

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
CIVIL ACTION NO. 10-CI-01868  
DIVISION D

ENERGY AND ENVIRONMENT CABINET

PLAINTIFF

VS.

**COMPLAINT**

ICG HAZARD, LLC  
ICG KNOTT COUNTY, LLC  
ICG EAST KENTUCKY, LLC, and  
POWELL MOUNTAIN ENERGY, LLC

DEFENDANTS

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

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

2. ICG Hazard, LLC (“ICG Hazard”), ICG Knott County, LLC (“ICG Knott”), ICG East Kentucky, LLC (“ICG East”), and Powell Mountain Energy, LLC (“Powell Mountain”) are each Delaware corporations in good standing with the Kentucky Secretary of State. ICG Hazard’s principal place of business is in Hazard, Kentucky. ICG Knott’s principal place of business is located in Kite, Kentucky. ICG East’s principal place of business is located in Hatfield, Kentucky. Powell Mountain’s principal place of business is located in St. Charles, Virginia.

3. ICG Hazard, ICG Knott, ICG East, and Powell Mountain have each been issued Kentucky Pollutant Discharge Elimination System (“KPDES”) Permits by the Cabinet’s Division of Water (“DOW”) for the discharge of treated effluent from its surface mining facilities to waters of

the Commonwealth. Each of these companies have also been issued permits from the Kentucky Division of Mine Reclamation and Enforcement (“DMRE”) to conduct their coal mining operations.

#### ICG HAZARD

4. On or about October 14, 2010, authorized representatives of DOW conducted a Performance Audit Inspection of ICG Hazard’s facility associated with KPDES Permit No. KYG044802. Among the conditions observed were an inadequate chain of custody, a lack of hard copies of analysis results, improper quality control and quality assurance procedures, discrepancies with recorded levels of acidity, and use of inappropriate test procedures.

5. On or about November 29, 2010, DOW issued a Notice of Violation (“NOV”) to ICG Hazard for the violations described in paragraph 4, above citing the following violations:

- a. 401 KAR 5:065 Section 2(1) (citing to 40 C.F.R. 122.41(j)(2)): failure to maintain required records;
- b. 401 KAR 5:065 Section 2(1) (citing to 40 C.F.R. 122.41(e)): improper operation and maintenance;
- c. 401 KAR 5:065 Section 2(1) (citing to 40 C.F.R. 122.41(e)): failure to comply with permit limitations;
- d. 401 KAR 5:065 Section 2(1) (citing to 40 C.F.R. 122.41(j)(4)): failure to properly collect and maintain samples;
- e. 401 KAR 5:065 Section 2(1) (citing to 40 C.F.R. 122.41(j)(4)): failure to monitor permit parameters with approved test procedures; and,
- f. 401 KAR 5:065 Section 2(1) (citing to 40 C.F.R. 122.41(a)): failure to comply with permit conditions.

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

6. On or about October 15, 2010, authorized representatives of the DOW conducted an inspection of the laboratory facilities of Geological Sciences Laboratory (“GSL”). GSL is the

laboratory with which ICG Hazard contracted to perform sample collection and analysis of wastewater discharged by its permitted mining operations, and related tasks. Among the conditions observed were:

a. Failure to maintain required records; failure to establish chain of custody for collected samples; sample bottles are reused and relabeled; the analysis results are entered directly into the computer with no hard copy retained; no quality assurance or quality control procedures were followed; the lab did not have standard operating procedures; tests were performed following the 17th edition of Standard Methods for the Examination of Water and Wastewater; equipment calibration is not documented; no log books are kept.

b. Improper operation and maintenance; adequate laboratory controls and quality assurance procedures are not in place by either ICG Hazard or GSL; no log books are kept verifying proper QA/QC procedures; chain-of-custody and bench sheet forms are not used; neither calibration logs, equipment maintenance logs, reagent logs, nor standard operating procedures are maintained.

c. Failure to comply with permit conditions; failure to collect samples in accordance with the monitoring requirements in the permit; samples are collected in the same plastic bottles each month and not always in the correct volume; samples are not preserved until received at the lab and are not transported in ice from the site to the facility; no written documentation of QA/QC or of calibration procedures or analyses; pH and conductivity field equipment are not approved by EPA.

d. Failure to monitor permit parameters with approved test procedures; samples are collected in the same plastic bottles each month and not always in the correct volume; samples are not preserved until received at the lab and are not transported in ice from the site to the facility; the sample storage refrigerator was also being used to hold food and drinks; no bench

sheets or chain-of-custody documentation to verify that samples were analyzed within the allowed holding times.

7. Based on information and belief, the Cabinet alleges the violations referenced in paragraph 6, above, apply to twenty-seven (27) of ICG Hazard's permitted operations; therefore, on or about November 29, 2010 the Cabinet issued a NOV to 27 of ICG Hazard's permitted facilities served by GSL for the conditions described in paragraph 6, citing the following violations:

- a. 401 KAR 5:065 Section 2(1): failure to maintain required records;
- b. 401 KAR 5:065 Section 2(1): improper operation and maintenance;
- c. 401 KAR 5:065 Section 2(1): failure to comply with permit conditions (two citations thereof; and,
- d. 401 KAR 5:065 Section 2(1): failure to monitor permit limits with approved test procedures.

A copy of each NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 2 through 28.

8. The DMRE permits and corresponding KPDES permits to which the NOV's referenced in paragraph 7, above, were issued are as follows:

- a. DMRE 813-0272/KPDES KYG046093
- b. DMRE 813-0291/KPDES KYG041123
- c. DMRE 813-0294/KPDES KYG046108
- d. DMRE 813-0296/KPDES KYG043595
- e. DMRE 813-0315/KPDES KYG046206
- f. DMRE 813-0292/KPDES KYG044019
- g. DMRE 813-5025/KPDES KYG044091
- h. DMRE 813-5026/KPDES KYG044753

- i. DMRE 813-7026/KPDES KYG044403
- j. DMRE 813-8018/KPDES KY0023086
- k. DMRE 813-8019/KPDES KYG043598
- l. DMRE 860-0445/KPDES KYG040737
- m. DMRE 866-0281/KPDES KYG043540
- n. DMRE 866-0295/KPDES KYG045542
- o. DMRE 855-5146/KPDES KYG041742
- p. DMRE 897-0446/KPDES KYG046154
- q. DMRE 897-0448/KPDES KY0106852
- r. DMRE 897-0454/KPDES KYG044107
- s. DMRE 897-0455/KPDES KYG045377
- t. DMRE 897-0456/KPDES KYG043989
- u. DMRE 897-0482/KPDES KYG040722
- v. DMRE 897-0483/KPDES KYG044268
- w. DMRE 897-0486/KPDES KYG046274
- x. DMRE 897-0543/KPDES KYG042314
- y. DMRE 897-5118/KPDES KYG044931
- z. DMRE 897-8040/KPDES KYG043089
- aa. DMRE 897-8041/KPDES KYG042693
- bb. DMRE 897-8043/KPDES KYG042598

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

a. Sample Custody Sheets do not appear to be used consistently, sample tags did not include the name of the sampler or the time the sample was collected; the sample tags are discarded along with the sample bottle after testing is completed; the Sample Custody Sheet does not record information necessary to establish a chain of custody; a "Pond Analysis Lab Sheet," apparently used as a bench sheet, provides some necessary information but does not identify who took the field readings or the name of the analyst(s); does not include the date and time the analysis was performed or any of the documentation (calculations) required to verify the sample results; neither the Pond Analysis Lab Sheets nor lab log books identify the method used for the analysis; no documentation of equipment calibration, maintenance records, the use of duplicates of spikes or other quality control measures.

