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June 10, 2015

## VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

FRASURE CREEK MINING, LLC  
P.O. Box 100  
Oak Hill, WV 25901

TRINITY COAL CORPORATION  
P.O. Box 100  
Oak Hill, WV 25901

Registered Agent for Frasure Creek Mining, LLC and Trinity Coal Corporation:  
NATIONAL CORPORATE RESEARCH, LTD.  
828 Lane Allen Rd.  
Suite 219  
Lexington, KY 40504

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

Dear Sir or Madam:

The purpose of this letter is to inform you that Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians For The Commonwealth, Inc., Kentucky Riverkeeper, Inc., and Sierra Club (collectively, the “Citizen Groups”) intend to sue Frasure Creek Mining, LLC and Trinity Coal Corporation (collectively, “Frasure Creek”) for violations of the federal Clean Water Act (“CWA”) and the laws of Kentucky.

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 comply 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. CWA §308(a)(4)(A)(i), 33 U.S.C. § 1318(a)(4)(A)(1).

Frasure Creek 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 its KPDES permits issued by the Kentucky Energy and Environment Cabinet (“Cabinet”), 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 violations noticed herein continue from false reporting violations first alleged by the Citizens Groups in 2010.<sup>1</sup> Five years ago the Citizen Groups discovered that Frasure Creek had repeatedly copied the exact same pollution monitoring data from one DMR to the next and submitted the falsified reports to the Cabinet.

After an apparent pause in its false reporting, Frasure Creek resumed this illegal practice as identified in the Citizen Groups’ November 14, 2014 notice of intent to sue (hereinafter referred to as “the 2014 NOI”).

As before, the Cabinet failed to notice these violations and responded with investigation and enforcement only after the Citizen Groups provided notice. In response to the Cabinet’s investigation, Frasure Creek or its contractor submitted to the Cabinet 149 purportedly “corrected” DMRs to replace the duplicate DMRs set forth in the 2014 NOI. Frasure Creek also submitted 23 additional corrected DMRs to replace DMRs that were not contained in the Citizen Groups’ 2014 NOI.<sup>2</sup> This NOI refers to all 172 replaced DMRs for first quarter 2014 as “corrected DMRs.”

This notice alleges a new type of false reporting. Based on the Citizens Groups’ analysis of raw data submitted to the Cabinet by J&M Monitoring, Inc. in response to the 2014 NOI, Frasure Creek has been falsely reporting settleable solids (SS) values when alternate effluent limits were requested. In these instances, the DMR that Frasure Creek submitted to the state as a “corrected” DMR showed a compliant SS value of 0.5 mL/L. In contrast, the actual raw data from the laboratory reports showed effluent limit violations for SS that were not reported. This false reporting of compliant SS values occurred in 25% of the instances in which the Citizens Groups were able to compare the DMR reported value for SS against the laboratory’s raw data.

This notice also alleges pollution limit violations that were masked by Frasure Creek’s previous submission of false DMRs for first quarter 2014. The pollution limit violations noticed herein and found in Table 7 attached hereto were reported on Frasure Creek’s corrected DMRs. The originally filed false DMRs did not contain these pollution limit exceedances.

Finally, Citizens Groups notice additional effluent limit violations for the third and fourth quarters of 2014 and an additional instance of duplicate DMR reporting in the fourth quarter 2014.

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<sup>1</sup> All of the Citizens Groups that provide notice here, except Sierra Club, first sent Frasure Creek a notice of intent to sue for its submission of duplicate DMRs on October 7, 2010.

<sup>2</sup> The values for these 23 corrected DMRs had previously been reported as “no flows.” The corrected DMRs for these 23 reported effluent values other than “no flow.”

## I. FALSE REPORTING

***Frasure Creek has engaged in false reporting in the corrected DMRs, the very documents it submitted to correct its prior instances of false reporting in the first quarter of 2014.***

Most of the false reporting violations noticed herein are based either on Frasure Creek's corrected DMRs or as a result of comparing the raw laboratory data provided to the Cabinet by J&M Monitoring, Inc. with the DMRs submitted by Frasure Creek for the first quarter 2014.

The false reporting alleged herein has occurred since January 2014 and consists of the following:

- (1) instances in which Frasure Creek requested an alternate effluent limit<sup>3</sup> and falsely reported its settleable solids (SS) value at 0.5 ml/l, the maximum value allowed under its permit, where the raw data provided to the Cabinet shows that the company was discharging in excess of 0.5 ml/l; and
- (2) instances in which Frasure Creek reported outfalls as not flowing, when in fact, not only were they flowing, they were polluting in excess of permitted levels.

