

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

PACE UNIVERSITY SCHOOL OF LAW

78 NORTH BROADWAY

WHITE PLAINS, NEW YORK 10603

PHONE: 914.422.4343

FAX: 914.422.4437

SUPERVISING ATTORNEYS

KARL S. COPLAN

DANIEL E. ESTRIN

ROBERT F. KENNEDY, JR.

ADMINISTRATORS

MARY BETH POSTMAN

JENNIFER RUHLE

October 7, 2010

VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

ICG HAZARD, LLC

1021 Tori Drive

Hazard, KY 41701

ICG HAZARD, LLC

c/o Corporation Service Company

421 West Main Street

Frankfort, KY 40601

Re: Notice of Intent to Sue for Clean Water Act Violations

Dear Sir or Madam:

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians for the Commonwealth, Inc. (“KFTC”), Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonney, and Mr. Winston Merrill Combs (collectively, “Appalachian Voices”) hereby place ICG Hazard, LLC (“ICG Hazard”) on notice of their intent to sue ICG Hazard pursuant to § 505(b) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(b), for violations of an “effluent standard or limitation” pursuant to CWA § 505(a)(1)(A) and (f), 33 U.S.C. § 1365(a)(1)(A) and (f).

Under CWA § 301(a), 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant into waters of the United States from a point source without, or in violation of, a permit issued pursuant to CWA § 402, 33 U.S.C. § 1342. In order to be in compliance with permit conditions and CWA statutory requirements, owners and operators of point sources are required to “install, use, and maintain . . . monitoring equipment or methods” to sample effluents. CWA § 308(A)(iii)-(iv), 33 U.S.C. § 1318(A)(iii)-(iv). In addition, owners and operators must “establish and maintain such records” and submit them in the form of Discharge Monitoring Reports (“DMRs”) in accordance with CWA § 308(A)(i)-(ii), 33 U.S.C. § 1318(A)(i)-(ii), permit conditions, and applicable regulations.

ICG Hazard has violated, and continues to violate, “an effluent standard or limitation” under CWA §§ 505(a)(1)(A) and (f), 33 U.S.C. §§ 1365(a)(1)(A) and (f), in reference to Kentucky Pollutant Discharge Elimination System (“KPDES”) Permit No. KYG040000 (the

“General Permit”),* issued by the Kentucky Department of Environmental Protection, Division of Water (“KDOW”) pursuant to § 402(b) of the CWA, 33 U.S.C. § 1342(b). Violation of “an effluent standard or limitation,” for purposes of a KPDES permit, is defined pursuant to CWA § 505(f), 33 U.S.C. § 1365(f), 401 K.A.R. 5:065 and 40 C.F.R. §§ 122 and 123.25.

The attached Appendix lists the specific violations of KPDES Permit No. KYG04000 as shown in DMRs on file with the Kentucky Department for Natural Resources (“KDNR”). These ongoing and continuing violations fall into one or more of the following categories:

I. Submission of False/Fraudulent DMR Data

DMRs on file with KDNR repeatedly show duplicate DMR submissions that contain exactly the same effluent data for all effluent characteristics reported on other DMRs for different outfalls during the same yearly quarter. In other words, ICG Hazard used the same effluent monitoring data for two or more outfalls. This pattern and practice of duplicating and recycling DMR data from one DMR to another continues over a period of two years from 2008-2009.

In addition to submitting identical effluent data for different monitoring periods or outfalls, ICG Hazard conversely submitted different effluent data for the same outfalls in the same monitoring periods. In many instances, ICG Hazard maintained multiple DSMRE numbers for a single outfall. Accordingly, ICG Hazard submitted multiple DMRs for the same outfalls for each monitoring period. Although effluent monitoring data on these DMRs should be identical, there are numerous discrepancies between data on multiple DMRs submitted by ICG Hazard for the same outfall in the same monitoring period. This pattern of submitting conflicting monitoring data for the same outfalls continues over a period of at least 21 months in 2008 and 2009.

For a DMR-specific identification of ICG Hazard’s submissions of false/fraudulent DMR data, please see the items listed under heading “I.” in the attached appendix.

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on their face raises obvious suspicion regarding the validity of data submitted in all of ICG Hazard’s DMRs on file with the KDNR for the past five years. Therefore, Appalachian Voices has a good faith belief that ICG Hazard has failed, and continues to fail, in its obligation to submit and maintain accurate DMRs in accordance with federal and state regulations and the terms and conditions of KPDES Permit No. KYG04000.

