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June 10 2026,

James Woods, Jr.
Incorporator and Registered Agent
Bernard Brown
Vice President
Clearco Processing Corporation
457 Craigsville Road
Craigsville, WV 26205

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Surface Mining Control and Reclamation Act for Violation of Surface Mining Statutes and Regulations Resulting from Conducting Unauthorized Surface Mining Activities on National Forest Land

Dear Messrs. Woods and Brown:

In accordance with Section 502 of the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, Appalachian Voices, Sierra Club, and the West Virginia Highlands Conservancy (“WVHC”) notify you that Clearco Processing Corporation (“Clearco”) has violated and continues to violate SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) and performance standards and other requirements thereof. *See* W. Va. Code §§ 22-3-8, 22-3-22(d)(5); 30 U.S.C. §§ 1256(a), 1272(e)(2); W. Va. Code St. R. §§ 38-2-3.21.c, 38-2-14; 40 C.F.R. § 761.11(b). Specifically, Clearco is in violation of federal regulations governing surface mining operations on federal lands, the WVSCMRA, and its regulations as a result of conducting surface mining operations along the portion of Haul Road No. 2 that follows United States Forest Service Road 249 (“FS 249”) within the Monogahela National Forest, purportedly pursuant to WVSCMRA Permit O302211.

In order to protect special places like the portion of the Cherry River watershed crossed by FS 249—which includes critical habitat for the federally-endangered candy darter, among other valuable and sensitive resources—Congress generally prohibited surface mining activities such as haul road operation on National Forest lands absent a demonstration of “valid existing rights” to conduct such activities. 30 U.S.C. § 1272(e)(2). West Virginia’s approved program contains that same prohibition. W. Va. Code § 22-3-22(d)(5). Because Clearco has not received a determination of valid existing rights from the federal Office of Surface Mining, Reclamation, and Enforcement (OSMRE) as required by the federal and state surface mining programs, its conduct of any surface mining activities within the boundaries of the National Forest violates the

Act and applicable performance standards. Further, because, as previously determined by OSMRE with respect to permit O302211, the absence of a VER determination renders the underlying WVSMCRA permit invalid, Clearco's operations in purported reliance on O302211 constitute the conduct of surface mining without a permit in violation of West Virginia Code section 22-3-8. *See also* W. Va. Code St. R. § 38-2-14 (adopting all requirements of WVSMCRA as performance standards); 30 U.S.C. § 1256(a).

If, within sixty (60) days of this notice, Clearco does not bring itself into full compliance with the SMCRA, WVSMCRA and all applicable regulations promulgated pursuant thereto, Appalachian Voices, Sierra Club, and WVHC intend to file a citizens' suit in federal court seeking declaratory and injunctive relief to remedy these violations.

LEGAL FRAMEWORK

Both the federal and state SMCRA recognize that not all lands are suitable for surface mining activities. In addition to providing a process for designation of additional "lands unsuitable for mining," Congress specifically recognized that certain areas, including many federal lands, should be off limits from surface mining activities absent certain extenuating circumstances. As relevant here, Congress generally prohibited surface mining activities within federal National Forest lands:

After August 3, 1977, and subject to valid existing rights no surface coal mining operations except those which exist on August 3, 1977, shall be permitted—

...

(2) on any Federal lands within the boundaries of any national forest: Provided, however, That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

(A) surface operations and impacts are incident to an underground coal mine; or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528–531], the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this chapter: And provided further, That no surface coal mining operations may be permitted within the boundaries of the Custer National Forest[.]

30 U.S.C. § 1272(e)(2). The federal regulations implementing that subsection are explicit that "You may not conduct surface coal mining operations on [any Federal lands within a national forest] unless you either have valid existing rights, as determined under [30 C.F.R.] § 761.16, or qualify for the exception for existing operations under § 761.12." 30 C.F.R § 761.11(b).