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

c. Inadequate quality assurance and quality control (QA/QC) procedures; no back-up data to support DMRs; no chains of custody, inadequate bench sheets/records, no lab equipment maintenance logs, reagent logs, calibration logs, and no lab Standard Operating Procedures manual; unapproved methodology (Hach DR 890 Colorimeter) for TSS analysis; DMRs continually and consistently report the Acidity concentration for all discharges, from all ponds, for all DMRs as 0 mg/l for 2008 through 2010;

d. No log of the preservatives used and/or the Certificates of Analysis that should come with the preservatives; the refrigerator at the lab did not contain a thermometer, no temperature log for the refrigerator; impossible to determine if samples were being analyzed within the required holding times; unapproved test methodology used to analyze for Total Suspended Solids.

10. Based on information and belief, the violations referenced in paragraph 9, above, apply to each of ICG Hazard's two (2) permitted facilities served by S&S; therefore, on or about November 29, 2010 the Cabinet issued a NOV to ICG Hazard's 2 permitted facilities referenced above for the conditions described in paragraph 9, above, citing the following violations:

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

A copy of each NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 29 and 30.

11. The DMRE permits and corresponding KPDES permits to which the NOV's referenced in paragraph 10, above, were issued are as follows:

- a. DMRE 860-0454/KPDES KYG046357
- b. DMRE 860-0463/KPDES KYG045985

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

13. On November 29, 2010, DENF issued a NOV to ICG Hazard for violations found as a result of the DMR review. The NOV cited eight (8) violations of KRS 224.70-110, which prohibits the pollution of the waters of the Commonwealth in contravention of any of the rules, regulations, permits, or orders of the Cabinet. The regulation at issue is 401 KAR 5:065 Section 2(1), citing to 40

C.F.R. 122.41(a),(k), and (l)(4)(i). The NOV cites eight (8) regulatory requirements that ICG Hazard failed to meet, regarding thirty-two (32) permitted sites. A copy of the NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 31 and 31(a).

14. The DMR review conducted by DENF, as referenced in paragraphs 12 and 13 above, revealed the following specific deficiencies:

a. Failure to submit the required monitoring data for conductivity for certain outfalls for the months of August and September 2009 for the following DMRE permits and corresponding KPDES permits:

- i. DMRE 813-0315/KPDES KYG04626: Outfall 007
- ii. DMRE 813-5026/KPDES KYG044753: Outfall 1268
- iii. DMRE 866-0295/KPDES KYG045542: Outfalls BP 2, S1, S2, and S6
- iv. DMRE 897-0446/KPDES KYG046154: Outfalls SS1, SS2, and SS4
- v. DMRE 866-0281/KPDES KYG043540: Outfalls 1246, 1247, 1376, 1400, 1402, 1407, 1801
- vi. DMRE 897-0483/KPDES KYG044268: Outfalls 3, 6, 7, 10, 11, 12

b. Failure to comply with permit limits for the following DMRE permits and corresponding KPDES permits:

- i. DMRE 813-0315/KPDES KYG046206: Total Recoverable Iron at Outfall 107 for January 2010
- ii. DMRE 866-0295/KPDES KYG045542: Total Recoverable Iron at Outfall S2 for March 2008; Total Recoverable Manganese at Outfall S6 for March 2008

c. ICG failed to comply with permit limits for Total Recoverable Iron ("TRFe") and Total Suspended Solids ("TSS") for DMRE Permit No. 897-0483/KPDES Permit No. KYG044268. In June 2010, this site exceeded its limit for Total Recoverable Iron at Outfall 11. In June 2010, this site exceeded its limit for Total Suspended Solids at Outfall 6.



d. Submission of unsigned DMR's for the following DMRE permits and corresponding

KPDES permits:

- i. DMRE 813-0291/KPDES KYG041123: April through June 2010
- ii. DMRE 813-0293/KPDES KYG044802: April through June 2010
- iii. DMRE 813-0315/KPDES KYG046206: April through June 2010
- iv. DMRE 813-5026/KPDES KYG044753: April through June 2010
- v. DMRE 866-0295/KPDES KYG045542: April through June 2010
- vi. DMRE 897-0454/KPDES KYG044107: April through June 2010
- vii. DMRE 897-0448/KPDES KY0106852: April through June 2010
- viii. DMRE 897-0446/KPDES KYG046154: April through June 2010
- ix. DMRE 866-5146/KPDES KYG041742: April through June 2010
- x. DMRE 866-0281/KPDES KYG043540: April through September 2010
- xi. DMRE 860-0445/KPDES KYG040737: April through June 2010
- xii. DMRE 813-8018/KPDES KY0023086: July through September 2010
- xiii. DMRE 897-8041/KPDES KYG042693: April through June 2010
- xiv. DMRE 897-0543/KPDES KYG042314: April through June 2010

e. Failure to submit any DMR's for certain time periods for certain permits and outfalls for the following DMRE permits and corresponding KPDES permits:

- i. DMRE 866-0295/KPDES KYG045542: Outfall 006: January through March 2009.
- ii. DMRE 897-0448/KPDES KY0106852: January through March 2008 and October through December 2008 and 2009.
- iii. DMRE 897-0446/KPDES KYG046154: April through June 2009.
- iv. DMRE 813-0272/KPDES KYG046093: October through December 2009 and January through June 2010.
- v. DMRE 813-0292/KPDES KYG044019: July through September 2009.
- vi. DMRE 813-0294/KPDES KYG046108: January through March 2008,

- July through September 2008, and April through June 2009.
- vii. DMRE 813-0296/KPDES KYG043595: April through June 2010.
  - viii. DMRE 813-5025/KPDES KYG044091: July through September 2008; Outfall BP-1: January through September 2009.
  - ix. DMRE 860-0454/KPDES KYG046357: July through December 2009.
  - x. DMRE 860-0445/KPDES KYG040737: January through March 2009.
  - xi. DMRE 813-8019/KPDES KYG043598: April through September 2009.
  - xii. DMRE 813-8018/KPDES KY0023086: October through December 2008 and January through March 2009.
  - xiii. DMRE 897-0483/KPDES KYG044268: January through June 2008, October through December 2008; Outfall 13: July through December 2009.
  - xiv. DMRE 897-0456/KPDES KYG043989: Outfall 049: April through June 2008 and April through December 2009.
  - xv. DMRE 897-0482/KPDES KYG040722: January through December 2008.
  - xvi. DMRE 897-0486/KPDES KYG046274: January through June 2010.
  - xvii. DMRE 897-5118/KPDES KYG044931: January through December 2008; Outfall BS-1: October through December 2009.
  - xviii. DMRE 897-8041/KPDES KYG042693: January through March 2009.
  - xix. DMRE 897-7012/KPDES KYG042111: January through December 2008, 2009, 2010.
  - xx. DMRE 860-0429/KPDES KYG046437: October through December 2008; January through December 2009; January through June 2010.
  - xxi. DMRE 813-7033/KPDES KYG043740: January through December 2008, 2009, and January through June 2010.
  - xxii. DMRE 866-5137/KPDES KYG044235: January through December 2008, 2009, and January through June 2010.
  - xxiii. DMRE 866-9010/KPDES KYG041819: January through December 2008, 2009, and January through June 2010.
  - xxiv. DMRE 897-7012/KPDES KYG042111: January through December 2008, 2009, and January through June 2010.

f. Unauthorized signature for DMRE Permit No. 860-0463/KPDES Permit KYG045985, on DMR's for Outfalls 101 and 102 for March 2008.

g. Failure to submit all of the required monitoring and reporting data for the following DMRE permits and corresponding KPDES permits:

- i. DMRE 897-0482/KPDES KYG040722: Outfalls Pond 1 and Pond 13: January through September 2009.
- ii. DMRE 897-5118/KPDES KYG044931: Outfall 008: January through September 2009.
- iii. DMRE 813-0292/KPDES KYG044019: January through June 2008, October through December 2008, and January through December 2009.

h. Failure to accurately report data for the following DMRE permits and corresponding KPDES permits:

- i. DMRE 813-0291/KPDES KYG041123: Outfall 1269: January through September 2008 and October through December 2009.
- ii. DMRE 813-0293/KPDES KYG044802: Outfall 1269: January through September 2008 and October through December 2009.
- iii. DMRE 813-0315/KPDES KYG046206: Outfalls 107 & 1268: January through June 2008.
- iv. DMRE 813-5026/KPDES KYG044753: Outfalls 107 & 1268: January through June 2008.

