

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF KENTUCKY  
AT PIKEVILLE**

**APPALACHIAN VOICES, INC.,  
WATERKEEPER ALLIANCE, INC.,  
KENTUCKIANS FOR THE  
COMMONWEALTH, INC., KENTUCKY  
RIVERKEEPER, INC, and THE SIERRA  
CLUB,**

**Plaintiffs,**

**v.**

**FRASURE CREEK MINING, LLC, and  
TRINITY COAL CORPORATION,**

**Defendants.**

**CIVIL ACTION**

**NO. \_\_\_\_\_**

**COMPLAINT and  
JURY DEMANDED**

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For their Complaint, Plaintiffs Appalachian Voices, Inc., Waterkeeper Alliance, Inc. Kentuckians For The Commonwealth, Inc., Kentucky Riverkeeper, Inc., and The Sierra Club (collectively “Plaintiffs” or “Plaintiff groups”) respectfully allege as follows:

**INTRODUCTION**

1. This action is a “citizen suit” brought under section 505(a)(1) of the Federal Water Pollution Control Act (“Clean Water Act,” or “CWA”), 33 U.S.C. § 1365(a)(1), seeking relief from Frasure Creek Mining, LLC’s ( “Frasure Creek”) and Trinity Coal Corporation’s (“Trinity,” collectively “Defendants”) chronic and frequent violations of the Clean Water Act and the terms and provisions of Frasure Creek’s Kentucky Pollutant Discharge Elimination System (“KPDES”) permits. These violations involve the repeated and systemic filing of inaccurate discharge monitoring reports (“DMRs”) containing

inaccurate data regarding the amount of pollutants discharged from Defendants' coal mining operations in eastern Kentucky, as well as self-reported exceedances of the amounts of pollutants Defendants are permitted to discharge from such mining operations.

2. The Clean Water Act and implementing regulations require that dischargers submit accurate DMRs reporting the amounts of specific pollutants they discharge into the nation's waters. The government and citizens depend on this information to know, among other things, whether dischargers are exceeding pollution limits and whether the affected waters are safe and protected.
3. Defendants have a history of submitting duplicate DMRs—in other words, DMRs with data copied from a prior DMR.
4. On October 7, 2010, Plaintiffs Appalachian Voices, Inc., Waterkeeper Alliance, Inc. Kentuckians For The Commonwealth, Inc., and Kentucky Riverkeeper, Inc. sent a notice of intent to sue Frasure Creek for, *inter alia*, the company's submission of duplicate DMRs. On December 3, 2010, the Kentucky Energy and Environment Cabinet ("Cabinet") filed a state court enforcement action against Frasure Creek for the violations alleged in the notice of intent to sue, including the filing of duplicate DMRs. Simultaneous with its filing, the Cabinet tendered a consent judgment. Plaintiffs Appalachian Voices, Inc., Waterkeeper Alliance, Inc. Kentuckians For The Commonwealth, Inc., and Kentucky Riverkeeper, Inc. were permitted to intervene for the purposes of assisting the Franklin Circuit Court in determining whether the proposed consent judgment was fair, adequate, reasonable, and in the public interest. On November 24, 2014, the Franklin Circuit Court ruled that the consent judgment was not

fair, adequate, reasonable, and in the public interest. The Franklin Circuit's determination is now on appeal.

5. At no point during the prior litigation did Frasure Creek deny the allegations that it had submitted duplicate DMRs.
6. In again submitting duplicate DMRs, Defendants display a cavalier disregard for the law that threatens both the health of Kentucky citizens and the environment and the integrity of the Clean Water Act's wastewater permitting programs.
7. Specifically, as alleged herein, on 141 occasions during the first quarter of 2014, Defendants submitted reports on its discharged pollutants that repeat exactly, or nearly exactly, the data submitted in a report for a prior month, indicating that Defendants simply copied existing information onto its forms and submitted them, rather than monitoring its discharges and reporting accurate data.
8. In addition, as alleged herein, during second quarter of 2014, Defendants self-reported 765 violations of daily maximum and monthly average effluent limitations contained in Frasure Creek's KPDES permits. These self-reported exceedances of permitted pollutant discharge amounts constitute admissions of liability under the CWA as a matter of law.
9. Plaintiffs seek civil penalties payable to the United States Treasury, declaratory and injunctive relief, and costs, including reasonable attorneys' fees.

### **JURISDICTION**

10. This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1), 28 U.S.C. § 1331, and 28 U.S.C. § 1355.

11. The relief requested in this action is authorized pursuant to section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), 28 U.S.C. § 1331, and 28 U.S.C. § 1355.
12. This Court has jurisdiction over the declaratory and injunctive claims set forth in this complaint pursuant to 29 U.S.C. § 2201(a) and 28 U.S.C. § 2202 respectively.

