

**COMMONWEALTH OF KENTUCKY  
ENERGY AND ENVIRONMENT CABINET  
FILE NO. DOW-34081-049**

ENERGY AND ENVIRONMENT CABINET,

PLAINTIFF

v.

FRASURE CREEK MINING, LLC,

DEFENDANT

and

APPALACHIAN VOICES, INC.,  
KENTUCKIANS FOR THE COMMONWEALTH, INC.  
WATERKEEPER ALLIANCE, INC.  
KENTUCKY RIVERKEEPER, INC.  
and SIERRA CLUB

PROPOSED INTERVENORS.

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**MOTION FOR FULL INTERVENTION**

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Pursuant to 401 KAR 100:010 §11, Appalachian Voices, Inc., Kentuckians For The Commonwealth, Inc., Waterkeeper Alliance, Kentucky Riverkeeper, Inc., and the Sierra Club, (hereinafter —Proposed Intervenors), by and through counsel, hereby move for full intervention in the above-styled matter. Proposed Intervenors seek leave to participate to protect the organizations' interests in the availability of accurate information regarding Frasure Creek Mining, LLC's ("Frasure Creek") effluent discharges. Proposed Intervenors also seek leave to participate to protect their members' interests in the use and enjoyment of the Big Sandy, Licking, and Kentucky Rivers by ensuring that those rivers are safe and healthy. Intervenors' interests are adversely affected by Frasure Creek Mining, LLC's ("Frasure Creek") failures to accurately and truthfully report their pollution discharges and by the discharges of excess pollution from Frasure Creek's permitted facilities.

The above-styled action was initiated by an Administrative Complaint filed January 12, 2015 by the Energy and Environment Cabinet ("Cabinet") against Frasure Creek for certain violations of Kentucky's Clean Water Act, KRS Chapter 224. The violations are more fully described in the Notices of Violation, filed as Exhibits 3-5 of the Cabinet's Complaint. The complaint alleges the duplication or inaccurate reporting by Frasure Creek of discharge monitoring results, numeric violations of KPDES permit effluent limitations, and failure to comply with 401 KAR 5:065, Section 2(1).

The Cabinet's Complaint followed 59 days after the Proposed Intervenors served on the Cabinet a Notice of Intent to Sue ("NOIS") Frasure Creek for many of the discharge monitoring report and numeric violations of effluent limits that are contained in the Cabinet's complaint. (*See* Cabinet's Complaint, Plaintiff's Ex. 2.)<sup>1</sup>

The instant action is also closely related to two other enforcement actions previously filed by the Cabinet against Frasure Creek for violations of KRS Chapter 224 and the KPDES permit conditions. In both of those actions, the Cabinet likewise filed its enforcement action on the 59<sup>th</sup> day after the Proposed Intervenors had served on the Cabinet an NOIS against Frasure Creek for the violations the Cabinet subsequently sought to enforce. The first of those actions was filed in Franklin Circuit Court on December 3, 2010. The second of those actions was filed in this Office on August 26, 2011 and assigned file number DOW-33597-047.

The Proposed Intervenors were permitted to intervene in both of the previous enforcement actions. Limited intervention in the Franklin Circuit action was granted for the purpose of determining whether the tendered consent judgment between Frasure Creek and the Cabinet was "fair, adequate, reasonable, and in the public interest." On November 24, 2014, the Franklin

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<sup>1</sup> Each of the violations found in Exhibits 3 and 5 of the Cabinet's Complaint were alleged in the NOIS filed by the Proposed Intervenors on November 14, 2014. The violations found in Exhibit 4 of the Cabinet's Complaint were not noticed by the Proposed Intervenors.

Circuit issued an Order finding that the proposed consent judgment was not. The Cabinet has appealed the Franklin Circuit's holding.

Proposed Intervenors were allowed to intervene as full parties in DOW-33597-047.

Despite their status as full part intervenors, the Cabinet and Frasure Creek settled the DOW-33597-047 enforcement action by Agreed Order without permitting the Proposed Intervenors to participate in the settlement process. The Proposed Intervenors appealed the Secretary of the Cabinet's entry of that agreed order to the Franklin Circuit Court. On November 24, 2014, the Franklin Circuit reversed the order and remanded the matter back to the Cabinet for proceedings consistent with the court's opinion and order. (*See* Ex. 1, Franklin Circuit No. 13-CI-584, Nov. 24, 2014, Opinion and Order, at 9.) The Franklin Circuit found that by entering an agreed order without permitting the intervenors the opportunity to present evidence and make a record regarding the sufficiency of the proposed agreed order, the Cabinet had violated the intervenor's due process rights. (*Id.*) The Cabinet has also appealed the Franklin Circuit's holding in that matter.

In support of this Motion, Proposed Intervenors state as follows:

1. This Motion is timely filed. Proposed Intervenors file this motion prior to the first scheduled prehearing conference in this matter.

#### **PROPOSED INTERVENORS' INTERESTS**

2. Proposed Intervenors' interests, which are protected by KRS 224, are distinctly and adversely affected by Frasure Creek's pollution of the Kentucky, Big Sandy, and Licking River watersheds, by Frasure Creek's failure to monitor and report discharges into these waters, and by Frasure Creek's failure to present accurate information to the public.

3. Proposed Intervenor's particular interests and the interests of their members are set out more fully in the following paragraphs:

(a) Appalachian Voices, Inc. is a non-profit, membership-based organization incorporated under the laws of the State of North Carolina with its principal place of business in Boone, North Carolina. Appalachian Voices is comprised of 745 individual members and works to solve the environmental problems that have the greatest impact on the people who live in the central and southern Appalachian Mountains. As part of its mission, Appalachian Voices educates its members regarding water pollution issues in Kentucky, advocates for more stringent laws and policies designed to protect the health and safety of the Commonwealth's waters, and litigates where necessary to ensure strict enforcement of existing water pollution laws. Accurate and reliable discharge monitoring information is critical to this work. As described more fully in the declarations attached as Exhibits 2 and 3, as a direct result of Frasure Creek's repeated failures to accurately and reliably file its discharge monitoring reports, Appalachian Voices has been required to expend considerable organizational resources to conduct additional water monitoring in the area of Frasure Creek's discharges and to create and maintain a database of pollution discharge information. In addition to those organizational interests, members of Appalachian Voices reside near or use and enjoy waters directly downstream from defendant's discharges into the Kentucky, Big Sandy Rivers, and Licking River and their tributaries in Pike, Floyd, Knott, and Magoffin Counties in Kentucky. These members use, or have used, these rivers and their tributaries for fishing, boating, recreation, drinking water and other uses. In particular, Appalachian Voices' member Bev May has lived most of her life on Wilson Creek in Floyd County downstream of Frasure Creek's discharges. Ms. May grew up along Wilson Creek, observing wildlife and playing along the creek. Ms. May has noticed a drop in the diversity and abundance of wildlife along Wilson Creek and is harmed by this awareness. She would like to be able to educate her great-niece about the diversity of species in the creek, but will not be able to do so because of the harm from pollution in the creek, some of which is being discharged by Frasure Creek. Ms. May is aware of Frasure Creek's pollution discharges into Wilson Creek and its false reporting of the amounts of pollution it is discharging. She is reasonably concerned that Frasure Creek may be discharging more pollution into Wilson Creek than it is reporting. She is aware through her own sampling that conductivity in the creek below Frasure Creek's discharges is very high. Ms. May is concerned about the levels of salts and metals that are being discharged by Frasure Creek. As a result of her concerns about the pollution in the creek, Ms. May has stopped using the creek to water her garden and will not allow her great-niece to play in the creek. Ms. May is also concerned about the health and safety of her water supply, which comes from the Levisa Fork at Allen, Kentucky downstream of several of Frasure Creek's mining operations. Ms. May has observed through her own conductivity testing that the conductivity of her tap water rises and falls in concert with increases and decreases in the conductivity of Wilson Creek and other waterways below Frasure Creek's mining operations which she tests regularly. She is therefore reasonably concerned that Frasure Creek is causing harmful levels of pollution in her drinking water. She also reasonably believes that the pollution contributes to higher municipal water treatment costs, which results in higher water bills for her.