With regard to the former type of false reporting, Frasure Creek falsely reported its settleable solids value 25% of the time on the corrected DMRs provided for first quarter 2014. In other words, for the first quarter 2014, when the company requested an alternate effluent limit because of a precipitation event, it falsely reported the effluent value one in four times. Furthermore, in every instance save one<sup>4</sup> where the laboratory data provided by J&M Monitoring, Inc. does not match the reported value, the laboratory data indicate a permit violation, yet Frasure Creek reported the 0.5 mL/L compliant value on the corrected DMR.

The false reporting of the 0.5 mL/L compliant settleable solids value where alternate effluent limits are requested is particularly troubling because, ***since 2011, every time Frasure Creek has submitted a request for alternate precipitation limits, it has reported a value of 0.5 mL/L for SS. Frasure Creek has made more than 300 such requests.***

But for the Citizen Groups' 2014 NOI and the raw data provided as part of the Cabinet's investigations of the Citizens Groups allegations in that NOI, these new false reporting violations could not be known. Ordinarily, companies are not required to submit raw laboratory data with their DMRs. These most recently discovered reporting violations reveal yet another, more insidious layer of falsification by Frasure Creek and call in to question the reliability of every single DMR Frasure Creek has submitted without accompanying raw data for at least the last seven years.

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<sup>3</sup> Alternate effluent limits are available for precipitation-induced discharges pursuant to 401 KAR 5:065 §4(2) and 40 C.F.R. § 434.63. To qualify for an alternate effluent limit, the discharge must provide proof that the discharge or increase in the discharge was caused by the precipitation event. Typically, when alternate effluent limits apply, the permit limits for manganese, iron, and total suspended solids drop out and are replaced by the 0.5 ml/l settleable solid (SS) limit. In most instances, when alternate effluent limits are in place, the only effluent limits in place are pH and settleable solids.

<sup>4</sup> In one instance, Frasure Creek submitted a "corrected" DMR with an alternate precipitation limit request and did not provide the corresponding bench sheet.

The false reporting violations noticed herein are as follows:

1. Seven known instances where SS, as reported on “corrected” first quarter 2014 DMRs, does not match the value recorded on the corresponding bench sheets. One instance where SS, as reported on the originally filed and uncorrected first quarter 2014 DMR, does not match the value on the corresponding bench sheet. (*See* Attachment 1, Table 1.)
2. Three known instances where a water quality parameter other than SS, as reported on the first quarter 2014 uncorrected DMRs, does not match the value recorded on the corresponding bench sheet. (*See* Attachment 1, Table 2.)
4. Seven known instances where a “corrected” DMR and bench sheet data indicate an outfall was flowing that was originally reported as having “no flow.” All known occurrences are for the first quarter of 2014. (*See* Attachment 1, Table 3.)
5. One known instance of duplicate submission of DMR data. Occurrence is in the fourth quarter of 2014. (*See* Attachment 1, Table 4.)

## **II. POLLUTION LIMIT EXCEEDANCES**

In addition to the additional instances of false reporting noticed herein, the “corrected” DMRs reveal pollution limit exceedances that were masked by the false, duplicate DMR data Frasure Creek originally reported. Pollution limit exceedances were found on the raw laboratory data that were not reported on the DMRs Frasure Creek submitted to the Cabinet. And, the company’s third and fourth quarter 2014 DMRs contain numerous self-reported exceedances.

The pollution violations noticed here are as follows:

1. Six known instances where a noncompliant SS value was recorded on the raw laboratory data yet a compliant value was reported on the first quarter 2014 “corrected” DMR. (*See* Attachment 1, Table 5.)
2. One known instance where a noncompliant SS value was recorded on the raw laboratory data yet a compliant value was reported on the originally filed first quarter 2014 DMR. (*See* Attachment 1, Table 5.)
3. Sixty-two instances of self-reported effluent limit violations of parameters other than SS as recorded on the laboratory data. In each instance, the company reported compliant values on the first quarter 2014. (*See* Attachment 1, Table 6.)
4. 640 instances of a self-reported effluent limit exceedances in “corrected” first quarter 2014 DMRs. (*See* Attachment 1, Table 7.)
5. 5039 instances of a self-reported effluent limit exceedances in the third and fourth quarters 2014 DMRs. (*See* Attachment 1, Table 8.)

