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January 31, 2013

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

Re: Plaintiff Intervenors' Objections to the Proposed Agreed Order
OAH File No. DOW 33597-047

Dear Secretary Peters,

Please accept these objections on behalf of Appalachian Voices, Inc., Kentuckians for the Commonwealth, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Lanny Evans, Winston Merrill Combs, Thomas Bonny, and Pat Banks (Intervening Plaintiffs) to the Agreed Order[1] in the above-referenced matter.

The Energy and Environment Cabinet ("Cabinet") and the Defendant coal company, Frasure Creek Mining, LLC ("Frasure Creek"), negotiated the Agreed Order without including the Plaintiff Intervenors. The Cabinet has no statutory authority to enter a settlement between only some of the parties to an administrative proceeding. Furthermore, entry of a settlement agreement by only some of the parties to an action over the objection of other full parties and without the opportunity to discover evidence and without a hearing constitutes a violation of the due process rights of the excluded parties.

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[1] As set forth below, Plaintiff Intervenors disagree that the proposed agreement between the Cabinet and Frasure Creek is actually an "Agreed Order" in this context. The term "Agreed Order" implies an agreement of all parties to an action. The Plaintiff Intervenors do not agree with the settlement that is being proposed here. Nonetheless, for simplicity, the proposed settlement is referred to as the "Agreed Order" herein, because it has been so named by the Cabinet and Frasure Creek.

[2] Based on a comparison of the Administrative Complaint and the proposed Agreed Order, it appears that Frasure

Though "full parties" to this enforcement proceeding, the Plaintiff Intervenors have been denied the opportunity to gather evidence, denied the opportunity to examine witnesses, denied the opportunity to present evidence at an adjudicatory hearing, and denied even the opportunity to participate in the settlement negotiations between the Cabinet and Frasure Creek that yielded the proposed settlement. The Agreed Order is proffered for your signature without any evidentiary record to support its vague, ineffective, and unreasonable terms.

On this record, entry of the Agreed Order would be arbitrary.

We therefore urge you to withhold your approval of proposed Agreed Order as being outside the authority of your Office. We further request that you send the matter back to the Office of Administrative Hearings for a hearing that honors the procedural due process rights of the Plaintiff Intervenors as full parties in this matter and results in a report and recommended order from the Hearing Officer.

Since learning of the seriousness of the Clean Water Act violations being committed by Frasure Creek and the lack of stringent enforcement to correct those violations, Plaintiff Intervenors have diligently pursued every legal avenue available to them to ensure that their interests are represented, whether through litigation or settlement. Until our interests are fully represented, we will continue to do so.

BACKGROUND

The Cabinet initiated this action with an Administrative Complaint filed against Frasure Creek on August 26, 2011. The Complaint alleges that on numerous occasions, Frasure Creek discharged pollutants into Kentucky waters in excess of KPDES permit limits, failed to submit discharge monitoring reports (DMRs), and discharged pollutants without a permit. The violations alleged in the Administrative Complaint occurred during the first quarter of 2011.

The proposed Agreed Order is a settlement by which the Cabinet and Frasure Creek seek to resolve not only the first quarter violations alleged in the Administrative Complaint[2] but also violations that occurred from the second quarter 2011 through the second quarter 2012. These include well over one thousand instances[3] of effluent limit violations and numerous violations

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[2] Based on a comparison of the Administrative Complaint and the proposed Agreed Order, it appears that Frasure Creek and the Cabinet seek to resolve all claims alleged in the Administrative Complaint, with the exception of the discharge without a permit claims made in paragraphs 74 and 75 of the Administrative Complaint, which the Cabinet and Frasure Creek represent have been rescinded by letter dated February 28, 2012.

[3] These are instances of discrete effluent limit violations, not counted by the number of days of violations. The Clean Water Act requires that violations be counted for each day they occur. *See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 317 (4th Cir. 1986). In contrast to what is required by the Clean Water Act, the proposed Agreed Order states that "[a] daily violation or monthly average violation as reported on a Frasure

for failure to report and discharging without a permit. The proposed Agreed Order also seeks to resolve certain additional violations, including effluent limit violations beginning in the third quarter 2012, through stipulated penalty assessments.