#### ICG KNOTT

15. On our about October 15, 2010, authorized representatives of the DOW conducted a Performance Audit Inspection of the S&S facilities in relation to its analysis of wastewater discharged by ICG Knott's permitted mining operations associated with KPDES Permit No. KYG045805. Among the conditions observed were:

a. Sample Custody Sheets do not appear to be used consistently, the Sample Custody Sheet does not record information necessary to establish a chain of custody; a "Pond Analysis Lab Sheet," apparently used as a bench sheet, does not include information required to

verify sample results; no identification of method used for analysis; no documentation of equipment calibration, or equipment maintenance records, the use of duplicates of spikes or other quality control measures.

b. Improper operation and maintenance; inadequate Quality Assurance/Quality Control; no "back-up" data to support the information contained on the DMRs; no chains of custody, inadequate bench sheets/records, no lab equipment maintenance logs, reagent logs, calibration logs, or precipitation logs, no lab Standard Operating Procedures manual; use of an unapproved methodology (Hach DR 890 Colorimeter) for TSS analysis; reporting of Acidity concentration for all discharges, from all ponds, for all DMRs as 0 mg/l for 2008, 2009 and 2010; Acidity concentration was initially 8.4 mg/l, however due to a decimal point error, the actual concentration of Acidity was 84 mg/l (DEP's lab analysis determined the acidity to be 22.5 mg/l).

c. Failure to comply with permit conditions; DMRs reviewed from January 2008 to present record all parameters within permit limits; DMRs for the 3rd quarter 2009 do not contain results for conductivity; all DMRs for 2008 through 2010 record acidity sample results as 0 although the lowest detection limit required by the test method is <10 mg/l;. 2nd quarter 2009: bench sheets obtained from S&S Water Monitoring Friday October 15, 2010 do not match the submitted DMR. The DMR results match the 1st quarter DMR results. 1st and 2nd quarter 2010: facility and receiving water fields are left blank; sample collection and analysis not performed in accordance with 40 CFR Part 136; analysis procedures are not followed correctly for all parameters; no documentation of sample collection, transportation, analyses, calibration procedures or quality assurance/quality controls is maintained.

d. Failure to monitor permit parameters utilizing approved test procedures; no log of the preservatives used and/or the Certificates of Analysis that should come with the preservatives; no thermometer for lab refrigerator, no temperature log for refrigerator; unable to determine if samples were being analyzed within the required holding times; unapproved test methodology to analyze for Total Suspended Solids.

16. On or about November 29, 2010 the DOW issued a NOV to ICG Knott for the conditions described in paragraph 15, above, citing the following violations:

- a. 401 KAR 5:065 Section 2(1)( citing to 40 C.F.R. 122.41(j)(2)): failure to maintain required records;
- b. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(e)): improper operation and maintenance;
- c. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(e)): failure to comply with permit conditions;
- d. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(j)(4)): failure to monitor permit limits with approved test procedures; and,
- e. 401 KAR 5:065 Section 2(1)(citing to 40 C.F.R. 122.41(j)(4)): failure to comply with permit conditions.

A copy of the NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No. 32.

17. On or about October 15, 2010, authorized representatives of the DOW also conducted inspections of the S&S facilities in relation to its analysis of wastewater discharged by 7 other mining facilities for which ICG Knott held a permit. Among the conditions observed were:

- a. Sample Custody Sheets do not appear to be used consistently, the Sample Custody Sheet does not record information necessary to establish a chain of custody; a "Pond Analysis Lab Sheet," apparently used as a bench sheet, does not include information required to verify sample results; no identification of method used for analysis; no documentation of equipment calibration, or equipment maintenance records, the use of duplicates of spikes or other quality control measures.
- b. Failure to submit monitoring results at specified intervals and to provide an authorized signature on the DMR's. ICG's contract lab collected and analyzing the samples and

signed the DMR's. No authorized ICG official signed the DMR's nor did ICG duly designate any personnel from S&S to sign the DMR's.

c. Improper operation and maintenance; inadequate Quality Assurance/Quality Control; no "back-up" data to support the information contained on the DMRs; no chains of custody, inadequate bench sheets/records, no lab equipment maintenance logs, reagent logs, calibration logs, or precipitation logs, no lab Standard Operating Procedures manual; use of an unapproved methodology (Hach DR 890 Colorimeter) for TSS analysis; reporting of Acidity concentration for all discharges, from all ponds, for all DMRs as 0 mg/l for 2008, 2009 and 2010.

d. Failure to monitor permit parameters utilizing approved test procedures; no log of the preservatives used and/or the Certificates of Analysis that should come with the preservatives; no thermometer for lab refrigerator, no temperature log for refrigerator; unable to determine if samples were being analyzed within the required holding times; unapproved test methodology to analyze for Total Suspended Solids.

18. Based on information and belief, the Cabinet alleges the violations referenced in paragraph 17, above, apply to each of ICG Knott's other seven (7) permitted operations; therefore, on or about November 29, 2010 the Cabinet issued a NOV to each of ICG Hazard's other 7 permitted facilities served by S&S for the conditions described in paragraph 17, citing the following violations:

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

A copy of each NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 33 through 39.

19. The DMRE permit numbers and corresponding KPDES permit numbers associated with those sites referenced in paragraphs 17 and 18, above, and to which an NOV was issued are as follows:

- a. DMRE 860-0414/KPDES KYG043345
- b. DMRE 860-5267/KPDES KYG042589
- c. DMRE 860-5268/KPDES KYG042754
- d. DMRE 860-5269/KPDES KYG043631
- e. DMRE 860-5312/KPDES KYG046395
- f. DMRE 860-8012/KPDES KY0094285
- g. DMRE 860-9011/KPDES KYG045000

20. In addition to the above-referenced inspections conducted by DOW, personnel from the Cabinet's Division of Enforcement ("DENF") also performed a review of DMR's submitted by ICG Knott. This review involved DMR submittals to the Cabinet between January 1, 2008 and June 30, 2010.

21. On November 29, 2010, DENF issued a NOV to ICG Knott for violations found as a result of the DMR review. The NOV cited six (6) violations of KRS 224.70-110 which prohibits the pollution of the waters of the Commonwealth in contravention of the rules, regulations, permits, or orders of the Cabinet. The regulation at issue is 401 KAR 5:065 Section 2(1) as in 40 C.F.R. 122.41(a), 40 C.F.R. 122.41 (k), and 40 C.F.R. 122.41 (l)(4)(i). The NOV cites only regulatory requirements that ICG Knott failed to meet regarding fourteen (14) permitted sites. A copy of the NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No. 40.