### **VENUE**

13. Venue is proper in the Eastern District of Kentucky pursuant to section 505(c)(1) of the CWA, 33 U.S.C. § 1365(c)(1), because Defendants' discharges occurred and continue to occur in this judicial district.
14. Venue is proper in the Southern Division, Pikeville Docket of the Eastern District of Kentucky, because the majority of Defendants' discharges (and therefore a substantial part of the events or omissions giving rise to the Complaint) occur in the Southern Division, in counties within the Pikeville Docket. LR 3.2(a)(3)(A), (d). Defendants have their principal office in Oak Hill, West Virginia 25901. Defendants do not reside in this district. LR 3.2(d).

### **NOTICE**

15. On November 14, 2014, Plaintiffs Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians For The Commonwealth, Inc. and Kentucky Riverkeeper, Inc. gave notice of their intent to file suit for violations of the Clean Water Act ("NOI #1") to Defendants pursuant to section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A). Copies of said notice were also served upon the Commissioner of the Kentucky Department for Environmental Protection ("KDEP"); the Director and Assistant Director of KDEP, Division of Water ("KDOW"); the Commissioner of the Kentucky Department for

Natural Resources (“KDNR”); the Office of the Secretary of the Cabinet; the Attorney General of the United States; the Administrator of the United States Environmental Protection Agency (“EPA”); and the Regional Administrator of EPA, Region IV. *See* Exhibit 1.

16. On December 19, 2014, Plaintiff Sierra Club gave notice of its intent to file suit for violations of the Clean Water Act (“NOI #2”) to Defendants pursuant to section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A). Copies of said notice were also served upon the Commissioner of the KDEP; the Director and Assistant Director of KDOW; the Commissioner of the KDNR; the Office of the Secretary of the Cabinet; the Attorney General of the United States; the Administrator of the United States EPA; and the Regional Administrator of EPA, Region IV. *See* Exhibit 2.
17. More than sixty days have passed since plaintiffs served NOI #1 and NOI #2 upon Defendants.

#### **ADMINISTRATIVE ACTION**

18. On January 12, 2015, 59 days after Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians For The Commonwealth, Inc. and Kentucky Riverkeeper, Inc served NOI #1, the Cabinet filed an administrative complaint against Defendant Frasure Creek.
19. The Cabinet’s administrative complaint alleges all of the violations alleged in Counts 1 and 2 of this Complaint.
20. The Cabinet’s administrative action does not constitute a diligent prosecution “in a court of the United States, or a State” that would bar this Complaint under the CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B).

21. The Cabinet's administrative action was commenced after the service of NOI #1, and fewer than 120 days have passed since Plaintiffs served NOI #1 and NOI #2. Therefore, the Cabinet's administrative action does not preclude this suit under CWA § 309(g)(6)(A)(ii). See § 309(g)(6)(B)(ii).
22. The Cabinet's administrative action against Defendant Frasure Creek does not constitute a diligent prosecution of an administrative action under state law comparable to Section 309(g) of the CWA, 33 U.S.C. § 1319(g).
23. Based upon Defendants' longstanding pattern and practice of violating the CWA by submitting duplicate DMRs and discharging effluent in violation of its KPDES permit limits, the violations alleged herein are continuing or are reasonably expected to recur until enjoined by this Court.
24. This action satisfies all conditions precedent to filing suit under CWA § 505, 33 U.S.C. § 1365.

### **PARTIES**

25. Defendant Frasure Creek Mining, LLC is a limited liability company incorporated under the laws of the State of West Virginia, doing business in the State of Kentucky, with its principal offices at P.O. Box 100, Oak Hill, West Virginia 25901 (Fayette County).
26. Defendant Frasure Creek Mining, LLC is a wholly owned subsidiary of Trinity Coal Corporation.
27. Defendant Trinity Coal Corporation is a company incorporated under the laws of the State of Delaware, doing business in the State of Kentucky, with its principal office at P.O. Box 100, Oak Hill, West Virginia 25901 (Fayette County).

