

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PEABODY ENERGY CORPORATION and
PEABODY HOLDING COMPANY, LLC,

Plaintiffs,

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CARRIE S. CAPERTON, CLERK
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. : 20-C-125

Bloom

v.

AUSTIN CAPERTON, SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant.

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to Rule 57, W.Va. R. Civ. P., and the West Virginia Uniform Declaratory Judgments Act, W.Va. Code § 55-13-1, et seq., Plaintiffs Peabody Energy Corporation and Peabody Holding Company, LLC (successor to Peabody Holding Company, Inc.) file this Verified Complaint for Declaratory and Injunctive Relief against the Respondent Austin Caperton in his official capacity as Secretary of the West Virginia Department of Environmental Protection (“DEP”) on the following grounds:

Introduction.

1. Plaintiff Peabody Energy Corporation (“PEC”) is a Delaware corporation with its principal place of business in St. Louis, Missouri.
2. Plaintiff Peabody Holding Company, LLC (“PHC”) is a Delaware limited liability company whose sole member is Peabody Investments Corp. Peabody Investments Corp. is a Delaware corporation with its principal place of business in St. Louis, Missouri.

SCANNED

3. The Defendant DEP is the state agency charged with administration and enforcement of various environmental statutes in West Virginia, including without limitation the West Virginia Water Pollution Control Act, W. Va. Code § 22-11-1, *et seq.* (“WPCA”). The WPCA served as one of the primary bases for DEP’s authorization by the U.S. Environmental Protection Agency to implement the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* (“CWA”) in West Virginia, including the National Pollutant Discharge Elimination System (“NPDES”) permitting program created under Section 402(b) of the CWA, 33 U.S.C. § 1342(b).

4. This action seeks a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgments Act, W.Va. Code § 55-13-1, *et seq.*, that the DEP is improperly and unlawfully seeking to impose liability upon the Plaintiffs through issuance and enforcement of an order under the WPCA dated June 25, 2018 (the “DEP Order”), when neither of the Plaintiffs is subject to personal jurisdiction in West Virginia under the long-arm statutes found at W.Va. Code § 56-3-33 and W.Va. Code § 31D-15-1501(d), or under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

5. The sole purpose of this action is to have this Court declare that Plaintiffs are not subject to personal jurisdiction in West Virginia and to restrain the DEP from enforcing the DEP Order against them. By filing this action, neither PEC nor PHC consents to personal jurisdiction in West Virginia for any other reason or purpose, and neither PEC nor PHC intends to waive any personal jurisdiction defense.

6. Following receipt of the DEP Order at their offices in St. Louis, Missouri, Plaintiffs advised the DEP that they are not subject to personal jurisdiction in West Virginia and should not have been named in the DEP Order.

7. Specifically, Plaintiffs informed the DEP that they do not satisfy any of the requirements for asserting personal jurisdiction over nonresidents as set forth in W.Va. Code § 56-3-33 and W.Va. Code § 31D-15-1501(d). The DEP did not dispute these factual representations and has never addressed Plaintiffs' position in this regard. Plaintiffs therefore asked that the DEP withdraw the DEP Order.

8. Without explanation, the DEP declined to withdraw the DEP Order.

9. Should the Plaintiffs fail to comply with the requirements of the DEP Order, the DEP intends to bring an enforcement action in circuit court against each of the Plaintiffs based on the DEP Order and the failure of each of them to comply with it.

10. Plaintiffs should not be forced to comply with the DEP Order because, *inter alia*, compliance with the DEP Order will improperly cause Plaintiffs to incur substantial costs in the near term and long-term liability for permitting and/or other environmental compliance costs.

11. Pursuant to W.Va. Code § 55-13-1, et seq., and Rule 57, W.Va. R. Civ. P., Plaintiffs therefore request entry of an order: (a) declaring that Plaintiffs are not subject to personal jurisdiction in West Virginia and the DEP Order may not be enforced against them; (b) declaring that the DEP was without authority to issue the DEP Order, which was void *ab initio* as to Plaintiffs because its issuance exceeded the DEP's power and authority under the WPCA; and (c) enjoining the DEP from seeking to enforce the DEP Order against Plaintiffs, or either of them, in any manner.

Jurisdiction and Venue.