The Plaintiff Intervenors have been excluded from the negotiations between Frasure Creek and the Cabinet and are not a party to the proposed Agreed Order. The Plaintiff Intervenors have been excluded despite the Cabinet's and Frasure Creek's awareness of their interests in this matter and despite the fact that the legal significance of those interests was affirmed by the Hearing Officer when he granted Plaintiff Intervenors full party status in this action.

On September 29, 2011, Plaintiff Intervenors timely moved the Office of Administrative Hearings for full intervention in the matter under 401 KAR 100:010 §11. Plaintiff Intervenors sought leave to participate to protect their own interests and those of their members in the use and enjoyment of the Kentucky, Big Sandy, and Licking Rivers, into which the Defendant's effluent flows. Plaintiff Intervenors described those interests thoroughly in paragraphs 3-13 of the Motion For Full Intervention. Plaintiff Intervenors, comprising four organizations and four individual members, each have distinct interests in preserving the health and safety of the waterways in eastern Kentucky. The individuals and organizations' members use the waters downstream of Frasure Creek's discharges for drinking, cooking, and normal household water use, for fishing and swimming, for bird-watching, photographing, and painting, and for other aesthetic pursuits. Those interests have been and continue to be adversely affected by Frasure Creek's numerous violations of the Clean Water Act at each of its 39 facilities in Eastern Kentucky.

Hearing Officer Robert Layton granted full intervention in the matter on November 7, 2011.[4] (See Scheduling Order filed Nov. 7, 2011). The effect of the intervention, as set forth in the regulation, is as follows: "A person granted leave to intervene in a proceeding may participate in the proceeding as a full party or, if desired, in a limited capacity. If an intervenor wishes to

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Creek DMR shall constitute one (1) violation for purposes of this section." (para. 40.) Failure to count violations by day constitutes another arbitrary enforcement action on the part of the Cabinet that is in direct violation of the Clean Water Act. This failure constitutes yet one more reason why the entry of the proposed Agreed Order would be unreasonable and arbitrary.

[4] Hearing Officer Layton granted full intervention under 401 KAR 100:010 §11(2), which reads:

> (2) Criteria to intervene.
>
> (a) The hearing officer shall grant intervention if the petitioner: (1) Had a statutory right to initiate the proceeding in which he wishes to intervene; or (2) Has an interest which is or may be adversely affected by the outcome of the proceeding.
>
> (b) If the criteria set forth in paragraph (a) of this subsection do not apply, the hearing officer shall consider the following in determining whether intervention is appropriate: (1) The nature of the issues; (2) The adequacy of representation of petitioner's interest which is provided by the existing parties to the proceeding; (3) The ability of the petitioner to present relevant evidence and argument; and (4) The effect of intervention on the cabinet's implementation of its statutory mandate.

participate in a limited capacity, the extent and the terms of the participation shall be at the discretion of the hearing officer." Plaintiff Intervenors explicitly sought and were explicitly granted full intervention rather than intervention in a limited capacity. (See Motion for Full Intervention and Nov. 7, 2011 Scheduling Order).

After being allowed to intervene as full parties to this enforcement action, Plaintiff Intervenors agreed to suspend the discovery schedule in hopes of reaching a settlement of both this action and the action pending before the Franklin Circuit Court. Plaintiff Intervenors made known that they intended to take discovery if the matter was not settled in the Franklin Circuit Court. (See Scheduling Order filed Nov. 7, 2011). The stay of discovery continued as Frasure Creek began reporting its financial troubles. (See Scheduling Orders filed May 25, 2012 and June 18, 2012). On October 17, 2012, the parties reported to Hearing Officer Layton that the negotiations in the Franklin Circuit Court matter had reached an impasse, and the parties were awaiting further direction from the Franklin Circuit.[5]

During the next status conference on November 19, 2012, Frasure Creek and the Cabinet announced that they had been in private settlement negotiations and had a draft agreed order. Plaintiff Intervenors stated our objection to any settlement that did not require the Plaintiff Intervenors' agreement. (See Scheduling Order filed Nov. 30, 2012).