28. Trinity Coal Corporation exerts pervasive control over and/or directs policies and operations of Frasure Creek Mining, LLC, including environmental compliance policies and operations such as wastewater monitoring and reporting. Trinity Coal Corporation has so dominated the policies and operations of Frasure Creek that it should not be recognized as a separate entity and doing so would sanction fraud or promote injustice. As such, all references in this Complaint to the activities of Frasure Creek Mining, LLC should be read to refer to the activities of both Defendants.
29. Defendants own and operate coal-mining facilities in Pike, Perry, Knott, Breathitt, Maggoffin, and Floyd Counties, Kentucky.
30. Defendants discharge effluent from their mining facilities in Kentucky into the Kentucky, Big Sandy, and Licking Rivers and/or their tributaries.
31. Defendants are “persons” for the purposes of section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1), as defined in section 502(5) of the CWA, 33 U.S.C. § 1362(5).
32. Plaintiff Appalachian Voices, Inc. (“Appalachian Voices”) sues on behalf of itself and its members. Appalachian Voices is a non-profit, member-based organization incorporated under the laws of the State of North Carolina with its principal place of business in Boone, North Carolina (Watauga County). Appalachian Voices is comprised of approximately 750 individual members and works to solve the environmental problems that have the greatest impact on the people who live in the central and southern Appalachian Mountains.
33. As part of its mission, Appalachian Voices focuses on reducing coal’s impact on the region, especially with regard to water pollution. The organization seeks to understand how pollution from coal facilities impacts the region’s waterways. It fulfills its mission

by educating its members, the region's citizens, and the broader public through its print and electronic news publications and by leading citizen monitoring workshops; by advocating for stricter pollution regulations; and by engaging in litigation. Appalachian Voices conducts each of these activities in eastern Kentucky in the areas affected by Frasure Creek's coal mining discharges. Each of these activities depends on accurate and reliable information water quality information, including information contained in coal mine discharge reports. Defendants' failure to provide accurate and reliable DMRs has harmed Appalachian Voices' ability to carry out its mission.

34. Appalachian Voices, in partnership with Kentuckians for the Commonwealth ("KFTC"), conducts workshops to educate community members on how to take basic water quality measurements. Both organizations expend resources on these workshops, which are geared toward community education and empowerment. Through these workshops, Appalachian Voices and KFTC teach eastern Kentuckians who live in areas likely affected by Defendants' pollution discharges how to conduct water quality sampling. The unreliability of data submitted by the Defendants and other coal companies in eastern Kentucky is one of the primary reasons that KFTC and Appalachian Voices train citizens to take their own water samples. If Frasure Creek and other coal companies submitted data that were reliable, the organizations would not need to expend their resources in conducting such extensive training in water quality testing and could focus their education and outreach efforts on other projects.
35. Based on its knowledge that Frasure Creek and other coal mining companies in eastern Kentucky have not been reporting accurate DMRs, Appalachian Voices has concerns about the accuracy and reliability of all coal-related DMRs. Because of its concerns,

Appalachian Voices developed a program to extract information from DMRs and compile that information into a broader database. The information is then analyzed and verified to look for repeated results and other anomalies. Appalachian Voices has expended hundreds of hours of staff time in creating the database and gathering, compiling, analyzing, and verifying the data.

36. In addition, because of its concerns regarding the unreliability of the water quality data from coal-related discharge monitoring reports, Appalachian Voices has expended resources to conduct water sampling in streams below coal mines to determine the true nature of coal mine discharges. This has included sampling below Defendants' discharge points. If Appalachian Voices were able to rely on the accuracy of the coal mine discharge reports, it would not have to conduct as much sampling, and would not conduct sampling in such hard to reach locations. Instead, the organization would focus its efforts farther downstream to monitor the health of the entire watersheds, which would require fewer samples and working in more easily accessible sites, which would require fewer expenditures.
37. As a result of Defendants' failures to file accurate DMRs, Appalachian Voices has expended resources it would not otherwise have expended. Those expenditures include additional monies spent on training community members in water testing, in scrutinizing DMRs, and in conducting its own water monitoring. If Appalachian Voices could rely on the accuracy of Defendants' DMRs, it would expend fewer resources on these specific activities.
38. In addition to those organizational interests, members of Appalachian Voices reside near or use and enjoy waters directly downstream from Defendants' discharges into the