12. This Court has jurisdiction over this action pursuant to W.Va. Code § 55-13-1, et seq. (the West Virginia Uniform Declaratory Judgments Act), and Rule 57, W.Va. R. Civ. P., because there is an actual justiciable controversy between the parties as to whether the Plaintiffs

are properly subject to personal jurisdiction in West Virginia for purposes of the DEP Order and whether the DEP has authority to enforce it against them. See Christian v. Sizemore, 383 S.E.2d 810, 813 (W. Va. 1989) (“one of the main purposes of the declaratory judgment [remedy]” is to “remove clouds from legal relations before they have become completed attacks or ‘disputes already ripened’”) (internal citations omitted); West Virginia Utility Contractors Ass’n. v. Laidley Field Athletic and Recreational Center Governing Bd., 260 S.E.2d 847, 850 (W.Va. 1979) (a justiciable controversy exists under the West Virginia Uniform Declaratory Judgments Act “when a legal right is claimed by one party and denied by another”) (internal citations omitted).

13. Venue is proper in the Circuit Court of Kanawha County, West Virginia, pursuant to W.Va. Code § 14-2-2(a)(1).

14. The Chief Executive of the Defendant DEP and the Attorney General of the State of West Virginia were provided with at least thirty (30) days’ advance written notice of the Plaintiffs’ intent to file this action, in compliance with W. Va. Code § 55-17-3(a)(1).

The DEP Order and Conditional EOB Appeal.

15. Plaintiffs are seeking to prohibit the DEP from enforcing the DEP Order, which was issued by Harold D. Ward, Director of the DEP’s Division of Mining and Reclamation, acting under authority delegated by the DEP Secretary. The DEP Order requires that Plaintiffs: (1) stop alleged unpermitted discharge of pollution into Rich Branch of Pond Fork of the Little Coal River, from a point source located at the elevation of the former Kopperston No. 2 Mine works, which mine was (according to the DEP Order) previously permitted by the DEP pursuant to DEP Mining Permit No. U-51-83 and WV/NPDES Permit Nos. WV0041122, WV0066699, and WV0066702

(the “Kopperston Discharge”); (2) take remedial or corrective actions as necessary to “address the effects of said discharge of pollution”; and (3) “apply forthwith” for a WV/NPDES permit for the Kopperston Discharge. *See* DEP Order (attached as Exhibit 1 and incorporated herein by reference), p. 2.¹

16. Compliance with the DEP Order would require that Plaintiffs incur substantial expense and liability in assuming control over and responsibility for the Kopperston Discharge, including without limitation the expense and liability associated with obtaining and maintaining compliance with a WV/NPDES permit for the Kopperston Discharge.

17. Expressly reserving their right to assert a defense of lack of personal jurisdiction (including the right to seek to have the DEP Order vacated on that basis), on January 3, 2019, the Plaintiffs filed a timely protective appeal of the DEP Order with the West Virginia Environmental Quality Board (“EQB”). *See* Notice of Appeal (attached as Exhibit 2 and incorporated herein by reference). Plaintiffs filed the EQB appeal for two reasons: (1) to afford the Plaintiffs and the DEP an opportunity to confer (without waiving Plaintiffs’ personal jurisdiction defenses) regarding the Plaintiffs’ position that the DEP did not have the authority to issue the DEP Order and does not have authority to seek to enforce that order due to the lack of personal jurisdiction over them; and (2) in the event they were unable to convince the DEP to withdraw the DEP Order and to obtain a timely determination regarding their personal jurisdiction defense, to avoid any potential waiver of Plaintiffs’ ability to challenge the merits of the DEP Order by not commencing an appeal within the mandatory thirty (30) day period established under the WPCA.

¹ The DEP Order also imposes these requirements on an entity referred to as “Pocahontas,” that is not otherwise identified. *See* DEP Order, p. 2.

18. Despite repeated efforts by Plaintiffs to persuade the DEP to rescind the DEP Order and/or agree that it cannot be enforced against them, the DEP has declined to do either. To the contrary, the DEP has indicated that if the DEP Order is upheld by the EQB and the DEP's authority to issue and enforce the DEP Order against Plaintiffs is upheld, the agency intends to enforce it against PEC, PHC, or both.

Count I:

The Plaintiffs Are Not Subject to Personal Jurisdiction in West Virginia.

19. Paragraphs 1 through 18 are re-alleged and incorporated herein by reference.

20. PEC and PHC are both considered to be citizens of Missouri and Delaware under basic personal jurisdiction principles. Neither is a citizen of West Virginia. *See Cent. West Va. Energy Co. v. Mountain State Carbon LLC*, 636 F.3d 101, 103 (4th Cir. 2011).

