

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

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June 28, 2011

VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

FRASURE CREEK MINING, LLC
4978 Teays Valley Road
Scott Depot, WV 25560

FRASURE CREEK MINING, LLC
c/o National Corporate Research, Ltd.
828 Lane Allen Road
Suite 219
Lexington, KY 40504

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 Frasure Creek Mining, LLC (“Frasure Creek”) on notice of their intent to sue Frasure Creek 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) and K.R.S. § 224.70-110, 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 and K.R.S. § 224.16-050. In order to be in compliance with permit conditions and CWA statutory requirements, owners and operators of point sources are required to comply with all numerical effluent limitations promulgated under CWA § 301(b), 33 U.S.C. § 1311(b) and also found in 401 K.A.R. 5:065 § 2(1) (citing to 40 C.F.R. § 122.41(a)). Violation of an “effluent standard or limitation” subjects the discharger to citizen suits under CWA §§ 505(a)(1)(A) and (f).

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 Kentucky Pollutant Discharge Elimination System (“KPDES”) Coal General 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) and K.R.S. § 224.16-050. 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. In the first quarter 2011, Frasure Creek violated an effluent standard or limitation 2,818 times (**please see the items listed in the Appendix, appended hereto as Attachment 1**).

I. Lack of Diligent Prosecution against Ongoing Violations

In a complaint filed on December 3, 2010 in the Franklin Circuit Court of the Commonwealth of Kentucky (the “Cabinet’s Compl”), the Kentucky Energy and Environment Cabinet (the “Cabinet”) alleged numerous violations of CWA permit conditions by Frasure Creek. Cabinet’s Compl, Ky. Energy & Env’t Cabinet v. Frasure Creek Mining, LLC, No. 10-CI-01867, 2010 WL 5800370 (Franklin Cir. Ct., filed Dec. 3, 2010) (**appended hereto as Attachment 2**). These alleged violations included failure to submit any Discharge Monitoring Reports (“DMRs”) for certain outfalls, failure to accurately report data, and failure to comply with permit limits. Cabinet’s Compl. at 10.

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 alleged in the Cabinet Compl, and many or all of the violations contained therein are ongoing. Appalachian Voices therefore provides this notice of intent to sue Frasure Creek Mining, LLC to enforce each of the violations alleged by the Cabinet in the Cabinet’s Compl.¹

II. Self-Reported Exceedances of Permit Conditions

Under the General Permit, permit-holders are required to comply with both daily maximum and monthly average effluent limitations for specific parameters each month during any given reporting period. Permit No. KYG040000, AI No. 35050 at p. I-3.

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

¹ Appalachian Voices is aware that certain of the violations alleged in the Cabinet’s Complaint were also alleged in Appalachian Voices’ October 7, 2010 notice of intent to sue Frasure Creek. The notice provided by this letter is intended to cover all violations alleged in the Cabinet’s complaint for which notice was not provided on October 7, 2010.

violations, fining the violator twice may result in imposing two fines for the same illegal act).

DMRs on file with Kentucky Department of Natural Resources (“KDNR”) indicate Frasure Creek’s failures to comply with effluent limitations for specific parameters set forth in the General Permit. Permit No. KYG040000, AI No. 35050 at p. I-3. In total, Frasure Creek failed to comply with specific effluent limitation parameters 2,818 times in the first quarter of 2011. Such failures constitute violations of CWA § 301(a), 33 U.S.C. § 1311(a) and K.R.S. § 224.70-110. **For a DMR-specific identification of Frasure Creek’s self-reported violations of daily maximum and monthly average effluent limitations, please see the items listed in Attachment 1.**

Based on the methodology described previously, in the first quarter of 2011, Frasure Creek self-reported the following violations:

- In January 2011:
 - 31 exceedances of the monthly average permit limit for total recoverable iron, total recoverable manganese, total suspended solids, and alkalinity and acidity, totaling 961 separate violations.
 - 4 exceedances of the daily maximum permit limit for total recoverable iron, 3 exceedances of the daily maximum permit limit for pH, and 7 exceedances of the daily minimum permit limit for pH, totaling 14 separate violations.
- In February 2011:
 - 31 exceedances of the monthly average permit limit for total recoverable iron, total recoverable manganese, total suspended solids, and alkalinity and acidity, totaling 868 separate violations.
 - 2 exceedances of the daily maximum permit limits for total recoverable iron and total suspended solids, and 5 exceedances of the daily minimum permit limit for pH, totaling 7 separate violations.
- In March 2011:
 - 31 exceedances of the monthly average permit limit for total recoverable iron, total recoverable manganese, and total suspended solids, totaling 961 separate violations.
 - 2 exceedances of the daily maximum permit limit for total recoverable iron, and 5 exceedances of the daily minimum permit limit for pH, totaling 7 separate violations.

III. 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. Appalachian Voices believes 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 will continue to pollute in the future.

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Based on Frasure Creek's apparent pattern and practice of repeatedly falsifying data on DMRs and violating effluent limitations by discharging pollutants in excess of permitted limits, Appalachian Voices reserves the right to allege additional CWA violations based on the same 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 Frasure Creek's violations of the CWA that have occurred within the statute of limitations.

Appalachian Voices believes that this letter provides sufficient information to place Frasure Creek on notice of its 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 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), 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. Under K.R.S. § 224.99-010, violators are subject to penalties in the amount of \$25,000 per day.