(b) Waterkeeper Alliance, Inc. (WKA) is a non-profit corporation headquartered in New York, New York that aspires to create and preserve swimmable, drinkable, fishable, and clean waterways in the United States and around the world. WKA is a membership

organization, currently comprising more than 240 licensed member Waterkeeper organizations on six continents. Kentucky Riverkeeper, Inc. is a licensed member of WKA. WKA advances its interests and the interests of its member organizations in a variety of ways, including by reviewing publicly available information concerning pollution discharges in order to bring noncompliances or other water quality information to the attention of its member organizations, regulatory authorities, and the public. To do this, WKA relies on accurate, truthful monitoring and reporting. Frasure Creek's submission of false discharge monitoring reports harms WKA's ability to fulfill its organizational mission of educating the public, its member organizations, and regulatory officials about water-related issues, responding to citizens' complaints, advocating compliance with environmental laws, and devising appropriate remedies to problems discovered. (*See Exhibit 4.*)

(c) Kentucky Riverkeeper, Inc. is a non-profit organization incorporated under the laws of the State of Kentucky, with its principal office located in Richmond, Kentucky. Kentucky Riverkeeper, Inc. advocates for the stewardship of the Kentucky River watershed and its resources for the present and future generations, and is a member of the Waterkeeper Alliance. Kentucky Riverkeeper works to educate its members about the Kentucky River and its tributaries and works to identify and draw attention to pollution issues in those waters. Because of Frasure Creek's false reporting of pollution data, Kentucky Riverkeeper cannot provide accurate information to its members and to the public about the health and safety of the Kentucky River and its tributaries. Frasure Creek's false reporting harms Kentucky Riverkeeper's ability to carry out this important part of its mission. In addition, Kentucky Riverkeeper member Pat Banks recreates in areas of the Kentucky River and its tributaries downstream of Frasure Creek's pollution discharges. Ms. Banks is aware of Frasure Creek's numerous self-reported pollution violations, as well as Frasure Creek's failure to accurately and truthfully report its pollution discharges on numerous occasions. As a result of this awareness, Ms. Banks suspects and fears that Frasure Creek's actual pollution discharges may be worse even than what has been reported. Knowing that there are pollution violations, but being unable to know the extent of those violations causes harm to Ms. Banks in that she cannot determine whether it is safe to eat food grown in the flood plain of the Kentucky River and its tributaries or whether it is safe to fish or swim or otherwise recreate in and near the waterways in eastern Kentucky.

(d) Kentuckians For The Commonwealth, Inc. ("KFTC") is a non-profit member organization incorporated under the laws of the State of Kentucky with its principal place of business in London, Kentucky. KFTC is a citizens' social justice organization with 9000 members in 100 counties in the Commonwealth. Many KFTC members live in Eastern Kentucky near Frasure Creek's mines that are the subject of this action. Protection of water quality in Kentucky through public education and advocacy work is one of KFTC's core social justice missions. To fulfill this mission, KFTC regularly disseminates information through its newsletter, blog posts, and meetings regarding water pollution issues in Kentucky. KFTC also advocates for better water quality protections before state and federal officials, and engages in litigation where necessary to enforce Kentucky's water quality laws. The availability of accurate and reliable discharge monitoring data is central to KFTC's ability to fulfill its education and advocacy mission. Frasure Creek's failure to provide accurate and reliable discharge monitoring information as KRS Chapter 224 requires has harmed KFTC's ability to carry out its mission. (*See Exhibit 5.*) In addition to that organizational interest, KFTC members regularly use the waters downstream of the discharges at issue in the two actions for

household use, as well as for recreational, aesthetic and other beneficial purposes. Bev May, whose interests and harm to those interests are described in paragraph (a) above is also a KFTC member. Another KFTC member, Geneva Marshall, lives just one-half mile downstream of one of Frasure Creek's outfalls, which discharges into Open Fork Creek in David, Kentucky. Ms. Marshall grew up swimming and playing in Open Fork Creek. She is harmed by Frasure Creek's pollution of Open Fork Creek. As a result of the pollution, there is thick orange sediment in parts of the creek and many of the living creatures that Ms. Marshall once observed and enjoyed are no longer found in the creek. In contrast to her childhood along the creek, Ms. Marshall will not allow her grandson to play in the obviously polluted areas of the creek. In addition, Ms. Marshall gets her household water from Prestonsburg's water supply, which is downstream of many of Frasure Creek's discharges. Ms. Marshall is concerned about water pollution of the Prestonsburg municipal water supply and does not use the water for drinking or cooking. (See Exhibit 6.) Another KFTC member, Cody Montgomery, regularly uses and has used water from the Salyersville municipal water supply, which is downstream of Frasure Creek's discharges into tributaries of the Licking River. Mr. Montgomery is concerned about the level of pollution in the public water supply from surface mines upstream of the Salyersville water intake, including some of Frasure Creek's mines. His concern is heightened because of Frasure Creek's false reporting. Because of the inaccurate DMRs filed by Frasure Creek, he reasonably believes that he cannot determine the quality of his family's municipal water supply. As a result of the concerns about the safety of the drinking water, his family buys bottled water. In addition, Mr. Montgomery grew up fishing and eating fish from the Licking River. Because he is concerned about pollution entering the Licking River and because he is aware that as a result of Frasure Creek's false reporting, he cannot determine the extent of the pollution, he no longer fishes or swims in the Licking River.

(e) The Sierra Club is a national non-profit, member-driven organization incorporated in the State of California as a Nonprofit Benefit Corporation. Sierra Club has approximately 640,000 members across the country, including over 5,000 members in its Cumberland Chapter. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club and its Cumberland (Kentucky) Chapter engage in public education, advocacy, and litigation on environmental issues including clean air, clean water, and conservation of natural resources. Water quality issues – and in particular issues relating to water pollution from coal mines – are important to the Sierra Club's mission. Its research, public education, and advocacy depend to a large degree on access to timely and accurate information required to be made available to the public, as well as on the successful function of regulatory measures put in place to limit and reduce existing pollution, and prevent future pollution from occurring. The Cumberland Chapter prepares newsletters and reports to explain water quality concerns to its members and to the public, and engages in litigation to enforce water quality protections. Sierra Club's ability to disseminate information to its members and the public, and its ability to bring litigation to protect water resources in Kentucky from harmful pollution, depend on the organization's access to timely, accurate, and reliable information in discharge monitoring reports. Members of the Cumberland Chapter live, work, exercise, raise children, farm, garden, fish, bird watch, hike, camp, and recreate throughout Kentucky, including in Floyd, Knott, Magoffin, Perry, and Pike Counties. (See Exhibit 7.) Bev May,

whose interests and harm to those interests are described in paragraph (a) above is also a Sierra Club member.