22. The DMR review, referenced in paragraphs 20 and 21 above, revealed the following specific deficiencies:

a. Failure to accurately report data on the DMR's. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 860-5269/KPDES KYG043631
- ii. DMRE 860-8012/KPDES KY0094285
- iii. DMRE 860-9011/KPDES KYG045000
- iv. DMRE 860-5271/KPDES KYG045805
- v. DMRE 860-5268/KPDES KYG042754
- vi. DMRE 860-5267/KPDES KYG042589
- vii. DMRE 860-0414/KPDES KYG043345

b. Submittal of DMRS with false statements or representations. On two different occasions, S&S submitted copies of the bench sheets for the 1<sup>st</sup> and 2<sup>nd</sup> quarters of 2009. The data in the two submittals was different. Despite this violation, the Cabinet has found no evidence of any intent by ICG Knott to defraud or mislead the Cabinet nor any indication that ICG Knott was aware of the two different sets of bench sheets.

c. Failure to submit the required monitoring data for conductivity. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 860-5269/KPDES KYG043631
- ii. DMRE 860-5268/KPDES KYG042754
- iii. DMRE 860-5279/KPDES KYG045360

d. Failure to accurately report data on the DMR associated with DMRE 860-8012/KPDES KY0094285. A comparison between the bench sheets and DMR's showed discrepancies with the data for Total Recoverable Manganese.

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

- i. DMRE 860-0441/KPDES KYG045265: Outfall SSB, SSE: April through June June 2009.



- ii. DMRE 860-5296/KPDES KYG044728: Outfall OOE, OOB: October through December 2009.
- iii. DMRE 860-5312/KPDES KYG046395: All outfalls: January through December 2008 and 2009.
- iv. DMRE 860-5324/KPDES KYG046374: All outfalls: January through December 2008 and 2009; January through June 2010.

f. Failure to submit all required monitoring and reporting data. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 860-0441/KPDES KYG045265: Outfall 002: January through March 2010.
- ii. DMRE 860-5296/KPDES KYG044728: Outfall 001: December 2009.
- iii. DMRE 860-5297/KPDES KYG044982: Outfall 1: June and October 2008; October, November 2009, and February 2010.
- iv. DMRE 860-8014/KPDES KYG041041: Outfall 030: October 2008.

#### ICG EAST

23. On or about October 15, 2010, authorized representatives of the DOW conducted an inspection of the S&S facilities in relation to its analysis of wastewater discharged by ICG East's permitted mining operations and related tasks. Among the conditions observed were:

a. Failure to maintain required records; Sample Custody Sheets do not appear to be used consistently, the Sample Custody Sheet does not record information necessary to establish a chain of custody; a "Pond Analysis Lab Sheet," apparently used as a bench sheet, does not include information required to verify sample results; no identification of method used for analysis; no documentation of equipment calibration, or equipment maintenance records, the use of duplicates of spikes or other quality control measures; neither the Pond Analysis Lab Sheets nor lab log books identify the method used for the analysis; no documentation of calibration, maintenance records, the use of duplicates of spikes or other quality control measures.

b. Failure to submit monitoring results at intervals specified in the permit; failure to

provide an authorized signature on the Discharge Monitoring Report.

c. Improper operation and maintenance; lack of adequate quality assurance and quality control (QA/QC) procedures; no back-up data to support information reported in DMRs; no chains of custody, inadequate bench sheets/records, no lab equipment maintenance logs, reagent logs, calibration logs, and no lab SOP manual; unapproved methodology (Hach DR 890 Colorimeter) for TSS analysis; DMRs continually and consistently report the Acidity concentration for all discharges, from all ponds, for all DMRs to be 0 mg/l for 2008 through 2010;

d. Failure to monitor permit parameters utilizing approved test procedures; no log of the preservatives used and/or the Certificates of Analysis that should come with the preservatives; the thermometer for lab refrigerator, no temperature log for lab refrigerator; unable to determine if samples were being analyzed within the required holding times; unapproved test methodology to analyze for Total Suspended Solids.

24. On or about November 29, 2010 the Cabinet issued a NOV to 4 of ICG East's permitted facilities served by S&S for the conditions described in paragraph 23, above, citing the following violations:

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

A copy of each NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 41 through 44.

25. The DMRE permit numbers and corresponding KPDES permit numbers associated with those sites referenced in paragraphs 23 and 24, above, and to which an NOV was issued are as follows:

- a. DMRE 880-0179/KPDES KYG046183
- b. DMRE 898-0735/KPDES KYG045173
- c. DMRE 898-0737/KPDES KYG045336
- d. DMRE 898-8155/KPDES KYG043050

26. In addition to the above-referenced inspections conducted by DOW, personnel from the Cabinet's Division of Enforcement ("DENF") also performed a review of DMR's submitted by ICG East. This review involved DMR's submitted to the Cabinet between January 1, 2008 and June 30, 2010.

27. On November 29, 2010, DENF issued a NOV to ICG East for violations found as a result of the DMR review. The NOV cited three (3) violations of KRS 224.70-110 which prohibits the pollution of the waters of the Commonwealth in contravention of the rules, regulations, permits, or orders of the Cabinet. The regulation at issue is 401 KAR 5:065 Section 2(1) as in 40 C.F.R. 122.41(a) and 40 C.F.R. 122.41(k). The violations involved three (3) permitted sites. A copy of the NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No.'s 45 and 45(a).

28. The DMR review, referenced in paragraphs 26 and 27 above, revealed the following specific deficiencies:

a. Failure to submit signed DMRs for DMRE Permit No. 880-0179/KPDES Permit KYG046183 for January through March 2010 for outfalls 2H, SS-26, and Pond

b. Failure to submit all of the required monitoring and reporting data. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 898-0735/KPDES KYG045173: Outfall 4: December 2009.
- ii. DMRE 880-0179/KPDES KYG046183: Outfall SS2: January 2008.

c. Failure to submit the required monitoring data for conductivity for two DMR's associated with DMRE 898-0737/KPDES KYG045336.

d. Failure to submit any DMR's for DMRE 898-7073/KPDES KYG045176 January through December 2008, 2009, and January through June 2010.

### **POWELL MOUNTAIN**

29. Personnel from the Cabinet's Division of Enforcement ("DENF") also performed a review of DMR's submitted by Powell Mountain. This review involved DMR's submitted to the Cabinet between January 1, 2008 and June 30, 2010.

30. On November 29, 2010, DENF issued a NOV to Powell Mountain for violations found as a result of the DMR review. The NOV cited three (3) violations of KRS 224.70-110 which prohibits the pollution of the waters of the Commonwealth in contravention of the rules, regulations, permits, or orders of the Cabinet. The regulation at issue is 401 KAR 5:065 Section 2(1) as in 40 C.F.R. 122.41(a). The violations involved five (5) permitted sites. A copy of the NOV is attached hereto and incorporated herein as Plaintiff's Exhibit No. 46.

31. The DMR review, referenced in paragraphs 29 and 30 above, revealed the following specific deficiencies:

a. Failure to submit the required monitoring data for conductivity for certain outfalls for the months of August and September 2009. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 848-5475/KPDES KYG045535: Outfall 2
- ii. DMRE 848-5473/KPDES KYG042008: Outfalls 1, 2
- iii. DMRE 848-5471/KPDES KYG041694: Outfalls 5, 6, 7
- iv. DMRE 848-5470/KPDES KYG040167: Outfall 6

b. Failure to submit the required monitoring data for conductivity for certain outfalls for the months of September, October, or November 2009. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 848-5471/KPDES KYG041694: Outfall 1: November 2009.
- ii. DMRE 848-5470/KPDES KYG040167: Outfall 3: September and November 2009; Outfall 6: October and November 2009.

c. Failure to submit all of the required monitoring and reporting data. The DMRE permit numbers and KPDES permit numbers associated with this violation are as follows:

- i. DMRE 848-5475/KPDES KYG045535
- ii. DMRE 848-5472/KPDES KYG041488
- iii. DMRE 848-5471/KPDES KYG041694
- iv. DMRE 848-5470/KPDES KYG040167

32. Each issued NOV identifies the remedial measures necessary to correct the cited violations.

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

34. ICG Hazard, ICG Knott, ICG East, and Powell Mountain will continue to violate its KPDES permits and the Cabinet's implementing regulations unless remedial measures are ordered by this Court.