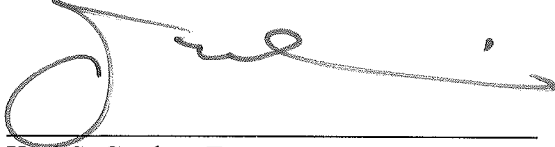
This letter is sent on behalf of: Appalachian Voices, Inc. (contact person: Ms. Willa Mays, Executive Director, 191 Howard Street, Boone, North Carolina 28607, Phone: (828) 262-1500); Waterkeeper Alliance, Inc. (contact person: Mr. Scott Edwards, Director of Advocacy, 50 South Buckhout Street, Suite 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. Bonney, 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., Kentuckians for the Commonwealth, 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, Phone: (914) 422-4343, Lauren H. Waterworth, Esq., Waterworth Law Offices, PLLC, P.O. Box 254, Boone, North Carolina, 28607, Phone: (828) 355-9750, Mary Cromer, Esq., Appalachian Citizens' Law Center, Inc., 317 Main Street, Whitesburg, Kentucky 48158, Phone: (606) 633-3929, and Burke A. Christensen, Esq., 350 Lancaster Avenue, Richmond, Kentucky 40467, Phone: (859) 622-1120.

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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.*
Jessica Yanefski & Robert Gorrie, Legal Interns
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Richmond, Kentucky 40476
(859) 622-1120

Attachment 1: Appendix identifying CWA violations alleged herein

Attachment 2: Complaint, Ky. Energy & Env't Cabinet v. Frasure Creek Mining, LLC, No. 10-CI-01867 (Franklin Cir. Ct. Dec. 3, 2010)

CC (via certified mail—return receipt requested):

Eric H. Holder, Jr., Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

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R. Bruce Scott, Commissioner
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Kentucky Energy and Environment Cabinet
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Frankfort, KY 40601

ATTACHMENT 1

Appendix: Alleged Clean Water Act Violations by Frasure Creek Mining, LLC.**Self-Reported Exceedances**

DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
813-0321	KYG040075	104 ²	1st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	37.4 mg/L (monthly av. for 2/2011)	28
					70 mg/L (daily max.)	117 mg/L (daily max. for 2/2011)	
836-0347	KYG045938	1	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	114.5 mg/L (monthly av. for 2/2011)	28
					70 mg/L (daily max.)	216 mg/L (daily max. for 2/2011)	
836-0347	KYG045938	1	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/L (daily max.)	6.14 mg/L (daily max. for 2/2011)	1
836-0347	KYG045938	1	1 st Quarter 2011	pH	9.0 SU (daily max.)	9.68 SU (daily max. for 1/2011)	1
836-0347	KYG045938	2	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	105.5 mg/L (monthly av. for 2/2011)	28
					70 mg/L (daily max.)	188 mg/L (daily max. for 2/2011)	
836-5524	KYG045752	1	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	39.5 mg/L (monthly av. for 3/2011)	31
836-5525	KYG045718	1	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	350 mg/L (monthly av. for	31

² Outfall 104 for DSMRE # 813-0321 and KPDES Permit # KYG040075 is listed under an additional permit for DSMRE # 860-0468. Although Frasure Creek self-reported the same exceedances on both DMRs, the exceedances have only been counted as a single set of violations in this Appendix.

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
						3/2011)	
					70 mg/L (daily max.)	1040 mg/L (daily max. for 3/2011)	
836-5525	KYG045718	1	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	10.29 mg/L (monthly av. for 3/2011)	31
					4.0 mg/L (daily max.)	30.6 mg/L (daily max. for 3/2011)	
836-5526	KYG040512	1	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	82.5 mg/L (monthly av. for 3/2011)	31
					70 mg/L (daily max.)	149 mg/L (daily max. for 3/2011)	
836-5526	KYG040512	1	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	135.5 mg/L (monthly av. for 2/2011)	28
					70 mg/L (daily max.)	261 mg/L (daily max. for 2/2011)	
836-5526	KYG040512	1	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/L (daily max.)	4.17 mg/L (daily max. for 3/2011)	1
836-8061	KY0078271	2	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	46.5 mg/l (monthly av. For 2/2011)	28
836-8061	KY0078271	2	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	28.145 mg/l (monthly av. For 2/2011)	28
					4.0 mg/l (daily max.)	52.3 mg/l (daily max. for 2/2011)	
836-	KY0078271	2	1 st Quarter	Total	2.0 mg/l	2.285	28

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
8061			2011	Recoverable Manganese	(monthly av.)	mg/l (monthly av. For 2/2011)	
836-8061	KY0078271	2	1 st Quarter 2011	pH	6.0 SU (daily min.)	3.56 SU (daily min. for 2/2011)	1
836-8061	KY0078271	2	1 st Quarter 2011	Acidity / Alkalinity	Monthly av. Acidity < monthly av. Alkalinity	7.5 mg/l acidity, 1 mg/l alkalinity (monthly av. For 2/2011)	28
					Daily max. acidity < daily max. alkalinity	10 mg/l acidity, 1 mg/l alkalinity (daily max. for 2/2011)	
836-8061	KY0078271	2	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	75 mg/l (monthly av. For 3/2011)	31
					70.0 mg/l (daily max.)	134 mg/l (daily max. for 3/2011)	
836-8061	KY0078271	2	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	71.5 mg/l (monthly av. For 3/2011)	31
					70.0 mg/l (daily max.)	91 mg/l (daily max. for 3/2011)	
836-8061	KY0078271	2	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	5.52 mg/l (monthly av. For 3/2011)	31
					4.0 mg/l (daily max.)	8.9 mg/l (daily max. for 3/2011)	
836-8062	KYG044819	2	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	76 mg/l (monthly av. For 3/2011)	31
					70.0 mg/l	132 mg/l	