The submission by ICG Hazard of fraudulent, or otherwise false, DMR data leads to the inevitable conclusion that ICG Hazard has violated KPDES Permit No. KYGO4000 in a number of ways, including, but not limited to, the following:

* The current version of KPDES Coal General Permit No. KYG040000 became effective on August 1, 2009, replacing a previous version of Permit No. KYG040000 that had been in effect since January 1, 2004. Unless otherwise noted, all references to the Coal General Permit in this Notice refer to the version that became effective on January 1, 2004.

a. Continuing Violations

i. Submission of Fraudulent DMRs Equates to an Ongoing Violation of No Submission

KPDES Permit No. KYG040000 states, “[D]ischarge monitoring results obtained during the previous month shall be summarized for each outfall and reported using only KDOW approved Discharge Monitoring Report (DMR) forms and formats.” Part I, Page I-15, D. The permit also requires that “[T]est procedures for the analysis of pollutants shall conform to all regulations published pursuant to KRS 224,” which includes 401 KAR 5:065 and incorporates 40 C.F.R. §§ 122.48 and 123.25. Part I, Page I-18, F.

Therefore, ICG Hazard’s filing of facially fraudulent, or otherwise false, DMRs equates to the failure to submit and maintain accurate DMRs with the KDNR. CWA §§ 308(A)(i)-(ii), (v), 33 U.S.C. §§ 1318(A)(i)-(ii), (v). *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111-12 (4th Cir. 1988); *Menzel v. County Utilities Corporation*, 712 F.2d 91, 94 (4th Cir. 1983) (“a discharger that fails to file discharge-monitoring reports, or fails to file accurate reports, would be in violation of the provisions of its NPDES permit and would be subject to citizens’ suits under 33 U.S.C. § 1365”). Failure to submit a DMR constitutes ongoing and continuing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit which and accrue penalties per day and per limit until the violations cease. *Simkins Industries*, 847 F.2d at 1112.

ii. Submission of Fraudulent DMRs Constitutes Ongoing Violations of Permit Conditions

In addition to the above, a violation of a permit or permit condition issued under CWA § 402, 33 U.S.C. § 142, is a violation of an “effluent standard or limitation” in accordance with CWA § 505(f), 33 U.S.C. § 1365(f). *Simkins Industries*, 847 F.2d at 1111-12 (4th Cir. 1988); *Menzel*, 712 F.2d at 94. KPDES Permit No. KYG040000 states, “[S]amples and measurements taken in accordance with the requirements of Part I pages I-1 through I-8 shall be representative of the volume and nature of the monitored discharge.” Part I, Page I-15, D.

As it is the responsibility of every owner and operator to ensure compliance with CWA permits and permit conditions, and as failure to submit accurate DMRs is a violation of the above condition of KPDES Permit No. KYG040000, ICG Hazard is in a state of continuing violation of its permit. Such violations are ongoing, and continuing, for each day for every outfall and every effluent parameter, and accrue civil penalties per day and per limit until the violations cease.

b. Failure to Install, Use, and/or Maintain Monitoring Equipment

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on their face raises suspicion regarding the validity of all of the monitoring data contained in all of ICG Hazard’s DMRs on file with the KDNR for the past five years. Appalachian Voices has a good faith belief that ICG Hazard has failed, and continues to fail, in its obligation to “install,

use, and maintain . . . monitoring equipment or methods” to sample effluents in accordance with CWA § 308(A)(iii), 33 U.S.C. § 1318(A)(iii). Additionally, such failures violate Standard Conditions of KPDES Permit No. KYG04000, which state that “[I]t is the responsibility of the permittee to demonstrate compliance with permit parameter limitations by utilization of sufficiently sensitive analytical methods.” KPDES Permit No. KYG04000, Part II, Page II-1.

As it is the responsibility of every owner and operator to install, use, and maintain adequate monitoring equipment in order to fulfill their obligations under the CWA, failure to do so equates to a violation of the Clean Water Act. Such violations are ongoing, and continuing, for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrue civil penalties per day and per limit until the violations cease.

c. Failure to Accurately Sample and Test Effluent

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on its face raises suspicion regarding the validity of sampling methods used by ICG Hazard in creating its DMRs on file with the KDNR for the past five years. Appalachian Voices has a good faith belief that ICG Hazard has failed, and continues to fail, in its obligation to sample effluent accurately and in compliance with the CWA and the General Permit. CWA § 308(A)(iv), 33 U.S.C. § 1318(A)(iv). In addition to requiring owners and operators to use “sufficiently sensitive analytical methods” to monitor and sample effluent, the General Permit also requires that “samples and measurements be taken . . . [that] shall be representative of the volume and nature of the monitored discharge.” KPDES Permit No. KYG04000, Part II, Page II-1; Part I, Page I-15, D.

