

## **EXHIBIT 1: AUDITING AGREEMENT**

### **I. GENERAL PROVISIONS**

1. Plaintiff Intervenor and ICG agree to jointly engage Smith Management Group, LLC (hereinafter, "SMG") to implement an Auditing Plan for a period that shall expire upon termination of the Consent Judgment to which this Exhibit (hereinafter, "Auditing Agreement" or "Agreement") is attached. All definitions within the Consent Judgment shall apply to this Auditing Agreement unless specifically provided otherwise.

2. Within twenty (20) days of entry of the Consent Judgment, ICG shall provide to SMG and Plaintiff Intervenor a detailed inventory of outfalls on each facility. The inventory shall include permit numbers, outfall identification numbers, and a history of whether the outfall was flowing each month from first calendar quarter of 2011 through the second calendar quarter of 2012. Additionally, ICG shall provide to SMG a chart detailing all relevant reported values on DMRs from the first calendar quarter of 2011 through the second calendar quarter 2012.

### **II. DOCUMENTATION AUDIT**

3. Each calendar quarter, SMG shall review laboratory reports and supporting documents for a randomly selected five percent (5%) of the total outfalls requiring the submission of DMRs by ICG. ICG shall direct its contract laboratories to respond and produce documents requested by SMG for purposes of the quarterly Documentation Audit within ten (10) calendar days of receipt of the request from SMG. The documents to be reviewed by SMG shall include field notes and measurements; date-, time-, and GPS-documented photographs of any outfall for which "no flow" is reported; chain-of-custody documentation; bench sheets; instrument calibration logs; documentation of all QA/QC procedures used during monitoring and reporting, including batch blanks, duplicates and matrix spikes; as well as all sampling results and DMRs. Upon review of laboratory reports and supporting documents, SMG shall determine, for the randomly selected 5% of outfalls subjected to the documentation audit, whether ICG has

correctly and fully reported all monitoring data and laboratory test results in accordance with the terms of the Kentucky Coal General KPDES permit, or applicable KPDES Individual Permit, and correctly followed all QA/QC procedures for the relevant quarter. In addition, ICG or its contract laboratory shall provide SMG a quarterly spreadsheet containing each individual sampling result from each outfall for each of the facilities listed in Appendix A for that quarter.

### **III. SPLIT SAMPLING**

4. Simultaneous and in coordination with ICG's<sup>1</sup> routine sample collection and testing for DMR reporting, SMG or its agent shall accompany ICG in the field and observe ICG's collection of twenty (20) samples per calendar quarter to be split with and tested each by two (2) laboratories chosen by SMG and, in the normal course of testing for DMR reporting, by ICG's contracted laboratories. The laboratories to be chosen by SMG shall be NELAC or A2LA certified. SMG shall send samples with known values ("spiked samples") to the chosen laboratories prior to the commencement of Split Sampling and report the results of the spiked samples in its first quarterly report. The agent(s) and laboratories chosen by SMG shall not have any current contractual relationship with ICG and shall not have been engaged in a contractual relationship with ICG for a period of at least one (1) year prior to the entry of the Consent Judgment. SMG shall observe and document whether proper procedures<sup>2</sup> are used for sample collection. For the purpose of Split Samples, pH shall be tested in the field, and Total Suspended Solids, Manganese, Iron, Settleable Solids (if applicable), and Acidity/Alkalinity shall be tested by the laboratories. Conductivity shall be tested either in the field or in the laboratory, but SMG

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<sup>1</sup> For the purposes of this Paragraph, all references to ICG shall include employees and agents of any entity contracted by ICG to perform sample collection, testing or analysis used in the completion of DMRs.

<sup>2</sup> SMG will observe sample procedures and document whether they are suitable for obtaining representative samples for monitoring purposes. These observations will be limited to confirming that ICG sample protocols will not cause or contribute to under reporting monitored parameter concentrations.

shall ensure that its chosen laboratories use the same analytical method<sup>3</sup> per sample as used by ICG.