35. ICG Hazard, ICG Knott, ICG East, and Powell Mountain is liable for civil penalties for said violations pursuant to KRS 224.99-010.

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

**WHEREFORE**, the Plaintiff respectfully requests that judgment be entered finding Defendants in violation of the statutes and regulations cited in the Notices of Violation and awarding the Cabinet the following relief:

1. That the Defendants be ordered to pay a civil penalty of up to twenty-five thousand dollars (\$25,000) per day per violation for the violations indentified above pursuant to KRS 224.99-010(1);

2. That the Defendants be ordered to comply with all applicable statutes, regulations, and KPDES permit conditions.

3. For any and all further relief to which the Cabinet is entitled.

Respectfully submitted,

ENERGY AND  
ENVIRONMENT CABINET



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MARY A. STEPHENS

JOSH W. NACEY

Office of General Counsel

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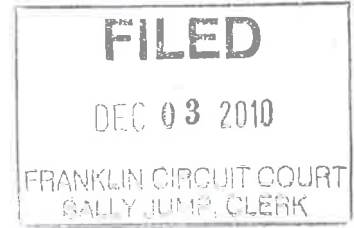
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COUNSEL FOR PLAINTIFF

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
Civil Action No. 10-CI-01968  
DIVISION 2



COMMONWEALTH OF KENTUCKY,  
ENERGY AND ENVIRONMENT CABINET,

PLAINTIFF,

v.

CONSENT JUDGMENT

ICG HAZARD, LLC  
ICG KNOTT COUNTY, LLC  
ICG EAST KENTUCKY, LLC and  
POWELL MOUNTAIN ENERGY, LLC

DEFENDANTS

\*\*\*\*\*

A. WHEREAS, Plaintiff the Commonwealth of Kentucky, Energy and Environment Cabinet (hereinafter “the Cabinet”), is an agency of the Commonwealth charged by statute with the duty to enforce laws for the protection of human health and the environment pursuant KRS Chapter 224, the Clean Water Act (CWA), 33 U.S.C.1251 et seq. and regulations promulgated pursuant thereto.

B. WHEREAS, ICG Hazard, LLC and ICG Knott County, LLC, ICG East Kentucky, LLC and Powell Mountain Energy, LLC (collectively hereinafter, Defendants) own and operate surface coal mining operations in Eastern Kentucky pursuant to surface mining permits issued by the Kentucky Division of Mine Reclamation and Enforcement (“DMRE”), a Division within the Cabinet’s Department for Natural Resources. Stormwater and other wastewater discharges (hereinafter “wastewater”) from the Defendants’ surface coal mining operations are authorized pursuant to Kentucky Pollutant Discharge Elimination System (“KPDES”) permits issued by the Kentucky Division of Water, within the Cabinet’s Department for Environmental Protection. A



listing of the DMRE permits and corresponding KPDES permits that have been issued to Defendants that are the subject of this Consent Judgment are set forth in Appendix A to this Consent Judgment.

C. WHEREAS, on or about October 7, 2010 the Cabinet was served with a Notice of Intent to Sue pursuant to § 505(b) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(b), on behalf of several environmental advocacy organizations and individuals alleging violations of KPDES permit requirements by ICG Knott and ICG Hazard at several of their surface mining facilities. Thereafter, the Cabinet conducted inspections and investigations to confirm whether ICG Knott and ICG Hazard had violated their KPDES permits and the underlying requirements of the Clean Water Act (“CWA”), Kentucky Revised Statutes (“KRS”) Chapter 224, and the Cabinet’s implementing regulations, as alleged in the Notice of Intent to Sue. In addition to alleged violations set out in the Notice of Intent to Sue for certain ICG Knott and ICG Hazard permits, the Cabinet’s investigations revealed additional alleged violations at the identified facilities as well as alleged violations of KPDES permits at other ICG surface coal mining operations.

D. WHEREAS, as set forth in the Cabinet’s Complaint, the Cabinet has determined that Defendants have violated terms and conditions of their KPDES permits and the obligations imposed by KRS Chapter 224, the CWA, and the Cabinet’s KPDES implementing regulations, relating to: discharge monitoring and reporting (401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(l)(4)); effluent limits (401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(a); recordkeeping of monitoring information (401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(j)(2); and quality assurance and quality control for maintaining a system designed to assure that monitoring and analysis requirements are properly implemented (401 KAR 5:065

Section 2(1), as in 40 CFR 122.41(e). The Cabinet has also determined that some discharge monitoring reports (“DMRs”) submitted under ICG’s KPDES permits were not properly signed and certified in accordance with 401 KAR 5:065 Section 2(1), as in 40 CFR 122.22(b) and 40 CFR 122.41(k). The Cabinet thereby alleged that Defendants failed to utilize a system designed to assure that qualified personnel properly gathered and evaluated the DMR information before it was submitted for each of their facilities during that period. The Cabinet also charges that Defendants failed to maintain records of monitoring information as required by 401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(j), for a period of three (3) years from the date of monitoring.

E. WHEREAS, as set forth in the Complaint, a review of Defendants’ Discharge Monitoring Reports (“DMRs”) reveals that, on numerous occasions, Defendants have included incorrect and erroneous data and other incorrect information in DMRs due to transcription errors and other mistakes, and to lack of sufficient oversight in completing DMRs, which were prepared by a third party contractor. The Cabinet has found no evidence tending to support a claim of fraudulent preparation or submittal of DMRs by Defendants. Transcription errors that indicated noncompliance were not explained on the DMRs as required by 401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(l)(7). The Cabinet has also determined that Defendants’ third party contractors have failed to comply with standard reference methods for conducting laboratory analyses for wastewater samples and failed to utilize appropriate quality assurance and quality control procedures within the contractor’s laboratory, as required by 40 CFR Part 136 and 40 CFR 122.41(e) and (j).

F. WHEREAS, the Cabinet has filed a Complaint in this action contemporaneously with this Consent Judgment, alleging that Defendants are civilly liable for violations of Kentucky

Revised Statutes (KRS), related Kentucky Administrative Regulations (KAR), and the Clean Water Act as set forth in Notices of Violation (NOVs) submitted as Exhibits 1 through 46 of the Complaint.

G. WHEREAS, on November 29, 2010 the Cabinet issued Notices of Violation (“NOVs”) to ICG for the above findings, alleging violations of the following environmental statutes and regulations:

- (1) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(j)(2)]
- (2) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(a)
- (3) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(e)
- (4) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(j)(4)
- (5) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(k)
- (6) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(k)(2)
- (7) 401 KAR 5:065 Section 2(1), as in 40 C.F.R. 122.41(l)(4)
- (8) 401 KAR 5:065 Section 2(1)
- (9) KRS 224.70-110

The NOVs are submitted as Exhibits 1 to 46 to the Complaint and are incorporated as if fully set out in the Complaint.

H. WHEREAS, during the Cabinet’s investigations, it met with representatives of Defendants to discuss and obtain the Company’s response to the Cabinet’s findings and Notice(s) of Violations. The Parties to this Consent Judgment have negotiated in good faith and reached a settlement of the claims raised in the Complaint.