It is the responsibility of every owner and operator to ensure that sampling and testing is conducted accurately in order to fulfill its obligations under the CWA. Failure to do so constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the General Permit, which accrues penalties per day and per limit until the violations are remedied.

II. Self-Reported Exceedance/Violation of Effluent Limitations

A DMR on file with KDNR shows a failure by ICG Hazard to comply with effluent limitations for one parameter set forth in KPDES Permit No. KYG04000. AI No. 35050, Fact Sheet Page 4-25. Such failure constitutes a violation of CWA § 301(a), 33 U.S.C. § 1311(a).

For a DMR-specific identification of ICG Hazard’s self-reported exceedance/violation of effluent limitations, please see the item listed under heading “II.” in the attached appendix.

“Violations of ‘average’ limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved.” *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 317 (4th Cir. 1986). As such, ICG Hazard violated its permit thirty-one (31) times in March, 2008 by exceeding the monthly average effluent limitation

for total recoverable iron, and an additional thirty-one (31) times in March, 2008 by exceeding the monthly average effluent limitation for total recoverable manganese.

* * *

Based on ICG Hazard's apparent pattern and practice of repeatedly falsifying or otherwise providing inaccurate data in its DMRs, Appalachian Voices reserves the right to add to the specific CWA violations set forth in the Appendix hereto additional claims based on the same or similar pattern of violations set forth herein upon determining that such claims exist. Appalachian Voices takes these violations very seriously and intends to enforce any and all of ICG Hazard's violations of the CWA that have occurred within the statute of limitations.

Appalachian Voices believes that this letter (including the attached Appendix) provide sufficient information to place ICG Hazard on notice of our intent to sue and the grounds for a complaint. At the close of the 60-day notice period, unless significant progress is made in remedying and preventing these violations, Appalachian Voices intends to file suit in federal court under CWA §§ 505(b) and 301(a), 33 U.S.C. §§ 1365(b), 1311(a). As noted in CWA § 309(d), 33 U.S.C. § 1319(d), 40 C.F.R. § 19.4, and K.R.S. 224.99-010, violators of the CWA are subject to civil monetary penalties in amounts of up to \$37,500 per violation, per day. Such civil monetary penalties, if assessed by a court, are payable to the federal treasury.

This letter is sent on behalf of: Appalachian Voices, Inc. (contact person: Ms. Willa Mays, Executive Director, 191 Howard Street, Boone, North Carolina 28607, Phone: (828) 262-1500); Waterkeeper Alliance, Inc. (contact person: Mr. Scott Edwards, Director of Advocacy, 50 South Buckhout Street, Suite 302, Irvington, New York 10533, Phone: (914) 674-0622, Ext. 13); Kentuckians for the Commonwealth, Inc. (contact person: Mr. Burt Lauderdale, Executive Director, P.O. Box 1450, London, Kentucky 40743, Phone: 606-878-2161); Kentucky Riverkeeper, Inc. (contact person: Ms. Pat Banks, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 622-3065); Ms. Pat Banks, in her capacity as Kentucky Riverkeeper, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 527-3334; Ms. Lanny Evans, 4625 Four Mile Road, Winchester, Kentucky 40391, Phone: (859) 527-0134; Mr. Thomas H. Bonney, 1548 Wisemantown Road, Irvine, Kentucky 40336, Phone (606) 723-5694; and Mr. Winston Merrill Combs, 7225 Old Boonesboro Road, Winchester, Kentucky 40391, Phone: (859) 595-9637.

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonney, and Mr. Winston Merrill Combs are represented in this matter by Karl S. Coplan and Daniel E. Estrin, Esqs., Pace Environmental Litigation Clinic, Inc., 78 North Broadway, White Plains, New York 10603. Appalachian Voices, Inc. is also represented by Paul A. Capua, Esq., Capua Law Firm, PA, The Greenhouse, 164 Depot Street, Boone, North Carolina 28607, Phone: (828) 264-0260; and Lauren H. Waterworth, Waterworth Law Offices, PLLC, 815 West King Street, Suite 2, P.O. Box 254, Boone, North Carolina, 28607, Phone: (828) 355-9750. KFTC is represented in this matter by

ICG HAZARD, LLC
NOTICE OF INTENT TO SUE
October 7, 2010
Page 6 of 8

Mary Cromer, Esq., Appalachian Citizens' Law Center, Inc., 317 Main Street, Whitesburg, Kentucky 48158, Phone: (606) 633-3929.