21. PEC has never:

- a. transacted business (including, without limitation, the sale of goods or services) in West Virginia;
- b. contracted to supply services or things in West Virginia;
- c. performed any service or sold any product in West Virginia;
- d. caused tortious injury by an act or omission in West Virginia;
- e. possessed, used or held an interest in real property in West Virginia; or
- f. entered into a contract to be performed, in whole or in part, in West Virginia.

As a result, PEC is not subject to personal jurisdiction under the West Virginia long-arm statutes at W.Va. Code § 56-3-33 or W.Va. Code § 31D-15-1501(d).

22. PHC has never:
- a. transacted business (including, without limitation, the sale of goods or services) in West Virginia;
 - b. contracted to supply services or things in West Virginia;
 - c. performed any service or sold any product in West Virginia;
 - d. caused tortious injury by an act or omission in West Virginia;
 - e. possessed, used or held an interest in real property in West Virginia; or
 - f. entered into a contract to be performed, in whole or in part, in West Virginia.

As a result, PHC is not subject to personal jurisdiction under the West Virginia long-arm statutes at W.Va. Code § 56-3-33 or W.Va. Code § 31D-15-1501(d).

23. Plaintiffs lack sufficient “minimum contacts” in West Virginia that would subject Plaintiffs to specific personal jurisdiction in this State under constitutional principles of due process for purposes of the DEP Order.

24. Although it is unnecessary to address it because Plaintiffs are not subject to jurisdiction under the West Virginia long-arm statutes, neither of the Plaintiffs’ affiliations with West Virginia are so “substantial, continuous and systematic as to render [it] essentially at home” in West Virginia and thereby allow assertion of jurisdiction over it in a manner that is consistent with federal due process. *See State ex. rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 310, 332 (W. Va. 2016).

Count II:

**Because Plaintiffs Are Not Subject to Personal Jurisdiction in West Virginia,
the DEP's Issuance and Intended Enforcement of the DEP Order
Exceeds Its Authority Under the WPCA.**

25. Paragraphs 1 through 24 are re-alleged and incorporated herein by reference.

26. Because the DEP is as an administrative agency, its powers are confined to those expressly granted by the Legislature:

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.

Francis O. Day Co. v. W. Va. Reclamation Bd. of Review, 424 S.E.2d 763, 764 (1992).

27. The WPCA applies only to waters located within the State of West Virginia (commonly referred to as "waters of the State"). W.Va. Code §§ 22-11-2, 22-11-3(23); 33 U.S.C. § 1342(b) (state NPDES permit program applies to discharges into waters within the jurisdiction of the state). *See also* W.Va. Code § 22-11-6 (a)(3) (referring to "West Virginia streams" that are subject to the WPCA).

28. Under W. Va. Code § 22-11-15, the statutory provision cited as the basis for the DEP Order, the DEP has authority to issue an order to any person who is causing the pollution of waters of the State, requiring that person to obtain a WV/NPDES permit for the discharge of a pollutant from a "point source" located within West Virginia. W. Va. Code § 22-11-8(b)(1); W.Va. C.S.R. § 47-10-3.1; Sierra Club v. Powellton Coal Co., LLC, 662 F.Supp.2d 514, 516 (S.D. W.Va. 2009).

29. A “point source” is defined to include “any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, [or] conduit...from which pollutants are or may be discharged.” W. Va. Code § 22-11-3.

30. In order to cause pollution to enter waters of the State from a point source located within West Virginia, a person must have a presence in West Virginia (e.g., as an owner of real property interests, operator of an industrial establishment, etc.). *See, e.g.,* W. Va. Code § 22-11-8(b) (describing types of industrial activities associated with point source discharges).

31. In order to be issued a WV/NPDES permit regulating the discharge of pollution to waters of the State from a point source, the person applying for such a permit must have a presence in West Virginia (e.g., as an owner of real property interests, operator of an industrial establishment, etc.). This is one reason why an application for a WV/NPDES permit must include a topographic map identifying the location of the industrial establishment within the State of West Virginia that is owned or operated by the applicant, and the latitude and longitude of all discharge outlets associated with that establishment. W.Va. C.S.R. § 47-10-4.4.a.6.

32. Any person who receives an order issued under W. Va. Code § 22-11-15 “may elect to cease operations of the establishment deemed to be the source of such discharge,” so long as that will stop the pollution. *Id.* *See also* W. Va. Code § 22-11-16 (when ordered to take remedial action, a person may cease operations but must forthwith apply for a WV/NPDES permit if “such ceasing does not stop the pollution”).

