

# PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

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October 7, 2010

**VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED**

ICG KNOTT COUNTY, LLC

P.O. Box 102

Kite, Kentucky 41828

ICG KNOTT COUNTY, LLC

c/o Corporation Service Company

421 West Main Street

Frankfort, KY 40601

**Re: Notice of Intent to Sue for Clean Water Act Violations**

Dear Sir or Madam:

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians for the Commonwealth, Inc. (“KFTC”), Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonny, and Mr. Winston Merrill Combs (collectively, “Appalachian Voices”) hereby place ICG Knott County, LLC (“ICG Knott”) on notice of their intent to sue ICG Knott pursuant to § 505(b) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(b), for violations of an “effluent standard or limitation” pursuant to CWA § 505(a)(1)(A) and (f), 33 U.S.C. § 1365(a)(1)(A) and (f).

Under CWA § 301(a), 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant into waters of the United States from a point source without, or in violation of, a permit issued pursuant to CWA § 402, 33 U.S.C. § 1342. In order to be in compliance with permit conditions and CWA statutory requirements, owners and operators of point sources are required to “install, use, and maintain . . . monitoring equipment or methods” to sample effluents. CWA § 308(A)(iii)-(iv), 33 U.S.C. § 1318(A)(iii)-(iv). In addition, owners and operators must “establish and maintain such records” and submit them in the form of Discharge Monitoring Reports (“DMRs”) in accordance with CWA § 308(A)(i)-(ii), 33 U.S.C. § 1318(A)(i)-(ii), permit conditions, and applicable regulations.

ICG Knott has violated, and continues to violate, “an effluent standard or limitation” under CWA §§ 505(a)(1)(A) and (f), 33 U.S.C. §§ 1365(a)(1)(A) and (f), in reference to Kentucky Pollutant Discharge Elimination System (“KPDES”) Permit No. KYG040000 (the

“General Permit”),\* issued by the Kentucky Department of Environmental Protection, Division of Water (“KDOW”) pursuant to § 402(b) of the CWA, 33 U.S.C. § 1342(b). Violation of “an effluent standard or limitation,” for purposes of a KPDES permit, is defined pursuant to CWA § 505(f), 33 U.S.C. § 1365(f), 401 K.A.R. 5:065 and 40 C.F.R. §§ 122 and 123.25.

**The attached Appendix lists the specific violations of KPDES Permit No. KYG04000 as shown in DMRs on file with the Kentucky Department for Natural Resources (“KDNR”).** These ongoing and continuing violations fall into one or more of the following categories:

**I. Submission of False/Fraudulent DMR Data**

DMRs on file with KDNR repeatedly show duplicate DMR submissions that contain exactly the same effluent data for all effluent characteristics reported on other DMRs for the same DSMRE number during different yearly quarters. In other words, ICG Knott merely re-filed previously submitted DMRs in subsequent reporting periods under a different signature and date. This pattern and practice of duplicating and recycling DMR data from one DMR to another continues over a period of six months in 2009. Some duplicate DMRs blatantly have the previously submitted dates crossed out and marked over in an obvious attempt to submit the exact same information without properly monitoring, sampling, and/or reporting effluent parameters, while other DMRs submit the exact same data and change only the dates on the DMRs.

**For a DMR-specific identification of ICG Knott’s submissions of false/fraudulent DMR data, please see the items listed under heading “I.” in the attached appendix.**

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on their face raises obvious suspicion regarding the validity of data submitted in all of ICG Knott’s DMRs on file with the KDNR for the past five years. Therefore, Appalachian Voices has a good faith belief that ICG Knott has failed, and continues to fail, in its obligation to submit and maintain accurate DMRs in accordance with federal and state regulations and the terms and conditions of KPDES Permit No. KYG04000.

The submission by ICG Knott of fraudulent, or otherwise false, DMR data leads to the inevitable conclusion that ICG Knott has violated KPDES Permit No. KYGO4000 in a number of ways, including, but not limited to, the following:

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\* The current version of KPDES Coal General Permit No. KYG040000 became effective on August 1, 2009, replacing a previous version of Permit No. KYG040000 that had been in effect since January 1, 2004. Unless otherwise noted, all references to the Coal General Permit in this Notice refer to the version that became effective on January 1, 2004.