4. As set forth in the descriptions above each of the organizational Proposed Intervenors relies on accurate discharge monitoring data to fulfill its mission. In particular, without accurate and reliable discharge monitoring reports, the organizations are unable to adequately educate their members about levels of pollution being discharged in particular areas, are hampered in their efforts to advocate for stricter laws and policies to ensure clean and healthy watersheds in Eastern Kentucky, and are unable to engage in citizen enforcement litigation to ensure that pollution laws are being enforced and Eastern Kentucky's waters are being protected. Each organization has been harmed by Frasure Creek's failure to file accurate and reliable discharge monitoring information.

5. The interests at stake in this case—protecting Kentucky waters and the health of Kentucky citizens by resolving and preventing violations of the Clean Water Act—are germane to each organization's purpose.

6. In addition to the harm to the organizations, as described more fully above, individual members of Appalachian Voices, KFTC, Waterkeeper Alliance, Kentucky Riverkeeper, and Sierra Club reside near and use and enjoy waters downstream from Frasure Creek's discharges. Many of these members have reduced their use of these waters because of their concerns about pollution from Frasure Creek's facilities.

7. The claims asserted by the Cabinet and the relief requested do not require the participation of individual members of the Intervenor groups.

8. In order to protect each organization's interests and the interests of their members, Proposed Intervenors filed a NOIS against Frasure Creek for pollution violations on November 14, 2014. (*See* Cabinet's Complaint, Plaintiff's Ex. 2.) The allegations in the November 14, 2014 NOIS are based on the Proposed Intervenors' review of DMRs made available through Kentucky's Open Records Act.

9. Despite being served with a copy of the NOIS and being involved in ongoing litigation that is closely related, the Cabinet did not contact any of the Proposed Intervenors to discuss its investigations, its plans for filing an Administrative Complaint, or its intentions regarding this action.

**PROPOSED INTERVENORS' INTEREST MAY BE ADVERSELY AFFECTED**

10. Proposed Intervenors' substantial interests in the health, safety, and cleanliness of the Kentucky, Big Sandy, and Licking River watersheds may be adversely affected by the outcome of this proceeding. 401 KAR 100:010 (Section 11(2)(a)(2)).

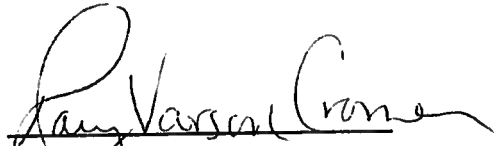
11. Likewise Proposed Intervenors' interest in dependable, accurate, and truthful information may be adversely affected by the outcome of this proceeding. *Id.*

12. If this proceeding results in an order or settlement between the Cabinet and Frasure Creek that is not sufficiently protective of Proposed Intervenors' interests and does not cause Frasure Creek to become compliant with its reporting requirements and does not prevent Frasure Creek from committing future pollution violations, Proposed Intervenors will continue to suffer the same injuries that have already resulted from Frasure Creek's non-compliance.

13. The outcome of this proceeding may permanently dictate the remedy for Plaintiff Intervenors' injuries, even if that remedy is insufficient to protect their interests. Resolution of this action could affect or impair the Proposed Intervenors' ability to pursue its remedies through a citizen suit enforcement action against Frasure Creek.

WHEREFORE, Proposed Intervenors respectfully request that they be granted leave to intervene as full participants in this proceeding, and that such participation shall include the right to present arguments, the right to present testimony and exhibits, and the right to call and cross-examine witnesses.





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### **CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing Motion to Intervene was served upon the following via email on this the 20<sup>th</sup> day of February 2015:

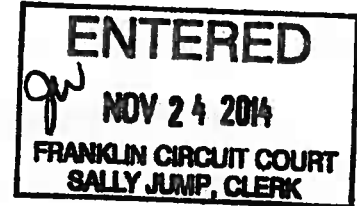
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**EXHIBIT** 1

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 13-CI-584**



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**APPALACHIAN VOICES, INC., et al.**

**PETITIONERS**

**V.**

**OPINION & ORDER**

**ENERGY AND ENVIRONMENT CABINET**

**RESPONDENT**

**AND**

**FRASURE CREEK MINING, LLC**

**INTERVENING RESPONDENT**

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This matter is before the Court on the Petitioner's Motion for Summary Judgment and Declaratory Relief, the Cabinet's Motion for Summary Judgment, the Cabinet's Motion to Dismiss Petition for Declaratory Judgment, Frasure Creek's Support of the Cabinet's Motion for Summary Judgment, and Frasure Creek's Motion to Dismiss the Petition in its entirety. Oral Arguments were heard on February 18, 2014. The parties fully briefed the issues, and the Court then took the case under submission. Upon review of the record and parties' pleadings, and after being sufficiently advised, the Court hereby **REVERSES** the Final Agreed Order of the Cabinet and **GRANTS** Summary Judgment in favor of the Petitioners, **REMANDING** the matter for an evidentiary hearing at the administrative level for reasons more fully detailed below.

**BACKGROUND**

The Court recognizes the context of this case includes Franklin Circuit Court Civil Action No. 10-CI-1868, enforcement proceedings initiated by the Energy and Environment Cabinet (hereinafter "Cabinet") regarding Frasure Creek Mining, LLC's (hereinafter "Frasure Creek") compliance with its KPDES permits for its mining operations. The Cabinet conducted an investigation of the alleged violations at Frasure Creek which revealed problems with

laboratories conducting wastewater analyses and preparing DMRs (discharge monitoring reports). The Cabinet filed a complaint in this Court in 2010 alleging the above violations by Frasure Creek. In April 2010, Petitioners began investigating water-monitoring data for Frasure Creek by submitting open record requests with the state's agencies and discovered DMR inaccuracies and inconsistencies. On December 3, 2010, the Cabinet and Frasure Creek filed a Joint Motion for the entry of a Consent Judgment that allegedly resolved the violations and is still pending before this Court. Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians For The Commonwealth, Inc., Kentucky Riverkeeper, Inc., Lanny Evans, Winston Merrill Combs, Thomas H. Bonny, and Pat Banks (hereinafter "Petitioners") objected to the proposed Consent Judgment. Throughout the course of 2011, the Cabinet continued its investigation of Frasure Creek's DMRs and detected additional violations. Petitioners then filed their Notice of Intent to file a citizen's suit under the federal Clean Water act against Frasure Creek for its violations. On August 26, 2011, the Cabinet filed a complaint initiating the administrative action to prosecute the violations by Frasure Creek. On November 7, 2011, Petitioners moved to intervene and were granted "full intervention" in the administrative proceeding. From June 2011 to September 2012, all parties were trying to reach a global settlement as to the administrative action, the Franklin Circuit Court action, the federal district court case, and the Petitioners' Notices of Intent to Sue. A mediation was attempted on four different occasions. On May 12, 2012, Frasure Creek notified the hearing officer and the parties of its dire financial situation and its potential bankruptcy. Settlement talks continued. On January 2, 2013, Frasure Creek and the Cabinet tendered to the Administrative Hearing Officer an Agreed Order purporting to be a global settlement of all claims against Frasure Creek. On January 31, 2013, Petitioners objected to the Agreed Order. On February 14, 2013, an

involuntary bankruptcy petition was filed against Frasure Creek by its creditors. On April 16, 2013, the proposed Agreed Order was entered as a final order of the Cabinet, without holding a full hearing before an administrative hearing officer so that Petitioners could hear, present, and test evidence, and consequently, the hearing officer made no findings of fact or conclusions of law before presenting the Agreed Order to the Secretary.