33. In order to operate an “establishment” subject to the WPCA (i.e., located within the State of West Virginia) and therefore be able to *cease* operation of such an establishment, a person must have a presence in West Virginia.

34. Because neither PEC nor PHC has ever had any presence in West Virginia, under the plain language of the WPCA, neither of the Plaintiffs is a “person” that may be subject to an order issued by the DEP under the authority of W. Va. Code § 22-11-15. See Liberty Mutual Ins. Co. v. Morrisey, 760 S.E.2d 863, 872 (W.Va. 2014); DeVane v. Kennedy, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) (“Where the language of a statutory provision is plain, its terms should be applied as written....”)

35. Because neither PEC nor PHC has ever conducted any operations in West Virginia, under the plain language of the WPCA neither of the Plaintiffs is a “person” that may be subject to an order issued by the DEP under the authority of W. Va. Code § 22-11-15. See Liberty Mutual Ins. Co.; DeVane (supra).

36. The DEP Order states that it was issued to PEC and PHC in each company’s capacity as an “owner” of Eastern Associated Coal Corporation, a separate entity that allegedly operated the Kopperston mine and polluted the waters of the State during the period from 1983 to 2004. See DEP Order, pp. 1-2.

37. However even assuming, *arguendo*, that PEC or PHC “owned” Eastern Associated Coal Corporation, neither the WPCA nor any implementing regulation authorizes the DEP to issue an order to an “owner” of a person who allegedly caused pollution of waters of the State. Therefore, even if it could be established that Eastern Associated Coal Corporation caused pollution to waters of the State (which Plaintiffs do not concede), the DEP exceeded its authority under W. Va. Code § 22-11-15 in issuing the DEP Order to PEC and PHC on the basis of their alleged ownership of Eastern Associated Coal Corporation.

38. Under W. Va. Code § 22-11-22, the DEP may compel compliance with an order issued pursuant to W. Va. Code § 22-11-15 by filing an action in circuit court, seeking injunctive relief against the recipient of the DEP's order.

39. The DEP may not, however, prosecute an action in circuit court against a person who is not subject to personal jurisdiction in West Virginia. State ex. rel. Ford Motor Co. v. McGraw, 788 S.E.2d 319, 326 (W.Va. 2016).

40. Accordingly, the DEP's authority to issue orders under W. Va. Code § 22-11-15 is limited to those persons who are subject to personal jurisdiction within this State. To hold otherwise would presume that the Legislature intended for the DEP to issue orders that it cannot enforce – which would be directly contrary to the well-established principle that statutes must be interpreted and applied so as to avoid absurd results. State ex rel. Frazier v. Meadows, 454 S.E.2d 65, 69 (W.Va. 1994). See also Sheena H. ex rel. Russell H. v. W. Va. Office of the Ins. Comm'r. No. 13-0875 (W. Va., 2015) (“it is always presumed that the legislature will not enact a meaningless or useless statute”).

41. Since neither PEC nor PHC is subject to personal jurisdiction in West Virginia, the DEP exceeded its authority in issuing the DEP Order to them under W. Va. Code § 22-11-15.

42. Since neither PEC nor PHC is subject to personal jurisdiction in West Virginia, the DEP would be exceeding its authority in enforcing the DEP Order against them under W. Va. Code § 22-11-15.

Standards for Issuance of Injunctive Relief.

43. By its express terms the DEP Order was effective upon receipt. Therefore, in the absence of a Stay, Plaintiffs would have been required to immediately satisfy all of the obligations the DEP Order imposed upon them. *See* DEP Order, p. 4.

44. Recognizing that the Environmental Quality Board (“EQB”) does not have authority to decide the question, Plaintiffs filed an unopposed motion with the EQB to continue the hearing of the EQB appeal and for a stay of the DEP Order, pending a final determination regarding whether Plaintiffs are subject to personal jurisdiction in West Virginia. On August 27, 2019, the EQB granted that motion and entered a Stay of the DEP Order (the “EQB Stay”) pending such a determination.

45. Assuming the EQB Stay remains effective and is observed by all persons, it eliminates the need for preliminary injunctive relief against enforcement of the DEP Order pending issuance of a final order in this action. However, entry of a permanent injunction against enforcement of the DEP Order will still be required in order to effectuate the declaratory judgment Plaintiffs seek by this action. *See* Stuart v. Lake Washington Realty, 92 S.E.2d 891, 906 (W. Va. 1956) (plaintiff was entitled to permanent injunction based on declaratory ruling in her favor, as the “effective means” of granting the relief to which she was entitled).