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
					(daily max.)	(daily max. for 3/2011)	
836-8066	KY0053546	3	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	37 mg/L (monthly av. for 1/2011)	31
836-8066	KY0053546	3	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	102.5 mg/L (monthly av. for 3/2011)	31
					70 mg/L (daily max.)	189 mg/L (daily max. for 3/2011)	
836-8066	KY0053546	3	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/L (daily max.)	4.03 mg/L (daily max. for 3/2011)	1
836-8066	KY0053546	8	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	78 mg/L (monthly av. for 3/2011)	31
					70 mg/L (daily max.)	140 mg/L (daily max. for 3/2011)	
836-8066	KY0053546	8	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	98 mg/L (monthly av. for 1/2011)	31
					70 mg/L (daily max.)	98 mg/L (daily max. for 1/2011)	
860-0466	KYG042947	133 ³	1 st Quarter 2011	Total Suspended Solids	70.0 mg/l (daily max.)	80 mg/l (daily max. for 2/2011)	1
860-0466	KYG042947	133 ³	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.13 mg/l (monthly av. For 3/2011)	31

³ Outfall 133 for DSMRE # 860-0466 and KPDES Permit # KYG042947 is listed under 3 additional permits for DSMREs # 860-0469, 860-0479, and 860-9014. Although Frasure Creek self-reported the same exceedances on all four DMRs, the exceedances have only been counted as a single set of violations in this Appendix.

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
					4.0 mg/l (daily max.)	4.17 mg/l (daily max. for 3/2011)	
860-0467	KYG040112	290	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	8.28 mg/L (monthly av. for 2/2011)	28
					4.0 mg/L (daily max.)	9.52 mg/L (daily max. for 2/2011)	
860-0467	KYG040112	290	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/L (monthly av.)	2.59 mg/L (monthly av. for 2/2011)	28
860-0467	KYG040112	290	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/L (monthly av.)	3.92 mg/L (monthly av. for 3/2011)	31
					4.0 mg/L (daily max.)	5.96 mg/L (daily max. for 3/2011)	
860-0469	KYG040569	140	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	3.91 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	5.37 (daily max. for 1/2011)	
860-0469	KYG040569	140	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	3.15 mg/l (monthly av. for 2/2011)	28
860-0469	KYG040569	140	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.89 mg/l (monthly av. for 3/2011)	31
860-0469	KYG040569	141	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.57 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	4.13 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	141	1 st Quarter 2011	Total Recoverable	2.0 mg/l (monthly av.)	2.02 mg/l (monthly av.)	31

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
				Manganese	av.)	av. for 3/2011)	
860-0469	KYG040569	142	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	4.86 mg/l (monthly av. For 1/2011)	31
					4.0 mg/l (daily max.)	6.86 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	142	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	11.02 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	13.63 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	142	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	3.55 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	5.78 mg/l (daily max. for 2/2011)	
860-0469	KYG040569	142	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	4.88 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	8.21 mg/l (daily max. for 3/2011)	
860-0469	KYG040569	143	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	3.74 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	6.98 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	143	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	4.64 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	10.62 mg/l	

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
						(daily max. for 1/2011)	
860-0469	KYG040569	143	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	4.68 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	6.55 mg/l (daily max. for 2/2011)	
860-0469	KYG040569	144	1 st Quarter 2011	pH	9.0 SU (daily max.)	9.6 SU (daily max. for 1/2011)	1
860-0469	KYG040569	145	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.05 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	11.7 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	145	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.27 SU (daily min. for 1/2011)	1
860-0469	KYG040569	145	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.49 SU (daily min. for 2/2011)	1
860-0469	KYG040569	145	1 st Quarter 2011	pH	6.5 SU (daily min.)	4.61 SU (daily min. for 3/2011)	1
860-0469	KYG040569	146	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	5.62 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	10.89 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	146	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	4.94 mg/l (monthly av. for 2/2011)	28

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
					4.0 mg/l (daily max.)	7.77 mg/l (daily max for 2/2011)	
860-0469	KYG040569	146	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.56 (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	4.36 mg/l (daily max. for 3/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	82.2 mg/l (monthly av. For 1/2011)	31
					70.0 mg/l (daily max.)	332 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	10.28 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	21.89 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	18.46 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	27.57 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	pH	9.0 SU (daily max.)	9.57 SU (daily max. for 1/2011)	1
860-0469	KYG040569	147	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	12.89 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	13.72 mg/l	

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
						(daily max. for 2/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	20.12 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	21.37 mg/l (daily max. for 2/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.67 SU (daily min. for 2/2011)	1
860-0469	KYG040569	147	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	5.38 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	12.28 mg/l (daily max. for 3/2011)	
860-0469	KYG040569	147	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	10.91 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	12.92 mg/l (daily max. for 3/2011)	
860-0469	KYG040569	148	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	23.09 mg/l (monthly av. For 1/2011)	31
					4.0 mg/l (daily max.)	26.38 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	148	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	18.54 mg/l (monthly av. for 2/2011)	28

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
					4.0 mg/l (daily max.)	25.94 mg/l (daily max. for 2/2011)	
860-0469	KYG040569	148	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	8.45 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	10.4 mg/l (daily max. for 3/2011)	
860-0469	KYG040569	149	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.07 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	5.21 mg/l (daily max. for 3/2011)	
860-0469	KYG040569	151	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	35.6 mg/l (monthly av. for 1/2011)	31
					70.0 mg/l (daily max.)	93 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	151	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	15.98 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	26.46 mg/l (daily max. for 1/2011)	
860-0469	KYG040569	151	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.06 SU (daily min. for 1/2011)	1
860-0469	KYG040569	151	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	14.83 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	16 mg/l (daily max. for	

