

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL
COALITION, INC., WEST VIRGINIA
HIGHLANDS CONSERVANCY, INC.,
COAL RIVER MOUNTAIN WATCH,
INC., and SIERRA CLUB**

Plaintiffs,

v.

CIVIL ACTION NO. 3:10cv0833

**COAL-MAC, INC., and MINGO LOGAN
COAL COMPANY,**

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR CIVIL
PENALTIES**

INTRODUCTION

1. This is an action for declaratory judgment and mandatory injunctive relief and for civil penalties against Defendants Coal-Mac, Inc., (“Coal-Mac”) and Mingo Logan Coal Company (“Mingo Logan”), for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (hereinafter “the Clean Water Act” or “the CWA”), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 *et seq.* (hereinafter “SMCRA”).

2. As detailed below, Plaintiffs allege that Coal-Mac and Mingo Logan discharged and continue to discharge selenium—a pollutant designated as toxic by the U.S. Environmental Protection Agency, 40 C.F.R. § 401.15—into waters of the United States in persistent violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and of the conditions and limitations

of four West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permits issued to Defendants by the State of West Virginia pursuant to Section 402 of the Clean Water Act.

3. Plaintiffs further allege that Defendants’ discharges of unlawful quantities of selenium into the waters adjacent to its mine sites violate the performance standards under SMCRA and the terms and conditions of its surface mining permits.

4. Prior to commencing this action, Plaintiffs Sierra Club, Ohio Valley Environmental Coalition, Coal River Mountain Watch, and the West Virginia Highlands Conservancy sent a notice of intent to sue to Mingo Logan Coal Company. All claims against Mingo Logan Coal Company are brought by Sierra Club, Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy.

5. Prior to this action, Plaintiffs Sierra Club, Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy sent a notice of intent to sue to Coal-Mac, Inc. All claims against Coal-Mac, Inc. are brought by Sierra Club, Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy.

JURISDICTION AND VENUE

6. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 33 U.S.C. § 1365 (Clean Water Act citizens’ suit provision), and 30 U.S.C. § 1270 (SMCRA citizens’ suit provision).

7. On April 14, 2010, Plaintiffs gave notice of the violations and its intent to file suit to the Defendants, the United States Environmental Protection Agency (“EPA”), the Office of Surface Mining, Reclamation, and Enforcement (“OSMRE”), and the West Virginia Department

of Environmental Protection (“WVDEP”), as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), and Section 520(b)(1)(A) of SMCRA, 30 U.S.C. § 1270(b)(1)(A).

8. More than sixty days have passed since notice was served and neither EPA, OSMRE, nor WVDEP has commenced or diligently prosecuted a civil or criminal action to redress the violations. Moreover, neither EPA nor WVDEP commenced an administrative penalty action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), or comparable state law to redress the violations prior to the issuance of the April 14, 2010 notice letter.

9. Venue in this District is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the Clean Water Act violations are located in this District, and pursuant to 30 U.S.C. § 1270(c) because the coal mining operations complained of are located in this District.

PARTIES

10. Coal-Mac, Inc. (“Coal-Mac”), is a Kentucky corporation doing business in Charleston, West Virginia.

11. Mingo Logan Coal Company (“Mingo Logan”) is a Delaware corporation doing business in Charleston, West Virginia.

12. Both Coal-Mac and Mingo Logan are subsidiaries of Arch Coal, Inc., a Delaware corporation.

13. Both Coal-Mac and Mingo Logan are persons within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), and Section 701(19) of SMCRA, 30 U.S.C. § 1291(19).

14. At all relevant times, Coal-Mac owned and operated the Hobet No. 7 Mine in Logan and Mingo Counties, West Virginia, which is regulated by Surface Mining Permit

S507492 and which discharges pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV1003763.

15. At all relevant times, Coal-Mac owned and operated mines near Island Creek in Mingo and Logan Counties, West Virginia, which are regulated by Surface Mining Permits S006983, S007280, S501494, U503595, O51600, S503695, AND S505289 and which discharge pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV0068764.