I. The Secretary Lacks the Statutory Authority to Approve the Agreed Order

Under the provisions of 400 KAR 1:090, the Hearing Officer can present a finalized agreed order to the Secretary for approval only if *all* parties to the action before the hearing officer agree to its entry. In this case, however, the Plaintiff Intervenors—full parties to the proceeding—were not permitted by the Cabinet and Frasure Creek to participate in negotiation of the Agreed Order, nor do the Plaintiff Intervenors stipulate to the terms contained therein. The Agreed Order being presented therefore is not a true settlement. *Ky. Am. Water Co. v. Commonwealth*, 847 S.W.2d 737, 741 (Ky. 1993) ("Common sense dictates that there can be no stipulation or settlement, without consent of all the parties ... [T]he agreement ... was not a settlement, as all parties had not agreed to it."). As such, it is not a settlement as contemplated in 400 KAR 1:090 Sec. 16.[6]

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[5] To date, the Franklin Circuit action continues. The court has not ruled on the motion by Frasure Creek and the Cabinet to enter the Consent Judgment tendered by Frasure Creek and the Cabinet on December 3, 2010.

[6] Nor does it constitute a "report and recommended order to the secretary" under the provisions of 400 KAR 100:010, which states: "The report and recommended order shall be based on a preponderance of the evidence appearing in the record as a whole and shall contain appropriate findings of fact and conclusions of law."

The process contemplated in the regulation, therefore, is being improperly applied in violation of the Plaintiff Intervenors' procedural due process rights.[7]

Under these circumstances, therefore, entry of the Agreed Order would be beyond the powers granted to the Cabinet in KRS Chapter 224. Such entry would constitute an arbitrary action. *Am. Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n*, 379 S.W.2d 450, 456 (Ky. Ct. App. 1964) ("Obviously within the scope of a proper review the court may determine whether the agency acted in exercise of its statutory powers. Such action would be arbitrary within the prohibition of section (2) of the Kentucky Constitution.").

II. Entry of the Agreed Order Would Violate Plaintiff Intervenors' Procedural Due Process Rights

Despite being granted full party status, the Cabinet and Frasure Creek excluded the Plaintiff Intervenors from all negotiations leading to the Agreed Order. Furthermore, as a result of the way in which the Cabinet is purporting to settle the matter through private negotiations with Frasure Creek, Plaintiff Intervenors have been denied the opportunity to gather facts, develop evidence, test the sufficiency of Frasure Creek's defenses, and have a hearing on the Defendant's violations.

In their attempt to limit public scrutiny, the Cabinet and Frasure Creek have effectively disenfranchised Plaintiff Intervenors from the settlement process. Any action on the Secretary's part short of returning the matter for a full hearing pursuant to 401 KAR 100:010(3)(6)(a) would result in a violation of Plaintiff Intervenors' procedural due process rights.[8]

III. Because the Parties Do Not Stipulate to the Facts Presented in the Agreed Order, Entry of the Agreed Order Would Not Be Supported by Substantial Evidence

Absent a settlement, stipulated to by all parties, Kentucky law requires the hearing officer to oversee an administrative hearing under the provisions of 400 KAR 100:010 and 100:090.[9] A

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[7] To the extent that the Cabinet would argue that the regulation as written limits the Hearing Officer's ability to do any more than treat the privately negotiated settlement as an actual Agreed Order resolving the matter, the regulation would be void. Any regulation that is outside of the Cabinet's statutory authority or operates to limit the due process rights of affected parties is void. *See* KRS 13A.120 and KRS 13A.130; *Franklin v. Commonwealth,* 799 SW 2d 1 (Ky. 1990). Furthermore, any doubts concerning the existence or extent of an agency's powers should be resolved against the agency. *United Sign, Ltd. v. Commonwealth*, 44 S.W. 3d 794, 798 (Ky. Ct. App. 2000); *Northern Kentucky Emergency Med Services, Inc. v. Christ Hosp. Corp.*, 875 S.W.2d 896, 898 (Ky. Ct. App.1993).

[8] "In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process. Administrative proceedings affecting a party's rights which did not afford an opportunity to be heard could likewise be classified as arbitrary." *Am. Beauty Homes*, 379 S.W.2d, at 456 (citation omitted).

[9] Where there is disagreement among the participating parties, an agreement should not be offered as a settlement, and the agency should hold a "full scale hearing" *Ky. Am. Water Co.*, 847 S.W.2d at 741.

recommended order, prepared by a hearing officer after closing the administrative hearing record, should contain findings of fact and conclusions of law that are based upon a preponderance of the evidence.[10] The Secretary, in considering such an order, must then determine whether it is based upon substantial evidence.[11]

Here, the Agreed Order presented to the Secretary is based neither upon stipulation of the parties to the facts that underlie it nor upon any evidence—substantial or otherwise—contained in the administrative record. There has been no administrative hearing. There has been no presentation of evidence. There have been no findings of fact or conclusions of law by an independent officer. To give to this proposed Agreed Order the weight of the Cabinet's authority, without any evidentiary support on the record, would be a reckless and arbitrary abuse of that authority.