46. Even assuming, *arguendo*, that the traditional test for issuance of preliminary injunctive relief applies here, Plaintiffs satisfy each of those requirements. In West Virginia, entitlement to preliminary injunctive relief is determined through application of a “balancing of hardship test,” including consideration of the following factors: “(1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.”

Markwest Liberty Midstream & Res. v. Nutt 2018 WL 527209 (W.Va., Jan. 24, 2018) (citing Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 393 S.E.2d 653, 662 (W.Va. 1990) (other internal citations omitted)).

47. As to the first factor, Plaintiffs will unquestionably suffer irreparable harm in the absence of an order enjoining the DEP from seeking to enforce the DEP Order against them. If Plaintiffs are forced to proceed in defending against the DEP Order, they will incur substantial harm in the form of, *inter alia*, the costs of participating in the EQB appeal (and possibly, subsequent appeals) of the DEP Order, and the costs of defending against a DEP-initiated circuit court proceeding to enforce the DEP Order. At the same time, Plaintiffs would be forced to incur the costs of obtaining a WV/NPDES permit for the Kopperston Discharge and the costs of complying with the requirements of such a permit, including at a minimum the expenses associated with water sampling, analysis and reporting, and possibly the cost of providing water treatment so that discharges under that permit comply with applicable effluent limitations. As a result of sovereign immunity, the Plaintiffs would be unable to recover *any* of those costs from the DEP or the State of West Virginia if it is later determined that the DEP was without authority to issue or enforce the DEP Order against them. This, in and of itself, constitutes irreparable harm. *See Hughes Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir.1994).

48. As to the second factor, DEP cannot suffer harm from issuance of an order enjoining the agency from seeking to enforce an administrative order that it had no authority to issue. To the contrary, these are not the kind of orders that the DEP should wish to issue or seek to enforce. *See, e.g., Arnold v. Bd. of Educ. of Capon Dist.*, 156 S.E. 835, 837 (W.Va. 1931) (enjoining collection of an illegal tax). In addition, by not opposing entry of the EQB Stay the DEP

conceded that it will suffer no harm from being enjoined from enforcing the DEP Order pending this Court's determination of this action.

49. As to the third factor, for the reasons set forth in Count I, Plaintiffs have plainly established that they are entitled to relief on the merits of their declaratory judgment request. As established by the verified factual representations set forth in this Complaint, Plaintiffs do not fall within any of the categories that allow assertion of personal jurisdiction over a nonresident, as set forth in W.Va. Code § 56-3-33 and W.Va. Code § 31D-15-1501(d). In addition, they cannot be subject to personal jurisdiction in West Virginia without violating the Due Process Clause of the Fourteenth Amendment. Ford Motor Co., 788 S.E.2d at 332.

50. Finally, issuance of a permanent injunction in Plaintiffs' favor is in the public interest. Administrative agencies are creatures of statute and have no common law powers. Francis O. Day Co., 424 S.E.2d at 764. For a variety of reasons, the public has an interest in ensuring that all State agencies (including the DEP) exercise only such powers as have been expressly granted to them by the Legislature. To issue orders to persons who are not subject to personal jurisdiction in this State and that cannot be enforced represents a waste of scarce governmental resources that could be more effectively applied to direct abatement of any ongoing uncontrolled pollution and/or identification of responsible persons who are subject to personal jurisdiction in West Virginia. The public interest is also served by ensuring that this Court's declaratory judgments are properly effectuated by a grant of permanent injunctive relief, rather than requiring multiple legal actions to achieve the same result.

WHEREFORE, Plaintiffs request the following relief:

1. A declaration that Plaintiffs are not subject to personal jurisdiction in West Virginia and that the DEP Order may not be enforced against Plaintiffs, or either of them;
2. A declaration that the DEP was without authority to issue the DEP Order, which was void *ab initio* as to Plaintiffs because its issuance exceeded the DEP's power and authority under the WPCA;
3. Entry of a permanent injunction, enjoining the DEP and those in concert with it from enforcing or seeking to enforce the DEP Order against the Plaintiffs or either of them in any manner; and
4. For such other and further relief the Court deems to be appropriate or necessary.

PEABODY ENERGY CORPORATION
PEABODY HOLDING COMPANY, LLC

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