

**COMMONWEALTH OF KENTUCKY**  
**FRANKLIN CIRCUIT COURT**  
**CIVIL ACTION NO. \_\_\_\_\_**  
**DIVISION \_\_**

**APPALACHIAN VOICES, INC.,  
WATERKEEPER ALLIANCE, INC.,  
KENTUCKIANS FOR THE  
COMMONWEALTH, INC., KENTUCKY  
RIVERKEEPER, INC., LANNY EVANS,  
WINSTON MERRILL COMBS, THOMAS H.  
BONNY, and PAT BANKS,**

**PETITIONERS,**

Addresses:

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Kentuckians for the Commonwealth  
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Marc Yaggi, Executive Director  
Waterkeeper Alliance  
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New York, NY 10004

Pat Banks, Kentucky Riverkeeper  
300 Summit Street  
Richmond, KY 40475

Lanny Evans  
4625 Four Mile Road  
Winchester, KY 40391

Winston Merrill Combs  
7225 Old Boonesboro Road  
Winchester, KY 40391

Thomas H. Bonny  
1548 Wisemantown Road  
Irvine, KY 40336

v.

**ENERGY AND ENVIRONMENT CABINET,**

**RESPONDENT.**

Serve:

Dr. Len Peters, Secretary  
Kentucky Energy and Environment Cabinet  
5<sup>th</sup> Floor Capital Plaza Tower  
500 Mero Street  
Frankfort, KY 40601

Jack Conway, Attorney General  
Office of the Attorney General  
700 Capitol Avenue, Suite 118  
Frankfort, KY 40601

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**PETITION FOR REVIEW**

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Petitioners and Plaintiffs, Appalachian Voices, Inc., Kentuckians for the Commonwealth, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Lanny Evans, Winston Merrill Combs, Thomas H. Bonny, and Pat Banks (collectively "Petitioners"), by and through counsel, hereby petition this Court for review of a final order of the Secretary of the Kentucky Energy and Environment Cabinet ("Secretary"), File No. DOW-33597-047. (Hereinafter "Secretary's Order.") A copy of the Secretary's Order is provided herein as ATTACHMENT 1. Petitioners state as follows:

**INTRODUCTION**

1. This is an action filed pursuant to Ky. Rev. Stat. Ann. § 224.10-470 to set aside the Secretary's April 16, 2013 Order in File No. DOW-33597-047.

2. Petitioners are aggrieved by the Secretary's Order in that the Order purports to resolve, over the Petitioners' objection, matters to which Petitioners were full parties in the administrative proceeding below. The purported resolution by the Secretary was undertaken without the benefit of any rationale and without any consideration of or response to the Petitioners' objections to the proposed Agreed Order between the Energy and Environment Cabinet ("Cabinet") and Frasure Creek Mining, LLC ("Frasure Creek"). The Secretary's Order is nothing more than the Secretary's signature on a proposed Agreed Order that was negotiated without the Petitioners' participation. The resolution of the matter below without the participation of Petitioners, who were full parties in the action below, and without any consideration and findings related to the Petitioners' objections to the proposed Agreed Order constitutes a violation of Petitioners' due process rights and contravenes the Secretary's authority. Furthermore, the Secretary's Order is unsupported by the evidence in the record.

3. The Secretary's Order adversely affects Petitioners and their members because it is insufficient to prevent future harms related to Frasure Creek's coal mining and reclamation

operations in eastern Kentucky. The Cabinet's action is arbitrary and capricious, an abuse of discretion, contrary to law, and not supported by substantial evidence.

## **PARTIES**

4. Petitioner Appalachian Voices is a non-profit membership corporation organized under the laws of the State of North Carolina, with its principal office in Boone, North Carolina. Appalachian Voices has approximately 900 individual members and works to solve environmental problems that impact people who live in the central and southern Appalachian Mountains, including in eastern Kentucky.

5. Petitioner Kentuckians for the Commonwealth (KFTC) is a non-profit membership corporation organized under the laws of the Commonwealth of Kentucky, with its principal office in London, Kentucky, in Laurel County. KFTC is a social, economic, and environmental justice organization with approximately 7000 members statewide. KFTC's purposes include promoting the participation of citizens in democratic institutions and promoting social justice and quality of life for all Kentuckians, including by addressing environmental harms that affect Kentucky citizens.

6. Petitioner Waterkeeper Alliance is an international non-profit membership corporation, organized under the laws of the State of New York, with its principal office in New York City. Waterkeeper Alliance is an umbrella organization comprising nearly two hundred local Waterkeeper organizations. Waterkeeper Alliance works to restore and protect the waters of the United States, including the Kentucky, Big Sandy, and Licking Rivers and their tributaries. Waterkeeper Alliance promotes compliance with environmental laws such as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, ("CWA"), responds to citizen complaints, identifies threats to water bodies, and protects the public's right to a pollution-free environment.