Kentucky, Big Sandy Rivers, and Licking River and their tributaries in Pike, Floyd, Knott, and Magoffin Counties in Kentucky. These members use, or have used, these rivers and their tributaries for fishing, boating, recreation, drinking water and other uses. In particular, Appalachian Voices' member Bev May has lived most of her life on Wilson Creek in Floyd County downstream of Frasure Creek's discharges. Ms. May grew up along Wilson Creek, observing wildlife and playing along the creek. Ms. May has noticed a drop in the diversity and abundance of wildlife along Wilson Creek and is harmed by this awareness. She would like to be able to educate her great-niece about the diversity of species in the creek, but will not be able to do so because of the harm from pollution in the creek, some of which is being discharged by Frasure Creek. Ms. May is aware of Frasure Creek's pollution discharges into Wilson Creek and its false reporting of the amounts of pollution it is discharging. She is reasonably concerned that Frasure Creek may be discharging more pollution into Wilson Creek than it is reporting. She is aware through her own sampling that conductivity in the creek below Frasure Creek's discharges is very high. Ms. May is concerned about the levels of salts and metals that are being discharged by Frasure Creek. As a result of her concerns about the pollution in the creek, Ms. May has stopped using the creek to water her garden and will not allow her great-niece to play in the creek. Ms. May is also concerned about the health and safety of her water supply, which comes from the Levisa Fork at Allen, Kentucky downstream of several of Frasure Creek's mining operations. Ms. May has observed through her own conductivity testing that the conductivity of her tap water rises and falls in concert with increases and decreases in the conductivity of Wilson Creek and other waterways below Frasure Creek's mining operations which she tests regularly. She is

therefore reasonably concerned that Frasure Creek is causing harmful levels of pollution in her drinking water. She also reasonably believes that the pollution contributes to higher municipal water treatment costs, which results in higher water bills for her.

39. Plaintiff KFTC sues on behalf of itself and its members. KFTC is a non-profit member organization incorporated under the laws of the State of Kentucky with its principal place of business in London, Kentucky (Laurel County). KFTC is a citizens' social justice organization with 9000 members in 100 counties in the Commonwealth.
40. As an organization, protection of water quality in Kentucky through public education and advocacy work is one of KFTC's core social justice missions. To fulfill this mission, KFTC regularly disseminates information through its newsletter, blog posts, and meetings regarding water pollution issues in Kentucky. KFTC also advocates before state and federal officials for better water quality protections and engages in litigation where necessary to enforce Kentucky's water quality laws. The availability of accurate and reliable discharge monitoring data is central to KFTC's ability to fulfill its education and advocacy mission. Defendants' failure to provide accurate and reliable discharge monitoring information has harmed KFTC's ability to carry out its mission.
41. Many KFTC members live in Eastern Kentucky near Defendants' mining operations which are the subject of this action. These members rely on waters downstream of Defendants' discharges for household use, as well as for recreational, aesthetic, and other beneficial purposes. Bev May, whose interests and harm to those interests are described in paragraph 38 above, is also a KFTC member. Another KFTC member, Geneva Marshal, lives just one-half mile downstream of one of Frasure Creek's outfalls, which discharges into Open Fork Creek in David, Kentucky. Ms. Marshall grew up swimming

and playing in Open Fork Creek. She is harmed by Frasure Creek's pollution of Open Fork Creek. As a result of the pollution, there is thick orange sediment in parts of the creek and many of the living creatures that Ms. Marshal once observed and enjoyed are no longer found in the creek. In contrast to her childhood along the creek, Ms. Marshal will not allow her grandson to play in the obviously polluted areas of the creek. In addition, Ms. Marshal gets her household water from Prestonsburg's water supply, which is downstream of many of Defendants' discharges. Ms. Marshal is concerned about water pollution of the Prestonsburg municipal water supply and does not use the water for drinking or cooking. Another KFTC member, Cody Montgomery, regularly uses and has used water from the Salyersville municipal water supply, which is downstream of Defendants' discharges into tributaries of the Licking River. Mr. Montgomery is concerned about the level of pollution in the public water supply from surface mines upstream of the Salyersville water intake, including some of Defendants' mines. His concern is heightened because of the Defendants' false reporting. Because of the inaccurate DMRs filed by Defendant, he reasonably believes that he cannot determine the quality of his family's municipal water supply and reasonably believes that it may not be safe. As a result of the concerns about the safety of the drinking water, his family buys bottled water for drinking. Because he is concerned about pollution entering the Licking River and because he is aware that as a result of Defendants' false reporting, he cannot determine the extent of the pollution, he no longer fishes or swims in the Licking River.

42. Plaintiff Waterkeeper Alliance, Inc. ("WKA") sues on behalf of itself and its members. WKA is a non-profit membership organization incorporated under the laws of the State of New York, with its principal office in New York, New York (New York County).

WKA aspires to create and preserve swimmable, drinkable, fishable, and clean waterways in the United States and around the world. WKA is a membership organization, currently comprising more than 240 licensed member Waterkeeper organizations on six continents. Kentucky Riverkeeper, Inc. is a licensed member of WKA. WKA advances its interests and the interests of its member organizations in a variety of ways, including by reviewing publicly available information concerning pollution discharges in order to bring noncompliances or other water quality information to the attention of its member organizations, regulatory authorities, and the public. To do this, WKA relies on accurate, truthful monitoring and reporting. Defendants' submission of false discharge monitoring reports harms WKA's ability to fulfill its organizational mission of educating the public, its member organizations, and regulatory officials about water-related issues, responding to citizens' complaints, advocating compliance with environmental laws, and devising appropriate remedies to problems discovered.