West Virginia's program includes the same prohibition, W. Va. Code 22-3-22(d)(5), W. Va. Code St. R. § 38-2-3.21.c, as was necessary for the program's approval by OSMRE. *See* 30

U.S.C. § 1253(a)(1), (5); W. Va. Code § 22-3-2(c)(5); *Canestraro v. Faerber*, 179 W. Va. 793, Syl. Pt. 1 (1988) (“When a provision of the West Virginia Surface Coal Mining and Reclamation Act . . . is inconsistent with federal requirements in the Surface Mining Control and Reclamation Act, . . . the state act must be read in a way consistent with the federal act.” (internal citations omitted)).

Accordingly, the only way that surface mining activities may be conducted in a National Forest on an operation, like the one at issue here, that was not in existence on August 3, 1977—absent a special determination by the Secretary not applicable here—is a demonstration of “valid existing rights” or “VER”. West Virginia’s implementing regulations require that, “[w]here the proposed operation would include Federal lands within the boundaries of any national forest when the applicant seeks a [VER determination] . . . , the applicant shall submit a permit application to the field office of the Federal Office of Surface Mine Reclamation and Enforcement with a request that such determinations be made.” W. Va. Code St. R. § 38-2-3.21.c. Any surface mining activities on National Forest lands are prohibited absent a positive VER determination. W. Va. Code § 22-3-22(d)(5); 30 C.F.R § 761.11(b).

HISTORY

Haul Road Permit O302211 was first issued to South Fork Coal Company (“South Fork”) by the West Virginia Department of Environmental Protection (WVDEP) on April 30, 2013.¹ In its application materials to the WVDEP, South Fork did not disclose that a 1.2-mile portion of the road travelled along FS 249 within the Monongahela National Forest.² In fact, the map submitted with its application affirmatively stated that the operation did *not* cross National Forest lands. South Fork did not seek a VER determination before obtaining permit O302211, nor before it belatedly obtained a road use permit for FS249 from the U.S. Forest Service on September 29, 2021.

On June 31, 2024, OSMRE issued a “ten-day notice” to South Fork and the WVDEP as a result of a citizen complaint. One of the violations listed was that the “[p]ermittee failed to seek a determination that mining is permissible for permit O-3022-11 where it crosses U.S. Forest Lands, referred to as Tract M on the Permit proposal and drainage map,” in violation of West Virginia code sections 22-3-22(a) and 22-3-22(d)(5) and code of state regulations section 38-2-3.21.c. OSMRE Ten-Day Notice No. X24-111-440-003.

On January 13, 2025, following no action by South Fork or WVDEP to cure the violations associated with conducting surface mining operations in a National Forest absent a VER determination, OSMRE issued Imminent Harm Cessation Order number C25-111-440-001 to South Fork regarding permit O302211. OSMRE reiterated that “South Fork Coal Company, LLC failed to obtain approval of a valid permit in that the permittee failed to demonstrate Valid

¹ The permit was most recently renewed on April 30, 2023.

² The United States acquired ownership of the surface property rights to the land on which the Road is located by deed from the Cherry River Boom and Lumber Company in 1934, and the land was part of the National Forest when SMCRA was enacted in 1977. Pocahontas County, West Virginia deed book 70, page 332.8.

Existing Rights (VER) across United States of America property (Tract M) prior to obtaining approval of permit O302211.” *See also South Fork Coal Co. v. OSMRE*, DOI OHA Docket No. CH-2025-01-R, OSMRE Initial Response at ¶2 (“OSMRE issued Imminent Harm Cessation Order (IHCO) No. C25-111-440-001 (Cessation Order) to South Fork on January 13, 2025 . . . for mining without a valid permit on the basis that permit No. O-3022-11 was issued without a determination of Valid Existing Rights by OSMRE required under Section 522 of [SMCRA]”). The Cessation Order noted that South Fork’s failure “is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.” *Id.* at 2.