**a. Continuing Violations**

**i. Submission of Fraudulent DMRs Equates to an Ongoing Violation of No Submission**

KPDES Permit No. KYG040000 states, “Discharge monitoring results obtained during the previous month shall be summarized for each outfall and reported using only KDOW approved Discharge Monitoring Report (DMR) forms and formats.” Part I, Page I-15, D. The permit also requires that “Test procedures for the analysis of pollutants shall conform to all regulations published pursuant to KRS 224,” which includes 401 KAR 5:065 and incorporates 40 C.F.R. §§ 122.48 and 123.25. Part I, Page I-18, F.

Therefore, ICG Knott’s filing of facially fraudulent, or otherwise false, DMRs equates to the failure to submit and maintain accurate DMRs with the KDNR. CWA §§ 308(A)(i)-(ii), (v), 33 U.S.C. §§ 1318(A)(i)-(ii), (v). *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111-12 (4th Cir. 1988); *Menzel v. County Utilities Corporation*, 712 F.2d 91, 94 (4th Cir. 1983) (“a discharger that fails to file discharge-monitoring reports, or fails to file accurate reports, would be in violation of the provisions of its NPDES permit and would be subject to citizens' suits under 33 U.S.C. § 1365”). Failure to submit a DMR constitutes ongoing and continuing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrue civil penalties per day and per limit until the violations cease. *Simkins Industries*, 847 F.2d at 1112.

**ii. Submission of Fraudulent DMRs Constitutes Ongoing Violations of Permit Conditions**

In addition to the above, a violation of a permit or permit condition issued under CWA § 402, 33 U.S.C. § 142, is a violation of an “effluent standard or limitation” in accordance with CWA § 505(f), 33 U.S.C. § 1365(f). *Simkins Industries*, 847 F.2d at 1111-12 (4th Cir. 1988); *Menzel*, 712 F.2d at 94. KPDES Permit No. KYG040000 states, “Samples and measurements taken in accordance with the requirements of Part I pages I-1 through I-8 shall be representative of the volume and nature of the monitored discharge.” Part I, Page I-15, D.

As it is the responsibility of every owner and operator to ensure compliance with CWA permits and permit conditions, and as failure to submit accurate DMRs is a violation of the above condition of KPDES Permit No. KYG040000, ICG Knott is in a state of continuing violation of its permit. Such violations are ongoing, and continuing, for each day for every outfall and every effluent parameter, and accrue civil penalties per day and per limit until the violations cease.

**b. Failure to Install, Use, and/or Maintain Monitoring Equipment**

The repeated submission of duplicate DMR data that are fraudulent, or otherwise false, on their face raises suspicion regarding the validity of all of the monitoring data contained in all

of ICG Knott's DMRs on file with the KDNR for the past five years. Appalachian Voices has a good faith belief that ICG Knott has failed, and continues to fail, in its obligation to "install, use, and maintain . . . monitoring equipment or methods" to sample effluents in accordance with CWA § 308(A)(iii), 33 U.S.C. § 1318(A)(iii). Additionally, such failures violate Standard Conditions of KPDES Permit No. KYG04000, which state that "It is the responsibility of the permittee to demonstrate compliance with permit parameter limitations by utilization of sufficiently sensitive analytical methods." KPDES Permit No. KYG04000, Part II, Page II-1.

As it is the responsibility of every owner and operator to install, use, and maintain adequate monitoring equipment in order to fulfill their obligations under the CWA, failure to do so equates to a violation of the Clean Water Act. Such violations are ongoing, and continuing, for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrue civil penalties per day and per limit until the violations cease.

**c. Failure to Accurately Sample and Test Effluent**

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on its face raises suspicion regarding the validity of sampling methods used by ICG Knott in creating its DMRs on file with the KDNR for the past five years. Appalachian Voices has a good faith belief that ICG Knott has failed, and continues to fail, in its obligation to sample effluent accurately and in compliance with the CWA and the General Permit. CWA § 308(A)(iv), 33 U.S.C. § 1318(A)(iv). In addition to requiring owners and operators to use "sufficiently sensitive analytical methods" to monitor and sample effluent, the General Permit also requires that "samples and measurements be taken . . . [that] shall be representative of the volume and nature of the monitored discharge." KPDES Permit No. KYG04000, Part II, Page II-1; Part I, Page I-15, D.