If you wish to discuss the matters set forth in this Notice of Intent to Sue, please do not hesitate to contact the undersigned.

Very truly yours,



Karl S. Coplan, Esq.
Daniel E. Estrin, Esq.
Peter Harrison & Robert Rieske, Legal Interns
Pace Environmental Litigation Clinic, Inc.
*Attorneys for Waterkeeper Alliance, Inc., Kentucky
Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans,
Mr. Thomas H. Bonny, and Mr. Winston Merrill Combs;
co-counsel for Appalachian Voices, Inc.*
78 North Broadway
White Plains, New York 10603
(914) 422-4343

Paul A. Capua, Esq.
Capua Law Firm, PA
Co-Counsel for Appalachian Voices, Inc.
The GreenHouse
164 South Depot Street
Boone, North Carolina 28607
(828) 264-0260

Lauren H. Waterworth, Esq.
Waterworth Law Office, PLLC
Co-Counsel for Appalachian Voices, Inc.
815 West King Street, Suite 2
P.O. Box 254
Boone, North Carolina 28607
(828) 355-9750

Mary V. Cromer, Esq.
Appalachian Citizens' Law Center
*Attorney for Kentuckians for the
Commonwealth*
317 Main Street
Whitesburg, Kentucky 41858
(606) 633-3929

Attachment—Appendix identifying CWA violations alleged herein

ICG HAZARD, LLC
NOTICE OF INTENT TO SUE
October 7, 2010
Page 7 of 8

CC (via certified mail—return receipt requested):

Eric Holder, Jr., Attorney General
United States Department of Justice
10th Street and Constitution Ave., N.W.
Washington, DC 20530

Lisa Jackson, Administrator
United States Environmental Protection Agency
Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Gwen Keyes Fleming, Regional Administrator
U.S. Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Sandy Gruzesky, Director
Kentucky Department of Environmental Protection, Division of Water
200 Fair Oaks Lane
Fourth Floor
Frankfort, KY 40601

Peter T. Goodman, Assistant Director
Kentucky Department of Environmental Protection, Division of Water
200 Fair Oaks Lane
Frankfort, KY 40601-1190

Carl Campbell, Commissioner
Kentucky Department for Natural Resources
#2 Hudson Hollow
Frankfort, KY 40601

Dr. Len Peters, Office of the Secretary
Kentucky Energy and Environment, Cabinet
500 Mero Street, 5th Floor, CPT
Frankfort, KY 40601

ICG HAZARD, LLC
NOTICE OF INTENT TO SUE
October 7, 2010
Page 8 of 8

R. Bruce Scott, Commissioner
Department for Environmental Protection
Kentucky Energy and Environment Cabinet
300 Fair Oaks Lane
Frankfort, KY 40601

Appendix: Alleged Clean Water Act Violations by ICG Hazard, LLC.

I. Submission of False/Fraudulent DMR data

DSMRE #	KPDES #	Outfall #	Monitoring Period	Nature of Violations	Description
813-0291	KYG041123	1269	1 st Quarter 2008	42 identically repeated values for 90 days.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0293	KYG044802	1269	1 st Quarter 2008(DMR dated 2 nd Quarter)	42 identically repeated values for 90 days.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0291	KYG041123	1269	2 nd Quarter 2008	38 identically repeated values for 90 days. DMR results given for different DMR reports.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0293	KYG044802	1269	2 nd Quarter 2008	38 identically repeated values for 90 days. DMR results given for different DMR reports.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be nearly identical.
813-0291	KYG041123	1269	3 rd Quarter 2008	42 identically repeated values for 90 days.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0293	KYG044802	1269	3 rd Quarter 2008	42 identically repeated values for 90 days.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0291	KYG041123	1269	4 th Quarter 2009	42 identically repeated values for 90 days.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0293	KYG044802	1269	4 th Quarter 2009	42 identically repeated values for 90 days.	DSMRE # 813-0291 and DSMRE # 813-0293 relate to different monitoring points, therefore the DMR values should not be identical.
813-0315 813-5026	KYG046206 KYG044753	107 1268	1 st , 2 nd Quarter 2008	Conflicting data for same outfall.	Different effluent data on each DMR. Both DSMRE #s relate to the same outfall, and should have identical effluent data on each corresponding DMR.