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
						2/2011)	
860-0469	KYG040569	151	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	5.66 mg/l (monthly av. For 3/2011)	31
					4.0 mg/l (daily max.)	11.78 mg/l (daily max. for 3/2011)	
860-0470	KYG041006	161	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	15.63 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	20.36 mg/l (daily max. for 1/2011)	
860-0470	KYG041006	161	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	12.6 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	19.84 mg/l (daily max. for 2/2011)	
860-0470	KYG041006	161	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	9.39 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	16.88 mg/l (daily max. for 3/2011)	
860-0470	KYG041006	162	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	44.5 mg/l (monthly av. for 1/2011)	31
					70.0 mg/l (daily max.)	81 mg/l (daily max. for 1/2011)	
860-0470	KYG041006	162	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	6.51 mg/l (monthly av. for 1/2011)	31

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
					4.0 mg/l (daily max.)	9.17 mg/l (daily max. for 1/2011)	
860-0470	KYG041006	162	1 st Quarter 2011	pH	6.5 SU (daily min.)	4.62 SU (daily min. for 1/2011)	1
860-0470	KYG041006	162	1 st Quarter 2011	Acidity / Alkalinity	Monthly av. acidity < monthly av. alkalinity	8 mg/l acidity, 4 mg/l alkalinity (monthly av. for 1/2011)	31
					Daily max. acidity < daily max. alkalinity	15 mg/l acidity, 4 mg/l alkalinity (daily max. for 1/2011)	
860-0470	KYG041006	162	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	6.82 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	8.18 mg/l (daily max. for 2/2011)	
860-0470	KYG041006	162	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.78 SU (daily min. for 2/2011)	1
860-0470	KYG041006	162	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.82 mg/l (monthly av. For 3/2011)	31
					4.0 mg/l (daily max.)	5.13 mg/l (daily max. for 3/2011)	
860-0470	KYG041006	162	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.08 SU (daily min. for 3/2011)	1
860-0470	KYG041006	163	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	41 mg/l (monthly av. for 1/2011)	31

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
860-0470	KYG041006	163	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/l (daily max.)	4.46 mg/l (daily max. for 1/2011)	1
860-0470	KYG041006	163	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	15.07 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	18.64 mg/l (daily max. for 1/2011)	1
860-0470	KYG041006	163	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.34 SU (daily min. for 1/2011)	1
860-0470	KYG041006	163	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	3.83 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	4.68 mg/l (daily max. for 2/2011)	
860-0470	KYG041006	163	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	15.94 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	18.23 mg/l (daily max. for 2/2011)	
860-0470	KYG041006	163	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.14 SU (daily min. for 2/2011)	1
860-0470	KYG041006	163	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	4.52 mg/l (monthly av. For 3/2011)	31
					4.0 mg/l (daily max.)	9.73 mg/l (daily max. for 3/2011)	

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
860-0470	KYG041006	163	1 st Quarter 2011	pH	6.5 SU (daily min.)	4.69 SU (daily min. for 3/2011)	1
860-0470	KYG041006	164	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/l (daily max.)	4.19 mg/l (daily max. for 1/2011)	1
860-0470	KYG041006	164	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	4.59 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	17.33 mg/l (daily max. for 1/2011)	
860-0470	KYG041006	164	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.31 SU (daily min. for 1/2011)	1
860-0470	KYG041006	164	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.52 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	10.34 mg/l (daily max. for 3/2011)	
860-0470	KYG041006	165	1 st Quarter 2011	pH	6.5 SU (daily min.)	4.7 SU (daily min. for 1/2011)	1
860-0470	KYG041006	165	1 st Quarter 2011	pH	6.5 SU (daily min.)	5.64 SU (daily min. for 3/2011)	1
860-0470	KYG041006	167	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	3.03 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	4.67 mg/l (daily max. for 1/2011)	
860-0470	KYG041006	167	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	3.39 mg/l (monthly av. for 2/2011)	28

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
860-0470	KYG041006	167	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.52 mg/l (monthly av. for 3/2011)	31
860-9014	KY0101761	290	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/l (monthly av.)	8.28 mg/l (monthly av. for 2/2011)	28
					4.0 mg/l (daily max.)	9.52 mg/l (daily max. for 2/2011)	
860-9014	KY0101761	290	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.59 mg/l (monthly av. for 2/2011)	28
860-9014	KY0101761	290	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	3.92 mg/l (monthly av. for 3/2011)	31
					4.0 mg/l (daily max.)	5.96 mg/l (daily max. for 3/2011)	
877-0177	KYG044922	13	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.69 mg/l (monthly av. for 1/2011)	31
877-0177	KYG044922	13	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.975 mg/l (monthly av. for 2/2011)	28
877-0182	KYG046282	16	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.61 mg/l (monthly av. for 1/2011)	31
897-0496	KYG044054	195	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	4.91 mg/L (monthly av. for 2/2011)	28
					4.0 mg/L (daily max.)	7.39 mg/L (daily max. for 2/2011)	
897-0496	KYG044054	195	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/L (daily max.)	4.71 mg/L (daily max. for 1/2011)	1

