coal Mining and Reclamation Act, W. VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22, to compel compliance with, and enjoin continuing and ongoing violations of, both Acts on ERP-operated mine sites throughout the State.

2. Upon its formation in 2015, ERP acquired over 100 permits relating to dozens of mining sites and other property of Patriot Coal Corporation out of Patriot Coal’s Chapter 11 bankruptcy case in or about November 2015.

3. After its acquisition of the former Patriot Coal permits and mining sites, ERP engaged in active operation and reclamation of the acquired sites under a Reclamation

Agreement dated February 17, 2016 (as the same may have been amended in writing executed in accordance therewith prior hereto) among ERP Environmental Fund, Inc., Virginia Conservation Legacy Fund, Inc., and DEP.

4. From its inception, however, ERP operated on a shoe-string budget and with an under-experienced and under-manned staff that left it unable to comply, fully, with its obligations under the Reclamation Agreement and in almost continuous and ongoing violation of its permits, the Surface Coal Mining and Reclamation Act, the Water Pollution Control Act, and the applicable rules promulgated thereunder.

5. ERP recently advised DEP that it has no more available funds or liquid assets needed for continuing operations, laid off all of its employees, and has ceased operation.

6. ERP's cessation of operations will not only lead to an acceleration in its violations of applicable law but has also left dozens of former mining sites in various stages of land and water disturbance and incomplete reclamation that now threatens imminent and identifiable harm to the public health and safety on many of its mine sites.

7. This action seeks to compel ERP to comply with its legal obligations to reclaim and treat polluted water at the mine sites it effectively abandoned.

8. In furtherance thereof, DEP seeks

- a. A permanent injunction requiring ERP to abate existing violations, comply with the mining and water pollution laws in the future, and devote all its resources to reclaiming and treating polluted water at its former mine sites; and
- b. The appointment of a special receiver to take control of ERP's property and assets and operate its mine sites pursuant to and in accordance with

West Virginia law.

9. To address the imminent threats to the public health and safety, DEP also seeks by separate motion the immediate appointment of a receiver to take control of and temporary and preliminary injunctive relief essential to ensuring ERP's immediate compliance with the law.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action pursuant to Section 17 of the Surface Coal Mining and Reclamation Act, W. VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22, each of which authorize the director to bring a civil action against any person who violates the provisions of the Surface Coal Mining and Reclamation Act or the Water Pollution Control Act.

11. Venue is proper in the Circuit Court of Kanawha County, West Virginia, pursuant to Section 17 of the Surface Coal Mining and Reclamation Act, W. VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22.

PARTIES

12. Harold D. Ward is the Deputy Secretary of the West Virginia Department of Environmental Protection and the Director of DEP's Division of Mining and Reclamation.

13. The West Virginia Department of Environmental Protection is the State agency responsible for administering and enforcing the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act and the rules promulgated thereunder.

14. ERP Environmental Fund, Inc. is a corporation organized under the laws of the State of West Virginia and holds more than 100 DEP-issued mining and water pollution permits and is the operator of numerous former mining sites throughout the State of West Virginia.

APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS

15. Given the undeniable threat of imminent and identifiable harm to the public health and safety from unregulated coal mining, the coal mining industry operates in a highly regulated environment both at the federal and state level.

16. The State of West Virginia is one of the states that has achieved primacy under the federal Surface Mining Control and Reclamation and Clean Water Acts and, with the approval of the federal government, has assumed the primary role in regulating surface coal mining and water pollution within the State of West Virginia.

The West Virginia Surface Coal Mining and Reclamation Act

17. Section 8 of the West Virginia Surface Coal Mining and Reclamation Act makes it unlawful for any person to engage in surface mining operations except in compliance with a permit issued by DEP. W. VA. CODE § 22-3-8.

18. Section 13 of the Surface Coal Mining and Reclamation Act establishes general environmental protection performance standards for surface mining operations. W. VA. CODE § 22-3-13.

19. Section 4 of the Surface Coal Mining and Reclamation Act authorizes the director broadly to enforce the Act and issue orders in connection therewith. W. VA. CODE § 22-3-4.