16. At all relevant times, Mingo Logan owned and operated the Left Fork No. 2 Mine in Logan County, West Virginia, which is regulated by Surface Mining Permits S508187 and U508886 and which discharges pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV1004956.

17. At all relevant times, Mingo Logan owned and operated the Gut Fork Surface Mine in Logan County, West Virginia, which is regulated by Surface Mining Permit S506391 and which discharges pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV1011120.

18. Plaintiff Ohio Valley Environmental Coalition (hereinafter "OVEC") is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1,500 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

19. Plaintiff West Virginia Highlands Conservancy, Inc., (hereinafter "WVHC") is a

nonprofit organization incorporated in West Virginia. It has approximately 2,000 members. It works for the conservation and wise management of West Virginia's natural resources.

20. Plaintiff Coal River Mountain Watch is a nonprofit membership organization located in southern West Virginia with approximately 500 members, most residing in West Virginia. Its mission is to establish and maintain social, economic and environmental justice in the southern coalfields of West Virginia, to keep communities intact and to improve the quality of life in these communities. Coal River Mountain Watch is a local leader in environmental and community issues related to the impacts of mountaintop removal coal mining.

21. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and approximately 1,900 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia.

22. Plaintiffs' members suffer injuries to their aesthetic, recreational, environmental, and/or economic interests as a result of Defendants' unlawful discharges of pollutants. Plaintiffs' members fish, swim, observe wildlife, or otherwise use the waters affected by Defendants' discharges and are harmed by the high levels of pollutants that Defendants are discharging in violation of its permits. Plaintiffs' members refrain from swimming, wading, fishing, and/or engaging in other activities in and around the streams affected by Defendants' discharges to avoid exposure to pollutants. Plaintiffs' members are also very concerned about the impacts of

pollution from Defendants' discharges on their friends and neighbors and on local wildlife. If Defendants' unlawful discharges ceased, the harm to the interests of Plaintiffs' members could be redressed. Injunctions and/or civil penalties would redress Plaintiffs' members' injuries by preventing and/or deterring future violations of the limits in Defendants' permits.

23. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5), and SMCRA, 30 U.S.C. § 1291(19).

STATUTORY AND REGULATORY FRAMEWORK

24. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit, such as a National Pollution Discharge Elimination System ("NPDES") Permit issued by the EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

25. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit issuing authority may issue a NPDES Permit that authorizes the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA and such other conditions as the permitting authority determines necessary to carry out the provisions of the CWA.

26. Section 402 of the CWA, 33 U.S.C. § 1342, directs the Administrator of EPA to prescribe conditions for NPDES permits to ensure compliance with the requirements of the CWA, including conditions on data and information collection, reporting, and other such requirements as the Administrator deems appropriate.

27. Effluent limitations, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11), are restrictions on quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges. Effluent limitations are among the conditions

and limitations prescribed in NPDES permits issued under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

28. Section 303(a) of the CWA, 33 U.S.C. § 1313(a), requires that states adopt ambient water quality standards and establish water quality criteria for particular water bodies that will protect the designated uses of the water. When technology-based effluent limitations are insufficient to keep receiving waters within those levels, the permit must include stricter water quality based effluent limits (“WQBELs”) that reflect water quality standards and criteria. 33 U.S.C. § 1311(b)(1)(C).

29. At all times relevant to this complaint, the State of West Virginia has been authorized by EPA to administer a NPDES program for regulating the discharges of pollutants into the waters of West Virginia. Permits issued under this program are known as “WV/NPDES” permits.

30. Holders of WV/NPDES Permits are required to monitor their discharges and report their average monthly discharges and maximum daily discharges on a quarterly basis. Those reports are called “Discharge Monitoring Reports,” or “DMRs.”

31. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any “citizen” to “commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.”

32. Section 505(f) of the CWA, 33 U.S.C. § 1365(f), defines an “effluent standard or limitation under this chapter,” for purposes of the citizen suit provision in Section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a), 33 U.S.C. § 1311(a), of the CWA, a WQBEL, and “a permit or condition thereof issued” under Section 402, 33 U.S.C. § 1342, of the CWA.