IV. The Agreed Order is *Prima Facie* Arbitrary and Unreasonable

Without evidence, the Agreed Order can only be judged on its face. The record of cited violations and the text of the proposed Agreed Order itself form the only basis upon which to determine whether the proposed Agreed Order is sufficient to meet the Cabinet's enforcement duties. Even with the scant information available, on its face, the proposed Agreed Order is not sufficient to ensure that the goals of the Clean Water Act are met.

A. Penalty Forgiveness is Arbitrary and Not Designed to Meet Reclamation Goal

The proposed Agreed Order states that it is its goal to not only resolve the enforcement claims of the Cabinet (and the Plaintiff Intervenors) but also "that Frasure Creek successfully reclaim its permitting coal mining operations in Kentucky." The Cabinet's concern over the reclamation status of Frasure Creek's operations is a concern shared by the Plaintiff Intervenors. As the proposed Agreed Order states, Frasure Creek represents that "it is financially unable to pay the full civil penalty assessed by the Cabinet for the violations that are the subject of the Agreed Order and also successfully reclaim to permanent program standards its Kentucky surface coal mining permits." (para. 16, emphasis added) The fear that Frasure Creek will abandon its legal obligations to reclaim its mines is a fear that is shared by many in eastern Kentucky.[12] The abandonment of thousands of acres of mined land in Eastern Kentucky would be a tragedy.

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[10] See, 400 KAR 100:010, Section 3(5).

[11] 400 KAR 100:010, Section 3(6)(c) states: "A final order of the secretary shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the secretary and the facts and law upon which the decision is based."

[12] Concerns over reclamation failures are made more serious by the Cabinet's failures to require adequate bond amounts. The seriousness of the Cabinet's failure to properly administer its bonding program has been made known most significantly through the Office of Surface Mining Reclamation and Enforcement's Part 733 letter addressed to Secretary Peters on May 1, 2012. (See Plaintiff Intervenors' Exhibit A.)

Plaintiff Intervenors share the goal of ensuring that Frasure Creek does not illegally abandon its mine sites. Plaintiff Intervenors want to ensure that the reclamation that Frasure Creek is required by law to perform is completed. However, there is nothing in the Agreed Order that furthers these goals.

The Agreed Order contains absolutely no indication that the Cabinet has done anything to verify Frasure Creek's statements that it cannot pay the penalty amount and fulfill its legal duties to reclaim its sites. Furthermore, there is absolutely nothing about the penalty forgiveness scheme negotiated by the Cabinet and Frasure Creek that would encourage, much less ensure, that Frasure Creek uses the money that would otherwise go toward penalties for reclamation. For these reasons, the penalty scheme presented in the proposed Agreed Order is not designed to ensure proper remediation of the serious pollution problems at Frasure Creek's sites that are the subject of this action and are not designed to ensure that the sites themselves are being properly reclaimed. Entry of the Agreed Order with the proposed penalty deferral and forgiveness measures would be completely arbitrary.

It is apparent that the Cabinet has not required verification of Frasure Creek's purported inability to both pay its fines and reclaim its sites despite the fact that Frasure Creek has been claiming insolvency for the better part of a year. (See May 25, 2012 Scheduling Order). Since the Agreed Order contemplates that Frasure Creek would only be required to provide documentation to verify its inability to pay one year after the entry of the Agreed Order (see para. 33), it can reasonably be inferred that, to date, no such documentation has been required. The Plaintiff Intervenors have sought such documentation in the Franklin Circuit Court action and will seek such documentation in this action if the matter is returned to the Office of Administrative Hearings. Without such documentation, there is no support for any penalty forgiveness or penalty deferral other than the statements of Frasure Creek's counsel. (See para. 16.) Such statements cannot and do not constitute evidence to support the deferral and potential forgiveness of any penalty.

Furthermore, on its face, the Agreed Order offers no reasonable explanation of how forgiveness of the civil penalties is necessary or even helpful to ensure that Frasure Creek will be able to complete reclamation. Likewise, there is absolutely nothing in the terms of the Agreed Order that would require or even encourage Frasure Creek to use the penalty money for reclamation.

