

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

**SOUTHERN APPALACHIAN
MOUNTAIN STEWARDS, SIERRA
CLUB, and APPALACHIAN VOICES**

Plaintiffs,

v.

CIVIL ACTION NO. _____

**PENN VIRGINIA OPERATING
COMPANY, LLC,**

Defendant.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR CIVIL
PENALTIES**

INTRODUCTION

1. This citizen suit is an action for declaratory judgment, mandatory injunctive relief, and civil penalties against Defendant Penn Virginia Operating Company, LLC (“Penn Virginia”) for discharging pollutants without a permit in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (“the Clean Water Act” or “the CWA”). Penn Virginia is discharging pollutants, including the toxic pollutant selenium, from at least seven point sources on its property north of Appalachia in Wise County, Virginia into Callahan Creek, Kelly Branch of Callahan Creek and/or tributaries of these streams. These streams are waters of the United States. Penn Virginia has no Clean Water Act permit for the discharges.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 33 U.S.C. § 1365 (Clean Water Act citizens’ suit provision).

3. On October 22, 2013, Plaintiffs gave notice of the violations and its intent to file

suit to the Defendant, the United States Environmental Protection Agency (“EPA”), and the Virginia Department of Environmental Quality (“DEQ”), as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A).

4. More than sixty days have passed since notice was served and, to Plaintiffs’ knowledge, no state or federal government agency has commenced and diligently prosecuted a civil or criminal action to require compliance with the Clean Water Act.

5. Moreover, neither EPA nor any agency of the Commonwealth of Virginia commenced an administrative penalty action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), or comparable state law to redress the violations prior to the issuance of the October 22, 2013 notice letter.

6. Venue in this District is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the Clean Water Act violations are located in this District.

7. Venue in this Division is proper pursuant to W.D. Va. Gen. R. 2(b) because a substantial part of the events or omissions giving rise to the claims herein occurred in this judicial Division.

PARTIES

8. Defendant Penn Virginia is a Delaware corporation that owns real property where the violations complained of in this action have occurred and are occurring.

9. Penn Virginia is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

10. Plaintiff Southern Appalachian Mountain Stewards (“SAMS”) is a Virginia corporation and has approximately thirty active members. SAMS works to prevent and correct harmful economic, environmental and human health effects of coal extraction in Virginia’s Wise and Dickenson Counties, and to promote sustainable economic development in the region.

SAMS' concerns include the exploration, enjoyment, restoration and protection of surface waters in Southwest Virginia.

11. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and approximately 15,000 members who reside in Virginia and belong to its Virginia Chapter. The 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 resources and ecosystems; 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 those objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in Virginia.

12. Plaintiff Appalachian Voices is a nonprofit North Carolina corporation committed to protecting the land, air, and water of the central and southern Appalachian region, focusing on reducing coal's impact on the region. Appalachian Voices has more than 900 members in the Appalachian region, including North Carolina, Virginia and Tennessee, and it maintains a permanent office in Virginia. Its concerns include the protection and restoration of surface waters in Virginia.

13. Plaintiffs' members suffer injuries to their aesthetic, recreational, environmental, and/or economic interests as a result of Defendant's unlawful discharges of pollutants. Plaintiffs' members fish, swim, observe wildlife, and/or otherwise use the waters affected by Defendant's discharges and are harmed by pollutants that Defendant is discharging. Plaintiffs' members refrain from swimming, wading, fishing, and/or engaging in other activities in and around the streams affected by Defendant's discharges to avoid exposure to pollutants or the effect of such pollutants. Plaintiffs' members are also very concerned about the impacts of pollution from Defendant's discharges on their friends and neighbors and on local wildlife. If

Defendant's unlawful discharges ceased, the harm to the interests of Plaintiffs' members could be redressed. Injunctions and/or civil penalties would redress Plaintiffs' members' injuries by regulating pollutant discharges and by preventing and/or deterring future violations of the Clean Water Act.

14. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5).

STATUTORY AND REGULATORY FRAMEWORK

15. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit, such as a National Pollution Discharge Elimination System ("NPDES") Permit issued by the EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

16. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any "citizen" to "commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter."

17. Section 505(f)(1) of the CWA defines "an effluent standard or limitation" to include "an unlawful act under subsection (a) of Section 301 of this title." 33 U.S.C. § 1365(f)(1).

18. In an action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant to comply with the CWA and to assess civil penalties under Section 309(d) of the CWA, 33 U.S.C. § 1319(d).

19. Section 309(d), 33 U.S.C. § 1319(d), provides that any person who violates Section 301, 33 U.S.C. § 1311, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation.

20. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C § 2461

note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, the court may assess a civil penalty of \$37,500 per day for each violation that occurred after January 12, 2009. See 40 C.F.R. § 19.4.

21. Under Section 505(d) of the CWA, 33 U.S.C § 1365(d), the Court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the Court determines such an award is appropriate.”

FACTS

A&G Coal Selenium Report

22. A&G Coal Corporation (“A&G”) is a Virginia corporation doing business in Wise County, Virginia.

23. In 2011 and 2012, A&G, at its own election, conducted on-site mapping, research, water sampling, flow measurements, photography and laboratory analysis of surface water discharges that are not on A&G real property and are not within the boundaries of its mining permit.

24. According to A&G, the study demonstrated identifiable sources of significant water flow and significant selenium and sulfate discharges. Such discrete sources are point sources within the meaning of the Clean Water Act.

25. A&G and/or its agents conducted laboratory analyses of the pollutant discharges from these sites, created a map of the discharges, and recorded the coordinates of each site.

26. The Report indicates the sources are unpermitted sites associated with mining activities that took place on the property prior to the enactment of the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1234 et seq.