In order to resolve the Cessation Order finding that it was conducting surface mining activities without a valid permit, South Fork sought and, on July 18, 2025, received from OSMRE a determination that it possessed valid existing rights. Determination of Valid Existing Rights Within the Monongahela National Forest, West Virginia, 90 Fed. Reg. 34,005 (July 18, 2025). OSMRE’s determination was based on the facts that the road was in existence at the time of SMCRA’s enactment and that South Fork possessed a “legal right” to use the road by way of the road use permit issued by the Forest service. *Id.* (applying section (c)(1) of the definition of VER at 30 C.F.R. § 761.5). It stated that its VER determination would remain in effect “so long as the [road use] permit remains valid.” *Id.* at 34,008.

That determination was appealed to the U.S. Department of Interior’s Interior Board of Land Appeals (IBLA) on grounds not relevant to this letter. While that appeal was pending, South Fork entered first Chapter 11 reorganization and later, in August 2025, Chapter 7 liquidation bankruptcy. South Fork is no longer a going concern, has no assets, and has abandoned all operations at its mines, including its use of FS 249. As a result, on September 11, 2025, the U.S. Forest Service revoked the road use permit. OSMRE then moved to dismiss the appeal of South Fork’s VER determination as moot on the ground that the revocation of the road use permit nullified the VER determination, such that there was no relief the hearings officer could grant. On May 4, 2026, IBLA granted the motion, explaining:

In a dispute over the validity of a permit decision, the expiration of the permit typically moots the appeal, since ‘there is no relief this Board can . . . give concerning the expired permit.’ . . . Here, Appellants’ dispute is with OSMRE’s valid existing rights determination, not the RUP. But the RUP provided the basis for OSMRE’s determination that South Fork had valid existing rights in the use of FS 249, and in its Decision, OSMRE expressly stated that its favorable valid existing rights determination extended only “so long as the permit remains valid,” which is no longer the case. In other words, once the Forest Service terminated the RUP, the basis for OSMRE’s valid existing rights determination no longer existed, and OSMRE’s determination expired by its terms. And because the determination expired, there is no relief we can provide Appellants with respect to that determination.

Order Dismissing Appeal, IBLA 2025-0324. Accordingly, South Fork’s VER’s determination is no longer valid, such that permit O302211 is no longer valid and all surface mining activities on FS 249 are strictly prohibited.

CLEARCO'S SMCRA LIABILITY

Because Clearco lacks a determination of valid existing rights to use FS 249, which renders permit O302211 invalid, its surface mining activities on Haul Road No. 2 and within the Monongahela National Forest violate the Act and its implementing provisions. As the current owner/operator of Haul Road No. 2, Clearco is directly responsible for these violations.

On May 11, 2026, WVDEP granted “advanced approval” of Clearco’s application to transfer permits O301211, O301311, and O302211 prior to the close of the public comment period on that application, citing the regulation at 38-2-3.25.a.4.³ Under that transfer, Clearco is now the owner or operator responsible for any violations associated with these permits. *See* W. Va. Code St. R. § 38-2-2.83(a), (c) (ownership and control established by, *inter alia*, “[b]eing a permittee of a surface coal mining operation” or “[h]aving any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface mining operations.”). Under the WVSMCRA regulations governing permit transfers, “[a]ny person who, through whatever means, assumes ownership or control directly or indirectly of a surface mining and reclamation operation shall become responsible for the correction of all outstanding unabated violations.”⁴ *Id.* § 38-2-3.25.b.

To Appalachian Voices, Sierra Club, and WVHC’s knowledge, Clearco is conducting surface mining operations on National Forest lands without having obtained a permit from the U.S. Forest Service to use FR 249 nor otherwise established any legal right to use the road. Clearco appears to have conducted earth disturbing activity and other commercial activities along the portion of Haul Road No. 2 that runs concurrently with FS 249. Clearco has not sought and obtained—nor could it—a VER determination from OSMRE as required by W. Va. Code St. R. § 38-2-3.21.c. Accordingly, Clearco is in ongoing violation of SMCRA, WVSMCRA, and the regulations promulgated thereunder as a result of its conduct of surface mining activities on National Forest lands without a valid VER determination. *See* W. Va. Code § 22-3-22(d)(5); 30 U.S.C. §1272(e)(2); W. Va. Code St. R. § 38-2-3.21.c; 40 C.F.R. § 761.11(b).