5. Within 30 days of entry of this Auditing Agreement and the Consent Judgment to which it is attached, and every two calendar quarters thereafter, Plaintiff Intervenors will provide SMG a list of outfalls that shall be subject to the Split Sampling procedure during the two calendar quarters following the submission of the list. For the list of outfalls, Plaintiff Intervenors may identify a number of outfalls up to or equal to the number of outfalls subject to Split Sampling in the first calendar quarter following the submission of the list. SMG shall supplement the list of outfalls to equal the number of outfalls to be subjected to Split Sampling during the two calendar quarters following the submission of the list by Plaintiff Intervenors. SMG shall not disclose to Plaintiff Intervenors or ICG the date or time or place of any testing that will occur during the two quarters, but upon request of Plaintiff Intervenors, may disclose that information once all sampling pursuant to this section is completed for said quarters. SMG shall communicate directly with ICG's contract laboratories and/or contract sample collectors to arrange for collection of Split Samples. Neither ICG nor the Plaintiff Intervenors shall make any efforts to determine the date, time, and place of SMG's testing.

6. If, and only if, an outfall that has been identified, either by Plaintiff Intervenors or SMG, for Split Sampling is not flowing on the date of sampling, SMG shall record the "no flow" and, in its discretion, shall select a substitute outfall to subject to Split Sampling. During any quarter, however, the number of substitute outfalls shall not exceed forty percent (40%) of the number of outfalls to be subjected to Split Sampling in that quarter.

7. SMG shall receive the Split Sample testing results from ICG's laboratory ("Reported Samples")<sup>4</sup> and the two (2) laboratories chosen by SMG. A Reported Sample will be

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<sup>3</sup> I.e., if ICG tests conductivity in the field, SMG shall also test conductivity in the field; if ICG tests conductivity in the laboratory, SMG's laboratories shall also test conductivity in the laboratories.

deemed compliant if all tested parameters fall within a “Range of Acceptable Deviation”. The Range of Acceptable Deviation for each parameter shall be either the “Acceptable Deviation”, which is equal to the value of the average of the two (2) test results for that parameter from the laboratories chosen by SMG, plus or minus thirty percent ( $\pm 30\%$ ), OR the “Alternate Acceptable Deviation” for those values for which test results are near or below the detection limit for each parameter. **Table 1** below details the Range of Acceptable Deviation that shall be deemed compliant for purposes of early release from this Consent Judgment.

**TABLE 1.**

Parameter	Acceptable Deviation	Low Value Exemption Limit*	Alternate Acceptable Deviation**
Iron	$\pm 30\%$	0.1 mg/L	$\pm 100\%$
Manganese	$\pm 30\%$	0.1 mg/L	$\pm 100\%$
TSS	$\pm 30\%$	6 mg/L	$\pm 100\%$
Acidity	$\pm 30\%$	10 mg/L	$\pm 50\%$
Alkalinity	$\pm 30\%$	10 mg/L	$\pm 50\%$
pH	$\pm 0.2^{***}$	N/A	N/A
SS	$\pm 30\%$	0.3 ml/L	$\pm 34\%$

\*If both the SMG average and ICG's Sample are equal to or below this, then measurements are considered in compliance for purposes of early release

\*\*Acceptable deviation if either the ICG value or the SMG average is above the "Low Value Exemption limit" and the other value is below it

\*\*\* Because pH is set to a logarithmic scale, the  $\pm 30\%$  values are determined according to the following formula:  $\log_{10}(10^{[\text{SMG pH}] * 0.7}) \leq \text{ICG pH} \leq \log_{10}(10^{[\text{SMG pH}] * 1.3})$ , which yields +0.11 or -0.15. Accounting for instrument error, and for ease of determination, the normal acceptable deviation for pH is set at the value shown.