7. Petitioner Kentucky Riverkeeper is a non-profit membership corporation organized under the laws of the Commonwealth of Kentucky, with its principal office in Richmond, Kentucky, in Madison County. Kentucky Riverkeeper has approximately 450

members. Kentucky Riverkeeper's mission includes protecting and restoring the Kentucky River watershed and the communities that use and enjoy it.

8. Petitioner Pat Banks sues in her capacity as the Kentucky Riverkeeper.

9. Members of Appalachian Voices, Waterkeeper Alliance, Kentucky Riverkeeper, and KFTC reside near and/or use and enjoy waters downstream from Frasure Creek's coal mining discharges into tributaries of the Kentucky, Big Sandy, and Licking rivers. These members have used and continue to use the affected waterways for activities such as fishing, boating, kayaking, swimming, and other recreation or activities that involve being on or in the water. In addition, some members drink the affected water and/or eat fish caught in these waters.

10. The interests that Appalachian Voices, Waterkeeper Alliance, Kentucky Riverkeeper, and KFTC seek to protect in this action are germane to each organization's purpose. Neither the claims asserted nor the relief requested requires the participation of individual members of these organizations as parties to this case.

11. Lanny Evans is a Kentucky resident who regularly uses and enjoys the Kentucky River.

12. Thomas H. Bonny is a Kentucky resident who regularly uses and enjoys the Kentucky River and its tributaries.

13. Winston Merrill Combs is a Kentucky resident who regularly uses and enjoys the Kentucky River and its tributaries.

14. The Cabinet is an agency of the Commonwealth of Kentucky. The Cabinet has authority under Ky. Rev. Stat. Ann. Chapter 224 to administer and enforce that Chapter, which pertains to environmental protection and water quality within the Commonwealth.

#### **JURISDICTION AND VENUE**

15. This action arises under Kentucky's CWA statutes, KRS Chapter 224. This Court has jurisdiction and venue is proper here pursuant to Ky. Rev. Stat. Ann. § 224.10-470(a).

16. Petitioners' interests are adversely affected by the Secretary's Order in two ways. First, Frasure Creek's Clean Water Act violations have injured and continue to injure Petitioners and their members. The Secretary's Order is inadequate to address Frasure Creek's pollution problems and prevent such harms from occurring in the future. Unless the Secretary's Order is vacated and Frasure Creek's CWA violations are adequately addressed, Petitioners will continue to be harmed by Frasure Creek's illegal actions. Second, Petitioners' due process rights were violated by the conduct of the proceedings below. Unless the Secretary's Order is vacated and the matter is remanded to the Cabinet, the Petitioners will continue to be harmed by the violations of their due process rights.

### **BACKGROUND**

17. This action closely relates to an action currently pending before the Franklin Circuit Court, *Energy & Env't Cabinet v. Frasure Creek Mining, LLC*, Civil Action No. 10-CI-01868 (Franklin Cir. Court, Div. I, filed Dec. 3, 2010), which involves thousands of violations by Frasure Creek for submitting false discharge monitoring reports and for failing to submit legally required data related to its water pollution discharges.

18. When the Cabinet filed its Complaint in Civil Action No. 10-CI-01868, it simultaneously filed a consent judgment between the Cabinet and Frasure Creek ("pending Consent Judgment") that purports to resolve all of the Cabinet's claims in said civil action. The Cabinet and Frasure Creek subsequently moved the Court for entry of the Consent Judgment.

19. The proposed Consent Decree tendered to the Franklin Circuit Court in Civil Action No. 10-CI-01868 has not been approved.

20. The Court allowed Petitioners to intervene in Civil Action No. 10-CI-01868 for the limited purpose of helping the court determine "whether this Court should approve the proposed consent decree as a matter of state law." *Cabinet v. Frasure Creek*, Civil Action No. 10-CI-1868, Order, February 11, 2011, at 6.

21. Petitioners, in their roles as plaintiff-intervenors in Civil Action No. 10-CI-01868, participated in global settlement negotiations with the Cabinet and Frasure Creek, which could have resolved both the claims in Civil Action No. 10-CI-01868, as well as the claims in the Administrative Proceeding.

22. On June 28, 2011, pursuant to Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), Petitioners gave notice of their intent to file suit for violations of the CWA ("NOI") to Frasure Creek, the Commissioner of the Cabinet's Department of Environmental Protection ("KDEP"), the Director and Assistant Director of KDEP's Division of Water, the Commissioner of the Cabinet's Department of Natural Resources, the Secretary of the Cabinet, the Attorney General of the United States, the Administrator of the Environmental Protection Agency (EPA), and the Regional Administrator of EPA, Region IV.