Additionally and alternatively, WVDEP’s transfer of permit O302211 was *ultra vires* and ineffective because, as OSMRE previously determined, permit O302211 is invalid in the absence of an effective VER determination. *See* Imminent Harm Cessation Order Number C25-111-440-

³ Appalachian Voices, Sierra Club, and WVHC do not in any way concede that this transfer was lawful. In fact, on June 1, 2026, Appalachian Voices staff submitted a comment to WVDEP providing “information . . . that would preclude approval” of the transfer application, *i.e.* Clearco’s lack of a VER determination, such that the advanced approval of the transfer must be “immediately withdrawn” under section 38-2-3.25.a.4.

⁴ In its advanced approval package, WVDEP stated that the “current permittee referenced above remains responsible for all enforcement activities related to this permit until final approval of the permit transfer.” Appalachian Voices, Sierra Club, and WVHC read “current permittee” to refer to Clearco, consistent with the ownership and control regulations cited above. To the extent that WVDEP intended “current permittee” to refer to South Fork, WVDEP has no authority to allow Clearco to conduct surface mining activities while responsibility for enforcement remains with a defunct, assetless entity, and any such representation is unenforceable.

001 (“South Fork Coal Company, LLC failed to obtain approval of a valid permit in that the permittee failed to demonstrate Valid Existing Rights (VER)”); OSMRE, Determination of Valid Existing Rights Within the Monongahela National Forest, West Virginia, 90 Fed. Reg. at 34,008 (“VER is necessary for issuance of a mining permit from the appropriate regulatory authority before coal mining activities may begin.”). Because permit O302211 is invalid in the absence of an effective VER determination, WVDEP could not effectively transfer the permit to Clearco and its actions were *ultra vires*. See *U.S. v. Cortez*, 930 F.3d 350, 357 (4th Cir. 2019) (“[B]ecause the power of administrative agencies ... is prescribed entirely by statute, any ‘improper’ agency action is ‘ultra vires[.]’” (emphasis original)); *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 526 (4th Cir. 1999) (holding ineffective a purported permit modification that was legally defective). Accordingly, Clearco is in violation of the Act’s prohibition on conducting surface activities without a valid permit. See W. Va. Code § 22-3-8; W. Va. Code St. R. § 38-2-14 (adopting all requirements of WVSMCRA as performance standards); 30 U.S.C. § 1256(a).

Section 520(a)(1) of SMCRA, 30 U.S.C. § 1270(a)(1), authorizes “any person having an interest which is or may be adversely affected [to] commence a civil action . . . against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.” West Virginia has, at all relevant times, administered an approved surface mining regulatory program pursuant to SMCRA, through WVSCMRA. 30 C.F.R. § 948.10. WVSCMRA mandates that all surface mining permits require the surface mining operation to “meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director.” W. Va. Code § 22-3-13(a). WVDEP’s regulations issued under WVSCMRA similarly provide that “[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of [WVSCMRA], and this rule.” W. Va. Code St. R. § 38-2-3.33.c.

If Clearco does not cease its violations of the statutes and regulations described above within sixty (60) days, Appalachian Voices, Sierra Club, and WVHC intend to file a citizens’ suit in federal court seeking declaratory and injunctive relief for these violations. If Clearco has taken any steps to eradicate the underlying cause or causes of the above-described violations, or if Clearco believes that anything in this letter is inaccurate, please let us know. If Clearco does not advise us of any remedial steps during the 60-day notice period, we will assume that no such steps have been taken and that violations are likely to continue. Further, we would be happy to meet with Clearco or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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