33. In an action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant or defendants to comply with the CWA and to assess civil penalties under Section 309(d) of the CWA, 33 U.S.C. § 1365(d). See 33 U.S.C. § 1365(a).

34. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation.

35. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, the court may assess a civil penalty of \$32,500 per day for each violation that occurred on or before January 12, 2009, and \$37,500 per day for each violation that occurred after January 12, 2009. See 40 C.F.R. § 19.4.

36. Under Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

37. Section 506 of SMCRA, 30 U.S.C. § 1256, prohibits any person from engaging in or carrying out surface coal mining operations without first obtaining a permit from the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) or from an approved state regulatory authority.

38. At all relevant times, the State of West Virginia has administered an approved surface mining regulatory program. See 30 C.F.R. § 948.10.

39. The legislative rules promulgated under the West Virginia Surface Coal Mining

and Reclamation Act (“WVSCMRA”) provide that, as a general condition of all surface mining permits issued under the WVSCMRA, the permittee must comply with all applicable performance standards. 38 C.S.R. § 2-3.33.c.

40. Among the performance standards mandated by SMCRA and the WVSCMRA is that mining activities must be conducted in such a manner so as to “prevent material damage to the hydrologic balance outside the permit area.” 30 C.F.R. §§ 816.41(a) and 817.41(a); 38 C.S.R. § 2-14.5.

41. Another performance standard mandated by SMCRA and the WVSCMRA is that “[d]ischarge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 30 C.F.R. §§ 816.42 and 817.42; 38 C.S.R. § 2-14.5.b.

42. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), authorizes any person adversely affected to bring an action in federal court to compel compliance with SMCRA against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to [SMCRA].”

43. Section 520(d) of SMCRA, 30 U.S.C. § 1270(d), authorizes the Court to award the costs of litigation, including attorney fees and expert witness fees, “to any party, whenever the court determines such an award is appropriate.”

44. WVDEP is the agency in the State of West Virginia that administers that State’s CWA and SMCRA programs, and issues WV/NPDES Permits and WVSCMRA Permits.

FACTS

WV/NPDES Permit WV1003763

45. At all relevant times, Coal-Mac has held WV/NPDES Permit Number WV1003763 to regulate water pollution from its Hobet No. 7 Mine.

46. At all relevant times, Coal-Mac has held WVSCMRA Permits S507492 for its Hobet No. 7 Mine.

47. WV/NPDES Permit Number WV1003763 places limits on the concentrations of selenium that Coal-Mac can discharge into Left Fork of Right Fork of Trace Fork of Pigeon Creek, a navigable water of the United States, from Outfall 002

48. On December 2, 2008, the selenium effluent limitations on Outfall 002 of WV/NPDES Permit WV1003763 became final and effective.

49. The DMRs that Coal-Mac submitted to WVDEP reveal that Coal-Mac has accrued at least 440 days of violation of the selenium limits on Outfall 002 by discharging selenium in excess of the final effluent limitations for selenium from Outfall 002 on 29 occasions, including during March 2010. Those violations are summarized in Appendix A to this Complaint.

50. On the basis of Coal-Mac's pattern of violations of its effluent limitations in WV/NPDES Permit Number WV1003763 and the absence of any evidence of any meaningful efforts by Coal-Mac to eradicate the cause of the violations, Plaintiffs allege that Coal-Mac is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

WV/NPDES Permit Number WV0068764

51. At all relevant times, Coal-Mac has held WV/NPDES Permit Number WV0068764 to regulate water pollution from its mines near Island Creek in Logan and Mingo Counties.

52. At all relevant times, Coal-Mac has held WVSCMRA Permits S006983, S007280, S501494, U503595, O51600, S503695, and S505289 for its mines near Island Creek.