I. WHEREAS, pursuant to this Consent Judgment, with respect to the matters set forth in the Complaint, as generally described above, Defendants shall:

(1) Pay a civil penalty to the Cabinet;

(2) Submit a Corrective Action Plan and complete remedial measures as more fully described herein to assure that ICG complies with KRS Chapter 224, the Clean Water Act, and implementing regulations with respect to discharges from its surface coal mining operations; and

(3) Satisfy all other terms of this Consent Judgment.

J. WHEREAS, Defendants do not admit any facts or liability to the Cabinet arising out of the transactions or occurrences alleged in the Complaint but agree to the entry of this Consent Judgment to resolve the violations alleged.

K. WHEREAS, the Parties recognize, and the Court by entering this Consent Judgment finds, that this Consent Judgment has been negotiated by the Parties as a settlement of the Cabinet's claims in good faith and will avoid litigation between the Parties, and that this Consent Judgment is fair, reasonable, and in the public interest.

NOW, THEREFORE, before taking testimony and without the adjudication or admission of any issue of fact or law except as provided in Section I, below, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

#### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of the claims in this action pursuant to KRS 224.99-010(9). The Court has personal jurisdiction over the Parties to this Consent Judgment. Venue lies in this Court because the discharges occurred in the Commonwealth of Kentucky and the Defendants conduct business in the Commonwealth of Kentucky. For purposes of this Consent Judgment, or any action to enforce this Judgment, Defendants consent to the Court's jurisdiction over this Judgment or such action and over Defendant, and consents to the venue.

## II. APPLICABILITY

2. The obligations of this Consent Judgment apply to and are binding upon the Cabinet, and upon Defendants, and any successors, assigns or other entities or persons otherwise bound by law.

3. Defendants shall provide a copy of this Consent Judgment to all contractors that are retained to provide services related to KPDES permit monitoring and analysis. Defendants shall condition any contract to perform such work upon performance of the work in conformity with the terms of this Consent Judgment.

4. In any action to enforce this Consent Judgment, Defendants shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Judgment.

## III. DEFINITIONS

5. Terms used in this Consent Judgment that are defined or used in KRS Chapter 224, the regulations promulgated thereunder, and the CWA, shall have the meanings assigned to them in such statute or such regulations, unless otherwise provided in this Judgment. Whenever terms set forth below are used in this Consent Judgment, the following definitions shall apply:

a. Cabinet shall mean the Commonwealth of Kentucky Energy and Environment Cabinet, an agency of the Commonwealth, or its successor.

b. Complaint shall mean the complaint filed by the Plaintiff in this action, unless noted otherwise.

c. Consent Judgment or Judgment shall mean this Consent Judgment.

d. Day shall mean a calendar day unless expressly stated to be a working day.

In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day.

e. Defendant or Defendants shall mean ICG Hazard, ICG Knott, ICG East, and Powell Mountain.

f. KPDES permit shall mean any individual or general Kentucky Pollutant Discharge Elimination System permit issued to ICG Hazard and ICG Knott, ICG East or Powell Mountain for wastewater discharges from their coal mining operations, including those KPDES permits listed in Appendix A to this Consent Judgment.

g. Quarter shall mean a calendar quarter. In computing any period of time under this Consent Judgment, where the last day of a calendar quarter would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day.

h. Paragraph shall mean a portion of this Consent Judgment identified by a number or letter.

i. Parties shall mean the Cabinet and ICG Hazard, ICG Knott, ICG East and Powell Mountain

j. Plaintiff shall mean the Cabinet.

k. State shall mean the Commonwealth of Kentucky.

l. ICG shall mean ICG Hazard and ICG Knott, ICG East and Powell Mountain.

#### **IV. CIVIL PENALTIES**

6. Defendants shall be jointly and severally liable and shall pay an aggregate civil penalty to the Cabinet of three hundred fifty thousand dollars (\$350,000). Defendants shall pay the civil penalty as set forth below:

a. Civil penalty payments shall be made by check or money order made payable to “The Kentucky State Treasurer” and sent to the Office of Administrative Hearings, 35-36 Fountain Place, Frankfort, Kentucky 40601.

b. The civil penalty shall be paid in two (2) installments of one hundred seventy five thousand dollars (\$175,000.00) each, as follows:

(1) The first installment payment of one hundred seventy-five thousand dollars (\$175,000) shall be paid within thirty (30) business days after the Consent Judgment is entered as a final order by the Franklin Circuit Court.

(2) The subsequent civil penalty installment payment of one hundred seventy five thousand dollars (\$175,000) shall be made no later than one calendar year following the payment of the initial penalty payment.

c. If Defendants fail to pay any of the installments on or before the due dates set forth above, the Cabinet may declare the remaining unpaid balance of the total civil penalty immediately due and demand payment in full.

d. Civil penalty payments shall be made by check or money order made payable to “The Kentucky State Treasurer” and sent to the Office of Administrative Hearings, 35-36 Fountain Place, Frankfort, Kentucky 40601.

**V. REMEDIAL MEASURES**

7. Each Defendant shall review its surface coal mining operations listed in Appendix A and shall prepare a Corrective Action Plan. The Corrective Action Plan (“CAP”) shall be submitted to the Cabinet by January 15, 2011 and shall contain, or identify:

a. The procedures and protocols the Defendant shall implement to ensure compliance with the monitoring, testing, recordkeeping, and DMR reporting requirements of the law and of its KPDES permits. The permittee shall monitor parameters in accordance with procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

b. Practices for ensuring DMRs contain complete and accurate information for all operations, including operations that share discharge outfalls, and for providing prompt submittal of corrected DMR information where required under 40 CFR 122.41(1)(8).

c. A copy of the laboratory Standard Operating Procedures plan (SOP) and Quality Assurance/Quality Control protocols that shall be used by ICG or its contractor(s).

i) Each Defendant shall verify that its contract laboratory has developed and is implementing a Standard Operating Procedures (SOP) plan and is using approved methodologies for all analysis; and

ii) Each Defendant shall verify that its contract laboratory has developed and is implementing proper Quality Assurance/Quality Control protocols.

d. A copy of a chain of custody form, bench sheet form, and maintenance, reagent, calibration and precipitation log forms that such Defendant's laboratory shall use; each form submitted shall include the following information, as appropriate:

- i. The date, exact location, and time of sampling or measurements;
- ii. identification of individual(s) who performed sampling or measurements;
- iii. date analysis was performed;
- iv. identification of individual(s) who performed analysis;
- v. analytical technique or methods used; and



vi. The results of analysis.

e. Protocols to be used by Defendants that are designed to assure that qualified personnel properly gather and evaluate monitoring data and other information submitted on DMRs, and that the information and data provided is representative of the monitored activity and otherwise complies with the requirements of 401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(j) and 40 CFR 122.41(l)(4) and ICG's KPDES permits. The protocol shall also require that all instances of noncompliance that are not otherwise immediately reportable be reported at the time DMR reports are submitted as required by 401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(l)(7). If a Defendant becomes aware that it has submitted incorrect information in a DMR, it shall promptly submit corrected facts or information to the Cabinet as required by 401 KAR 5:065 Section 2(1), as in 40 CFR 122.41(l)(8).

8. Each Defendant shall submit with its DMRs for the 4<sup>th</sup> quarter of 2010 the associated chain(s) of custody, bench sheets and analytical data for December, 2010. Each Defendant shall submit with its DMRs for the 1st quarter of 2011 the associated chain(s) of custody, bench sheets and analytical data.