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
897-0497	KYG044510	197	1 st Quarter 2011	Total Suspended Solids	35 mg/L (monthly av.)	116 mg/L (monthly av. for 1/2011)	31
					70 mg/L (daily max.)	217 mg/L (daily max. for 1/2011)	
897-0497	KYG044510	195	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	4.91 mg/L (monthly av. for 2/2011)	28
					4.0 mg/L (daily max.)	7.39 mg/L (daily max. for 2/2011)	
897-0497	KYG044510	195	1 st Quarter 2011	Total Recoverable Iron	4.0 mg/L (daily max.)	4.71 mg/L (daily max. for 1/2011)	1
897-0499	KYG044971	104	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	43.5 mg/l (monthly av. for 2/2011)	28
					70.0 mg/l (daily max.)	117 mg/l daily max. for 2/2011)	
897-0499	KYG044971	173	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	51 mg/l (monthly av. for 3/2011)	31
					70.0 mg/l (daily max.)	98 mg/l (daily max. for 3/2011)	
897-0503	KYG045676	210	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/l (monthly av.)	2.98 mg/l (monthly av. for 1/2011)	31
					4.0 mg/l (daily max.)	5.45 mg/l (daily max. for 1/2011)	
897-0503	KYG045676	213	1 st Quarter 2011	Total Suspended Solids	35.0 mg/l (monthly av.)	35.5 mg/l (monthly av. for 1/2011)	31

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
898-0810	KYG045749	55	1 st Quarter 2011	Total Suspended Solids	70.0 mg/l (monthly av.)	75 mg/l (monthly av. for 3/2011)	31
897-8048	KY0046981	209	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	21.93 mg/L (monthly av. for 1/2011)	31
					4.0 mg/L (daily max.)	21.93 mg/L (daily max. for 1/2011)	
897-8048	KY0046981	209	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	60.21 mg/L (monthly av. for 2/2011)	28
					4.0 mg/L (daily max.)	70.23 mg/L (daily max. for 2/2011)	
897-8048	KY0046981	209	1 st Quarter 2011	Total Recoverable Iron	3.5 mg/L (monthly av.)	14.09 mg/L (monthly av. for 3/2011)	31
					4.0 mg/L (daily max.)	21.86 mg/L (daily max. for 3/2011)	
897-8048	KY0046981	209	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/L (monthly av.)	8.07 mg/L (monthly av. for 1/2011)	31
					4.0 mg/L (daily max.)	8.07 mg/L (daily max. for 1/2011)	
897-8048	KY0046981	209	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/L (monthly av.)	8.3 mg/L (monthly av. for 2/2011)	28
					4.0 mg/L (daily max.)	8.52 mg/L (daily max. for 2/2011)	

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DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge	Number of Violations
897-8048	KY0046981	209	1 st Quarter 2011	Total Recoverable Manganese	2.0 mg/L (monthly av.)	3.3 mg/L (monthly av. for 3/2011)	31
					4.0 mg/L (daily max.)	4.21 mg/L (daily max. for 3/2011)	
897-8048	KY0046981	209	1 st Quarter 2011	pH	6.0 SU (daily min.)	5.24 SU (daily min. for 1/2011)	1
897-8048	KY0046981	209	1 st Quarter 2011	pH	6.0 SU (daily min.)	5.64 SU (daily min. for 3/2011)	1
Total Permit Violations During 1st Quarter 2011							2,818

ATTACHMENT 2

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
CIVIL ACTION NO. 10-CF-01867
DIVISION I

FILED
DEC 03 2010
FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

ENERGY AND ENVIRONMENT CABINET

PLAINTIFF

VS.

COMPLAINT

FRASURE CREEK MINING, LLC

DEFENDANT

COMES THE PLAINTIFF, the Energy and Environment Cabinet (hereinafter “the Cabinet”), and for its complaint against the above named Defendant states and alleges as follows:

1. The Cabinet is the administrative agency charged with the statutory duty to enforce all statutes, regulations and orders regarding environmental protection including KRS Chapter 224 and the regulations promulgated thereto, which includes those relating to the prevention of degradation of the waters of the Commonwealth of Kentucky.

2. Frasure Creek Mining, LLC (“Frasure Creek”) is a Kentucky limited liability company in good standing with its principal place of business at 4978 Teays Valley Road, Scott Depot, West Virginia. Frasure Creek’s registered agent for service of process within the Commonwealth is National Corporate Research, Ltd., 828 Lane Allen Road, Suite 219, Lexington, Kentucky.

3. Frasure Creek has been issued Kentucky Pollutant Discharge Elimination System (“KPDES”) Permits by the Cabinet’s Division of Water (“DOW”) for the discharge of treated effluent from its surface coal mining facilities to waters of the Commonwealth. Frasure Creek has also been issued permits by the Cabinet’s Division of Mine Reclamation and Enforcement (“DMRE”) to conduct its surface coal mining operations.

4. On or about October 14, 2010, authorized representatives of the Division of Water (“DOW”) conducted an inspection of Frasure Creek’s facility associated with KPDES Permit No. KYG041006. Among the conditions observed were an inadequate chain of custody, a failure to timely submit Discharge Monitoring Reports (“DMR’s”), inadequate quality assurance and quality control process, improper maintenance of samples, a lack of a Best Management Practice Plan, degradation of the waters of the Commonwealth, as well as permit excursions for pH, iron, and manganese. As a result of these inspections, on November 29, 2010 DOW issued an NOV to Frasure Creek citing the following violations:

- a. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(j)(2)): failure to maintain required records;
- b. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(l)(4)): failure to submit monitoring results at required intervals;
- c. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(e)): improper operation and maintenance;
- d. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(a)) (two citations thereof): failure to comply with permit limits;
- e. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(j)(4)): failure to monitor permit limits with approved test procedures;
- f. KRS 224.70-110: pollution of the waters of the Commonwealth; and,
- g. 401 KAR 10:031 Section 2: degradation of the waters of the Commonwealth.

A copy of the NOV is attached hereto and incorporated herein as Plaintiff’s Exhibit No. 1.