## **III. VIOLATIONS ALLEGED**

### **A. Submission of False DMRs Constitutes a Failure to Submit and Maintain Accurate DMRs.**

Frasure Creek’s filing of facially fraudulent, or otherwise false, DMRs equates to the failure to submit and maintain accurate DMRs with the Kentucky Department for Natural Resources (“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, 1111-1112 (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”). 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. Also, the permit details 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.

The submission of effluent data that conflict with the raw laboratory data and the submission of “corrected” DMRs containing flow data where the originally submitted DMRs indicated “no flow” raises suspicion regarding the validity of data submitted in all of Frasure Creek’s DMRs on file with the Cabinet for the past seven years.<sup>5</sup> Therefore, the Citizen Groups have a good faith belief that Frasure Creek 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 its KPDES permits.

Failure to submit a DMR constitutes ongoing 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. *See Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1112 (4th Cir. 1988) *citing Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 313 (4th Cir. 1986), *vacated*, 484 U.S. 49 (1987).

**B. Submission of False DMRs Constitutes a Violation of a Permit Condition.**

In addition to the above, a violation of a permit or permit condition issued under CWA § 402, 33 U.S.C. § 1342, is a violation of an “effluent standard or limitation” in accordance with CWA § 505(f), 33 U.S.C. § 1365(f). *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111-1112 (4th Cir. 1988); *Menzel v. County Utilities Corporation*, 712 F.2d 91, 94 (4th Cir. 1983). Frasure Creek’s KPDES permits require that samples and measurements taken must be representative of the volume and nature of the monitored discharge.

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 a condition of its KPDES permits, Frasure Creek is in a state of continuing violation of its permits. This constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrues penalties per day and per limit until the violations cease.

**C. Failure to Install, Use, and/or Maintain Monitoring Equipment Constitutes a Violation of a Permit Condition.**

The repeated submission of DMRs that are fraudulent, or otherwise false, raises suspicion regarding the validity of monitoring data found in all of Frasure Creek’s DMRs on file with the KDNR for the past seven years. Therefore, the Citizen Groups have a good faith belief that Frasure Creek 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, this violates the conditions of its KPDES permits which

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<sup>5</sup> The Citizen Groups have reviewed DMRs submitted by Frasure Creek since 2008.

require the permittee to demonstrate compliance with the permit limits using sufficiently sensitive analytical methods.

As it is the responsibility of every owner and operator to install, use, and maintain its monitoring equipment in order to fulfill its obligations under the CWA, failure to do so equates to a violation. This constitutes ongoing violations for each day for every outfall and every effluent characteristic listed in the applicable CWA permit, which accrues penalties per day and per limit until the violations cease.

**D. Failure to Accurately Sample and Test Effluent Constitutes a Violation of a Permit Condition.**

The repeated submission of DMRs that are fraudulent, or otherwise false, raises suspicion regarding the validity of sampling methods used by Frasure Creek in creating its DMRs on file with the KDNR for the past seven years. Therefore, the Citizen Groups have a good faith belief that Frasure Creek has failed, and continues to fail, in its obligation to sample effluent accurately and in compliance with the CWA and its permit. CWA § 308(A)(iv), 33 U.S.C. § 1318(A)(iv). In addition, Citizen Groups have a good faith belief that Frasure Creek has failed to ensure that its samples and measurements are representative of the volume and nature of the measured discharge as Frasure Creek's KPDES permits require.

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 applicable CWA permit, which accrues penalties per day and per limit until the violations are remedied.

**E. Self-Reported Exceedances of Permit Limits Constitute a Violation of a Permit Condition.**

Under its KPDES permits, Frasure Creek must comply with both daily maximum and monthly average effluent limitations for specific parameters each month during any given reporting period.

A violation of a daily maximum effluent limitation is treated as a single violation. "Violations of 'average' limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 317 (4th Cir. 1986). As such, a violation of a monthly average effluent limit is counted as one violation for each day of the month in which it occurred. However, when a permit holder violates both the monthly average and daily maximum effluent limitation for the discharge of a single pollutant at one outfall during the same month, the daily maximum effluent limitation violation is not counted as a separate violation. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140 (11th Cir. 1990) (finding that because discharge of a single pollutant may be the cause of both daily and monthly violations, fining the violator twice may result in imposing two fines for the same illegal act).