Petitioners seek declaratory relief stating that the Cabinet violated Section 2 of the Kentucky Constitution by (1) arbitrarily entering an agreed order that was not agreed to by all parties to the associated administrative proceeding; (2) violating Petitioners' due process rights by entering an agreed order without allowing Petitioners the opportunity to present and test evidence and participate in the administrative hearing; (3) violating Petitioners' due process rights by entering an agreed order without setting forth specific findings of fact or conclusions of law by the Secretary to support the entry of the agreed order; (4) acting outside of its statutory authority by following an improvised process for settling this matter without the consent of all the necessary parties; and (5) entering an agreed order that is unsupported by substantial evidence in the record. Petitioners also seek summary judgment on their claims, and review by this Court pursuant to KRS 13B.150 and Section 2 of the Kentucky Constitution. They argue that without a declaration from this Court, citizen participation in administrative enforcement actions will be eliminated and that no representation will be made as to their interests, and there will be no effective recourse to challenge the Cabinet's actions.

The Cabinet then filed its own Motion for Summary Judgment. The Cabinet argues that the Agreed Order is supported by substantial evidence and that entry of the Agreed Order is within the Cabinet's authority. The Cabinet also argues that Appalachian Voices has no protectable property interest in an evidentiary hearing before the Cabinet may settle an

enforcement action. They argue that Petitioners were provided with due process and a notice of the proposed settlement agreement and an opportunity to make their objections heard during the negotiation process with Frasure Creek, that the Agreed Order is not arbitrary or unreasonable, and that the entry of the Agreed Order should be affirmed because it is supported by substantial evidence.

The Cabinet also filed a Motion to Dismiss the Petition for Declaratory Judgment arguing that Petitioners are seeking to have this court declare their rights *after* adjudication by the Secretary. They argue there is no justiciable controversy between the parties. The Cabinet does not believe a Declaratory Judgment Action is a proper vehicle for resolving this appeal and that it should be dismissed.

Following its Bankruptcy Proceedings, Frasure Creek then intervened in the current action on February 21, 2014. Frasure Creek filed its Motion to Dismiss and its Statement in Support of Energy and Environment Cabinet's Motion for Summary Judgment on February 21, 2014. Frasure Creek argues, in its Motion to Dismiss, that the case is moot because Petitioners' claimed injury cannot be redressed by a favorable decision in this action. They also argue that Petitioners lack standing to bring this Petition. Their arguments differ from the Cabinet's in that Frasure Creek argues the Chapter 11 bankruptcy case bars Petitioners' claims because any potential claims against Frasure Creek by Petitioners were discharged on January 31, 2014 (the effective date of Frasure Creek's Plan of Reorganization). Frasure Creek argues that Appalachian Voices had notice of the bankruptcy proceedings and did not file their claims, so their claims are forever barred, rendering this case moot. Since completion of oral arguments and briefing of these issues, counsel for Frasure Creek have filed with the Court a notice of withdrawal as counsel of record.

## STANDARD OF REVIEW

In reviewing an administrative decision, the Court's role "is not to reinterpret or reconsider the merits of the claim." *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983). In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence of record. As such, as long as there is substantial evidence in the record to support the Cabinet's determinations with regard to the Permit, we must defer to the Cabinet, even if there is conflicting evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). Substantial evidence "means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Kentucky Retirement Systems v. Bowers*, 281 S.W.3d 776, 780 (Ky. 2009) (internal citations omitted). If it finds that the agency's decision is supported by substantial evidence, an appellate court must then determine whether the agency applied the correct rule of law. This Court reviews an agency's conclusions of law *de novo*, mindful of the fact that "agencies are entitled to great deference in interpreting their own statutes and regulations, at least where those interpretations do not contravene the law." *Morgan v. Natural Resource and Environmental Protection Cabinet*, 6 S.W.3d 833, 842 (Ky. App. 1999).

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelevest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (1991). The record must be viewed in light most favorable to the party opposing the

motion for summary judgment and all doubts are to be resolved in that party's favor. *Id.* "Summary judgment is proper when it is manifest that the party against whom the judgment is sought cannot strengthen his own case at a trial and the moving party would be entitled ultimately and inevitably to a directed verdict." *American Inc., Co. v. Horton*, 401 S.W.2d 758, 760-61 (Ky. 1966) (internal citation omitted). In this analysis, "the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999).

## DISCUSSION

### a. Declaratory Judgment

The Court cannot render advisory opinions. "In any action... [where] an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked." KRS 418.040. Declaratory judgment statutes are "remedial; their purpose is to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty, and insecurity with respect to rights, duties and relations, and are to be liberally interpreted and administered." KRS 418.080. See *Hammond v. Smith*, 930 S.W.2d 408 (Ky. App. 1996). Kentucky courts have long held that "there can be a 'justiciable controversy' when an advance determination would eliminate or minimize the risk of wrong action or mistakes by any of the parties." *Combs v. Matthews*, 364 S.W.2d 647 (Ky. 1963).

Here, an actual controversy exists between the parties in interest. Petitioners argue they were not given an opportunity to be heard on the merits at the administrative level and that the final agreed order was entered into without their consent. Petitioners are entitled to a declaratory judgment as a matter of law, as the Cabinet denied Petitioners due process rights when they

entered an agreed order with Frasure Creek, without the Petitioners' consent. The Cabinet acted arbitrarily and also violated Petitioners' due process rights by failing to conduct a full administrative hearing and failed to set forth findings of fact and conclusions of law by the Secretary supporting the Final Order. Petitioners were denied an avenue to redress their grievances because they were not able to fully participate in the administrative process and have suffered injury to their procedural and substantive interests because of the Cabinet's actions.

**b. Summary Judgment**

Furthermore, Petitioners are entitled to summary judgment as a matter of law because no genuine issues of material fact are in dispute. Petitioners were granted full intervention rights at the administrative level on November 7, 2011, but then were denied the right to a full administrative hearing where they could hear, present, and test evidence on the inadequacy of the consent decree. Petitioners were effectively bypassed in entering the Agreed Order. To tender a Final Agreed Order, the consent of all three parties to the administrative proceeding was required. Petitioners did not consent and a hearing was not held.

The Cabinet had every right to enter into an enforceable agreement with Frasure Creek, in the form of an Agreed Order or stipulation, during the pendency of the administrative hearing. But it had no right to short-circuit or by-pass the right of intervening parties to engage in discovery, present evidence, and test the adequacy of the Cabinet's agreement, at a full due process hearing on the merits, as required under KRS Chapter 13B and the Cabinet's own obligations under its regulations governing administrative hearings.