43. Plaintiff Kentucky Riverkeeper, Inc. ("KRR") sues on behalf of itself and its members. KRR is a non-profit organization incorporated under the laws of the State of Kentucky, with its principal office located in Richmond, Kentucky (Madison County). KRR advocates for the stewardship of the Kentucky River watershed and its resources for the present and future generations, and is a member of Waterkeeper Alliance. Kentucky Riverkeeper works to educate its members about the Kentucky River and its tributaries and works to identify and draw attention to pollution issues in those waters. Because of Defendants' false reporting of pollution data, Kentucky Riverkeeper cannot provide accurate information to its members and to the public about the health and safety of the

Kentucky River and its tributaries. Defendants' false reporting harms KRK's ability to carry out this important part of its mission.

44. KRK members rely on waters downstream of Defendants' discharges for recreational, aesthetic, and other beneficial purposes. KRK member Pat Banks recreates in areas of the Kentucky River and its tributaries downstream of Defendants' pollution discharges. Ms. Banks is aware of Defendants' numerous self-reported pollution violations, as well as Defendants' failure to accurately and truthfully report pollution discharges on numerous occasions. As a result of this awareness, Ms. Banks reasonably suspects and fears that Defendants' actual pollution discharges may be worse even than what has been reported. Knowing that there are pollution violations, but being unable to know the extent of those violations causes harm to Ms. Banks in that she cannot determine whether it is safe to eat food grown in the flood plain of the Kentucky River and its tributaries or whether it is safe to fish or swim or otherwise recreate in and near the waterways in eastern Kentucky.
45. Plaintiff Sierra Club is a national non-profit, member-driven organization incorporated in the State of California as a Nonprofit Benefit Corporation, with its principal office located in San Francisco, California (San Francisco County). Sierra Club has approximately 640,000 members across the country, including over 5,000 members in its Cumberland Chapter. 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 ecosystems and resources; 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 and its Cumberland (Kentucky) Chapter engage in

public education, advocacy, and litigation on environmental issues including clean air, clean water, and conservation of natural resources. Water quality issues – and in particular issues relating to water pollution from coal mines – are important to the Sierra Club’s mission. Its research, public education, and advocacy depend to a large degree on access to timely and accurate information required to be made available to the public, as well as on the successful function of regulatory measures put in place to limit and reduce existing pollution, and prevent future pollution from occurring. The Cumberland Chapter prepares newsletters and reports to explain water quality concerns to its members and to the public, and engages in litigation to enforce water quality protections. Sierra Club’s ability to disseminate information to its members and the public, and its ability to bring litigation to protect water resources in Kentucky from harmful pollution, depend on the organization’s access to timely, accurate, and reliable information in DMRs. Members of the Cumberland Chapter live, work, exercise, raise children, farm, garden, fish, bird watch, hike, camp, and recreate throughout Kentucky, including in Floyd, Knott, Magoffin, Perry, and Pike Counties. Bev May, whose interests and harm to those interests are described in paragraph 38 above is also a Sierra Club member.

46. Neither the claims asserted, nor the relief requested herein, require individual members of Plaintiffs to be included as parties to this Action.
47. Defendants’ failure to accurately report discharges, and its self-reported discharges of pollutants in excess of permitted amounts, are germane and detrimental to the organizational purposes of the Plaintiff groups. These organizations are injured by Defendants’ illegal actions.

48. Plaintiffs have additional organizational interests that are negatively affected by the Defendants' failure to fulfill monitoring and reporting obligations. Plaintiffs rely on accurate and complete discharge monitoring reports to fulfill their organizational purposes, including to ensure that Kentucky waters are safe and protected from pollution and other harms. Defendants' monitoring and reporting violations have impaired the organizations' efforts to research the compliance status of Kentucky dischargers and to report the results of that research to their members; to seek regulatory and legislative changes needed to better protect Kentucky's waterways; and to bring litigation to prevent violations of the discharge limitations in the permits and thereby protect the waters affected by Defendants' discharges. All of these activities are essential to fulfilling Plaintiffs' institutional goals.
49. Defendants' failure to submit accurate discharge information frustrates Plaintiffs' daily operations to the extent that these organizations can no longer honor their own monitoring and reporting obligations to their members.
50. Plaintiffs are all "citizens" for the purposes of the Clean Water Act citizen suit provision, 33 U.S.C. § 1365, as defined in section 505(g) of the CWA, 33 U.S.C. § 1365(g).
51. Plaintiffs' injuries are redressable by the relief requested in this Complaint.