It is the responsibility of every owner and operator to ensure that sampling and testing is conducted accurately in order to fulfill its obligations under the CWA. Failure to do so constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the General Permit, which accrues penalties per day and per limit until the violations are remedied.

\* \* \*

Based on ICG Knott's apparent pattern and practice of repeatedly falsifying or otherwise providing inaccurate data in its DMRs, Appalachian Voices reserves the right to add to the specific CWA violations set forth in the Appendix hereto additional claims based on the same or similar pattern of violations set forth herein upon determining that such claims exist. Appalachian Voices takes these violations very seriously and intends to enforce any and all of ICG Knott's violations of the CWA that have occurred within the statute of limitations.

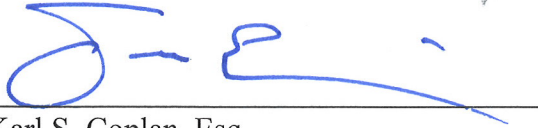
Appalachian Voices believes that this letter (including the attached Appendix) provides sufficient information to place ICG Knott on notice of our intent to sue and the grounds for a complaint. At the close of the 60-day notice period, unless significant progress is made in remedying and preventing these violations, Appalachian Voices intends to file suit in federal court under CWA §§ 505(b) and 301(a), 33 U.S.C. §§ 1365(b), 1311(a). As noted in CWA § 309(d), 33 U.S.C. § 1319(d), 40 C.F.R. § 19.4, and K.R.S. 224.99-010, violators of the CWA are subject to civil monetary penalties in amounts of up to \$37,500 per violation, per day. Such civil monetary penalties, if assessed by a court, are payable to the federal treasury.

This letter is sent on behalf of: Appalachian Voices, Inc. (contact person: Ms. Willa Mays, Executive Director, 191 Howard Street, Boone, North Carolina 28607, Phone: (828) 262-1500); Waterkeeper Alliance, Inc. (contact person: Mr. Scott Edwards, Director of Advocacy, 50 South Buckhout Street, Suite 302, Irvington, New York 10533, Phone: (914) 674-0622, Ext. 13); Kentuckians for the Commonwealth, Inc. (contact person: Mr. Burt Lauderdale, Executive Director, P.O. Box 1450, London, Kentucky 40743, Phone: 606-878-2161); Kentucky Riverkeeper, Inc. (contact person: Ms. Pat Banks, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 622-3065); Ms. Pat Banks, in her capacity as Kentucky Riverkeeper, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 527-3334; Ms. Lanny Evans, 4625 Four Mile Road, Winchester, Kentucky 40391, Phone: (859) 527-0134; Mr. Thomas H. Bonny, 1548 Wisemantown Road, Irvine, Kentucky 40336, Phone (606) 723-5694; and Mr. Winston Merrill Combs, 7225 Old Boonesboro Road, Winchester, Kentucky 40391, Phone: (859) 595-9637.

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonney, and Mr. Winston Merrill Combs are represented in this matter by Karl S. Coplan and Daniel E. Estrin, Esqs., Pace Environmental Litigation Clinic, Inc., 78 North Broadway, White Plains, New York 10603. Appalachian Voices, Inc., Ms. Banks, Ms. Evans, Mr. Bonny, and Mr. Combs are also represented by Paul A. Capua, Esq., Capua Law Firm, PA, The Greenhouse, 164 Depot Street, Boone, North Carolina 28607, Phone: (828) 264-0260; and Lauren H. Waterworth, Waterworth Law Offices, PLLC, 815 West King Street, Suite 2, P.O. Box 254, Boone, North Carolina, 28607, Phone: (828) 355-9750. KFTC is represented in this matter by Mary Cromer, Esq., Appalachian Citizens' Law Center, Inc., 317 Main Street, Whitesburg, Kentucky 48158, Phone: (606) 633-3929.

If you wish to discuss the matters set forth in this Notice of Intent to Sue, please do not hesitate to contact the undersigned.