The Cabinet's approach to the problem of insufficient funds for reclamation, as reflected in the proposed Agreed Order, is to make concessions, deferring or completely forgiving two-thirds of an unsubstantiated, arbitrary penalty amount, in hopes that Frasure Creek will use that money to do the reclamation job its bonding cannot guarantee or, better yet, to entice a more responsible third party to take over the business. The Cabinet's reliance on such hope is naïve at best and pandering at worst. Approval of the proposed Agreed Order with this ill-conceived penalty forgiveness provision would be unreasonable and arbitrary.

Approval of this Agreed Order would not appropriately penalize Frasure Creek or deter future violations, but instead it punishes the citizens of Kentucky. The Agreed Order sends a message to Frasure Creek and other coal companies that they can come into Kentucky, enjoy a near amnesty from state and federal environmental regulation, plunder the state's natural resources, annihilate mountains and destroy rivers and streams, endanger the lives of the people living downstream, all before leaving without being held accountable for the destruction they have wrought. To enter the Agreed Order would be to endorse to this shameful scam.

B. Remedial Measures Do Not Address Pollution Problems at Frasure Creek's Facilities

The penalty forgiveness problem is compounded by the fact that the only remedial measures in the proposed Agreed Order are not designed to address the pollution problems that are the primary substance[13] of this action and make the concerns regarding reclamation more pressing. Rather than address the pollution problems, the remedial measures address problems with Frasure Creek's laboratories and reporting procedures; problems that are the subject of the Franklin Circuit Court action and not the primary subject of this action. The proposed Agreed Order arbitrarily leaves it up to Frasure Creek to craft a plan for how it might achieve compliance in the future, and does not include mechanisms to actually abate the admitted pollution problems at Frasure Creek's facilities. These measures cannot reasonably be expected to bring Frasure Creek into compliance with the Clean Water Act. Nor can the reasonably be expected to further the goal of ensuring that the sites are being reclaimed.

Rather than actual remediation of the pollution problems, the focus of the proposed Agreed Order's remedial measures is on requiring procedures to check the validity of the Defendant's self-reporting. That the Cabinet felt the need to include such remedial measures in this proposed Agreed Order suggests that it believes that the measures that were put in place following the Franklin Circuit Court action are not yet sufficient to ensure the credibility of Frasure Creek's DMRs. It is unreasonable and arbitrary then for the Cabinet to rely entirely on the Defendant's self-reporting of effluent on its DMRs in this enforcement action, given Frasure Creek's history of false reporting. Yet that is precisely what the Cabinet attempts to do in the Agreed Order. There is no indication that the Cabinet conducted any on-the-ground inspection to validate the scope of the pollution problems that Frasure Creek was reporting.

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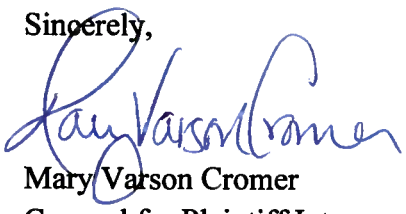
[13] Plaintiff Intervenors acknowledge that the Cabinet's Administrative Complaint alleges, in addition to the numerous discrete instances of permit limit exceedances, failures on the part of the company to get a permit for certain outfalls and failures to report certain discharges. The vast majority of the violations at issue in this action, however, are the serious pollution violations that Frasure Creek self-reported. The Cabinet's failure to address these violations through remedial measures and penalties makes the proposed Agreed Order arbitrary.

Furthermore, the Agreed Order lacks adequate mechanisms to enforce future violations. The Cabinet has agreed with Frasure Creek to limit any stipulated penalty assessments for future violations to $1,000, tens of thousands of dollars less than what the Cabinet has the authority to impose. There is no ratcheting up provision for stipulated penalties that would properly incentivize the company to deal with its problem ponds. Along the same lines, the Cabinet has negotiated an illegal methodology for counting Frasure Creek's violations of monthly average effluent limitation violations. (See para. 40.) The Cabinet stipulated to only count such violations as a single violation in the future, in spite of well-established judicial precedent requiring that a monthly average violation be counted as a separate violation for every day of the month. *See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 317 (4th Cir. 1986).

CONCLUSION

For the foregoing reasons, entry of the proposed Agreed Order presented by the Cabinet and Frasure Creek would be arbitrary. Plaintiff Intervenors therefore urge you to deny entry and return the matter to the Office of Administrative Hearings for a full hearing on the matter.