DMRs on file with KDNR indicate Frasure Creek's failures to comply with effluent limitations for specific parameters set forth in its KPDES permits. In total, Frasure Creek's pollution discharges exceeded the numerical effluent limitations in its discharge permits thousands of times during the first, third, and fourth quarters of 2014. Each of these exceedances constitutes a violation of CWA § 301(a), 33 U.S.C. § 1311(a) and K.R.S. § 224.70-110.

#### **IV. THERE HAS BEEN NO DILIGENT PROSECUTION OF THESE ONGOING VIOLATIONS.**

Under CWA § 501(b)(1)(B), 33 U.S.C. § 1361(b)(1)(B), a government enforcement action for violations of the CWA may preclude a citizen enforcement action only if the action is diligently prosecuted. The Cabinet has failed to diligently prosecute the CWA violations subsequent to Frasure Creek's emergence from bankruptcy. To the best of the Citizens Groups' knowledge, the Cabinet has not instituted nor is it diligently prosecuting any enforcement action against Frasure Creek for the violations alleged herein.

#### **V. THE VIOLATIONS ALLEGED ARE ONGOING.**

Citizen plaintiffs alleging ongoing and continuous CWA violations may satisfy the burden of proof by proving a "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd.*, 791 F.2d at 317. The Citizen Groups believe that Frasure Creek's history of non-compliance with permit terms, in addition to the violations cited herein, creates a reasonable likelihood that the company's violations will continue in the future.

The violations alleged herein continue a pattern of false reporting masking pollution violations that have occurred since at least 2010. The false reporting violations herein continue from the false reporting violations committed by Frasure Creek for at least the past five years. In response to our 2014 NOI, Frasure Creek submitted "corrected" DMRs to replace DMRs containing false data. Shockingly, at least seven of those "corrected" DMRs contain additional false reporting in that the values reported on the "corrected" DMR do not match the values on the corresponding laboratory raw data. In addition, the Citizens Groups' analysis of the raw laboratory data submitted by J&M Monitoring, Inc. reveals that at least one original DMR from the first quarter of 2014 also contains falsely submitted data. Still further, there are seven instances where "corrected" DMRs indicate an outfall was flowing when the original DMR submitted indicated the outfall was not flowing.

Based on Frasure Creek's pattern and practice of repeatedly falsifying data on DMRs and violating effluent limitations by discharging pollutants in excess of permitted limits, the Citizen Groups reserve the right to allege additional CWA violations based on the same pattern of violations set forth herein, upon determining that such violations have occurred. The Citizen Groups take these violations very seriously and intend to enforce any and all of Frasure Creek's violations of the CWA.

The Citizen Groups believe that this letter provides sufficient information to place Frasure Creek on notice of their 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, the Citizen Groups will bring enforcement actions 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) and 40 C.F.R. § 19.4, violators of the CWA are subject to civil monetary penalties in amounts of up to \$37,500 per violation, per day. Under K.R.S. § 224.99-010, violators are subject to penalties in the amount of \$25,000 per day.

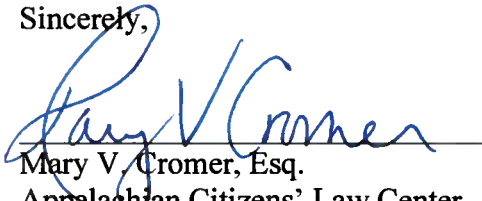
This letter is sent on behalf of: Appalachian Voices, Inc. (contact person: Mr. Tom Cormons, Executive Director, 171 Grand Boulevard, Boone, North Carolina 28607, Phone: (828) 262-1500); Waterkeeper Alliance, Inc. (contact person: Mr. Peter A. Harrison, 17 Battery Place, Suite 1329, New York, New York 10004, Phone: (212) 747-0622); 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); and Sierra Club (contact person: Mr. Aaron Isherwood, 85 Second St., 2d Floor, San Francisco, CA 94105-3441, Phone: 415-977-5680).

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Kentuckians For The Commonwealth, Inc., and Sierra Club 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, Phone: (914) 422-4343; Lauren H. Waterworth, Esq., Waterworth Law Office, PLLC, P.O. Box 254, Boone, North Carolina, 28607, Phone: (828) 355-9750; and 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.

Sincerely,



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