5. On or about October 15, 2010, authorized representatives of the DOW conducted an inspection of the laboratory facilities of S & S Water Monitoring (“S & S”). S & S is the laboratory with which Frasure Creek contracted to collect samples and perform analysis of wastewater discharged by its permitted mining operations, and related tasks. Among the conditions observed

were:

a. Failure to maintain required records; failure to establish chain of custody for collected samples; failure to establish that samples were timely analyzed, within the “hold” time; no documentation of calculations required to verify sample results; no identification of the method used to analyze samples; no documentation of equipment calibration or maintenance records, the use of duplicates of spikes, or other Quality Control measures.

b. Failure to submit monitoring results at intervals specified in the permit; failure to provide an authorized signature on the Discharge Monitoring Report.

c. Deficient laboratory controls due to the lack of adequate quality assurance and quality control (QA/QC) procedures; no back-up data to support information on the DMRs; no laboratory Standard Operating Procedures (SOP) manual; use of unapproved methodology for analyzing Total Suspended Solids; no chain of custody, inadequate bench sheets/records, no lab equipment maintenance logs, reagent logs, calibration logs; failure to properly report acidity values.

d. Failure to analyze permit parameters utilizing approved test procedures; failure to properly transport and store samples; no thermometer or temperature log for lab refrigerator; no log of the preservatives used; due to deficiencies in chain of custody forms and lab records DOW was unable to determine if samples were analyzed within the required holding times. It appeared the lab used an unapproved test methodology to analyze for Total Suspended Solids. The lab sometimes uses the unapproved Hach test kit method instead of the gravimetric method approved through Standard Methods.

e. Frasure Creek Mining submitted a Quality Assurance Project Plan (QAPP) and a Standard Operating Procedures plan for lab analysis to DOW on August 11, 2010. The QAPP and SOP referenced S & S Water Monitoring as being a part of the QAPP and SOP, yet when

DOW conducted the Performance Audit Inspection (PAI) of Frasure Creeks's laboratory facility, S & S personnel reported that they did not have a SOP plan or manual.

6. Based on information and belief, the Cabinet alleges the violations referenced in paragraph 5, above, apply to each of Frasure Creek's other thirty-seven (37) permitted operations; therefore, on or about November 29, 2010 the DOW issued a Notice Of Violation (NOV) to each of Frasure Creek's other 37 permitted facilities served by S&S Water Monitoring for the conditions described in paragraph 5, citing the following violations:

- a. 401 KAR 5:065 Section 2(1): failure to maintain required records;
- b. 401 KAR 5:065 Section 2(1): failure to submit monitoring results at required intervals;
- c. 401 KAR 5:065 Section 2(1): improper operation and maintenance;
- d. 401 KAR 5:065 Section 2(1): failure to monitor permit limits with approved test procedures; and,
- e. 401 KAR 5:065 Section 2: failure to comply with terms of the permit.

A copy of each NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 2 through 37 and 37(a).

7. The Cabinet's Department of Natural Resources, Division of Mine Reclamation and Enforcement permits and corresponding KPDES permits to which the NOV's reference in paragraphs 4, 5 and 6, above, were issued are as follows:

- a. DMRE 860-0469/KPDES KYG040569
- b. DMRE 836-8061/KPDES KY0078271
- c. DMRE 836-8062/KPDES KYG044819
- d. DMRE 860-0466/KPDES KYG04297
- e. DMRE 897-0493/ KPDESKYG040644

- f. DMRE 860-9014/ KPDES KY0101761
- g. DMRE 898-0810/ KPDES KG045749
- h. DMRE 898-0811/ KPDES KYG046049
- i. DMRE 897-0499/KPDES KYG044971
- j. DMRE 897-0503/ KPDES KYG045676
- k. DMRE 877-0182/ KPDES KYG046282
- l. DMRE 836-0341/ KPDES KYG046237
- m. DMRE 836-0345/KPDES KYG045764
- n. DMRE 836-0346/KPDES KYG045996
- o. DMRE 836-5526/KPDES KYG040512
- p. DMRE 836-5524/KPDES KYG045752
- q. DMRE 836-5525/KPDES KYG045718
- r. DMRE 836-5531/KPDES KYG041754
- s. DMRE 836-0347/KPDES KYG045938
- t. DMRE 836-0326/KPDES KY0108111
- u. DMRE 836-0343/KPDES KYG046409
- v. DMRE 897-8049/KPDES KYG041311
- w. DMRE 813-0328/KPDES KYG045943
- x. DMRE 897-8048/KPDES KY0046981
- y. DMRE 897-0492/KPDES KYG040609
- z. DMRE 897-0495/KPDES KYG043231
- aa. DMRE 897-0496/KPDES KYG044054
- bb. DMRE 897-0497/KPDES KYG044510
- cc. DMRE 877-0177/KPDES KYG044922
- dd. DMRE 877-0184/KPDES KYG046469

- ee. DMRE 877-0200/KPDES KYG046314
- ff. DMRE 836-8066/KPDES KY0053546
- gg. DMRE 860-0467/KPDES KYG040112
- hh. DMRE 813-0321/KPDES KYG040075
- ii. DMRE 897-0494/KPDES KYG042269
- jj. DMRE 836-0342/KPDES KYG046408
- kk. DMRE 860-0468/KPDES KYG040567
- ll. DMRE 860-0470/KPDES KYG041006

The NOV for DMRE 860-0470/KPDES KYG041006 has already been referenced herein as Plaintiff's Exhibit No. 1.

8. In addition to the above-referenced on-site inspections conducted by DOW, personnel from the Cabinet's Division of Enforcement ("DENF") conducted a review of DMR's submitted by Frasure Creek between January 1, 2008 and June 30, 2010.