Sincerely,



Mary Varson Cromer
Counsel for Plaintiff Intervenors

List of Exhibits:

A Dir. Joe Pizarchik, OSMRE, May 1, 2012 ltr to Sec. Len Peters.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing, Plaintiff Intervenors' Objections to the Proposed Agreed Order, OAH File No. DOW 33597-047, were sent via postage prepaid US mail and email to the following on January 31, 2012:

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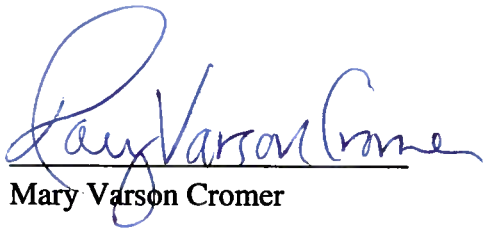

Mary Varson Cromer

United States Department of the Interior
OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT
Washington, D.C. 20240

May 1, 2012

Dr. Leonard K. Peters
Secretary, Energy and Environmental Cabinet
500 Mero Street
5th Floor, Capital Plaza Tower
Frankfort, Kentucky 40601

EXHIBIT A

Dear Dr. Peters:

I am writing regarding the Kentucky bonding program and Kentucky's legal obligations and my legal obligations. First, thank you for your efforts, those of Governor Beshear, and those of the officials in the Kentucky Department of Natural Resources (KYDNR) to attempt to resolve the deficiencies in Kentucky's bonding program. I appreciate the complexities of the matter and recognize the deficiencies that developed over the past decade or more will take a concerted effort over time to resolve. Nonetheless, it is time to make actual progress. I look forward to Kentucky developing a Kentucky solution to this Kentucky problem. It is my duty to notify you that I have reason to believe that Kentucky is not implementing, administering, enforcing, and maintaining its reclamation bond program as Kentucky agreed to and as required by law. With this letter I am initiating the Part 733 process. Please see 30 CFR Part 733.

In 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) approved the Kentucky mining and reclamation program and granted Kentucky primary responsibility for regulating coal mining in the Commonwealth. 47 Fed. Reg. 21404, May 18, 1982. As part of its application, Kentucky agreed that it would comply with the legal requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), its implementing regulations, and its approved regulatory program. 30 C.F.R. § 732.15(a). Kentucky agreed, and Federal and state law require Kentucky to implement, administer, enforce, and maintain its reclamation bonding program in a manner to ensure that coal mine operators post reclamation bonds sufficient in amount to enable Kentucky to complete the reclamation plan if the mine operator defaults on its legal obligations. 30 U.S.C. § 1259(a); 30 C.F.R. §§ 732.15(b)(6), 800.14(b) Kentucky Revised Statutes 350.060, Section 1(11).

As required by SMCRA and 30 CFR 733.12, OSM has conducted a number of reviews of the Kentucky bonding program during the past several years. KYDNR cooperated on these reviews. I appreciate Kentucky's professionalism, cooperation, and constructive input. KYDNR's insight

and expertise contributed to sound findings that accurately document the deficiencies in the Kentucky bonding program.

The first series of studies examined whether the reclamation performance bond amounts established by Kentucky were adequate to complete reclamation in the event of forfeiture. These oversight studies included a file review, site inspection, review of enforcement actions, and a comparison of the forfeited bond amounts with the reclamation cost estimates calculated by the Kentucky Division of Abandoned Mine Land (KYDAML). The 2008 Evaluation Year (EY) study found that 4 out of 5 permanent program bond forfeitures studied did not have adequate bond. A similar study conducted during EY 2009 found that 2 out of 5 permanent program bond forfeitures studied did not have adequate bond. The EY 2010 study found that 10 out of 12 permanent program bond forfeitures studied did not have adequate bond to complete reclamation. The lack of adequate reclamation bond prevents the land from being restored to a productive use.

The file reviews and review of enforcement actions found that Kentucky had not taken enforcement actions to require the mine operators to adjust the amounts of bond to be commensurate with the costs of reclaiming the disturbed areas. However, the reviews confirmed that, in general, Kentucky was ensuring that mine operators were keeping current in their reclamation.