II. Reported Exceedances/Violations of Effluent Limitations

DSMRE #	KPDES #	Outfall #	Monitoring Period	Effluent Characteristic	Permit Limits	Reported Discharge
866-0295	KYG0455 42	S2	1 st Quarter 2008	Total Recoverable Iron	3.5 mg/l (monthly av.)	26.21 mg/l (monthly av. for 3/2008) ¹
					4.0 mg/l (daily max.)	52 mg/l (3/18/2008)
866-0295	KYG0455 42	S6	1 st Quarter 2008	Total Recoverable Manganese	2.0 mg/l (monthly av.)	29.255 mg/l (monthly av. for 3/2008) ¹
					4.0 mg/l (daily max.)	58 mg/l (3/4/2008)

¹ Monthly average determined by calculating arithmetic mean of all sample values recorded for the calendar month, as specified in KPDES Permit No. KYG04000, Part I, Page I-14, § E(22).

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

PACE UNIVERSITY SCHOOL OF LAW

78 NORTH BROADWAY

WHITE PLAINS, NEW YORK 10603

PHONE: 914.422.4343

FAX: 914.422.4437

SUPERVISING ATTORNEYS

KARL S. COPLAN

DANIEL E. ESTRIN

ROBERT F. KENNEDY, JR.

ADMINISTRATORS

MARY BETH POSTMAN

JENNIFER RUHLE

October 7, 2010

VIA CERTIFIED MAIL—RETURN RECEIPT REQUESTED

ICG KNOTT COUNTY, LLC

P.O. Box 102

Kite, Kentucky 41828

ICG KNOTT COUNTY, LLC

c/o Corporation Service Company

421 West Main Street

Frankfort, KY 40601

Re: Notice of Intent to Sue for Clean Water Act Violations

Dear Sir or Madam:

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians for the Commonwealth, Inc. (“KFTC”), Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonny, and Mr. Winston Merrill Combs (collectively, “Appalachian Voices”) hereby place ICG Knott County, LLC (“ICG Knott”) on notice of their intent to sue ICG Knott pursuant to § 505(b) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(b), for violations of an “effluent standard or limitation” pursuant to CWA § 505(a)(1)(A) and (f), 33 U.S.C. § 1365(a)(1)(A) and (f).

Under CWA § 301(a), 33 U.S.C. § 1311(a), it is unlawful for any person to discharge a pollutant into waters of the United States from a point source without, or in violation of, a permit issued pursuant to CWA § 402, 33 U.S.C. § 1342. In order to be in compliance with permit conditions and CWA statutory requirements, owners and operators of point sources are required to “install, use, and maintain . . . monitoring equipment or methods” to sample effluents. CWA § 308(A)(iii)-(iv), 33 U.S.C. § 1318(A)(iii)-(iv). In addition, owners and operators must “establish and maintain such records” and submit them in the form of Discharge Monitoring Reports (“DMRs”) in accordance with CWA § 308(A)(i)-(ii), 33 U.S.C. § 1318(A)(i)-(ii), permit conditions, and applicable regulations.

ICG Knott has violated, and continues to violate, “an effluent standard or limitation” under CWA §§ 505(a)(1)(A) and (f), 33 U.S.C. §§ 1365(a)(1)(A) and (f), in reference to Kentucky Pollutant Discharge Elimination System (“KPDES”) Permit No. KYG040000 (the

“General Permit”),* issued by the Kentucky Department of Environmental Protection, Division of Water (“KDOW”) pursuant to § 402(b) of the CWA, 33 U.S.C. § 1342(b). Violation of “an effluent standard or limitation,” for purposes of a KPDES permit, is defined pursuant to CWA § 505(f), 33 U.S.C. § 1365(f), 401 K.A.R. 5:065 and 40 C.F.R. §§ 122 and 123.25.

The attached Appendix lists the specific violations of KPDES Permit No. KYG04000 as shown in DMRs on file with the Kentucky Department for Natural Resources (“KDNR”). These ongoing and continuing violations fall into one or more of the following categories:

I. Submission of False/Fraudulent DMR Data

DMRs on file with KDNR repeatedly show duplicate DMR submissions that contain exactly the same effluent data for all effluent characteristics reported on other DMRs for the same DSMRE number during different yearly quarters. In other words, ICG Knott merely re-filed previously submitted DMRs in subsequent reporting periods under a different signature and date. This pattern and practice of duplicating and recycling DMR data from one DMR to another continues over a period of six months in 2009. Some duplicate DMRs blatantly have the previously submitted dates crossed out and marked over in an obvious attempt to submit the exact same information without properly monitoring, sampling, and/or reporting effluent parameters, while other DMRs submit the exact same data and change only the dates on the DMRs.

For a DMR-specific identification of ICG Knott’s submissions of false/fraudulent DMR data, please see the items listed under heading “I.” in the attached appendix.