**c. KRS 13B.150**

In reviewing the Cabinet's Final Order, the Court finds that the Cabinet acted arbitrarily and outside the scope of its authority when the Secretary entered the Agreed Order, without



Petitioners' consent and before conducting a full hearing before an administrative hearing officer. Kentucky courts are authorized to review final agency actions to ensure they are not arbitrary. Moreover, the Secretary's decision must be subject to meaningful review, which requires the Secretary "to set forth sufficient facts to support conclusions that are reached, so the parties understand the decision," and those facts must be supported by substantial evidence. *See 500 Assocs., Inc. v. Natural Res. & Env'tl. Prot. Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006). The Secretary's decision to sign the Agreed Order, without giving the intervening parties the opportunity to question the Agreed Order, test the adequacy of its provisions, or question its contents, is not based on substantial evidence in the record. All of the parties were not at the table, as required by basic principles of due process. While the Cabinet may enter into an agreement with Frasure Creek, it cannot circumvent the rights of intervening parties to question that agreement, to gather evidence concerning its adequacy, and to put on proof before a hearing officer raising objections to the agreement. A lawsuit in which 2 of 3 parties enter into a settlement agreement is not fully settled. The same is true for an administrative proceeding. The plaintiffs here were granted a right to intervene, as provided for in KRS 13B.060<sup>1</sup> and the Cabinet's own hearing procedures. Moreover the statute governing administrative hearings at the Cabinet provides "unless all parties to the case agree in writing otherwise, the hearing officer shall conduct the hearing, complete the report and recommended order, and transmit the report and recommended order to the Secretary within 180 days ..." KRS 224.10-440(5) (emphasis supplied). The intervening parties have a right to engage in discovery, to take testimony under oath, and compel production of relevant documents. 401 KAR 1:040. The Cabinet itself properly granted the petitioners' motion to intervene, as required under 401 KAR 100:010

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<sup>1</sup> While administrative proceedings for the Cabinet are exempt from KRS Chapter 13B under KRS 13B.020, that statute requires the Cabinet's own procedures must meet or exceed the procedural safeguards of KRS Chapter 13B, and the Court must so construe the Cabinet's own hearing statute and administrative regulations.

§11(2)(a). It is unquestionable that the petitioners have standing. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 693, 181 (2000). It cannot now unilaterally divest the petitioners of the right to an administrative hearing by entering into a settlement with the permittee. While the hearing may now focus on the adequacy of the settlement rather than the underlying violations, the petitioners are still entitled to a hearing. The Cabinet's own statute and administrative regulations dictate that the right of intervening parties to a due process hearing cannot be circumvented by a partial settlement between the Cabinet and the permittee.


The Secretary has an obligation to hear and consider all objections and concerns raised by the petitioners at the administrative hearing. Petitioners have a right to make a record and to compel testimony and the production of evidence that relate to those concerns. While the Secretary remains free to accept or reject the arguments of the petitioners, he cannot deprive the petitioners of the right to make a record to present for judicial review, and to short-circuit the administrative hearing process by entering into a partial settlement which does not resolve the claims of the petitioners.

### CONCLUSION

Accordingly, this Court is compelled to **REVERSE** the Cabinet's Final Order. **WHEREFORE**, the Final Order of Respondent Energy and Environment Cabinet is hereby **REVERSED** and **REMANDED** to the Cabinet for further proceedings consistent with this Opinion and Order.

This order is final and appealable and there is no just cause for delay.

So **ORDERED** this 24th day of November, 2014.

  
PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

**DISTRIBUTION:**

**Mary Varson Cromer  
Appalachian Citizens' Law Center, Inc.  
317 Main Street  
Whitesburg, KY 41858**

**Mary Stephens  
Office of General Counsel  
200 Fair Oaks Lane, First Floor  
Frankfort, KY 40601**

**Frasure Creek Mining, LLC  
4978 Teays Valley Rd.  
Scott Depot, WV 25560**

**Registered Agent for Frasure Creek Mining, LLC  
National Corporate Research  
828 Lane Allen Rd, Suite 219  
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300 W. Vine St., Suite 1100  
Lexington, KY 40507**

**COMMONWEALTH OF KENTUCKY  
ENERGY AND ENVIRONMENT CABINET  
FILE NO. DOW-34081-049**

ENERGY AND ENVIRONMENT CABINET,

PLAINTIFF

v.

FRASURE CREEK MINING, LLC,

DEFENDANT

---

**DECLARATION OF ERIN SAVAGE**

---

I, Erin Savage, declare and have personal knowledge of the following:

1. I am a resident of Watauga County, North Carolina.
2. I am a member of Appalachian Voices and am also employed by the organization as the Central Appalachian Campaign Coordinator. In this capacity I coordinate App Voices' water and coal mining work in Kentucky. I am also a member of Kentuckians For The Commonwealth.
3. App Voices is an environmental non-profit corporation committed to protecting the land, air and water of the central and southern Appalachian region. App Voices' mission includes empowering people to defend our region's rich natural and cultural heritage by providing them with tools and strategies for

successful grassroots campaigns. In particular, App Voices is committed to reducing coal's impact on the region and advancing our vision for a cleaner energy future.

4. App Voices has approximately 750 members in total who pay annual dues, including over 30 members in Kentucky.

5. App Voices produces a bi-monthly environmental news publication, The Appalachian Voice, which has a total circulation of 60,000. App Voices also produces a monthly e-newsletter, The Advocate, which receives an average of 28,000 page visits each month.

6. App Voices' work in Kentucky includes public education, advocacy, and litigation on environmental issues including efforts to protect clean air and clean water.

7. App Voices and our members envision a day when the integrity of the land, air and water of central and southern Appalachia is protected for future generations, and the region is upheld as a national model of a vibrant, just and sustainable economy. In order to achieve that vision, App Voices works to understand how pollution from coal mines and other coal facilities impact streams, rivers, and other waterways throughout Kentucky, including in Floyd, Knott, Magoffin, and Pike Counties.

8. Because water quality issues – and in particular issues relating to water pollution from coal mines – are important to App Voices and its members, App Voices is greatly concerned that Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal, Inc., continue to pollute streams in eastern Kentucky in violation of their permits and continue to submit false discharge monitoring reports to government officials.

9. As part of my work for App Voices, I regularly go out in the field to take water samples from streams and other waterways that receive discharges from coal mines and other coal facilities. I take water quality samples in Kentucky approximately four to six times per year. I have taken water samples on at least four occasions below facilities operated by Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal, Inc. in Kentucky. Because I have reason to question the accuracy of discharge monitoring reports in Kentucky, I have to go out and take samples from the receiving streams to try to understand the true nature of those discharges. This is very time consuming and labor intensive. If I could trust the discharge monitoring reports from individual facilities, I would not have to take samples from the headwaters below individual mines. Instead, I could focus on taking samples farther downstream to monitor the health of entire watersheds. This would allow me to take fewer samples, and to sample from sites that are easier to reach.

10. Part of App voices' work in Kentucky is to educate community members about the health of their streams and rivers, and to identify sources of pollution to those waterbodies. I regularly lead workshops to train community members on how to educate themselves about these issues. I am frequently asked by local residents about which mines are discharging into local streams, and what pollutants are in those streams. If I could trust the information in discharge monitoring reports, I could easily answer these questions. Instead, I frequently have to tell people that we don't know. This leads to feelings of frustration and helplessness – both for the local residents and for me. To answer these questions, we have to do our own water monitoring. But this is time and resource intensive, and we can't monitor all of the streams where local residents have questions.

11. Another part of App Voices' work in Kentucky is to engage in advocacy around regulations that impact water quality and coal mining pollution. App Voices participated in public processes surrounding Kentucky's proposed changes to its selenium water quality standard, wastewater laboratory certification program and Kentucky's revised general NPDES permits for coal mining. As part of that advocacy, App Voices relied on a variety of water quality data originating from coal company self-reporting, as that is frequently the only data available regarding coal mine discharges. App Voices' ability to advocate for strong regulations on

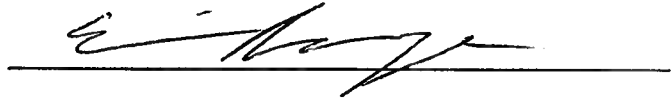
coal mine discharges, therefore, depends on accurate and reliable information in coal mine discharge monitoring reports.