8. If any Reported Sample falls outside the Range of Acceptable Deviation for any tested parameter or parameters, ICG may require the two (2) laboratories chosen by SMG to re-test the Split Samples and recalculate the Range of Acceptable Deviation based on results of the re-test. If the Reported Sample at issue falls within the recalculated Range of Acceptable

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<sup>4</sup> These samples are subject to KPDES reporting requirements and will be reported on ICG's quarterly discharge monitoring reports.

Deviation, the Reported Sample shall be deemed compliant for purposes of early release from this Consent Judgment.

9. If, after a period of two (2) consecutive quarters, no single parameter, excepting TSS, out of the forty (40) Reported Samples that were subjected to Split Sampling in those two (2) consecutive quarters fell outside of the Range of Acceptable Deviation, and for TSS not more than one sample per quarter fell outside of the Range of Acceptable Deviation, the number of Split Samples taken in the next quarter shall be reduced to fifteen (15). After any period of two consecutive quarters of taking Split Samples from fifteen (15) outfalls, if no single parameter, excepting TSS, out of the thirty (30) Reported Samples that were subjected to split sampling in those two (2) consecutive quarters fell outside the Range of Acceptable Deviation, and for TSS not more than one sample per quarter fell outside of the Range of Acceptable Deviation, the number of Split Samples taken in the next quarter shall be reduced to ten (10). After any period of two consecutive quarters of taking Split Samples from ten (10) outfalls, if no single parameter, excepting TSS, out of the twenty (20) Reported Samples that were subjected to Split Sampling in those two (2) consecutive quarters fell outside of the Range of Acceptable Deviation, and for TSS not more than one sample per quarter fell outside of the Range of Acceptable Deviation, the number of Split Samples taken in the next quarter shall be reduced to five (5). After a period of two consecutive quarters of taking Split Samples from five (5) outfalls, if no single parameter, including TSS, out of the ten (10) Reported Samples that were subjected to split sampling in those two (2) consecutive quarters fell outside the Range of Acceptable Deviation, the taking of Split Samples for testing shall cease. Such performance-based cessation of Split Sampling shall occur automatically, without need for any Party to petition the Court. **Table 2** below illustrates the progression to performance-based cessation of testing described above.

**TABLE 2.**

	<b>Splits per Quarter</b>	<b>Maximum Substitute Outfalls</b>	<b>Splits per Quarter</b>	<b>Maximum Substitute Outfalls</b>	<b>Total Splits per 2 Consecutive Quarters</b>	<b>TSS samples/All other parameters allowed outside of Range to progress to next step</b>
STEP 1	20	8	20	8	40	2 (1/qtr.)/ 0
STEP 2	15	6	15	6	30	2 (1/qtr.)/0
STEP 3	10	4	10	4	20	2 (1/qtr.)/0
STEP 4	5	2	5	2	10	0/0
STEP 5	Cease Sampling	Cease Sampling	Cease Sampling	Cease Sampling	Cease Sampling	N/A

Once ICG has progressed to a Step, it will remain at that Step until it qualifies for the next Step.

#### **IV. INDEPENDENT SAMPLING**

10. SMG shall direct the taking of twenty (20) Independent Samples per month<sup>5</sup> for testing by a laboratory chosen by SMG. The laboratory to be chosen by SMG shall be NELAC or A2LA certified. SMG shall send samples with known values (“spiked samples”) to the chosen laboratories prior to the commencement of split sampling and report the results of the spiked samples in its first quarterly report. If SMG uses the same laboratories for Independent Sampling and Split Sampling, this process need only be done once. The agent(s) and laboratories chosen by SMG shall not have any current contractual relationship with ICG; and shall not have been engaged in a contractual relationship with ICG for a period of at least one (1) year prior to the entry of the Consent Judgment. SMG or its agent shall contact ICG no earlier than one (1) hour before entering the permitted area for independent sampling. SMG and ICG shall communicate with one another only to the extent necessary to ensure the safety of personnel collecting the Independent Samples. The samples shall be collected within one foot

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<sup>5</sup> Recognizing the time constraints necessary for training, planning and coordination of the sampling program, if SMG is unable to complete the sampling requirements for October 2012, it will take and test thirty (30) Independent Samples in November 2012 and thirty (30) Independent Samples in December 2012. In compliance with Paragraph 12, SMG shall be allowed to take up to twelve (12) substitute samples each month if “no flows” occur. The collection of Independent Samples as set forth herein shall not alter, limit or delay the determination of compliance and applicable reduction in sampling requirements set forth in Paragraphs 13 and 14.

upstream of the outfall identified. Such collection shall be conducted in a manner and location such that the sample is not-reportable on DMRs.