27. A&G designated the sites with the following names: AML (abbreviation for “Abandoned Mine Land”) 1, AML 2, AML 3, and AML 4; KB (abbreviation for “Kelly

Branch”) 2, KB 3, and KB 4. AML 5, AML 6, and KB 1 were identified in the Report but are not a part of this Complaint. The “AML” sites discharge to Callahan Creek or its unnamed tributary shown in the report. The “KB” sites discharge to Kelly Branch of Callahan Creek or its unnamed tributary shown in the report.

28. The Report is attached, as well as certain supporting laboratory analyses and documentation, as Exhibit A. The following table summarizes the locations, pollutants and receiving streams identified by A&G.

Point Source	Location	Average Flow	Average Selenium Concentration	Sulfate Concentration	Receiving Stream
AML-1	36°56'57"N 82°47'31"W	5 gpm	7.98 µg/l	440 mg/l	Callahan Creek
AML-2	36°56'58"N 82°47'31"W	50 gpm	9.02 µg/l	441 mg/l	Callahan Creek
AML-3	36°56'58"N 82°47'30"W	350 gpm	8.59 µg/l	455 mg/l	Callahan Creek
AML-4	36°56'53"N 82°47'02"W	50 gpm	7.95 µg/l	124 mg/l	Callahan Creek
KB-2	36°56'12"N 82°47'29"W	250 gpm	8.23 µg/l	435 mg/l	Kelly Branch
KB-3	36°56'14"N 82°47'26"W	22.5 gpm	5.85 µg/l	418 mg/l	Kelly Branch
KB-4	36°56'16"N 82°47'25"W	237.5 gpm	9.65 µg/l	208 mg/l	Kelly Branch

29. The Report includes photographs of the sites. The photographs depict discrete channels carrying surface waters, and depict discrete sources of the water. Other documentation created or supplied by A&G corroborates the Report and the characterization of the sites as defined, discrete sources of pollutant discharges. The A&G Report further locates the point sources by way of a topographic map, photographs, and field notes describing the point sources in relation to other monitoring points. The geographic coordinates of the sites and a color topographic map showing the sites of the discharges is attached as Exhibit B.

30. Selenium is a toxic pollutant under the Clean Water Act. 40 C.F.R. § 401.15. Sulfates are pollutants associated with coal mining discharges.

31. Penn Virginia controls and/or owns the sites of the point sources.

32. The point sources are untreated and therefore discharges continue and are likely to continue unabated. Accordingly, Plaintiffs allege that Penn Virginia is in continuous and/or intermittent violation of the prohibition against unpermitted discharges of pollutants.

33. The Virginia Department of Mining, Minerals and Energy has confirmed in writing in correspondence with the Plaintiffs that none of the sites described in the report are within any Clean Water Act or surface mining permit boundary.

34. In its October 22, 2013 letter to Penn Virginia and various state and federal governmental agency recipients, Plaintiffs fully described the facts set forth above, articulated the Clean Water Act claims alleged herein, and requested to be advised of any factual inaccuracies in the report or new factual developments since the creation of the report. None of the recipients of the letter refuted the facts described in the report or Plaintiffs' factual assertions.

CLAIM FOR RELIEF

35. Plaintiffs incorporate by reference all preceding allegations.

36. Penn Virginia's discharges identified in the above paragraphs are discharges from a point source or sources into navigable waters of the United States within the meaning of Section 301 of the Clean Water Act, which prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311.

37. Penn Virginia has discharged and added pollutants, specifically selenium and sulfates, from the point sources identified above to the waters of Callahan Creek, Kelly Branch of Callahan Creek and/or tributaries of these streams.

38. Each of the sources is a point source within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. Callahan Creek, Kelly Branch of Callahan Creek and their tributaries are waters of the United States within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

40. At the time of these discharges, and continuing to the present, Penn Virginia did not and does not have a permit under the Clean Water Act to discharge pollutants from any of the locations identified in the Report.

41. Penn Virginia's discharges are continuing and/or intermittent.

42. Because of its unpermitted discharges, Penn Virginia is in violation of the prohibition in the Clean Water Act on discharges of pollutants without a permit. 33 U.S.C § 1311. This prohibition is enforceable pursuant to Sections 505(a)(1) and 505(f)(1) of the CWA, 33 U.S.C. §§ 1365(a)(1), 1365(f)(1).

43. Pursuant to Sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. § 1319(d) and 1365, Penn Virginia is liable for civil penalties of up to \$37,500 per day for its unpermitted discharges.

44. Penn Virginia is also subject to an injunction under the Clean Water Act ordering it to cease its unpermitted discharges and/or to apply for a Clean Water Act permit.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order:

1. Declaring that Penn Virginia has violated and is in continuing violation of the CWA;

2. Enjoining Penn Virginia from managing its property in such a manner as will result in further unpermitted discharges of pollutants from its property;

3. Assessing appropriate civil penalties up to \$37,500 per day against Penn Virginia for each Clean Water Act violation;

4. Ordering Penn Virginia to apply for a Clean Water Act permit and/or to cease

unpermitted pollutant discharges entirely;

5. Ordering Penn Virginia to conduct monitoring and sampling to determine the environmental effects of its violations, to report the results of monitoring and sampling to the Plaintiffs and to the appropriate governmental agency, to remedy and repair environmental contamination and/or degradation caused by its violations, and restore the environment to its prior uncontaminated condition;

6. Awarding Plaintiffs their attorney and expert witness fees and all other reasonable expenses incurred in pursuit of this action; and

7. Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ Isak Howell

Isak Howell (VSB No. 75011)
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901
(304) 645-9006

Counsel for Plaintiffs