23. Nearly sixty days after Petitioners' NOI, the Cabinet filed the Administrative Complaint against Frasure Creek in the Cabinet's Office of Administrative Hearings on August 26, 2011, which was assigned file number DOW 33597-047 ("Administrative Complaint"), thereby initiating the administrative enforcement proceeding below that is the subject of this action.

24. The Administrative Complaint alleged numerous violations, including failures to submit required monitoring data, failures to submit DMRs as required, failures to receive permit coverage from DOW before adding certain outfalls, and failure to comply with permit effluent limits. Admin. Compl., File No. DOW-33597-047, ¶¶ 6, 10, 14, 18, 22, 26, 30, 34, 38, 42, 46, 50, 54, 58, 62, 66, 70, 78, 82, 86, 90, 94, 98, 102, 106, 110, 114, 118, 122, 126, 130, 134, 138.

25. Each violation specifically listed in the Administrative Complaint occurred during the first quarter of 2011.

26. Many of the violations alleged in the Cabinet's Administrative Complaint were alleged in Petitioners' NOI.

27. On November 7, 2011, Hearing Officer Robert Layton granted Petitioners full intervention under 401 KAR 10:010 § 11(2).

28. After being granted status as a full party, Petitioners sought the opportunity to take discovery in the administrative matter.

29. On October 17, 2012, Petitioners and the Cabinet reported to Hearing Officer Layton that negotiations in Franklin Circuit Court Civil Action No. 10-CI-01868 had reached an impasse and had ceased.

30. Based on information and belief, throughout the course of the action below, the Cabinet and Frasure Creek engaged in settlement negotiations on the claims at issue in this matter without the participation of Petitioners.

31. On November 19, 2012, the Cabinet announced that they had been in private settlement negotiations and had a draft agreed order.

32. Those settlement negotiations resulted in a proposed Agreed Order, which was tendered to the Cabinet's Office of Administrative Hearings on January 2, 2013.

33. Petitioners did not participate in the negotiation of the proposed Agreed Order.

34. The proposed Agreed Order claims to resolve all of the first quarter 2011 violations enumerated in the Administrative Complaint.

35. The proposed Agreed Order also claims to resolve all "like violations occurring at the permits listed in Appendix A to th[e] Agreed Order from date of tendering of the Consent Judgment to Franklin Circuit Court on December 3, 2010 to the date of entry of the Agreed Order which have not been individually identified." Agreed Order ¶ 20(d) (referring to Civil Action No. 10-CI-01868).

36. Pursuant to a Scheduling Order, on January 31, 2013, Petitioners filed objections to the proposed Agreed Order.

37. On February 1, 2013, the Sierra Club, a nonprofit public-interest organization, also submitted comments to the proposed Agreed Order to the Cabinet on behalf of its members who are citizens of Kentucky. A copy of Sierra Club's comments is attached as ATTACHMENT 2.

38. On February 15, 2013, the Cabinet filed a Motion to Strike Sierra Club's comments.

39. On April 16, 2013, The Secretary signed an Order entering the Agreed Order and granting the Cabinet's Motion to Strike Sierra Club's comments (the "Secretary's Order").

40. The Secretary's Order contains no explanation for entry of the Agreed Order.

41. The Secretary's Order contains no explanation for granting the Cabinet's motion to strike Sierra Club's comments.

42. The Secretary's Order contains no indication that he read or considered Petitioners' objections.

### **COUNT 1**

#### **The Cabinet Violated Petitioners' Due Process Rights**

43. Petitioners hereby incorporate the allegations set forth in paragraphs 1 through 42.

44. Petitioners were granted status as full party intervenors in the administrative action below.

45. As full parties, Petitioners had a right to a hearing, a right to develop and present evidence, and a right to test the sufficiency of Frasure Creek's defenses in the administrative proceeding below.

46. As parties, Frasure Creek and the Cabinet could not resolve the matter below without the participation of the Petitioners

47. Frasure Creek and Cabinet sought to resolve the matter below through the proposed Agreed Order that was negotiated without the participation of the Petitioners.

48. Petitioners objected to the entry of the Agreed Order.

49. The Secretary entered the Agreed Order over Petitioners' objections.

50. Entry of the Agreed Order without Petitioners' consent constitutes a violation of Petitioners' due process rights.



51. The Petitioners' due process rights were foreclosed by the Secretary's entry of the contested Agreed Order in the administrative proceeding below.

52. As full parties, Petitioners had a due process right to a statement of findings and evidentiary bases upon which the Secretary based his decision to enter the contested Agreed Order.

53. The Secretary's Order contains no findings nor any explanation of any kind for the decision to enter the proposed Agreed Order.