Very truly yours,



Karl S. Coplan, Esq.  
Daniel E. Estrin, Esq.  
Peter Harrison & Robert Rieske, Legal Interns  
Pace Environmental Litigation Clinic, Inc.  
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(606) 633-3929

**Attachment—Appendix identifying CWA violations alleged herein**

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CC (via certified mail—return receipt requested):

Eric Holder, Jr., Attorney General  
United States Department of Justice  
10<sup>th</sup> Street and Constitution Ave., N.W.  
Washington, DC 20530

Lisa Jackson, Administrator  
United States Environmental Protection Agency  
Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue, N. W.  
Mail Code: 1101A  
Washington, DC 20460

Gwen Keyes Fleming, Regional Administrator  
U.S. Environmental Protection Agency, Region 4  
Sam Nunn Atlanta Federal Center  
61 Forsyth Street, SW  
Atlanta, GA 30303

Sandy Gruzesky, Director  
Kentucky Department of Environmental Protection, Division of Water  
200 Fair Oaks Lane  
Fourth Floor  
Frankfort, KY 40601

Peter T. Goodman, Assistant Director  
Kentucky Department of Environmental Protection, Division of Water  
200 Fair Oaks Lane  
Frankfort, KY 40601-1190

Carl Campbell, Commissioner  
Kentucky Department for Natural Resources  
#2 Hudson Hollow  
Frankfort, KY 40601

Dr. Len Peters, Office of the Secretary  
Kentucky Energy and Environment, Cabinet  
500 Mero Street, 5th Floor, CPT  
Frankfort, KY 40601

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R. Bruce Scott, Commissioner  
Department for Environmental Protection  
Kentucky Energy and Environment Cabinet  
300 Fair Oaks Lane  
Frankfort, KY 406

**Appendix: Alleged Clean Water Act Violations by ICG Knott County, LLC.**

**I. Submission of False/Fraudulent DMR data**

| DSMRE #  | KPDES #   | Outfall # | Monitoring Period                                | Nature of Violation(s)                       | Description   |
|----------|-----------|-----------|--|--|---|
| 860-0414 | KYGO43345 | 1         | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date scratched through on 2 <sup>nd</sup> Quarter 2009 DMR; other than sampling dates, 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR.                              |
| 860-5267 | KYG042589 | KPDES 2   | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR.     |
| 860-5268 | KYG042754 | MD-2      | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR. |
| 860-5268 | KYG042754 | 1         | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date scratched through on 2 <sup>nd</sup> Quarter 2009 DMR report; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR.                 |
| 860-5269 | KYG04631  | 1         | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date scratched through on 2 <sup>nd</sup> Quarter 2009 DMR report; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR.                 |
| 860-5271 | KYG045805 | KPDES 2   | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date scratched through on 2 <sup>nd</sup> Quarter 2009 DMR report; other than the sample dates, the 2009 2 <sup>nd</sup> Quarter DMR is an exact duplication of the 1 <sup>st</sup> Quarter DMR.                      |

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| DSMRE #  | KPDES #   | Outfall # | Monitoring Period                                | Nature of Violation(s)                       | Description   |
|----------|-----------|-----------|--|--|---|
| 860-5271 | KYG045805 | 7         | 1 <sup>st</sup> and 2 <sup>nd</sup> Quarter 2009 | 42 identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR. |
| 860-5271 | KYG045805 | KPDES 5   | 1st and 2nd Quarter 2009                         | 42 Identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR. |
| 860-5271 | KYG045805 | 001       | 1st and 2nd Quarter 2009.                        | 42 identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR. |
| 860-8012 | KYG042478 | 5         | 1st and 2nd Quarter 2009                         | 42 identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR. |
| 860-8012 | KYG042478 | 1         | 1st and 2nd Quarter 2009                         | 42 identically repeated numbers for 90 days. | Signature date scratched through on 2 <sup>nd</sup> Quarter 2009 DMR report; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR.                 |
| 860-9011 | KYG045000 | 1         | 1st and 2nd Quarter 2009                         | 42 identically repeated numbers for 90 days. | Signature date scratched through on 2 <sup>nd</sup> Quarter 2009 DMR report; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR.                 |
| 860-9011 | KYG045000 | KPDES 1   | 1st and 2nd Quarter 2009                         | 42 identically repeated numbers for 90 days. | Signature date on 2 <sup>nd</sup> Quarter 2009 DMR is the 1 <sup>st</sup> Quarter 2009 date; other than the sample dates, the 2 <sup>nd</sup> Quarter 2009 DMR is an exact duplication of the 1 <sup>st</sup> Quarter 2009 DMR. |