11. Within 30 days of entry of this Auditing Agreement and the Consent Judgment to which it is attached, and every two calendar quarters thereafter, Plaintiff Intervenors will provide to SMG a list of outfalls that shall be subject to Independent Sampling by SMG or its agent during the two calendar quarters following the submission of the list. For the list of outfalls, Plaintiff Intervenors may identify a number of outfalls up to or equal to the number of outfalls subject to Independent Sampling in the first quarter following the submission of the list. SMG shall supplement the list of outfalls to equal the number of outfalls to be subjected to Independent Sampling during the two quarters following the submission of the list by Plaintiff Intervenors. SMG shall not communicate with Plaintiff Intervenors or ICG regarding the date or locations of sampling in a given two quarters, but upon request of Plaintiff Intervenors, may disclose that information once all sampling pursuant to this section is completed for said quarters.

12. If, and only if, an outfall that has been identified, either by Plaintiff Intervenors or SMG, for Independent Sampling is not flowing on the date of sampling, SMG shall record the “no flow” and, in its discretion, shall select a substitute outfall to subject to Independent Sampling. During any month, however, the number of substitute outfalls shall not exceed forty percent (40%) of the number of outfalls to be subjected to Independent Sampling in that month.

13. SMG shall compare the results of the testing of the Independent Samples to the daily discharge limits required by the Applicable Permit covering the sampled sites. For purposes of early release from this Auditing Agreement, compliance shall be determined on a per-sample basis. A sample is deemed compliant if all tested parameters fall within the Applicable Permit’s daily discharge limits. If ICG requests an alternate effluent limit due to a precipitation event for an outfall that was subject to Independent Sampling during the testing quarter, SMG shall

determine if such alternate effluent limit should apply to the relevant Independent Sample and whether, taking the alternate effluent limit into account, the Independent Sample is compliant for purposes of early release from this Auditing Agreement. SMG shall provide explanation for such determination in its quarterly report.

14. After a period of two (2) consecutive quarters, if twelve (12) or fewer of the one hundred twenty (120) Independent Samples taken in those two (2) consecutive quarters were deemed non-compliant with the Applicable Permit's daily discharge limits, the number of Independent Samples taken each month in the next quarter shall be reduced to fifteen (15). After any period of two (2) consecutive quarters of Independent Sampling of fifteen (15) samples per month, if nine (9) or fewer of the ninety (90) Independent Samples taken in those two (2) consecutive quarters were deemed non-compliant with the Applicable Permit's daily discharge limits, the number Independent Samples taken each month in the next quarter shall be reduced to ten (10). After any period of two (2) consecutive quarters of Independent Sampling of ten (10) samples per month, if six (6) or fewer of the sixty (60) Independent Samples taken in those two (2) consecutive quarters were deemed non-compliant with the Applicable Permit's daily discharge limits, the number of Independent Samples taken each month in the next quarter shall be reduced to five (5). After any period of two (2) consecutive quarters of Independent Sampling of five (5) samples per month, if three (3) or fewer of the thirty (30) Independent Samples taken in those two (2) consecutive quarters were deemed non-compliant with the Applicable Permit's daily discharge limits, Independent Sampling shall cease. Such performance-based cessation of Independent Sampling shall occur automatically, without need for any Party to petition the Court. **Table 3** below illustrates the progression to performance-based cessation of testing described above.