12. App Voices' ability to gather information on water quality and convey it to our members and the general public – including through our print and web-based publications – depends on access to reliable information, including information in discharge monitoring reports. App Voices has an organizational interest in ensuring that dischargers obtain permits authorizing their pollution discharges and follow the monitoring and reporting requirements set forth in those permits.

13. Central to App Voices' mission is the ability to gather and interpret information regarding sources of pollution in central and southern Appalachia, to communicate that information to our members and the general public (including through our print and web-based publications), and to act on that information including by participating in litigation. App Voices' cannot meet its mission and obligations if it doesn't have access to timely and accurate information, including information contained in the discharge monitoring reports that the Clean Water Act requires permit holders to produce. App Voices therefore cannot meet its obligations to its members if Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal submit incomplete, false, or otherwise inaccurate discharge monitoring reports.



I declare under penalty of perjury that the foregoing is true and correct. Executed  
this 18<sup>th</sup> day of February, 2015.



ERIN SAVAGE

STATE OF NORTH CAROLINA  
COUNTY OF Watauga

Subscribed and sworn before me by Erin Elizabeth Savage on this  
the 18<sup>th</sup> day of February 2015.

My Commission expires: Jan. 2, 2018

Carolyn M. Henderson  
NOTARY PUBLIC

<b>CAROLYN M. HENDERSON</b> Notary Public Watauga Co., North Carolina My Commission Expires Jan. 2, 2018
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**COMMONWEALTH OF KENTUCKY  
ENERGY AND ENVIRONMENT CABINET  
FILE NO. DOW-34081-049**

**ENERGY AND ENVIRONMENT CABINET,  
PLAINTIFF**

**v.**

**FRASURE CREEK MINING, LLC,  
DEFENDANT**

---

**DECLARATION OF ERIC CHANCE**

---

I, Eric Chance, declare and have personal knowledge of the following:

1. I am a resident of Boone, North Carolina.
2. I am a member of Appalachian Voices and am also employed by the organization as a Water Quality Specialist. In this capacity I monitor water quality across Appalachia, including in Kentucky, by reviewing discharge monitoring reports and other records, and by taking water samples. I am also a member of Kentuckians For The Commonwealth.
3. App Voices is an environmental non-profit corporation committed to protecting the land, air and water of the central and southern Appalachian

region. App Voices' mission includes empowering people to defend our region's rich natural and cultural heritage by providing them with tools and strategies for successful grassroots campaigns. In particular, App Voices is committed to reducing coal's impact on the region and advancing our vision for a cleaner energy future.

4. App Voices has approximately 750 members in total who pay annual dues, including over 30 members in Kentucky.

5. App Voices produces a bi-monthly environmental news publication, The Appalachian Voice, which has a total circulation of 60,000. App Voices also produces a monthly e-newsletter, The Advocate, which receives an average of 28,000 page visits each month.

6. App Voices' work in Kentucky includes public education, advocacy, and litigation on environmental issues including efforts to protect clean air and clean water.

7. App Voices and our members envision a day when the integrity of the land, air and water of central and southern Appalachia is protected for future generations, and the region is upheld as a national model of a vibrant, just and sustainable economy. In order to achieve that vision, App Voices works to understand how pollution from coal mines and other coal facilities impact

streams, rivers, and other waterways throughout Kentucky, including in Floyd, Knott, Magoffin, and Pike Counties.

8. Because water quality issues – and in particular issues relating to water pollution from coal mines – are important to App Voices and its members, App Voices is greatly concerned that Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal, Inc., continue to pollute streams in eastern Kentucky in violation of their permits and continue to submit false discharge monitoring reports to government officials.

9. As part of my work for App Voices, I collect all quarterly discharge monitoring reports for coal mining operations in Kentucky. Because we have concerns about pollution from coal mining as well as concerns about the accuracy and reliability of information in these discharge monitoring reports, we developed a program to extract information from individual reports and compile that information into a broader database. Developing this program was a long and burdensome process that consumed significant App Voices resources, including my own time. Other states, such as Virginia, already compile all of this information in easily accessible databases. I then go through the database I compile to analyze and verify the information, including looking for repeated results or other anomalies. This is also a lengthy and burdensome process. I

would not be required to use App Voices' resources in this way if I could trust that the information in discharge monitoring reports was accurate, or if Kentucky were already doing an effective job of reviewing and verifying the data in those reports.

10. I have also participated in water testing of streams below coal mines in Kentucky. I would not have to test in as many locations, or in locations that are so difficult to access, if I and my employer could rely on the accuracy and reliability of information in discharge monitoring reports.

11. Another part of App Voices' work in Kentucky is to engage in advocacy around regulations that impact water quality and coal mining pollution. App Voices participated in public processes surrounding Kentucky's proposed changes to its selenium water quality standard, wastewater laboratory certification program and Kentucky's revised general NPDES permits for coal mining. As part of that advocacy, App Voices relied on a variety of water quality data originating from coal company self-reporting, as that is frequently the only data available regarding coal mine discharges. App Voices' ability to advocate for strong regulations on coal mine discharges, therefore, depends on accurate and reliable information in coal mine discharge monitoring reports.

12. App Voices' ability to gather information on water quality and convey it to our members and the general public – including through our print and web-based publications – depends on having access to discharge monitoring reports that are correct, timely, and reliable. App Voices has an organizational interest in ensuring that dischargers obtain permits authorizing their pollution discharges and follow the monitoring and reporting requirements set forth in those permits.

13. Central to App Voices' mission is the ability to gather and interpret information regarding sources of pollution in central and southern Appalachia, to communicate that information to our members and the general public (including through our print and web-based publications), and to act on that information including by participating in litigation. App Voices' cannot meet its mission and obligations if it doesn't have access to timely and accurate information, including information contained in the discharge monitoring reports that the Clean Water Act requires permit holders to produce. App Voices therefore cannot meet its obligations to its members if Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal submit incomplete, false, or otherwise inaccurate discharge monitoring reports.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18<sup>th</sup> day of February, 2015.



ERIC CHANCE

STATE OF NORTH CAROLINA  
COUNTY OF Watauga

Subscribed and sworn before me by Eric W Chance on this  
the 18<sup>th</sup> day of February 2015. NCDL # 37720824

My Commission expires: 7-25-2015

  
NOTARY PUBLIC

Brandon A. Miller  
NOTARY PUBLIC  
Ashe County, NC

**EXHIBIT** 4

**DECLARATION OF MARC A. YAGGI**

County of New York,    )  
  )  
State of New York        )

I, Marc A. Yaggi, hereby declare and state:

1. I have personal knowledge of the matters stated herein. I am over the age of 18 and suffer from no legal incapacity. I submit this declaration to establish the standing of Waterkeeper Alliance, Inc. (WKA) to intervene in this action.
2. I am 43 years old.
3. I currently live at 190 Nelson Street, Brooklyn, New York. I have resided at this address for more than four years.
4. I am the Executive Director of WKA. As Executive Director, I am responsible for overseeing all aspects of WKA's operations, supervising all employees of WKA, and providing overall direction to the organization's campaigns and fulfillment of the organization's mission.
5. I received a Bachelor of Science in administration of justice from Pennsylvania State University. I earned a Juris Doctor degree and a Master of Laws in Environmental Law (LLM) degree from Pace University School of Law.
6. WKA is a non-profit corporation headquartered in New York, New York that aspires to create and preserve swimmable, drinkable, fishable, and clean waterways in the United States and around the world. WKA is a membership organization, currently comprising more than 240 member Waterkeeper organizations (WKO) on six (6) continents, including more than 125 WKO in the United States.