53. WV/NPDES Permit Number WV0068764 places limits on the concentrations of pollutants that Coal-Mac can discharge into Laurel Fork of Right Fork of Pine Creek from

Outfall 001, into Fivemile Creek from Outfall 003, and into Right Fork of Trace Fork of Pigeon Creek from Outfall 014. Each of those waterways is a navigable water of the United States.

54. On or about April 5, 2007, WVDEP issued Amended Order No. 5 to Coal-Mac. That Order delayed the effective date of the permit's final selenium effluent limitations until April 5, 2010.

55. Amended Order No. 5 placed additional obligations on Coal-Mac regarding selenium treatment and compliance. Among other things, Amended Order No. 5 required Coal-Mac to commence construction of selenium treatment facilities by October 5, 2008, and to complete installation of the requisite selenium treatment facilities by April 5, 2010.

56. On information and belief, Plaintiffs allege that Coal-Mac failed to commence construction of selenium treatment facilities on Outfalls 001, 003, and 014 by October 5, 2008.

57. On information and belief, Plaintiffs allege that Coal-Mac failed to complete installation of selenium treatment facilities on Outfalls 001, 003, and 014 by April 5, 2010.

58. On April 5, 2010, the selenium effluent limitations in WV/NPDES Permit WV0068764 became final and effective.

59. The DMRs that Coal-Mac submitted to WVDEP reveal that Coal-Mac has discharged selenium in excess of the final effluent limitations for selenium from Outfalls 001, 003, and 014 on multiple occasions, including during March 2010 for Outfalls 001 and 014 and during February 2010 for Outfall 003.

60. On information and belief, Plaintiffs allege that Coal-Mac has violated the final effluent limitations on Outfalls 001, 003, and 014 of WV/NPDES Permit WV0068764 on one or more occasions since April 5, 2010.

61. On the basis of Coal-Mac's pattern of exceedances of its effluent limitations in

WV/NPDES Permit Number WV0068764 and the absence of any evidence of any meaningful efforts by Coal-Mac to eradicate the cause of the violations, Plaintiffs allege that Coal-Mac is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

WV/NPDES Permit Number WV1004956

62. At all relevant times, Mingo Logan has held WV/NPDES Permit Number WV1004956 to regulate water pollution from its Left Fork No. 2 Mine in Mingo County, West Virginia.

63. At all relevant times, Mingo Logan has held WVSCMRA Permits S508187 and U508886 for its mines near Island Creek.

64. WV/NPDES Permit Number WV1004956 places limits on the concentrations of pollutants that Mingo Logan can discharge into Left Fork of Beech Creek from Outfall 001 and into Dingess Run from Outfall 015. Each of those streams is a navigable water of the United States.

65. On or about April 5, 2007, WVDEP issued Amended Order No. 45 to Mingo Logan. That Order delayed the effective date of the permit's final selenium effluent limitations until April 5, 2010.

66. Amended Order No. 45 placed additional obligations on Mingo Logan regarding selenium treatment and compliance. Among other things, Amended Order No. 45 required Mingo Logan to commence construction of selenium treatment facilities by October 5, 2008, and to complete installation of the requisite selenium treatment facilities by April 5, 2010.

67. On information and belief, Plaintiffs allege that Mingo Logan failed to commence construction of selenium treatment facilities on Outfalls 001 and 015 by October 5, 2008.

68. On information and belief, Plaintiffs allege that Mingo Logan failed to complete installation of selenium treatment facilities on Outfalls 001 and 015 by April 5, 2010.

69. On April 5, 2010, the selenium effluent limitations in WV/NPDES Permit WV1004956 became final and effective.

70. The DMRs that Mingo Logan submitted to WVDEP reveal that Mingo Logan has discharged selenium in excess of the final effluent limitations for selenium from Outfalls 001 and 015 on multiple occasions, including during March 2010.

71. On information and belief, Plaintiffs allege that Mingo Logan has violated the final effluent limitations on Outfalls 001 and 015 of WV/NPDES Permit WV1004956 on one or more occasions since April 5, 2010.