**TABLE 3.**

	<b>Samples per Month</b>	<b>Maximum Substitute Outfalls</b>	<b>Samples per Quarter</b>	<b>Total Samples per 2 Consecutive Quarters</b>	<b>Samples allowed to be noncompliant to progress to next step</b>
STEP 1	20	8	60	120	12
STEP 2	15	6	45	90	9
STEP 3	10	4	30	60	6
STEP 4	5	2	15	30	3
STEP 5	Cease Sampling	Cease Sampling	Cease Sampling	Cease Sampling	N/A

Once ICG has progressed to a Step, it will remain at that Step until it qualifies for the next Step.

## **V. REPORTING**

15. At the time ICG submits testing results in its quarterly DMR reports to the Cabinet, it shall also provide to SMG those testing results, along with the testing results of all other samples taken at each of the facilities included in Appendix A, which shall include but is not limited to the unreported samples used to calculate monthly average for any parameter reported on a quarterly DMR.

16. Not later than six (6) weeks after the conclusion of each quarter, SMG shall provide to ICG, the Cabinet, and Plaintiff Intervenors an Audit Report detailing the results of the documentation review, the split sampling, and the independent sampling. The Audit Report shall discuss any errors identified, any delays or logistical problems in conducting independent or split sampling, and any recommended actions, and the Audit Report shall disclose the number of Split Samples and independent samples to be taken in the next quarter. SMG shall include in the Audit Report a trend analysis comparing the Split Samples and SMG's independent samples with other ICG samples taken from the same outfalls that are sampled for audit compliance and all other samples taken by ICG for that quarter.

17. Unless any representative of the listed entities below request delivery of the quarterly reports by electronic means, such quarterly reports shall be provided in writing by US certified mail to the following:

For the Cabinet:

Jeffrey Cummins, Director  
Division of Enforcement  
300 Fair Oaks Lane  
Frankfort, KY 40601

For Plaintiff Intervenors:

Mary Varson Cromer, Esq.  
Appalachian Citizens' Law Center  
310 Main Street  
Whitesburg, KY 41858

For ICG:

Kevin M. McGuire, Esq.  
Laura P. Hoffman, Esq.  
Jackson Kelly, PLLC  
175 East Main Street, Suite 500  
P.O. Box 2150  
Lexington, KY 40588-9945

18. All documentation provided to SMG by ICG or its contract laboratories and all documentation created by SMG as part of its auditing shall be made available to Plaintiff Intervenors upon written request to either ICG or SMG. If such request is made, ICG or SMG shall provide the documents to Plaintiff Intervenors at no additional cost, except that SMG may charge Plaintiff Intervenors for the reasonable costs of administrative time, copying and postage. When practicable, Plaintiff Intervenors agree to receive such information electronically, whether by email, DVD, CD-ROM, flash drive, or other electronic media.

## **VI. LIMITATIONS ON AUDIT RESULTS**

19. ICG and Plaintiff Intervenors agree that the testing done at the direction of SMG, whether Split Samples or independent samples, shall be diagnostic testing and shall not be reportable on DMRs.

20. ICG and Plaintiff Intervenors also agree that any Split Sample or independent sample that exceeds the current Permit effluent limits shall not be included in the calculation of

stipulated penalties nor used by any Party to the Consent Judgment as evidence of specific, individual violations of numeric effluent limits or water quality standards in ICG's KPDES permits. Subject to those limitations, ICG and Plaintiff Intervenors agree that the location of any sample taken by Smith Management Group or its successor, in accordance with the Auditing Agreement, shall not be used as an argument seeking to bar its admissibility as evidence in support of any motion before the Court relating to Civil Action 10-CI-01868 in the Franklin Circuit Court, but the location of any sample may be presented to determine the appropriate weight to be given such evidence.

21. Plaintiff Intervenors shall keep the audit work, including reports and underlying data, confidential and not use or disclose the audit work for any purpose, except in connection with Civil Action 10-CI-01868 in the Franklin Circuit Court, including the enforcement of the applicable Consent Judgment and the implementation of this Audit Plan.