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on their face raises obvious suspicion regarding the validity of data submitted in all of ICG Knott’s DMRs on file with the KDNR for the past five years. Therefore, Appalachian Voices has a good faith belief that ICG Knott has failed, and continues to fail, in its obligation to submit and maintain accurate DMRs in accordance with federal and state regulations and the terms and conditions of KPDES Permit No. KYG04000.

The submission by ICG Knott of fraudulent, or otherwise false, DMR data leads to the inevitable conclusion that ICG Knott has violated KPDES Permit No. KYGO4000 in a number of ways, including, but not limited to, the following:

* The current version of KPDES Coal General Permit No. KYG040000 became effective on August 1, 2009, replacing a previous version of Permit No. KYG040000 that had been in effect since January 1, 2004. Unless otherwise noted, all references to the Coal General Permit in this Notice refer to the version that became effective on January 1, 2004.

a. Continuing Violations

i. Submission of Fraudulent DMRs Equates to an Ongoing Violation of No Submission

KPDES Permit No. KYG040000 states, “Discharge monitoring results obtained during the previous month shall be summarized for each outfall and reported using only KDOW approved Discharge Monitoring Report (DMR) forms and formats.” Part I, Page I-15, D. The permit also requires that “Test procedures for the analysis of pollutants shall conform to all regulations published pursuant to KRS 224,” which includes 401 KAR 5:065 and incorporates 40 C.F.R. §§ 122.48 and 123.25. Part I, Page I-18, F.

Therefore, ICG Knott’s filing of facially fraudulent, or otherwise false, DMRs equates to the failure to submit and maintain accurate DMRs with the KDNR. CWA §§ 308(A)(i)-(ii), (v), 33 U.S.C. §§ 1318(A)(i)-(ii), (v). *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1111-12 (4th Cir. 1988); *Menzel v. County Utilities Corporation*, 712 F.2d 91, 94 (4th Cir. 1983) (“a discharger that fails to file discharge-monitoring reports, or fails to file accurate reports, would be in violation of the provisions of its NPDES permit and would be subject to citizens' suits under 33 U.S.C. § 1365”). Failure to submit a DMR constitutes ongoing and continuing violations for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrue civil penalties per day and per limit until the violations cease. *Simkins Industries*, 847 F.2d at 1112.

ii. Submission of Fraudulent DMRs Constitutes Ongoing Violations of Permit Conditions

In addition to the above, a violation of a permit or permit condition issued under CWA § 402, 33 U.S.C. § 142, is a violation of an “effluent standard or limitation” in accordance with CWA § 505(f), 33 U.S.C. § 1365(f). *Simkins Industries*, 847 F.2d at 1111-12 (4th Cir. 1988); *Menzel*, 712 F.2d at 94. KPDES Permit No. KYG040000 states, “Samples and measurements taken in accordance with the requirements of Part I pages I-1 through I-8 shall be representative of the volume and nature of the monitored discharge.” Part I, Page I-15, D.

As it is the responsibility of every owner and operator to ensure compliance with CWA permits and permit conditions, and as failure to submit accurate DMRs is a violation of the above condition of KPDES Permit No. KYG040000, ICG Knott is in a state of continuing violation of its permit. Such violations are ongoing, and continuing, for each day for every outfall and every effluent parameter, and accrue civil penalties per day and per limit until the violations cease.

b. Failure to Install, Use, and/or Maintain Monitoring Equipment

The repeated submission of duplicate DMR data that are fraudulent, or otherwise false, on their face raises suspicion regarding the validity of all of the monitoring data contained in all

of ICG Knott's DMRs on file with the KDNR for the past five years. Appalachian Voices has a good faith belief that ICG Knott has failed, and continues to fail, in its obligation to "install, use, and maintain . . . monitoring equipment or methods" to sample effluents in accordance with CWA § 308(A)(iii), 33 U.S.C. § 1318(A)(iii). Additionally, such failures violate Standard Conditions of KPDES Permit No. KYG04000, which state that "It is the responsibility of the permittee to demonstrate compliance with permit parameter limitations by utilization of sufficiently sensitive analytical methods." KPDES Permit No. KYG04000, Part II, Page II-1.