20. Whenever any person violates or fails or refuses to comply with any order of the director, the terms or conditions of any permit, or any provision of the Surface Coal Mining and Reclamation Act or the rules promulgated pursuant thereto, Section 17 of the Act authorizes the director to institute in this Court a civil action for relief, including the issuance of a permanent or temporary injunction, restraining order or any other appropriate order, to compel compliance with and enjoin violations, failures, or refusals thereof. W. VA. CODE § 22-3-17(j).

The West Virginia Water Pollution Control Act

21. Section 402(b) of the Federal Clean Water Act, 33 U.S.C. § 1342(b), provides that the United States Environmental Protection Agency may authorize a State to implement and administer an approved National Pollutant Discharge Elimination System (“NPDES”) program to regulate the discharges of pollutants into navigable waters within the State’s jurisdiction.

22. At all relevant times, EPA has authorized the State of West Virginia to administer a NPDES program under the West Virginia Pollution Control Act. 47 Fed. Reg. 22,373-01 (May 24, 1982).

23. Pursuant to the West Virginia Pollution Control Act, DEP is the State regulatory agency that administers the NPDES permitting program in West Virginia. W. VA. CODE §§ 22-1-5, 22-1-7, and 22-11-4.

24. Section 22 of the West Virginia Pollution Control Act authorizes the director to apply to the circuit courts of the State for an injunction to compel compliance with and enjoin violations of the Act, the rules of the director issued thereunder, or the terms and conditions of any NPDES permit or the effluent limitations thereunder. W. VA. CODE § 22-11-22.

GENERAL ALLEGATIONS

25. Pursuant to the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act, DEP issued to the Defendant over 100 mining and NPDES permits (the “Permits”).

26. At all relevant times since November 2015, the Defendant has operated, and managed, directed, and controlled environmental compliance at, its mining sites under the Permits.

27. Prior to the date hereof, DEP issued to the Defendant 160 notices of violations,

118 failure to abate cessation orders, and 41 orders to show cause relating the Defendant's failure to comply with the conditions of its Permits and the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act.

28. As of the date hereof, the Defendant has failed to abate any of the subject violations and cessation orders.

29. Prior hereto, the Defendant acknowledged and agreed that it is in material and ongoing violation of the terms and conditions of its Permits.

30. Prior hereto, the Defendant has represented that it has no available funds or other liquid assets and no management or employees with which to continue to operate its mine sites or abate those violations.

31. At the same time, the Defendant has represented that it has material real and personal property and other assets not needed in the operation of its permitted mining sites that, if sold and liquidated, would yield significant proceeds that, if made available, could provide funds for abating existing violations of the law and reclaiming and treating polluted water at its mine sites.

COUNT I
INJUNCTIVE RELIEF AGAINST ERP

32. ERP has violated and continues to violate the terms and provisions of the Permits, various orders of DEP, and the Surface Coal Mining and Reclamation Act and Water Pollution Control Act and the rules promulgated thereunder.

33. Injunctive action is both necessary and appropriate under the Surface Coal Mining and Reclamation Act and Water Pollution Control Act and the rules promulgated thereunder to address the Defendant's continuing and ongoing violations of the terms and conditions of its mining and NPDES Permits, the Surface Coal Mining and Reclamation Act and Water Pollution

Control Act and the rules promulgated thereunder.

34. Civil penalties and other legal remedies have proven and will prove inadequate inasmuch as, among other things, the Defendant does not have sufficient liquid assets or resources to pay for or perform reclamation and water treatment required under the Permits and the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act.

35. ERP's continuing and ongoing violations and its failure to immediately reclaim and treat polluted water at its permitted sites threatens the very kind of irreparable harm to the public health and safety of the citizens and residents of the State of West Virginia that the legislature sought to address in enacting the Surface Coal Mining and Reclamation Act and Water Pollution Control Act.

36. The harm to public health and safety plainly outweighs any harm to ERP in requiring that it abate continuing and ongoing violations of, and otherwise comply with, its obligations under the Surface Coal Mining and Reclamation Act and Water Pollution Control Act.