## **VII. DISPUTE RESOLUTION AND TERMINATION**

22. If any dispute or disagreement arises between or among ICG, Plaintiff Intervenors and SMG specifically with regard to the work performed under this Agreement, the Party seeking relief shall notify all other Parties to this Auditing Agreement in writing of the dispute or disagreement at issue. The Notice shall include adequate information to describe the dispute at issue and, if applicable, facts to support any allegation of noncompliance with this Auditing Agreement. ICG, Plaintiff Intervenors, and SMG shall then have thirty (30) days to resolve the issue informally. If informal resolution is not reached by the end of thirty (30) days following the Notice, one of the following actions shall be taken.

23. If the dispute is between ICG and the Plaintiff Intervenors, the alleging party shall have the right to move the Franklin Circuit Court for relief and any appropriate remedy, if applicable.

24. If the dispute alleges that SMG has breached the terms of the Agreement or failed to perform its duties under the Agreement, a Notice of Breach or Non-Performance may be given to SMG by the alleging party only with the consent of the other party.

25. SMG may elect to terminate the Agreement, and will follow the provisions of Paragraph 38 of this Agreement.

26. During the pendency of the informal dispute resolution or any resulting court action, SMG shall continue to perform its duties under this Agreement, provided that payment for its services is made promptly and in accordance with the terms of this Agreement. During the pendency of the informal dispute resolution or any resulting court action, ICG and Plaintiff Intervenors shall continue to perform their duties under this Agreement and neither party shall act or fail to act in such a way as to impair or impede SMG's ability to continue to perform its duties under this Agreement.

27. If, following the dispute resolution process described in Paragraph 22, a Notice of Breach or Non-Performance is issued to SMG by ICG or the Plaintiff Intervenors with the consent of the other, SMG shall have a period of 30 days to contest the alleged breach or non-performance or to correct the same to the satisfaction of the notifying party. In the event that SMG is unsuccessful in resolving the alleged matter, SMG's services shall be terminated and the provisions of Paragraph 38 will be followed. If ICG or Plaintiff Intervenors wish to terminate this Agreement without the consent of the other, it shall be required to follow the procedures set forth in Paragraph 22 prior to issuing a Notice of Breach or Non-Performance to SMG. If termination occurs, whether by Notice of Breach or Non-Performance or by SMG's election, ICG and Plaintiff Intervenors shall jointly endeavor in good faith to retain a mutually agreeable environmental consultant under terms substantially similar to the material terms in this Auditing Agreement and its supporting documents to replace SMG within thirty (30) days of termination. If a replacement is not retained within thirty (30) days, either ICG or Plaintiff Intervenors may

move the Franklin Circuit Court for appointment of an environmental consultant and the non-moving Party shall be heard in response. If termination occurs, the requirements of the Auditing Agreement shall be suspended until a replacement environmental consultant has been selected and a replacement Auditing Agreement has been executed.

## VIII. STANDARD TERMS AND CONDITIONS

28. **Entire Agreement:** This Auditing Agreement, including any Proposals issued in conjunction with this Agreement, contains the entire Agreement among SMG, Plaintiff Intervenors, and ICG with regard to the Work to be performed by SMG. No amendments to the Agreement will be effective unless they are in writing and signed by the appropriate representatives of SMG, Plaintiff Intervenors, and ICG. Counsel for the Plaintiff Intervenors shall serve as appropriate representative of Plaintiff Intervenors in this instance. SMG will provide the details of the tasks to be accomplished included in a Proposal to the Plaintiff Intervenors for their review prior to initiating work. The cost information for any Proposal and invoices will only be provided to ICG.

29. **Scope and Cost of Work:** The scope of any Proposal will be in accordance with this Agreement and the cost specific to the Work shall be described in the Proposal and shall be based upon the Agreement and information available to SMG at the time the Work is initiated. If the scope of work changes or if changes to the initial work product are required, the cost of the Work may change. In such event, the Proposal shall be amended to reflect such change.