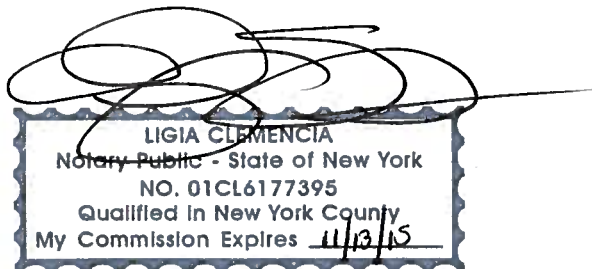


7. WKA's organizational model emphasizes grassroots advocacy. Each WKO is associated with a particular body of water or watershed, which represents the WKO's "jurisdiction." WKOs seek to protect and preserve the quality of the water resources within each of their jurisdictions by educating citizens about water-related issues, advocating compliance with environmental laws, responding to citizen complaints, identifying problems that negatively affect waterbodies, and devising appropriate remedies to address those problems.
8. Kentucky Riverkeeper, Inc. (KRI) is a licensed WKO and member of WKA that is based in Richmond, KY. KRI serves communities and protects waterways throughout the entire Kentucky River Watershed, including one or more tributaries of the Kentucky River into which Frasure Creek Mining, LLC ("Frasure Creek") discharges pollutants from its surface mining operations.
9. WKA advances its own interests and the interests of its member WKOs through a variety of means, including reviewing publicly available data concerning pollution discharges, such as discharge monitoring reports (DMRs) filed by dischargers, to identify water quality issues and noncompliance with federal and state environmental laws. In the event that water quality issues or noncompliance are discovered, WKA staff routinely notify interested WKOs, regulatory authorities, and/or the public. WKA also brings litigation on behalf of itself and WKOs to enforce state and federal environmental laws and regulations.
10. To execute these important components of its ordinary business practices and to advance its organizational mission, WKA relies on truthful, accurate monitoring and reporting of data concerning pollution discharges. When dischargers file untruthful or inaccurate data concerning their water pollution discharges, it interferes with WKA's ordinary business practices and undermines WKA's organizational mission.

11. I am aware that the State of Kentucky administers a Clean Water Act delegated program, which includes issuing National Pollutant Discharge Elimination System (NPDES) permits for point source discharges of pollutants, and that Frasure Creek has been issued such a permit or permits.
12. I am further aware that since 2010, WKA, KRI, and other partnering organizations have documented numerous occasions on which Frasure Creek submitted entirely false DMRs to the State of Kentucky, and that such false submissions have continued in spite of previous enforcement actions brought by state regulators.
13. Because WKA relies on access to timely, accurate, and reliable information on DMRs, Frasure Creek's submission of false DMRs interferes with WKA's ability to fulfill its organizational mission.
14. I declare under the penalty of perjury that the foregoing is true and correct.

Executed on February 18, 2015

  
\_\_\_\_\_  
Marc A. Yaggi





**DECLARATION OF THEODORE F. WITHROW**

I, Theodore F. Withrow, declare and have personal knowledge of the following:

1. I am a resident of Morehead, Kentucky.

2. I am a member of Kentuckians For The Commonwealth (KFTC) and currently serve as the co-chair of the KFTC Litigation Work team. Kentuckians For The Commonwealth is a non-profit organization incorporated in the State of Kentucky as a Nonprofit Benefit Corporation. KFTC is a grassroots organization of more than 9,000 members across Kentucky. We have local chapters and at-large members in many counties. We use a set of core strategies, from leadership development communications, litigation, and voter empowerment, to impact a broad range of issues, including coal and water, new energy and transition, economic justice and voting rights.

3. KFTC's work is rooted in our vision statement. That statement reads: *"We have a vision ... We are working for a day when Kentuckians – and all people – enjoy a better quality of life. When the lives of people and communities matter before profits. When our communities have good jobs that support our families without doing damage to the water, air, and land. When companies and the wealthy pay their share of taxes and can't buy elections. When all people have health care, shelter, food, education, and other basic needs. When children are listened to and valued. When discrimination is wiped out of our laws, habits, and*

*hearts. And when the voices of ordinary people are heard and respected in our democracy.”*

4. KFTC members believe that we are intricately tied to the land for our health, economic well-being and identity. We know that what we do to the land, we do to ourselves. Since our founding in 1981, KFTC members have worked to protect our homeland, demanding that coal companies obey, and the responsible officials enforce, laws designed to protect the people who live in areas where coal is mined.

5. KFTC is committed to protecting Kentucky’s natural resources for many reasons including for health, recreation, and economic development purposes. We work on environmental justice issues and advocate for the responsible use of earth’s ecosystems and resources. We work to ensure effective enforcement of laws protecting our communities and advocate for new laws where current ones are insufficient for protecting public health and our communities.

6. Kentuckians For The Commonwealth is a membership-led organization in which members direct and participate in all aspects of the organization’s work including our work on environmental issues. Members pay annual dues and elect the volunteer leadership of the organization.

7. Kentuckians For The Commonwealth and its chapters throughout Kentucky engage in base building, leadership development, public education, communications, advocacy, and litigation on environmental justice issues including issues related to clean air and clean water.

8. Members of Kentuckians For The Commonwealth have an interest in protecting the natural beauty of Kentucky and in ensuring that its streams, rivers, and other natural resources will be available for the use and enjoyment of future generations. Members have an interest in protecting streams, rivers, and other natural resources for public health and economic development purposes. Members of Kentuckians For The Commonwealth live, work, exercise, raise children, farm, garden, fish, bird watch, hike, camp, and recreate throughout Kentucky, including in Floyd, Knott, Magoffin, Perry, and Pike Counties.

9. Protection of water quality in Kentucky is one of Kentuckians For The Commonwealth's core social justice missions as articulated in our vision--*When our communities have good jobs that support our families without doing damage to the water, air, and land.*" Kentuckians For The Commonwealth regularly conducts advocacy on water quality issues in Kentucky with a particular focus on water quality issues that are a result of surface coal mining.

10. Because water quality issues – and in particular issues relating to water pollution from coal mines – are important to Kentuckians For The Commonwealth's mission of social justice the organization and its Members are greatly concerned that Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal, Inc., continue to pollute streams in eastern Kentucky in violation of their permits and continue to submit false discharge monitoring reports to government officials.

11. Kentuckians For The Commonwealth's community building, public education, and advocacy work depend on access to timely and accurate information, including information contained in the discharge monitoring reports that the Clean Water Act requires permit holders to produce. Kentuckians For The Commonwealth has an organizational interest in ensuring that dischargers obtain permits authorizing their pollution discharges and follow the monitoring and reporting requirements set forth in those permits.

12. KFTC educates our members and the public through our newsletter, blog posts, and other avenues about issues impacting mining communities, issues related to specific mining companies and with regards to the quality of streams. Additionally, KFTC members regularly engage with state and federal officials around information reported through discharge monitoring reports. KFTC engages in litigation in instances in which our members or their communities are directly impacted by water quality issues or are inherently done damage when they can't know for certain what is in their streams because of inaccurate or falsified reports. Discharge Monitoring Reports are used to inform our membership of conditions in their communities, inform our litigation committee of possible need for litigation and aid in discussions with officials at all levels. Finally, it is part of KFTC's mission to hold government accountable for full and fair enforcement of the law and challenge them when they fall short of that—either knowingly or when they don't have accurate information to allow for full and fair enforcement.