9. On November 29, 2010, DENF issued a NOV to Frasure Creek for violations found as a result of the DMR review. The NOV cited five (5) violations of KRS 224.70-110, which prohibits the pollution of the waters of the Commonwealth in contravention of the rules, regulations, permits, or orders of the Cabinet. The regulation at issue is 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(a),(k), and (l)(4)(i). The NOV cites six (6) regulatory requirements that Frasure Creek failed to meet regarding thirty-five (38) permitted sites. A copy of the NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No. 38.

10. The DMR review conducted by DENF, as referenced in paragraphs 8 and 9 above, revealed the following specific deficiencies:

a. Failure to accurately report data on the DMR's for the following DMRE permits and corresponding KPDES permits:

- a. DMRE 897-0503/KPDES KYG045676

- b. DMRE 897-0499/KPDES KYG044971
- c. DMRE 860-0468/KPDES KYG040567
- d. DMRE 860-0466/KPDES KYG042947
- e. DMRE 860-0469/KPDES KYG040569

b. Failure to submit the required monitoring data for conductivity for the following DMRE permits numbers and corresponding KPDES permits:

- a. DMRE 860-0469/KPDES KYG040569
- b. DMRE 836-8061/KPDES KY0078271
- c. DMRE 836-8062/KPDES KYG044819
- d. DMRE 860-0466/KPDES KYG042947
- e. DMRE 860-0468/KPDES KYG040567
- f. DMRE 860-0470/KPDES KYG041006
- g. DMRE 860-9014/KPDES KY0101761
- h. DMRE 898-0810/KPDES KYG045749
- i. DMRE 898-0811/KPDES KYG046049
- j. DMRE 897-0499/KPDES KYG044971
- k. DMRE 897-0503/KPDES KYG045676
- l. DMRE 877-0182/KPDES KYG046282
- m. DMRE 836-0341/KPDES KYG046237
- n. DMRE 836-0345/KPDES KYG045764
- o. DMRE 836-0346/KPDES KYG045996
- p. DMRE 836-5526/KPDES KYG040512
- q. DMRE 836-5524/KPDES KYG045752
- r. DMRE 836-5525/KPDES KYG045718
- s. DMRE 836-5531/KPDES KYG041754

- t. DMRE 836-0347/KPDES KYG045938
- u. DMRE 836-0326/KPDES KY0108111
- v. DMRE 836-0343/KPDES KYG046409
- w. DMRE 897-8049/KPDES KYG041311
- x. DMRE 813-0328/KPDES KYG045943
- y. DMRE 897-8048/KPDES KY0046981
- z. DMRE 897-0492/KPDES KYG040609
- aa. DMRE 897-0495/KPDES KYG043231
- bb. DMRE 897-0496/KPDES KYG044054
- cc. DMRE 897-0497/KPDES KYG044510
- dd. DMRE 877-0177/KPDES KYG044922
- ee. DMRE 877-0200/KPDES KYG046314
- ff. DMRE 836-8066/KPDES KY0053546
- gg. DMRE 860-0467/KPDES KYG040112
- hh. DMRE 813-0321/KPDES KYG040075
- ii. DMRE 836-0342/KPDES KYG046408
- jj. DMRE 897-0493/KPDES KYG040644
- kk. DMRE 897-0494/KPDES KYG042269
- ll. DMRE 877-0184/KPDES KYG046469

c. Unauthorized signature or no signature. The DMR's for the following permits were found to be out of compliance with this regulatory requirement:

- a. DMRE 860-0469/KPDES KYG040569
- b. DMRE 836-8061/KPDES KY0078271
- c. DMRE 836-8062/KPDES KYG044819
- d. DMRE 860-0466/KPDES KYG042947
- e. DMRE 860-0468/KPDES KYG040567

- f. DMRE 860-0470/KPDES KYG041006
- g. DMRE 860-9014/KPDES KY0101761
- h. DMRE 898-0810/KPDES KYG045749
- i. DMRE 898-0811/KPDES KYG046049
- j. DMRE 897-0499/KPDES KYG044971
- k. DMRE 897-0503/KPDES KYG045676
- l. DMRE 877-0182/KPDES KYG046282
- m. DMRE 836-0341/KPDES KYG046237
- n. DMRE 836-0345/KPDES KYG045764
- o. DMRE 836-0346/KPDES KYG045996
- p. DMRE 836-5526/KPDES KYG040512
- q. DMRE 836-5524/KPDES KYG045752
- r. DMRE 836-5525/KPDES KYG045718
- s. DMRE 836-5531/KPDES KYG041754
- t. DMRE 836-0347/KPDES KYG045938
- u. DMRE 836-0326/KPDES KY0108111
- v. DMRE 836-0343/KPDES KYG046409
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- x. DMRE 813-0328/KPDES KYG045943
- y. DMRE 897-8048/KPDES KY0046981
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- aa. DMRE 897-0495/KPDES KYG043231
- bb. DMRE 897-0496/KPDES KYG044054
- cc. DMRE 897-0497/KPDES KYG044510
- dd. DMRE 877-0177/KPDES KYG044922
- ee. DMRE 877-0200/KPDES KYG046314

- ff. DMRE 836-8066/KPDES KY0053546
- gg. DMRE 860-0467/KPDES KYG040112
- hh. DMRE 813-0321/KPDES KYG040075
- ii. DMRE 836-0342/KPDES KYG046408
- jj. DMRE 897-0493/KPDES KYG040644
- kk. DMRE 897-0494/KPDES KYG042269
- ll. DMRE 877-0184/KPDES KYG046469

d. Failure to report required monitoring data: The data for flow, total suspended solids, total recoverable manganese, conductivity, acidity, alkalinity, and pH for DMRE Permit No. 898-0810/KPDES permit No. KYG045749 was missing on several DMR's.

e. Failure to submit any DMR's for the following time periods, permits and outfalls:

- a. DMRE 898-0810/KPDES KYG045749: Outfall 44: May 2010 and June 2010.
- b. DMRE 836-8062/KPDES KYG044819: Outfalls OB-1, OB-3, OB-4: January and February 2010.
- c. DMRE 860-0469/KPDES KYG040569: Outfall 7: April through June 2010.
- d. DMRE 897-8049/KPDES KYG041311: Outfall SB-1: January through December 2008, October through December 2009.
- e. DMRE 813-0328/KPDES KYG045943: Outfall 102: January through December 2009.
- f. DMRE 897-8048/KPDES KY0046981: Outfall Pond-1, Dam-1: April through September 2009.
- g. DMRE 897-0492/KPDES KYG040609: Outfalls BB-1, BB-2: April through September 2009.
- h. DMRE 897-0493/KPDES KYG040644: Outfall BB-48: April through September 2009.
- i. DMRE 897-0495/KPDES KYG043231: Outfalls BB-9, BB-13, BB-21, 3, 4: April through September 2009.

- j. DMRE 897-0496/KPDES KYG044054: Outfalls 10, RF-1, WP-1: April through September 2009.
- k. DMRE 897-0497/KPDES KYG044510: Outfalls 1,2,3, BB-2, WP-1: April through September) of 2009.
- l. DMRE 877-0177/KPDES KYG044922: Outfalls 1-6, 12-20, 25-29: July through September 2008, 2009.
- m. DMRE 836-0341/KPDES KYG046237: Outfalls BB-07: July through September) of 2008.
- n. DMRE 836-0343/KPDES KYG046409: Outfalls 2, D.O.-27, D.O.-28, D.O.-29, D.O.-30, D.O.-31, D.O.-33, D.O.-34: January through March 2009.
- o. DMRE 836-8066/KPDES KY0053546: Outfalls 3, 6-9: January through December 2008; and January through March 2009.
- p. DMRE 836-5525/KPDES KYG045718: Outfall D.O.-1: January through March) 2009.
- q. DMRE 897-0494/KPDES KYG042269: Outfalls -- unknown: January through December 2008 and 2009, and January through June 2010.
- r. DMRE 836-0345/KPDES KYG045764: Outfalls 1, 1B, 7B, 8B: January through March) 2009.
- s. DMRE 860-0467/KPDES KYG040112: Outfalls 1, BB-1, BB-2, BB-4: July through September 2009.
- t. DMRE 836-0346/KPDES KYG045996: January through December 2008, 2009, and January through June 2010.
- u. DMRE 836-0326/KPDES KY0108111: January through December 2008

f. Failure to accurately report data: In particular, there were discrepancies between bench sheets and DMR's that involved identical data, conflicting data, sample reporting errors, and other clerical errors. These violations were found regarding the following permits:

- a. DMRE 860-0469/KPDES KYG040569 : Outfall 4: April through September 2008; Outfall 11: July through December 2008; Outfall 10: October through December 2008.
- b. DMRE 836-8061/KPDES KY0078271: Outfall 2: April through December 2008, April through June 2009, and October through December 2009.

- c. DMRE 836-8062/KPDES KYG044819: Outfall 2: April through December 2008, April through June 2009, and October through December 2009.
- d. DMRE 860-0466/KPDES KYG042947: Outfall 10: October through December 2008.
- e. DMRE 860-0468/KPDES KYG040567: Outfall 10: January through March 2008 and October through December 2008.
- f. DMRE 860-0470/KPDES KYG041006: Outfall 10: October through December 2008.
- g. DMRE 860-9014/KPDES KYG0101761: Outfall 10: October through December 2008.
- h. DMRE 898-0810/KPDES KYG045749: Outfall 59: October through December 2008, January through June 2009, and October through December 2009.
- i. DMRE 898-0811/KPDES KYG046049: Outfall 59: October through December 2008, January through June 2009, and October through December 2009.
- j. DMRE 897-0499/KPDES KYG044971: Outfall 119: January through March 2008.
- k. DMRE 877-0182/KPDES KYG046282: Outfalls 1, 14, 16: July through September 2009.

11. As set forth above, Frasure Creek violated and continues to violate the Clean Water Act, 33 U.S.C. § 1251 et. seq., KRS 224.70-110, the Cabinet's implementing water quality regulations at 401 KAR Chapter 5, and corresponding provisions of Frasure Creek's KPDES permits set forth herein above. The findings of the Cabinet at specific Frasure Creek operations establish that the same types of violations, including, but not limited to, failure to properly monitor, test, record and report effluent discharges as required by its permits and 401 KAR 5:065 Section 2(1), have occurred over the past 5 years at all of Frasure Creek's permitted facilities and corrective action must be taken at all facilities to remedy the ongoing violations.

12. Frasure Creek will continue to violate its KPDES permits and the Cabinet's implementing regulations unless remedial measures are ordered by this Court.

13. Frasure Creek is liable for civil penalties for said violations pursuant to KRS 224.99-010.


14. The Cabinet has authority under KRS 224.10-100 and KRS 224.99-020 to bring an action for recovery of penalties and for injunctive relief for any person in violation of KRS Chapter 224.

WHEREFORE, the Plaintiff respectfully requests a judgment finding that Defendant violated the cited statutes and regulations and awarding the Cabinet the following relief:

1. Ordering Defendant to pay a civil penalty of up to twenty-five thousand dollars (\$25,000) per day per violation for the violations identified above pursuant to KRS 224.99-010(1);
2. Ordering Defendant to comply with all applicable statutes, regulations, and KPDES permit conditions; and
3. For any and all further relief to which the Cabinet is entitled.

Respectfully submitted,

ENERGY AND
ENVIRONMENT CABINET


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