As it is the responsibility of every owner and operator to install, use, and maintain adequate monitoring equipment in order to fulfill their obligations under the CWA, failure to do so equates to a violation of the Clean Water Act. Such violations are ongoing, and continuing, for each day for every outfall and every effluent parameter listed in the applicable CWA permit, which accrue civil penalties per day and per limit until the violations cease.

c. Failure to Accurately Sample and Test Effluent

The repeated submission of duplicate DMRs that are fraudulent, or otherwise false, on its face raises suspicion regarding the validity of sampling methods used by ICG Knott in creating its DMRs on file with the KDNR for the past five years. Appalachian Voices has a good faith belief that ICG Knott has failed, and continues to fail, in its obligation to sample effluent accurately and in compliance with the CWA and the General Permit. CWA § 308(A)(iv), 33 U.S.C. § 1318(A)(iv). In addition to requiring owners and operators to use "sufficiently sensitive analytical methods" to monitor and sample effluent, the General Permit also requires that "samples and measurements be taken . . . [that] shall be representative of the volume and nature of the monitored discharge." KPDES Permit No. KYG04000, Part II, Page II-1; Part I, Page I-15, D.

It is the responsibility of every owner and operator to ensure that sampling and testing is conducted accurately in order to fulfill its obligations under the CWA. Failure to do so constitutes ongoing violations for each day for every outfall and every effluent parameter listed in the General Permit, which accrues penalties per day and per limit until the violations are remedied.

* * *

Based on ICG Knott's apparent pattern and practice of repeatedly falsifying or otherwise providing inaccurate data in its DMRs, Appalachian Voices reserves the right to add to the specific CWA violations set forth in the Appendix hereto additional claims based on the same or similar pattern of violations set forth herein upon determining that such claims exist. Appalachian Voices takes these violations very seriously and intends to enforce any and all of ICG Knott's violations of the CWA that have occurred within the statute of limitations.

Appalachian Voices believes that this letter (including the attached Appendix) provides sufficient information to place ICG Knott on notice of our intent to sue and the grounds for a complaint. At the close of the 60-day notice period, unless significant progress is made in remedying and preventing these violations, Appalachian Voices intends to file suit in federal court under CWA §§ 505(b) and 301(a), 33 U.S.C. §§ 1365(b), 1311(a). As noted in CWA § 309(d), 33 U.S.C. § 1319(d), 40 C.F.R. § 19.4, and K.R.S. 224.99-010, violators of the CWA are subject to civil monetary penalties in amounts of up to \$37,500 per violation, per day. Such civil monetary penalties, if assessed by a court, are payable to the federal treasury.

This letter is sent on behalf of: Appalachian Voices, Inc. (contact person: Ms. Willa Mays, Executive Director, 191 Howard Street, Boone, North Carolina 28607, Phone: (828) 262-1500); Waterkeeper Alliance, Inc. (contact person: Mr. Scott Edwards, Director of Advocacy, 50 South Buckhout Street, Suite 302, Irvington, New York 10533, Phone: (914) 674-0622, Ext. 13); Kentuckians for the Commonwealth, Inc. (contact person: Mr. Burt Lauderdale, Executive Director, P.O. Box 1450, London, Kentucky 40743, Phone: 606-878-2161); Kentucky Riverkeeper, Inc. (contact person: Ms. Pat Banks, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 622-3065); Ms. Pat Banks, in her capacity as Kentucky Riverkeeper, 300 Summit Street, Richmond, Kentucky 40475, Phone: (859) 527-3334; Ms. Lanny Evans, 4625 Four Mile Road, Winchester, Kentucky 40391, Phone: (859) 527-0134; Mr. Thomas H. Bonny, 1548 Wisemantown Road, Irvine, Kentucky 40336, Phone (606) 723-5694; and Mr. Winston Merrill Combs, 7225 Old Boonesboro Road, Winchester, Kentucky 40391, Phone: (859) 595-9637.

Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans, Mr. Thomas H. Bonney, and Mr. Winston Merrill Combs are represented in this matter by Karl S. Coplan and Daniel E. Estrin, Esqs., Pace Environmental Litigation Clinic, Inc., 78 North Broadway, White Plains, New York 10603. Appalachian Voices, Inc., Ms. Banks, Ms. Evans, Mr. Bonny, and Mr. Combs are also represented by Paul A. Capua, Esq., Capua Law Firm, PA, The Greenhouse, 164 Depot Street, Boone, North Carolina 28607, Phone: (828) 264-0260; and Lauren H. Waterworth, Waterworth Law Offices, PLLC, 815 West King Street, Suite 2, P.O. Box 254, Boone, North Carolina, 28607, Phone: (828) 355-9750. KFTC is represented in this matter by Mary Cromer, Esq., Appalachian Citizens' Law Center, Inc., 317 Main Street, Whitesburg, Kentucky 48158, Phone: (606) 633-3929.

If you wish to discuss the matters set forth in this Notice of Intent to Sue, please do not hesitate to contact the undersigned.