72. On the basis of Mingo Logan's pattern of exceedances of its effluent limitations in WV/NPDES Permit Number WV1004956 and the absence of any evidence of any meaningful efforts by Mingo Logan to eradicate the cause of the violations, Plaintiffs allege that Mingo Logan is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

WV/NPDES Permit Number WV1011120

73. At all relevant times, Mingo Logan has held WV/NPDES Permit Number WV1011120 to regulate water pollution from its Gut Fork Surface Mine.

74. At all relevant times, Mingo Logan has held WVSCMRA Permit S506391 for its Gut Fork Surface Mine.

75. WV/NPDES Permit Number WV1011120 places limits on the concentrations of pollutants that Mingo Logan can discharge into Spruce Fork, a navigable water of the United States, from Outfall 012.

76. On or about April 5, 2007, WVDEP issued Amended Order No. 30 to Mingo Logan. That Order delayed the effective date of the permit's final selenium effluent limitations until April 5, 2010.

77. Amended Order No. 30 placed additional obligations on Mingo Logan regarding

selenium treatment and compliance. Among other things, Amended Order No. 30 required Mingo Logan to commence construction of selenium treatment facilities by October 5, 2008, and to complete installation of the requisite selenium treatment facilities by April 5, 2010.

78. On information and belief, Plaintiffs allege that Mingo Logan failed to commence construction of selenium treatment facilities on Outfall 012 by October 5, 2008.

79. On information and belief, Plaintiffs allege that Mingo Logan failed to complete installation of selenium treatment facilities on Outfall 012 by April 5, 2010.

80. On April 5, 2010, the selenium effluent limitations in WV/NPDES Permit WV1011120 became final and effective.

81. The DMRs that Mingo Logan submitted to WVDEP reveal that Mingo Logan has discharged selenium in excess of the final effluent limitations for selenium from Outfall 012 on multiple occasions, including during March 2010.

82. On information and belief, Plaintiffs allege that Mingo Logan has violated the final effluent limitations on Outfall 012 of WV/NPDES Permit WV1011120 on one or more occasions since April 5, 2010.

83. On the basis of Mingo Logan's pattern of exceedances of its effluent limitations in WV/NPDES Permit Number WV1011120 and the absence of any evidence of any meaningful efforts by Mingo Logan to eradicate the cause of the violations, Plaintiffs allege that Mingo Logan is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

Plaintiffs' 60-Day Notice Letters

84. Plaintiffs sent a notice of intent letter (hereinafter, "NOI"), postmarked on April 14, 2010, to Coal-Mac notifying it that its discharges of selenium, its violations of Amended Order No. 5, and its violations of the effluent limitations in WV/NPDES Permits WV1003763 and WV0068764 violate the Clean Water Act and SMCRA.

85. Plaintiffs sent a notice of intent letter (hereinafter, "NOI"), postmarked on April 14, 2010, to Mingo Logan notifying it that its discharges of selenium, its violations of Amended Order No. 45 and Amended Order No. 30, and its violations of the effluent limitations in WV/NPDES Permits WV1004956 and WV1011120 violate the Clean Water Act and SMCRA.

86. The NOIs also notified Defendants of Plaintiffs' intent to sue Defendants for those violations at the end of the 60-day period required by statute.

87. The NOI to Coal-Mac was sent by certified mail, return receipt requested, to the following persons: Gary L. Bennett, President, Coal-Mac, Inc.; Secretary Randy Huffman, WVDEP; Shawn M. Garvin, Regional Administrator of EPA Region III; Lisa P. Jackson, Administrator of EPA; Ken Salazar, Secretary of the United States Department of Interior; Joseph Pizarchik, Director of the Office of Surface Mining Reclamation and Enforcement; and CT Corporation System, Registered Agent for Coal-Mac, Inc.. The NOI was also sent to the Regional Director for the Appalachian Region of the Office of Surface Mining Enforcement and Reclamation via first class mail, postage prepaid.