#### **STATUTORY AND REGULATORY BACKGROUND**

52. Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).
53. The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, prohibits the discharge of any pollutant by any person from a point source into waters of the United States unless the discharge complies with various enumerated sections of the CWA. Among other things, the CWA

prohibits discharges that are not authorized by, or are in violation of, the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA or an EPA-delegated State permitting authority. *See* 33 U.S.C. §§ 1311(a), 1362(12)(A), 1342.

54. Under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), any citizen may commence a civil action on his own behalf against any person who is alleged to be in violation of an effluent standard or limitation. An "effluent standard or limitation" is defined to include "a permit or condition thereof" issued pursuant to section 402 of the CWA, 33 U.S.C. § 1342. *Id.* § 1365(f)(6).

**A. MONITORING AND REPORTING REQUIREMENTS**

55. The Clean Water Act and its implementing regulations require dischargers to monitor and report their discharges of pollutants. Under the CWA, owners or operators of point sources that discharge pollutants must "(i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods" and "(iv) sample such effluents" as EPA may reasonably require. 33 U.S.C. § 1318(a)(A). This self-monitoring and reporting by dischargers allows the government to determine, among other things, whether the discharger is in violation of effluent limitations applicable to the discharge. *See id.* § 1318(a). The Clean Water Act carries criminal penalties for any person who negligently or knowingly violates permit conditions or other specified sections of the Act, including provisions related to monitoring and reporting. *Id.* § 1319(c).
56. Pursuant to the CWA, EPA has promulgated regulations that establish monitoring, recordkeeping, and reporting requirements. 40 C.F.R. §§ 123.25(a)(12), 122.41(j), (l). Samples and measurements taken for the purpose of monitoring must be representative of

the monitored activity, *id.* § 122.41(j)(1); the permit-holder's records of monitoring information must include, among other things, the date, place, and time of sampling, the analytical techniques used, and the results of such analyses, *id.* § 122.41(j)(3); monitoring must be conducted according to certain approved test procedures, *id.* § 122.41(j)(4); and monitoring results must be reported on a DMR, *id.* § 122.41(l)(4)(i).

57. Kentucky's administrative regulations incorporate these federal monitoring and reporting requirements. *See* 401 Ky. Admin. Regs. 5:065.

**B. KENTUCKY'S PERMIT PROGRAM**

58. EPA has delegated NPDES permitting authority within Kentucky to the Commonwealth. *See* 33 U.S.C. § 1342(b); Approval of Kentucky's NPDES Program, 48 Fed. Reg. 45,597 (Oct. 6, 1983); Ky. Rev. Stat. Ann. § 224.16-050. Kentucky's program for issuing NPDES permits is known as the KPDES. 401 Ky. Admin. Regs. 5:002(66).
59. "Waters of the United States" within the meaning of the Clean Water Act include any navigable waters or waters that are tributaries of navigable waters. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2. The Kentucky, Big Sandy, and Licking Rivers and their tributaries into which Defendants discharge pollutants are all waters of the United States within the meaning of the Clean Water Act.
60. Defendants' discharges are subject to the terms and conditions of either the KPDES Coal General Permit or, with regard to three of the surface coal mining facilities at issue herein, an individual KPDES permit.
61. Most of the violations alleged herein occurred at facilities regulated under KPDES Coal General Permit No. KYG040000, which was effective from August 1, 2009 until September 30, 2014. [Hereinafter referred to as "the 2009 Coal General Permit."]

62. A new KPDES Coal General Permit went into effect on October 1, 2014. [Hereinafter referred to as “the 2014 Coal General Permit.”]
63. Based on information and belief, Defendants have not applied for coverage under the 2014 Coal General Permit for any of the surface coal mining operations at issue in this Complaint.
64. Defendants’ continuous violations of the 2009 Coal General Permit, as alleged herein, will also constitute violation of the 2014 Coal General Permit, if and when Defendants apply for and are granted coverage under the 2014 Coal General Permit for any of the surface coal mining operations at issue in this Complaint.
65. With the exception of the three individual permits referred to in the following paragraph, all of Defendants’ surface coal mining facilities at issue in this Complaint are regulated under the 2009 Coal General Permit.
66. Plaintiffs also make allegations regarding three of the Defendants’ surface mining facilities that operate under individual KPDES permits. Those facilities operate under KPDES numbers KY005346, KY0078271, and KY0108111.
67. Based on information and belief, all terms and conditions relevant to the allegations in this Complaint are identical on the 2009 Coal General Permit, the 2014 Coal General Permit, and the three individual KPDES permits.
68. Among other terms and conditions, the KPDES permits authorize Defendant Frasure Creek to discharge limited quantities of certain pollutants into Kentucky waters and require accurate monitoring and reporting on the quantity of discharge of these and other pollutants and parameters.