On January 4, 2011, OSM issued a report entitled "National Priority Oversight Evaluation, Adequacy of Kentucky Reclamation Performance Bond Amounts." This report documents the results of a further investigation OSM conducted using its own bond calculations and analysis. OSM found that reclamation performance bonds in Kentucky are not always sufficient to complete the reclamation required in the approved permit. Kentucky is not properly maintaining its bond program, as it has not adjusted its bonding protocols since 1993. The cost of reclamation has increased since then, but the Kentucky bonding protocols have not been maintained to reflect the increased costs.

Based upon the analysis and findings of the various studies, on February 3, 2011, Kentucky and OSM signed an *"Action Plan for Improving the Adequacy of Kentucky Performance Bond Amounts"* to resolve the deficiencies in a timely and effective manner. Kentucky committed to an April 1, 2011, deadline to develop bond computation protocols that would include the rationale and supporting documentation to demonstrate that the revised bonding protocols would result in bonds sufficient to complete reclamation should forfeiture occur. OSM appreciates Kentucky's inclusive approach of engaging industry and environmental representatives to develop the new bonding protocols. However, OSM found that while the proposal submitted could result in improvements to the Kentucky bonding program, they were not sufficient to cure the documented deficiencies observed and fall short of meeting the applicable statutory and

regulatory requirements cited above. Furthermore, the proposal specifically excluded existing mines with inadequate reclamation bonds.

Two additional oversight studies were conducted during EY 2011. The first found that 17 out of 22 Kentucky bond forfeitures studied did not have adequate bond to complete reclamation. The second found that 18 out of 22 Kentucky bond forfeitures studied did not have adequate bond to complete reclamation.

The KYDAML completed its own study of thirty-nine forfeitures that occurred between January 1, 2007, and May 1, 2010. KYDAML prepared reclamation cost estimates and compared those costs to the amount of bond on the sites and found that over 80% of these forfeited mines did not have sufficient bond to complete reclamation to the permit standards.

On August 1, 2011, Kentucky submitted another proposal to address the bond program deficiencies. Kentucky agreed to participate with OSM in a Bond Review Team that would review and validate whether the August 1 proposal addressed the deficiencies. The Team completed its report in December 2011 and found the August 1, 2011, proposal to be an improvement of the existing bonding protocols. However, the Bond Review Team found that the proposal did not remedy the deficiencies and would not result in bonds that reflected the actual cost to reclaim the disturbed areas of mine sites.

In February and March of 2012, OSM initiated mine-specific oversight review of permits undergoing a mid-term review. OSM conducted mine site reviews, prepared reclamation cost estimates of the disturbed areas and compared the cost estimates to the amounts of bond currently posted by the operators. OSM found that the amount of bond posted for the mines were significantly less than the costs to reclaim the sites.

It is OSM's duty to monitor and oversee State program implementation by KYDNR. In keeping with OSM's policy of working closely with the States, OSM has had numerous discussions and other interactions with the officials of the Commonwealth of Kentucky regarding the current bonding situation. Significant problems with the adequacy of the reclamation bond amounts required for coal mining operations in Kentucky have been identified. Kentucky's bonding protocols used to calculate the reclamation bonds have not been modified since 1993. Moreover, Kentucky has not taken enforcement actions to require mine operators to increase their reclamation bonds to be commensurate with the costs of reclaiming the mine sites. In recognition of these problems, KYDNR has cooperated with OSM and had established a workgroup consisting of individuals representing KYDNR, the environmental community, and the mining and bonding industries. The purpose of this workgroup was to examine and make recommendations on the redesign of bond computation protocols in Kentucky that would satisfy the statutory and regulatory bonding requirements. While numerous meetings of the workgroup

were held, various proposals were advanced, and some conceptual progress was made, a resolution, establishing adequate reclamation bond amounts, has not been reached.

As Kentucky has not resolved its bond program deficiencies, I am fulfilling my statutory responsibility under section 521(b) of SMCRA and 30 CFR 733.12(b) to initiate this action. The initiation of the 733 process today continues to provide Kentucky the opportunity to correct its bond program deficiencies. However, should Kentucky not correct its bond program deficiencies, it will likely lose approval of all or part of its regulatory program, and OSM will implement a full or partial Federal program in Kentucky. In that case, Kentucky should also expect, in accordance with 30 CFR 736.24, to lose eligibility to receive Federal funding for its abandoned mine land reclamation program.