9. Each Defendant shall, by December 22, 2010, provide the Cabinet with written notification of the responsible corporate officer as specified in 401 KAR 5:065 Section 2(1), as in 40 CFR 122.22(a), or the duly authorized representative of such person as provided for in 40 CFR 122.22(b) that will be responsible for certifying DMRs, beginning with the Fourth Quarter 2010 DMRs required under its respective KPDES permits. If a Defendant elects to provide the Cabinet with a written authorization of one or more duly authorized representatives, the authorization must be made consistent with KAR 5:065 Section 2(1), as in 40 CFR 122.22(d) and shall specify the KPDES permits for which each such duly authorized representative is

responsible. Any changes to a duly authorized representative shall be made in writing consistent with 401 KAR 5:065 Section 2(1), as in 40 CFR 122.22(c).

10. Defendants shall at all times properly operate and maintain their facilities and systems of treatment. Defendants shall comply with effluent limitations established under their KPDES permits.

## **VI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

11. This Consent Judgment resolves the violations specified above and in the Complaint and Notices of Violation, and those like violations, whether of KPDES or DMRE permits, which may exist regarding Defendants' permits listed in Appendix A but which were not specifically identified in the course of the Cabinet's investigation of the allegations in the Notice of Intent to Sue, for the period 5 years prior and up to date of filing the Complaint and this Consent Judgment. Except for those matters resolved through this Consent Judgment, nothing contained herein shall be construed to waive or limit any remedy or cause of action by the Cabinet based on statutes or regulations under its jurisdiction, and Defendant reserves its defenses thereto. Except for the matters resolved herein, the Cabinet expressly reserves its right at any time to issue Administrative Orders and to take any other action it deems necessary, including the right to order all necessary remedial measures, assess penalties for violations, or recover all response costs incurred and the Defendant reserves its defenses thereto.

12. Except for those matters resolved through this Consent Judgment, this Judgment shall not prevent the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit to the Defendants. The Defendants reserve their rights to defenses thereto. Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue

preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Cabinet in the subsequent proceeding were or should have been brought in the instant case, except with respect to the claims that have been specifically resolved herein.

13. As a material term of this Consent Judgment, the Parties state that the Consent Judgment is not intended to preclude nor shall it preclude, any defense offered by Defendants in any other civil litigation, whether based upon principles of waiver, laches, res judicata, collateral estoppel, equitable estoppel, issue preclusion, claim preclusion, or any other preclusive doctrine. Defendants further specifically reserve their right to raise any defense that may be available to them in any civil litigation regarding matters addressed herein involving any individual, person, or entity that is not party to this Consent Judgment.

14. This Consent Judgment is without prejudice to the rights of the Cabinet against Defendants with respect to all matters other than those expressly specified above.

The Defendants waive their right to any hearing on the matters set forth herein. However, failure by the Defendants to comply strictly with the terms of this Consent Judgment shall be grounds for the Cabinet to seek enforcement of this Judgment in the Franklin Circuit Court and to pursue any other appropriate administrative or judicial action under KRS Chapter 224 and the regulations promulgated pursuant thereto. The Defendants reserve their right to be heard in defense of any such enforcement proceedings.

15. Each separate provision, condition, or duty contained in this Consent Judgment may be the basis for an enforcement action for a separate violation and penalty pursuant to KRS Chapter 224 upon failure to comply with the terms of this Consent Judgment.

16. The Cabinet does not, by its consent to the entry of this Consent Judgment, warrant or aver in any manner that the Defendants' complete compliance with the Consent Judgment will

result in compliance with provisions of KRS Chapter 224, and the regulations promulgated pursuant thereto. Notwithstanding the Cabinet's review of any plans formulated, pursuant to this Consent Judgment, the Defendants shall remain solely responsible for compliance with the terms of KRS Chapter 224 and the regulations promulgated pursuant thereto, this Consent Judgment and any pertinent requirements.

17. The provisions of this Consent Judgment shall apply to and be binding upon the Defendants. The acts or omissions of the Defendants' Officers, Directors, Agents, and/or employees shall not excuse performance of any provision of this Consent Judgment. The Cabinet reserves the right to seek enforcement of this Consent Judgment against the successors and assigns of the Defendants, and the Defendants reserve their defense thereto. The Defendants shall give notice of this Consent Judgment to any purchaser, lessee, or successor in interest to its surface mining operations prior to the transfer of ownership and/or operation of any of its now existing facilities occurring prior to termination of this Consent Judgment, shall notify the Cabinet that such notice has been given, and shall follow all statutory and regulatory requirements for a transfer of the KPDES permit. Whether or not a transfer takes place, the Defendants shall remain fully responsible for the payment of all civil penalties and performance of all remedial measures identified in this Consent Judgment.

18. This Consent Judgment does not limit or affect the rights of Defendants or of the Cabinet against any third party, not party to this Consent Judgment, nor does it limit the rights of any third party, not party to this Consent Judgment, against Defendants, except as otherwise provided by law.

19. This Consent Judgment shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Judgment.

20. The Cabinet agrees to allow the performance of the above-listed remedial measures and payment of the above-listed civil penalties by the Defendant to satisfy the Defendants' obligations to the Cabinet generated by the violations described in the Complaint or the NOV's.

21. This Consent Judgment shall be of no force and effect unless and until it is entered by the Franklin Circuit Court as evidenced by signatures thereon. If this Consent Judgment contains any date by which the Defendants are required to take any action under Section V and the Franklin Circuit Court enters the Consent Judgment after that date, then the Defendants are nonetheless obligated to perform the action by the date contained in this Consent Judgment.

#### **VII. COSTS**

22. The Parties shall bear their own costs of this action, including attorneys fees, except that Plaintiffs shall be entitled to collect the costs (including attorneys fees) incurred in any action necessary to enforce this Consent Judgment with respect to payments required under paragraph 6.

#### **VIII. EFFECTIVE DATE**

23. The Effective Date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court.

#### **IX. RETENTION OF JURISDICTION**

24. The Court shall retain exclusive jurisdiction over this case until termination of this Consent Judgment, for the purpose of resolving disputes arising under this Judgment or entering orders modifying this Judgment, pursuant to Section X (Modification), or effectuating or enforcing compliance with the terms of this Judgment.

## **X. MODIFICATION**

25. The terms of this Consent Judgment may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Judgment, it shall be effective only upon approval by the Franklin Circuit Court.

## **XI. TERMINATION**

26. After Defendants have completed performance of their obligations required by this Judgment, including payments of civil penalties, Defendant may submit to the Cabinet a written request for termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

27. If the Cabinet agrees that the Judgment may be terminated, the Cabinet shall file a motion or a joint stipulation for termination of the Judgment. If the Cabinet does not agree that the Judgment may be terminated, the matter may be presented to the Franklin Circuit Court to decide the termination issue.

## **XII. INTEGRATION**

28. This Consent Judgment constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Judgment and supersedes all prior agreements and understandings, whether oral or written. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Judgment or the settlement it represents, nor shall it be used in construing the terms of this Judgment.

## **XIII. FINAL JUDGMENT**

29. Upon approval and entry of this Consent Judgment by the Court, this Consent Judgment shall constitute a final judgment between the Cabinet and Defendant.