13. Kentuckians For The Commonwealth's ability to accurately inform our members and the public about the condition of water in their communities and its ability to bring litigation to protect water resources in Kentucky from harmful pollution, depend on the organization's access to timely, accurate, and reliable information in discharge monitoring reports. Kentuckians For The Commonwealth therefore cannot meet its obligations to its members if Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal submit incomplete, false, or otherwise inaccurate discharge monitoring reports.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 13<sup>th</sup> day of February, 2015.

Theodore F. Withrow

Theodore F. Withrow

**STATE OF KENTUCKY**  
**COUNTY OF ROWAN**

Subscribed and sworn before me by Theodore F. Withrow on this the 13<sup>th</sup> day of February 2015.

My Commission expires: 01/21/2019

Nathaniel R. Scully #520490  
NOTARY PUBLIC



## AFFIDAVIT

BEFORE ME, the undersigned Notary, Connie Sue Standifer,  
on this the 19 day of February, 2015, personally appeared GENEVA MARSHALL,  
known to me to be a credible persona and of lawful age, who being by me first duly  
sworn, on her oath deposes and says:

1. My name is Geneva Marshall. I have personal knowledge of the matters stated herein. I am over the age of 18 and suffer from no legal incapacity.
2. I finished high school in Floyd County. I married and had four children and worked at home to raise them.
3. My current address is 1901 Open Fork Road, David Kentucky 41616. I grew up along Open Fork Creek.
4. I have been a member of Kentuckians For The Commonwealth ("KFTC") since approximately 2004. I am an at-large member.
5. Through my own experiences and through a staff person at KFTC, I am aware that Frasure Creek Mining, LLC ("Frasure Creek") holds Kentucky Surface Mining Reclamation and Control Act permits for coal mining operations including a settling pond at the head of Open Fork Creek, about a half a mile upstream of my home. I am also aware that Frasure Creek has been filing false water monitoring reports for its outfalls, including the outfall for the pond at the head of Open Fork Creek.
6. When I was young I would play and swim in Open Fork Creek. I observed wildlife such as minnows, crawdads and salamanders. It used to be you could not pick up a rock in the creek without finding some living creature under it. These creatures are still present in the creek but they are not as plentiful as they were when I was a child, before Frasure Creek began mining above my home. Parts of the creek and some of the springs around my home have a thick orange sediment in them. I let my five year old grandson play in the creek by my home but will not allow him to play in some areas because of the orange water and snakes. I am concerned about pollution from Frasure Creek's mining operations and about what is in the water from the settling pond at the head of Open Fork Creek.
7. My drinking water is city water from Prestonsburg and the Levisa Fork. I do not like the city water and I do not drink it. It smells bad and thickens if it sets too long. I add Clorox to the water before using it to wash dishes and I sometimes add some to my bath water. I purchase bottled water for drinking and most of my cooking. I use the city water for laundry. I am aware that several of Frasure Creek's mining operations discharge water into streams that drain into the Levisa Fork and am concerned that the water is polluted because of these mining operations.

Geneva Marshall

Geneva Marshall  
1901 Open Fork Rd.  
David, KY 41616

Sworn to and subscribed before me by Geneva Marshall, on this the 19<sup>th</sup> day of February, 2015.

My Commission expires: 9-8-18

Notary Seal

Connie Sue Standifer  
NOTARY PUBLIC



**COMMONWEALTH OF KENTUCKY  
ENERGY AND ENVIRONMENT CABINET  
FILE NO. DOW-34081-049**

ENERGY AND ENVIRONMENT CABINET,

PLAINTIFF

v.

FRASURE CREEK MINING, LLC,

DEFENDANT

---

**DECLARATION OF JUDY LYONS**

---

I, Judy Lyons, declare and have personal knowledge of the following:

1. I am a resident of Louisville, Kentucky.
2. I currently serve as the Chair of the Cumberland Chapter of the Sierra Club.

The Cumberland Chapter represents all of Kentucky, and is the only Sierra Club chapter in Kentucky.

3. The Sierra Club is a national non-profit organization incorporated in the State of California as a Nonprofit Benefit Corporation. Sierra Club has approximately 640,000 members across the country, including over 5,000 members in its Cumberland Chapter. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and

enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

4. The Sierra Club is a member-driven organization in which members direct and participate in all aspects of the organization's environmental advocacy.

Members pay annual dues and elect the volunteer leadership of the organization.

5. The Sierra Club and its Cumberland (Kentucky) Chapter engage in public education, advocacy, and litigation on environmental issues including clean air, clean water, and conservation of natural resources.

6. Members of the Cumberland Chapter have an interest in protecting the natural beauty of Kentucky and in ensuring that its streams, rivers, and other natural resources will be available for the use and enjoyment of future generations. Members of the Cumberland Chapter live, work, exercise, raise children, farm, garden, fish, bird watch, hike, camp, and recreate throughout Kentucky, including in Floyd, Knott, Magoffin, Perry, and Pike Counties.

7. Protection of water quality in Kentucky is one of Sierra Club's core missions. The Sierra Club regularly conducts advocacy on water quality issues in Kentucky. In particular, Sierra Club has identified surface coal mining as a major contributor of water pollution in Kentucky.

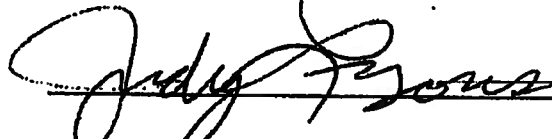
8. Because water quality issues – and in particular issues relating to water pollution from coal mines – are important to the Sierra Club's mission, the Sierra

Club and its Cumberland Chapter are greatly concerned that Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal, Inc., continue to pollute streams in eastern Kentucky in violation of their permits and continue to submit false discharge monitoring reports to government officials.

9. The Sierra Club's research, public education, and advocacy depend to a large degree on access to timely and accurate information, including information contained in the discharge monitoring reports that the Clean Water Act requires permit holders to produce. The Sierra Club has an organizational interest in ensuring that dischargers obtain permits authorizing their pollution discharges and follow the monitoring and reporting requirements set forth in those permits.

10. The Cumberland Chapter prepares newsletters and reports to explain water quality concerns to its members and to the public. Sierra Club and its Cumberland Chapter also engage in litigation to enforce water quality protections. Sierra Club's ability to disseminate information to its members and the public, and its ability to bring litigation to protect water resources in Kentucky from harmful pollution, depend on the organization's access to timely, accurate, and reliable information in discharge monitoring reports. The Sierra Club therefore cannot meet its obligations to its members if Frasure Creek Mining, Trinity Coal Corporation, and New Trinity Coal submit incomplete, false, or otherwise inaccurate discharge monitoring reports.

I declare under penalty of perjury that the foregoing is true and correct. Executed  
this 12 day of February, 2015.

  
\_\_\_\_\_  
JUDY LYONS

STATE OF KENTUCKY  
COUNTY OF Jefferson

Subscribed and sworn before me by Judy Lyons on this  
the 12<sup>th</sup> day of February 2015.

My Commission expires: 8/19/15

  
\_\_\_\_\_  
NOTARY PUBLIC