88. The NOI to Mingo Logan was sent by certified mail, return receipt requested, to the following persons: David Runyon, President, Mingo Logan Coal Company.; Secretary Randy Huffman, WVDEP; Shawn M. Garvin, Regional Administrator of EPA Region III; Lisa P. Jackson, Administrator of EPA; Ken Salazar, Secretary of the United States Department of Interior; Joseph Pizarchik, Director of the Office of Surface Mining Reclamation and Enforcement; and Corporation Trust Company, Registered Agent for Mingo Logan Coal Company. The NOI was also sent to the Regional Director for the Appalachian Region of the Office of Surface Mining Enforcement and Reclamation via first class mail, postage prepaid.

FIRST CLAIM FOR RELIEF

(Clean Water Act Violations of WV/NPDES Permit Number WV1003763)

89. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

90. Coal-Mac's wastewater discharges identified in the above paragraphs are discharges from a point source or sources into navigable waters of the United States within the meaning of Section 301 of the Clean Water Act, which prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311.

91. The selenium limits in WV/NPDES Permit Number WV1003763 are "effluent standards or limitations" for purposes of section 505(a)(1) of the Clean Water Act because they are a condition of a permit issued under section 402 of the Act. 33 U.S.C. § 1365(f).

92. Each and every discharge in excess of the effluent limitations in WV/NPDES Permit Number WV1003763 is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

93. A violation of an average monthly effluent limitation in a permit is considered to be a violation on each and every day of that month.

94. Coal-Mac has accrued at least 440 days of violations of the selenium effluent limitations on Outfall 002 of WV/NPDES Permit WV1003763 through the 29 instances of violation exceedances set forth in Appendix A to this Complaint.

95. Unless enjoined, Coal-Mac will remain in continuing violation of the Clean Water Act.

96. On information and belief, Plaintiffs allege that Coal-Mac is in continuing and/or intermittent violation of the Clean Water Act as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1003763 because Coal-Mac has taken no meaningful action to eradicate the underlying cause of the violations.

97. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), Coal-Mac is liable for civil penalties of up to \$32,500 per day for each violation that occurred on or before January 12, 2009, and \$37,500 per day for each violation that occurred after January 12, 2009 for its violations of the effluent limitations in WV/NPDES Permit Number WV1003763.

SECOND CLAIM FOR RELIEF

(SMCRA Violations Related to WV/NPDES Permit Number WV1003763)

98. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

99. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), allows citizen suits in federal court against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.”

100. As discussed above, federal and state regulations under SMCRA include performance standards that (1) prohibit surface mining operations that cause violations of effluent standards in Clean Water Act permits and (2) prohibit operations from causing material damage to the hydrologic balance outside of the permit area.

101. Under 38 C.S.R. § 2-3.33.c, all performance standards are incorporated as conditions in permits issued under the State Act.

102. WV/NPDES Permit Number WV1003763 regulates Coal-Mac’s discharges from its Hobet No. 7 Surface Mine (WVSCMRA Permit No. S507492).

103. As set out in Appendix A to this Complaint, Coal-Mac has accrued at least 440 days of violation of the effluent limitations in WV/NPDES Permit WV1003763.

104. Consequently, Coal-Mac has committed hundreds of violations of the performance standards incorporated in the regulations under SMCRA.

105. Because those performance standards are permit conditions, Coal-Mac is also in

violation of the terms and conditions of WVSCMRA Permit S507492.

106. Unless enjoined, Coal-Mac will remain in ongoing and continuing violation of SMCRA.

107. On information and belief, Plaintiffs allege that Coal-Mac is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1003763 because Coal-Mac has taken no meaningful action to eradicate the underlying cause of the violations.

THIRD CLAIM FOR RELIEF

(Clean Water Act Violations of WV/NPDES Permit Number WV0068764)

108. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

109. Coal-Mac's wastewater discharges identified in the above paragraphs are discharges from a point source or sources into navigable waters of the United States within the meaning of Section 301 of the Clean Water Act, which prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311.

110. The selenium limits in WV/NPDES Permit Number WV0068764 are "effluent standards or limitations" for purposes of section 505(a)(1) of the Clean Water Act because they are a condition of a permit issued under section 402 of the Act. 33 U.S.C. § 1365(f).