30. **Scheduling of Work:** The schedule for performance of the Work will be in accordance with the terms of this Agreement. Delays resulting from events beyond the parties' control may cause this schedule to be revised, and such delays will not terminate the agreement.

31. **Information and Access:** In order to enable SMG to perform the Work, ICG and Plaintiff Intervenors will provide to SMG that information available to ICG and Plaintiff Intervenors which is related to the Work and necessary for SMG's performance. This

information includes ICG's objectives, schedule, financial constraints, and criteria and the Plaintiff Intervenors objectives and criteria. ICG will notify SMG of any known safety issues on the property and of any materials used or stored on the property about which SMG's personnel should be aware. ICG and Plaintiff Intervenors will make available to SMG any and all plans or other documents, or any other information, which relates to the Work and is necessary for SMG's performance. If any new information becomes available to ICG or Plaintiff Intervenors during the project that relates to the Work and is necessary for SMG's performance, ICG or Plaintiff Intervenors will make such information available to SMG immediately. ICG will provide a facility contact that can assure that access to the property is available to SMG at all reasonable times. Except where necessary in the performance of the Document Audit, SMG will regard as reliable and accurate all information obtained from ICG and Plaintiff Intervenors.

32. **Payment Terms:** ICG will be invoiced on a monthly basis for Work performed during the preceding calendar month. Payment will be expected following receipt of each invoice. Any invoice that has not been paid within thirty (30) days after its date will accrue interest at 1.5% per month (equivalent to 18% per annum) until paid in full. In the event that SMG's invoices remain unpaid for a period of sixty (60) days beyond their date, SMG shall have the right to suspend all Work and retain or retrieve all work products until such invoices have been paid in full. In the event that SMG must use the assistance of an attorney to collect payment, ICG agrees to pay all attorneys' fees and associated costs of collection.

33. **Reliance Upon the Work:** SMG is performing the Work for the benefit of ICG and Plaintiff Intervenors. Except as provided in Paragraphs 15–18, all work products, such as audit reports, are intended solely for ICG and Plaintiff Intervenors' use. It is, however, understood that the Work be used for permitting and compliance purposes with any regulatory agency with jurisdiction over the facility addressed by the Work.

34. **Confidentiality:** Except as provided for in Paragraphs 15–18 herein or unless required by law or court order, SMG shall not disclose the terms and conditions of the Auditing Contract or the substance of any report or recommendation which it gives to ICG and Plaintiff Intervenors in connection with the services. SMG shall treat as confidential proprietary information relating to this Agreement and the services including any such information received from ICG or Plaintiff Intervenors or obtained in connection with the Agreement or the services provided hereunder . If disclosure of any information is required by law or court order, SMG will immediately notify ICG and Plaintiff Intervenors of the circumstances requiring such disclosure and refrain from such disclosure for the maximum period of time allowed by law so that ICG and Plaintiff Intervenors may procure a protective order or take other actions to protect the confidentiality of the information.

35. The obligations of confidentiality set forth above shall not apply to any information: (1) after it becomes generally available to the public other than as a result of a disclosure by SMG or its directors, officers, employees, agents, representatives, or contractors or by breach of the Auditing Contract; (2) which was generally available to the public on the date of this agreement; or (3) which was lawfully received by SMG from a third party without restriction on disclosure provided such third party is not under an obligation of non-disclosure with ICG or Plaintiff Intervenors.

36. **Cost Estimates:** Any information SMG transmits to ICG regarding anticipated costs of work or materials to be furnished by other companies is based, in part, on information obtained from third parties and on assumed conditions and should be considered only as an opinion or estimate. SMG cannot and does not warrant as accurate estimates or cost of work to be performed by other companies.

37. **Accrual of Causes of Actions Relating to the Work:** Any cause of action between SMG and ICG or Plaintiff Intervenors which relates to the Work performed under the

Auditing Contract will be deemed to have accrued (and the applicable statutes of limitation shall begin to run) the date the Work is completed or should be completed in accordance with the terms of the Proposal.