69. As relevant to the allegations herein, the KPDES permits require the Defendants to file reports for at least eight parameters: Flow, Total Suspended Solids, Total Recoverable Iron, Total Recoverable Manganese, Conductivity, Acidity, Alkalinity, and pH. In addition, the permits require the Defendants to measure each of these parameters twice per month, except for Conductivity, Acidity, and Alkalinity, which Defendants must measure once per month for most of the Defendants' operations.

**COUNT 1**

**VIOLATIONS OF THE CLEAN WATER ACT BY  
FAILING TO MONITOR AND/OR  
ACCURATELY REPORT POLLUTANT DISCHARGES**

70. Plaintiffs reallege, as if set forth fully herein, each and every allegation contained in the preceding paragraphs.
71. Failure to comply with all conditions of a permit, including the failure to monitor and accurately report discharges, is a violation of the CWA. 33 U.S.C. §§ 1365(f)(6), 1311(a); 40 C.F.R. § 122.41; and 401 KAR 5:065 § 2(1).
72. Under the terms of its KPDES permits, Defendants must take accurate samples and measurements of its discharged effluents, use approved testing procedures and analytical methods, and accurately report the results of its monitoring to the KDNR. Such samples and measurements must be "representative of the volume and nature of the monitored discharge," test procedures for the analysis of pollutants must conform to applicable Kentucky regulations, permittees must demonstrate compliance with parameter limitations by the use of sufficiently sensitive analytical methods, and discharge monitoring results must be summarized and reported using only approved DMR forms.

73. Defendants have violated, and continue or are reasonably likely to continue to violate, conditions of Frasure Creek's KPDES permits with regard to the submission of inaccurate reports regarding its discharged pollutants.
74. Defendants' noncompliance with permit conditions constitutes violations of the Clean Water Act and is grounds for an enforcement action. 40 C.F.R. § 122.41(a). Any citizen may commence a civil action against any person alleged to be in violation of an "effluent standard or limitation," which includes violation of a permit condition. 33 U.S.C. § 1365(a)(1), (f)(6). Defendants are "persons" within the meaning of this provision. *Id.* § 1362(5).
75. Under the terms of Frasure Creek's KPDES permits, on each DMR at issue in this Complaint, Defendants are required to report 14 different measured or calculated values of various effluent parameters per month per outfall, each value is typically reported with between two and five significant digits.
76. Defendants submitted DMRs for months during the first quarter of 2014 that contained identical or nearly identical measurement values for each effluent parameter reported for the same outfall during different months. There were 141 such submissions during the first quarter of 2014. Some or all of the monitoring results reported for those outfalls for those months are inaccurate, in violation of Frasure Creek's permits. *See* Exhibit 1, Attachment 2, Tables 1 and 2 for an itemized summary of the duplicate reporting violations alleged herein.
77. Measured values that are identical, in some instances to the nearest hundredth of a unit of measurement, in repeated months at the same outfall are not realistically possible.
78. Defendants copied and re-filed previously-submitted DMR effluent data.

79. For example, Defendants' DMR submissions for January and February 2014 for KPDES KY0108111, DSMRE#836-0326, outfall #1 repeat all effluent characteristics from the Defendants' submission for the same outfall for October and November 2013, constituting an exact duplication of two sets of 16 effluent characteristics or 32 total.
80. Defendants submitted DMRs that exactly duplicated each of the effluent characteristics from a previous month 112 times during the first quarter of 2014. *See* Exhibit 1, Attachment 2, Table 1.
81. In 29 other instances during the first quarter of 2014, Defendants submitted DMRs that nearly duplicated each of the effluent characteristics for the same outfall from a previous month. *See* Exhibit 1, Attachment 2, Table 2.
82. An example of such near-duplicate DMRs occurred on KPDES KY0108111, DSMRE# 836-0326, outfall #1, where Defendants' DMR submission of 16 effluent characteristics for March 2014 tracked Defendants' submission of the same effluent characteristics for December 2013, with the exception that, rather than report "N/A" as it had done in December, Defendants reported 10 mg/L for the monthly average for TSS and 0.2 mg/L for the monthly average for iron.
83. Defendants repeated submission of inaccurate effluent monitoring data indicates a pattern of chronic and persistent inaccuracy in its monitoring and testing results in violation of federal and state regulations and KPDES permits. Defendants failed to submit and maintain accurate DMRs in accordance with above stated regulations and permit conditions.