37. Inasmuch as ERP is in continuing and ongoing violation of laws designed to protect the public health and safety, the equities weigh heavily in favor of granting injunctive relief.

COUNT II
APPOINTMENT OF RECEIVER

38. Given its precarious financial condition, the Defendant has proven unable to abate its existing violations, comply with its legal obligations in the future, or address the threats to the public health and safety that its unreclaimed mine sites and untreated water pollution pose, and now, with no liquid assets available and having laid off all its management and employees, the Defendant has no ability to do so.

39. The Defendant does, however, own and control valuable property and assets that are either necessary to comply with the law or available for sale and liquidation to fund its operations to comply.

40. But the Defendant has proven unable over the past four years to secure or sell and liquidate those assets, with the effect that, for example, the Defendant has lost or had stolen equipment needed in its operations and have been unable to generate monies needed to fund its operations.

41. In addition, the Defendant has engaged in transactions, including the transfer of its property to insider and related third parties and the granting of liens to secure the obligations of insider and related third parties, that have had the effect of reducing the assets available for the Defendant's use in operating its business and complying with the law.

42. As a result of these actions and for other reasons, DEP lost faith in the management of the Defendant and its ability, without immediate and effective financial and operational supervision, to properly manage its properties, assets, operations and affairs and operate its business in compliance with its obligations under the Permits and applicable law.

43. It, thus, appears that the only available means to ensure ERP's compliance with its legal obligations and address its continuing and ongoing violations and the threat to the public health and safety is the appointment of a receiver to take control of the Defendant's properties, assets, and operations to manage the same in compliance with the law.

44. DEP understands that the surety company that has issued more than \$115 million in surety bonds to back ERP's obligations under its West Virginia mining Permits is prepared to provide the necessary funding to enable ERP to bring its operations into compliance with the Permits and the law, but only if a receiver is appointed to take control and assess of ERP's

properties, assets, and operations and develop a feasible plan therefor.

45. Civil penalties and other legal and equitable remedies, including injunctive relief, are inadequate inasmuch as the Defendant lacks the financial, operational, and managerial ability to abate the violations and perform its obligations under the Permits.

46. The State and its citizens and residents will suffer immediate and irreparable harm unless the Defendant's properties, assets, and operations are placed in the hands of a well-funded receiver.

47. The prompt and effective sale and liquidation of the Defendant's properties and assets is necessary to ensure funding to comply with the law and address the ongoing violations and threats posed by the Defendant's mine sites and operations.

48. Given the Defendant's limited funds, properties and assets available to comply with the law and the liens and interests of DEP and other parties therein, this suit involves the funds and property of the Defendant and the proper allocation thereof to ensure the Defendant's compliance with its legal obligations under the Permits and applicable law.

49. There is, in addition and particularly in light of the Defendant's inability to secure or, for more than four years, sell and liquidate its available properties and assets and prior transfers and encumbering of its assets, a danger of loss or misappropriation of the properties and assets of the Defendant absent the appointment of a receiver.

50. Continuing the Defendant in the management of its properties, assets, and operations without sufficient funds available therefor would countenance its continuing violation of the law.

RELIEF REQUESTED

WHEREFORE, Plaintiff, the West Virginia Department of Environmental Protection,

respectfully prays that this Court:

1. Temporarily and permanently enjoin the Defendant from violating the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act, the rules promulgated thereunder, and any permit and order issued thereunder;

2. Order the Defendant to take all necessary steps to comply with the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act, the rules promulgated thereunder, and any permit and order issued thereunder;

3. Appoint a receiver to take control of the properties, assets, and operations of the Defendant, operate the Defendant's mining sites and water discharge outlets in compliance with the Permits and applicable law with funding provided by the Defendant's surety company, and sell and liquidate the Defendant's properties and assets not otherwise needed in connection with operations to provide additional funding to comply with the Permits and applicable law; and

4. Grant DEP such other and further relief as the Court may deem appropriate.

Dated: March 25, 2020

HAROLD D. WARD, Director, Division of Mining
and Reclamation, West Virginia Department of
Environmental Protection,

By Counsel



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