38. **Post Termination Actions and Duties:** If this Auditing Contract is terminated in accordance with Paragraphs 22–27, SMG will, upon receiving notice of termination, consolidate the Work to date and prepare a closing report, which will be delivered to ICG and Plaintiff Intervenors together with an invoice to ICG representing Work performed through the date of termination. ICG will make payment of that invoice within thirty (30) days of its receipt.

39. **Standard of Care:** The objective of the Work shall be to monitor compliance with applicable environmental regulations and standards. In the performance of the Work, SMG will exercise care and skill consistent with the standards of its profession. SMG's Work and any work product arising out of that Work cannot be construed as a guarantee or assurance that ICG will have no environmental liabilities or that undetected environmental problems do not exist or will not arise in the future. SMG will be responsible only for its own negligent performance of the work, and SMG will not be liable for damages or costs arising out of the actions or negligence of parties not under its control.

40. **Risk Allocation:** In recognition of the relative risks and benefits of the Work to ICG and Plaintiff Intervenors and to SMG, the risks have been allocated such that ICG and Plaintiff Intervenors agree, to the fullest extent permitted by law, to limit the liability of SMG to ICG and to Plaintiff Intervenors, and to any other person or entity in privity of contract with ICG and Plaintiff Intervenors on the project, for any and all claims, losses, costs, damages of any other nature whatsoever or claims expenses from any cause or causes, so that the total aggregate liability of SMG to ICG, Plaintiff Intervenors, and all those named shall be ten times the total fee paid to SMG for services rendered on this project up to a maximum of one hundred thousand



dollars (\$100,000). Such claims include, but are not limited to, negligence, professional errors or omissions, strict liability, breach of contract or warranty.

41. **Electronic Delivery of Information:** Due to the unique character of electronic media, should ICG or Plaintiff Intervenors request that SMG provide to either ICG or Plaintiff Intervenors certain of SMG's work in electronic media, the following agreements will apply. ICG and Plaintiff Intervenors agree not to use any report, drawings, data or other information provided to ICG or Plaintiff Intervenors by electronic media for any purpose or project other than the project which is the subject of this Auditing Agreement. ICG and Plaintiff Intervenors agree to waive all claims against SMG resulting in any way from any unauthorized changes or reuse of the report, drawings or data for any other project by anyone other than SMG.

42. In addition, ICG agrees, to the fullest extent permitted by law, to indemnify and hold SMG harmless from any damage, liability or cost, including reasonable attorneys' fees and costs of defense, arising from any changes made by anyone other than SMG or from any reuse of the report, drawings, data or other information without the prior written consent of SMG.

**AGREED TO BY ICG:**

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For ICG Hazard, LLC; ICG Knott County, LLC;  
ICG East Kentucky, LLC; and Powell Mountain Energy, LLC

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Date

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Kevin M. McGuire, Esq.  
Laura P. Hoffman, Esq.  
*Counsel for ICG*

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Date

**AGREED TO BY SMG:**

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SMITH MANAGEMENT GROUP

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Date

**AGREED TO BY PLAINTIFF INTERVENORS:**

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Willa Coffee Mays, Executive Director  
APPALACHIAN VOICES, INC.

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Date

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Steve Boyce, KFTC Chair  
KENTUCKIANS FOR THE COMMONWEALTH, INC.

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Date

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Peter Harrison, Staff Attorney  
WATERKEEPER ALLIANCE, INC.

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Date

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Pat Banks, Executive Director  
KENTUCKY RIVERKEEPER, INC.

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Date

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PAT BANKS, Individually

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Date

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WINSTON MERRILL COMBS, Individually

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Date

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THOMAS H. BONNY, Individually

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Date

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LANNY EVANS, Individually

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Date

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Mary Varson Cromer, Esq.  
*Co-counsel for Plaintiff Intervenors*

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Date

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Lauren H. Waterworth, Esq.  
*Co-counsel for Plaintiff Intervenors*

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Date