Very truly yours,



Karl S. Coplan, Esq.
Daniel E. Estrin, Esq.
Peter Harrison & Robert Rieske, Legal Interns
Pace Environmental Litigation Clinic, Inc.
*Attorneys for Waterkeeper Alliance, Inc., Kentucky
Riverkeeper, Inc., Ms. Pat Banks, Ms. Lanny Evans,
Mr. Thomas H. Bonny, and Mr. Winston Merrill Combs;
co-counsel for Appalachian Voices, Inc.*
78 North Broadway
White Plains, New York 10603
(914) 422-4343

Paul A. Capua, Esq.
Capua Law Firm, PA
Co-Counsel for Appalachian Voices, Inc.
The GreenHouse
164 South Depot Street
Boone, North Carolina 28607
(828) 264-0260

Lauren H. Waterworth, Esq.
Waterworth Law Office, PLLC
Co-Counsel for Appalachian Voices, Inc.
815 West King Street, Suite 2
P.O. Box 254
Boone, North Carolina 28607
(828) 355-9750

Mary V. Cromer, Esq.
Appalachian Citizens' Law Center
*Attorney for Kentuckians for the
Commonwealth*
317 Main Street
Whitesburg, Kentucky 41858
(606) 633-3929

Attachment—Appendix identifying CWA violations alleged herein

ICG KNOTT COUNTY, LLC
NOTICE OF INTENT TO SUE
October 7, 2010
Page 7 of 8

CC (via certified mail—return receipt requested):

Eric Holder, Jr., Attorney General
United States Department of Justice
10th Street and Constitution Ave., N.W.
Washington, DC 20530

Lisa Jackson, Administrator
United States Environmental Protection Agency
Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Gwen Keyes Fleming, Regional Administrator
U.S. Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Sandy Gruzesky, Director
Kentucky Department of Environmental Protection, Division of Water
200 Fair Oaks Lane
Fourth Floor
Frankfort, KY 40601

Peter T. Goodman, Assistant Director
Kentucky Department of Environmental Protection, Division of Water
200 Fair Oaks Lane
Frankfort, KY 40601-1190

Carl Campbell, Commissioner
Kentucky Department for Natural Resources
#2 Hudson Hollow
Frankfort, KY 40601

Dr. Len Peters, Office of the Secretary
Kentucky Energy and Environment, Cabinet
500 Mero Street, 5th Floor, CPT
Frankfort, KY 40601

ICG KNOTT COUNTY, LLC
NOTICE OF INTENT TO SUE
October 7, 2010
Page 8 of 8

R. Bruce Scott, Commissioner
Department for Environmental Protection
Kentucky Energy and Environment Cabinet
300 Fair Oaks Lane
Frankfort, KY 406

Appendix: Alleged Clean Water Act Violations by ICG Knott County, LLC.

I. Submission of False/Fraudulent DMR data

DSMRE #	KPDES #	Outfall #	Monitoring Period	Nature of Violation(s)	Description
860-0414	KYGO43345	1	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date scratched through on 2 nd Quarter 2009 DMR; other than sampling dates, 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5267	KYG042589	KPDES 2	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5268	KYG042754	MD-2	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5268	KYG042754	1	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date scratched through on 2 nd Quarter 2009 DMR report; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5269	KYG04631	1	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date scratched through on 2 nd Quarter 2009 DMR report; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5271	KYG045805	KPDES 2	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date scratched through on 2 nd Quarter 2009 DMR report; other than the sample dates, the 2009 2 nd Quarter DMR is an exact duplication of the 1 st Quarter DMR.

ICG KNOTT COUNTY, LLC
 NOTICE OF INTENT TO SUE:
 APPENDIX
 Page 2 of 2

DSMRE #	KPDES #	Outfall #	Monitoring Period	Nature of Violation(s)	Description
860-5271	KYG045805	7	1 st and 2 nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5271	KYG045805	KPDES 5	1st and 2nd Quarter 2009	42 Identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-5271	KYG045805	001	1st and 2nd Quarter 2009.	42 identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-8012	KYG042478	5	1st and 2nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-8012	KYG042478	1	1st and 2nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date scratched through on 2 nd Quarter 2009 DMR report; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-9011	KYG045000	1	1st and 2nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date scratched through on 2 nd Quarter 2009 DMR report; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.
860-9011	KYG045000	KPDES 1	1st and 2nd Quarter 2009	42 identically repeated numbers for 90 days.	Signature date on 2 nd Quarter 2009 DMR is the 1 st Quarter 2009 date; other than the sample dates, the 2 nd Quarter 2009 DMR is an exact duplication of the 1 st Quarter 2009 DMR.