54. The Final Order contains no consideration of the numerous objections Petitioners raised regarding the Agreed Order.

55. Petitioners' due process rights to a rationale for the Secretary's decision were denied.

56. Petitioner seeks judicial review pursuant to Ky. Rev. Stat. Ann. 13B.150(2)(a), as the Secretary's actions are in contravention of Section 2 of the Kentucky Constitution.

## COUNT 2

### **Entry of the Agreed Order is Arbitrary, Capricious, and Contrary to Law**

57. Petitioners hereby incorporate the allegations set forth in paragraphs 1 through 56.

58. Kentucky law prohibits the settlement of a case without the consent of each and every party to the Proceeding.

59. Regulations governing the Cabinet's administrative hearing process prohibit the entry of the Agreed Order without the consent of each and every full party to the Administrative Proceeding.

60. Petitioners were full parties in the Administrative Proceeding.

61. Petitioners did not stipulate to the terms of the Agreed Order.

62. The Secretary entered the Agreed Order without Petitioners' consent.

63. The Secretary's entry of the Agreed Order without Petitioners' consent, participation, or stipulation violates the regulations governing the Cabinet's administrative hearing process.

64. Petitioner seeks judicial review pursuant to Ky. Rev. Stat. Ann. 13B.150, as the Secretary's actions in contravention of Kentucky law and the Cabinet's regulations were arbitrary, capricious, characterized by abuse of the Secretary's discretion, and deficient as otherwise provided by law.

### COUNT 3

#### **The Agreed Order is not Supported by Substantial Evidence in the Record**

65. Petitioners hereby incorporate the allegations set forth in paragraphs 1 through 64.

66. The administrative record lacks substantial evidence to support a finding that the Agreed Order is a fair resolution of Frasure Creek's thousands of known and unknown violations, or that it will be an effective deterrent of future violations.

67. The Agreed Order contains no rationale, no findings of fact, no conclusions of law, nor any statement or bases upon which this Court can judge the propriety of the Cabinet's entry of the contested Agreed Order.

68. The Cabinet lacks knowledge of the actual amounts of pollution Frasure Creek discharged from certain of its wastewater outfalls between at least 2005 and 2010.

69. The Agreed Order relieves Frasure Creek of liability for pollution discharges above permitted limits occurring in 2011 and/or 2012 at some or all of the outfalls referenced in the Agreed Order.

70. The Cabinet failed to identify how long Frasure Creek has been discharging pollution in excess of its KPDES permits for each outfall addressed in the Agreed Order.

71. Without knowing how long each of Frasure Creek's violations had been occurring, the Cabinet could not determine what measures and penalties are necessary and appropriate to address the violations cited in the Administrative Complaint.

72. The penalty scheme in the Agreed Order, which partially relieves Frasure Creek of its liability for penalties if Frasure Creek sells certain of its coal mines, is arbitrary and capricious.

73. There is no evidence in the record that a provision of the penalty scheme in the Agreed Order, which partially relieves Frasure Creek of its liability for civil penalties if Frasure Creek sells certain of its coal mines in the future, is justified or necessary to address any of Frasure Creek's violations that are cited in the Order.

74. Based on information and belief, the Cabinet failed to conduct any on-the-ground inspection as part of the administrative action that would validate the scope of the pollution problems that Frasure Creek reported.

75. The methodology for calculating or ignoring Frasure Creek's violations of monthly average effluent limitation violations as set forth in the "Civil Penalties/Stipulated Penalties" section of Agreed Order violates the Clean Water Act.

76. The sparse record generated by the Cabinet is insufficient for this Court to conduct a meaningful review of the Secretary's Order and as such cannot be considered substantial evidence.

77. Petitioners seek judicial review, pursuant to KRS 13B.150(2)(c), because the Secretary's Order is not supported by substantial evidence in the record.

**WHEREFORE**, Petitioners respectfully pray for the following relief:

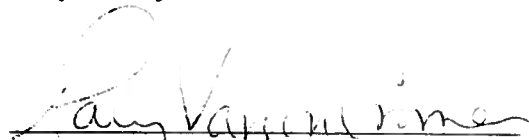
(i) Vacate the Secretary's Order in File No. DOW-33597-047;

(ii) Remand this case to the Cabinet with instruction to provide Petitioners, as full party intervenors, with full party rights of discovery and the opportunity to be heard;

(iii) Award Petitioners costs and attorneys' fees; and

(iv) Award any and all other relief to which Petitioners may be entitled.

Respectfully Submitted.



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#### **CERTIFICATE OF SERVICE**

I hereby certify that, in addition to service of the Petition for Review as provided in KRS 224.10-470, a true and accurate copy of the foregoing Petition for Review was served this the 16th day of May, 2013 by certified first-class mail to those persons listed below:

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