The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment. This Consent Judgment is dated and entered this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

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Judge, Franklin Circuit Court

AGREED TO BY:

LEONARD K. PETERS, SECRETARY  
KENTUCKY ENERGY AND  
ENVIRONMENT CABINET  
12<sup>th</sup> Floor Capital Plaza Tower  
500 Mero Street  
Frankfort, KY 40601

\_\_\_\_\_  
Date

Roger Nicholson  
ROGER NICHOLSON  
for ICG HAZARD, LLC  
as its Assistant Secretary

12/3/10  
Date

Roger Nicholson  
ROGER NICHOLSON  
for POWELL MOUNTAIN ENERGY, LLC  
as its Vice President and Secretary

12/3/10  
Date

Christina Brumley  
CHRISTINA BRUMLEY  
for ICG KNOTT COUNTY, LLC  
as its Secretary

12/3/10  
Date

Christina Brumley  
CHRISTINA BRUMLEY  
for ICG EAST KENTUCKY, LLC  
as its Secretary

12/3/10  
Date

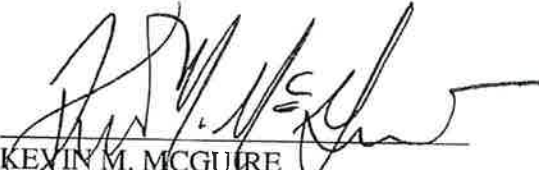


**HAVE SEEN AND AGREED TO ENTRY BY:**

\_\_\_\_\_  
JOHN G. HORNE, II  
MARY STEPHENS  
JOSH NACEY  
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Environmental Protection Legal Division  
300 Fair Oaks Lane  
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\_\_\_\_\_  
Date

**COUNSEL FOR PLAINTIFF**

  
\_\_\_\_\_  
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Lexington, KY 40507

\_\_\_\_\_  
Date

12/3/10

**COUNSEL FOR DEFENDANTS**  
ICG Hazard, LLC,  
ICG Knott County, LLC,  
ICG East Kentucky, LLC, and  
Powell Mountain Energy, LLC

Civil Action No. 10-CI-01969

**AGREED TO BY:**



LEONARD K. PETERS, SECRETARY  
KENTUCKY ENERGY AND  
ENVIRONMENT CABINET  
12<sup>th</sup> Floor Capital Plaza Tower  
500 Mero Street  
Frankfort, KY 40601

12/3/10  
Date

**HAVE SEEN:**



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12-3-10  
Date

**COUNSEL FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing **CONSENT JUDGMENT** was mailed, postage prepaid, to the following this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

ICG Hazard, LLC,  
ICG Knott County, LLC,  
ICG East Kentucky, LLC, and  
Powell Mountain Energy, LLC  
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Mary Stephens  
Josh Nacey  
Office of General Counsel  
200 Fair Oaks Lane, First Floor  
Frankfort, Kentucky 40601

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Clerk, Franklin Circuit Court

## APPENDIX A

### ICG Knott Co, LLC

Facility Name	County	KPDES #	DNR #
ICG Knott County, LLC	Knott	KYG045805	860-5271
ICG Knott Co LLC	Knott	KYG043345	860-0414
ICG Knott Co LLC	Knott	KYG042589	860-5267
ICG Knott Co LLC	Knott	KYG042754	860-5268
Knott Co Mining Co	Knott	KYG043631	860-5269
ICG Knott Co LLC	Knott	KYG046395	860-5312
ICG Knott Co LLC	Knott	KY0094285	860-8012
ICG Knott Co LLC	Knott	KYG045000	860-9011
ICG Knott Co LLC	Knott	KYG045265	860-0441
ICG Knott Co LLC	Knott	not assigned	860-5270
ICG Knott Co LLC	Knott	KYG046392	860-5277
ICG Knott Co LLC	Knott	KYG045360	860-5279
ICG Knott Co LLC	Knott	KYG044728	860-5296
ICG Knott Co LLC	Knott	KYG044982	860-5297
ICG Knott Co LLC	Knott	KYG045973	860-5298
ICG Knott Co LLC	Knott	KYG046374	860-5324
ICG Knott Co LLC	Knott	KYG041041	860-8014

### ICG East Kentucky, LLC

Facility Name	County	KPDES #	DNR #
ICG East KY LLC	Martin	KYG046183	880-0179
ICG East KY LLC	Pike	KYG045173	898-0735
ICG East KY LLC	Pike	KYG045336	898-0737
ICG East KY LLC	Pike	KYG043050	898-8155
ICG East KY LLC	Pike	KYG045176	898-7073

### ICG Hazard, LLC

Facility Name	County	KPDES #	DNR #
ICG Hazard, LLC	Knott	KYG046357	860-0454
ICG Hazard, LLC	Knott	KYG045985	860-0463
ICG Hazard, LLC	Breathitt	KYG044802	813-0293
ICG Hazard, LLC	Breathitt	KYG046093	813-0272
ICG Hazard, LLC	Breathitt	KYG041123	813-0291
ICG Hazard, LLC	Breathitt	KYG046108	813-0294
ICG Hazard, LLC	Breathitt	KYG043595	813-0296
ICG Hazard, LLC	Breathitt	KYG046206	813-0315
ICG Hazard, LLC	Breathitt	KYG044403	813-5025
ICG Hazard, LLC	Breathitt	KYG044753	813-5026
ICG Hazard, LLC	Breathitt	KYG044019	813-7026
ICG Hazard LLC-Flint Ridge Plant	Breathitt	KY0023086	813-8018
ICG Hazard, LLC	Breathitt	KYG043598	813-8019
ICG Hazard, LLC	Knott	KYG040737	860-0445
ICG Hazard, LLC	Leslie	KYG043540	866-0281
ICG Hazard, LLC	Leslie	KYG045542	866-0295
ICG Hazard, LLC	Leslie	KYG041742	866-5146

ICG Hazard, LLC	Perry	KYG046154	897-0446
ICG Hazard, LLC	Perry	KY0106852	897-0448
ICG Hazard, LLC	Breathitt	KYG044107	897-0454
ICG Hazard, LLC	Perry	KYG045377	897-0455
ICG Hazard, LLC	Perry	KYG043989	897-0456
ICG Hazard, LLC	Perry	KYG040722	897-0482
ICG Hazard, LLC	Perry	KYG044268	897-0483
ICG Hazard, LLC	Perry	KYG046274	897-0486
ICG Hazard, LLC	Perry	KYG042314	897-0543
ICG Hazard, LLC	Perry	KYG044931	897-5118
ICG Hazard LLC-Kentucky River Loading	Perry	KYG043089	897-8040
ICG Hazard, LLC	Perry	KYG042693	897-8041
ICG Hazard LLC-Krypton Tipple	Perry	KYG042598	897-8043
ICG Hazzard LLC	Breathitt	KYG043740	813-7033
ICG Hazard LLC	Leslie	KYG044235	866-5137
ICG Hazard LLC	Leslie	KYG041819	866-9010
ICG Hazard LLC	Breathitt	KYG046436	813-0323
ICG Hazard LLC	Perry	KYG046401	813-0331
ICG Hazard LLC	Knott	KYG046437	860-0429
ICG Hazard LLC	Knott	KYG045818	860-0462
ICG Hazard LLC	Perry	KYG045906	860-0471
ICG Hazard LLC	Perry	KYG046120	860-7009
ICG Hazard LLC	Knott	no permit	860-7011
ICG Hazard LLC	Perry	KYG042111	897-7012
ICG Hazard LLC	Perry	KYG046023	860-0416

**Powell Mountain Energy LLC**

Facility Name	County	KPDES #	DNR #
Powell Mountain Energy LLC	Harlan	KYG045535	848-5475
Powell Mountain Energy LLC	Harlan	KYG042008	848-5473
Powell Mountain Energy LLC	Harlan	KYG041488	848-5472
Powell Mountain Energy LLC	Harlan	KYG041694	848-5471
Powell Mountain Energy LLC	Harlan	KYG040167	848-5470
Powell Mountain Energy LLC	Harlan	no permit	848-5457
Powell Mountain Energy LLC	Harlan	KYG045436	848-5474
Powell Mountain Energy LLC	Harlan	KYG044246	848-5476