84. Each permittee is responsible for ensuring compliance with CWA permits and permit conditions. Failure to submit accurate DMRs is a violation of a condition of Frasure Creek's permits.
85. Defendants violated "an effluent standard or limitation," as defined in section 505(f)(6) of the CWA, 33 U.S.C. § 1365(f)(6), by submitting inaccurate DMR data to the State of Kentucky.
86. By submitting DMRs containing inaccurate data, Defendants failed to "install, use and maintain . . . monitoring equipment or methods" to sample effluents in accordance with section 308(A)(iii) of the CWA, 33 U.S.C. § 1318(A)(iii).
87. Each day that Defendants violate a condition of Frasure Creek's KPDES permits, for each parameter to which the condition applies, is a separate and distinct violation of the Clean Water Act.
88. Defendants' violations described within this Count are violations of a permit or condition thereof issued under CWA § 402, 33 U.S.C. § 1342, as defined by CWA § 505(f), 33 U.S.C. § 1365(f), for which plaintiffs are entitled to relief. Defendants are subject to liability for civil penalties for each day for each violation. 33 U.S.C. § 1365(a)(1), (f)(6); *id.* § 1319(d).
89. As is described more fully in NOI #1 and NOI #2, Defendants have a history of submitting duplicate DMRs. (*See* Exhibit 1, NOI #1, pp. 3-5 for a narrative history of the litigation involving Defendants' prior duplicate DMR filings.)
90. Defendants' pattern and practice of submitting inaccurate data raises an inference that such practice is continuing, and will continue, or is reasonably likely to continue, unless enjoined by a court of law.

91. Plaintiffs reserve the right to add to the specific violations set forth in this Complaint, additional claims based on similar violations upon determining that such claims exist based on information in Defendants' possession or the government's possession that may be made available to Plaintiffs after the filing of this Complaint.

**COUNT 2**

**VIOLATIONS OF THE CLEAN WATER ACT BY  
DISCHARGING A POLLUTANT IN EXCESS OF PERMIT LIMITS**

92. Plaintiffs reallege, as if set forth fully herein, each and every allegation contained in the preceding paragraphs.
93. Plaintiffs, through their investigation of Defendants' DMRs, have identified 43 discrete, self-reported exceedences of monthly average or daily minimum/maximum permit effluent limits by Defendants during the second quarter 2014, which ran from April 2014 to June 2014. A full list of the effluent limit violations is found in Exhibit 1, Attachment 2, Table 3.
94. Each day that Defendants violate a condition of Frasure Creek's KPDES permits, for each parameter to which the condition applies, is a separate and distinct violation of the Clean Water Act. Until the violations contained herein are corrected, Defendants are in a state of continuous violation of CWA § 301(a), 33 U.S.C. § 1311(a).
95. Defendants exceeded an effluent limitation in Frasure Creek's KPDES permits at least 43 times as reported on DMRs during the second quarter of 2014. These exceedences represent at least 765 separate and distinct violations of CWA effluent standards or limitations. *See* 33 U.S.C. § 1311(a) and Ky. Rev. Stat. Ann. § 224.70.110.

96. Plaintiffs reserve the right to add to the specific violations set forth in this Complaint, additional claims based on similar violations upon determining that such claims exist based on information in Defendants' possession or the government's possession that will be made available to Plaintiffs after the filing of this Complaint.

**REQUEST FOR RELIEF**

WHEREFORE, the Plaintiffs respectfully request the following:

1. A jury trial on all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure;
2. That the Court enter a judgment declaring, pursuant to 28 U.S.C. § 2201, that Defendants have violated and are in violation of Frasure Creek's KPDES permits and the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1365(a);
3. That the Court enjoin Defendants from operating their surface mining operations in such a manner as will result in further violations of Frasure Creek's KPDES permits and the Clean Water Act, 33 U.S.C. § 1311(a) and 1365(a), and requiring Defendants to take such measures as are necessary to bring each surface mining operation into compliance.
4. That the Court award civil penalties (payable to the United States Treasury) in the amount of \$37,500 per violation per day for each violation. *See* 33 U.S.C. §§ 1365(a), 1319(d); 40 C.F.R. § 19.4 (adjustment of civil monetary penalties for inflation).
5. That the Court award to Plaintiffs their costs, including reasonable attorney and expert witness fees, as authorized by CWA § 505(d), 33 U.S.C. § 1365(d); and
6. That the Court award such other relief as this Court deems just and proper.

This the 13<sup>th</sup> day of March, 2015.

Respectfully Submitted,

**/s/ Mary Varson Cromer**

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