This action is necessary because I have reason to believe that Kentucky's bonding program does not meet the standards of 30 CFR Part 800 and because I have reason to believe Kentucky has not implemented, administered, enforced, and maintained its reclamation bonding program in a manner to ensure that coal mine operators post reclamation bonds sufficient in amount to enable Kentucky to complete the reclamation plans if the mine operators default on their legal obligations. A summary of the facts that support this conclusion are set forth above.

The tenets of primacy call for Kentucky to attempt to resolve this problem in the first instance. I recognize that you and KYDNR have put forth proposals to improve the situation. However, the proposals lack specificity, any immediate action to address the situation, and a commitment to a specific timeline to ensure that the deficiencies will be fully addressed in a timely and realistic manner. While I recognize that this situation did not develop overnight, and Kentucky will require time to develop and implement a solution, the status of Kentucky's inadequate bonding system remains relatively unchanged today despite several years of studies and collective efforts to correct the situation.

Pursuant to 30 CFR 733.12(b)(3), within 30 days of the date of this letter, Kentucky must submit a detailed and specific plan that outlines the immediate and long-term actions that Kentucky will take to eliminate the deficiencies in its bonding program. Specifically, the Kentucky submission must address the steps and implementation schedule to:

(1) Ensure that all new permits issued will have adequate bond to enable Kentucky to complete the approved reclamation plan to meet statutory and regulatory requirements.
(2) Re-evaluate and adjust the amount of bond required on existing permitted mines to ensure they will have adequate bond to enable Kentucky to complete the approved reclamation plan to meet statutory and regulatory requirements.

(3) Ensure that the Kentucky bonding program will be maintained so that the amount of each bond is periodically adjusted as the cost of future reclamation changes to reflect the actual costs of reclamation.
(4) Ensure that amount of bond on each mining permit is regularly reviewed and adjusted so that Kentucky will have adequate bond to enable Kentucky to complete the approved reclamation plan to meet statutory and regulatory requirements.

In addition, Kentucky has known of its bonding program deficiencies for quite some time and during this time mine sites without adequate bond to complete the reclamation have been forfeited and will likely continue to be forfeited. I request that you inform me of the steps Kentucky will take to ensure that forfeited sites that do not have sufficient bond will be reclaimed in accordance with the approved reclamation plan to meet statutory and regulatory requirements.

Under 30 CFR 733.12(c), Kentucky is entitled to an informal conference to discuss either the facts supporting the assertions contained in this letter, or the timetable for initiating and completing the necessary remedial measures. Kentucky may request an informal conference no later than 45 days from the date of this letter.

As provided in 30 CFR 733.12(d), after the conference, or after expiration of the time allowed to request a conference, whichever is later, I will notify you as to whether I continue to have reason to believe that Kentucky is not adequately implementing, administering, enforcing, or maintaining its bonding program. If such a basis still exists, I will notify you and the public and will then schedule a public hearing in Kentucky.

Following the public hearing, if I find that Kentucky has not demonstrated the capability and intent to require and maintain adequate reclamation performance bonds on all surface coal mining and reclamation operations and that Kentucky has failed to implement, administer, enforce, and maintain its reclamation bonding program in a manner to ensure that coal mine operators post reclamation bonds sufficient in amount to enable Kentucky to complete the reclamation plans if the mine operators default on their legal obligations, I will, in accordance with 30 CFR 733.12(e), either substitute direct Federal enforcement of all or part of the State program, or recommend to the Secretary of the Interior that he withdraw approval of the State program, in whole or in part.

The Part 733 process provides OSM with a formal mechanism for communicating with State governments that immediate attention should be directed to the identified concerns, so the proper safeguards for the regulation of surface coal mining and reclamation operations are put in place. The process also provides Kentucky with the opportunity to reassert its commitment to primacy and the effective administration of SMCRA's environmental standards.

I am confident that Kentucky will take this opportunity to correct the deficiencies described in this letter in conformance with its primacy program.

If you have any questions regarding this decision or if you would like to discuss options for consideration, please contact Thomas Shope, Regional Director for the Appalachian Region, at (412) 937-2828. Please contact Joseph Blackburn at (859) 260-3902 for any assistance you may require in developing remedial measures. I look forward to a mutually satisfactory resolution of this issue.

Sincerely,

Joseph G. Pizarchik

Joseph G. Pizarchik
Director

cc: Steve Hohmann, Commissioner
Kentucky Department for Natural Resources