111. Each and every discharge in excess of the effluent limitations in WV/NPDES Permit Number WV0068764 is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

112. A violation of an average monthly effluent limitation in a permit is considered to be a violation on each and every day of that month.

113. On information and belief, Plaintiffs allege that Coal-Mac has violated the

selenium effluent limitations in WV/NPDES Permit WV0068764 on one or more occasion since April 5, 2010.

114. Unless enjoined, Coal-Mac will remain in continuing violation of the Clean Water Act.

115. On information and belief, Plaintiffs allege that Coal-Mac is in continuing and/or intermittent violation of the Clean Water Act as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV0068764 because Coal-Mac has taken no meaningful action to eradicate the underlying cause of the violations.

116. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), Coal-Mac is liable for civil penalties of up to \$37,500 per day of violation for its violations of the effluent limitations in WV/NPDES Permit Number WV0068764.

FOURTH CLAIM FOR RELIEF
(Violations of Amended Order No. 5)

117. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

118. Amended Order No. 5 that Coal-Mac received from WVDEP constitutes an “order issued by the Administrator or a State with respect to [effluent] standard[s] or limitation[s]” for purposes of Section 505(a)(1) of the CWA and, hence, violations of Amended Order No. 5 are actionable in a Clean Water Act citizen suit.

119. Coal-Mac’s failure to commence construction of selenium treatment facilities on Outfalls 001, 003, and 014 of WV/NPDES Permit WV0068764 by October 5, 2010, is a violation of the terms of Amended Order No. 5.

120. Coal-Mac is in ongoing violation of the requirement that it commence construction of selenium treatment facilities on Outfalls 001, 003, and 014 of WV/NPDES

Permit WV0068764 by October 5, 2010.

121. Coal-Mac's failure to complete construction of selenium treatment facilities on Outfalls 001, 003, and 014 of WV/NPDES Permit WV0068764 by April 5, 2010, is a violation of the terms of Amended Order No. 5.

122. Coal-Mac is in ongoing violation of the requirement that it complete installation of a selenium treatment system for Outfalls 001, 003, and 014 of WV/NPDES Permit WV0068764 by April 5, 2010.

123. Unless enjoined, Coal-Mac will remain in continuing violation of Amended Order No. 1.

FIFTH CLAIM FOR RELIEF

(SMCRA Violations Related to WV/NPDES Permit Number WV0068764)

124. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

125. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), allows citizen suits in federal court against any "person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter."

126. As discussed above, federal and state regulations under SMCRA include performance standards that (1) prohibit surface mining operations that cause violations of effluent standards in Clean Water Act permits and (2) prohibit operations from causing material damage to the hydrologic balance outside of the permit area.

127. Under 38 C.S.R. § 2-3.33.c, all performance standards are incorporated as conditions in permits issued under the State Act.

128. WV/NPDES Permit Number WV0068764 regulates Coal-Mac's discharges from its mines near Island Creek in Logan and Mingo Counties (WVSCMRA Permit No. S006983,

S007280, S501494, U503595, O51600, S503695, and S505289).

129. On information and belief, Plaintiffs allege that Coal-Mac has violated the effluent limitations in WV/NPDES Permit WV0068764 on one or more occasion since April 5, 2010.

130. Consequently, Coal-Mac has committed one or more violations of the performance standards incorporated in the regulations under SMCRA.

131. Because those performance standards are permit conditions, Coal-Mac is also in violation of the terms and conditions of WVSCMRA S006983, S007280, S501494, U503595, O51600, S503695, and S505289.

132. Unless enjoined, Coal-Mac will remain in ongoing and continuing violation of SMCRA.

133. On information and belief, Plaintiffs allege that Coal-Mac is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV0068764 because Coal-Mac has taken no meaningful action to eradicate the underlying cause of the violations.

SIXTH CLAIM FOR RELIEF

(Clean Water Act Violations of WV/NPDES Permit Number WV1004956)

134. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

135. Mingo Logan's wastewater discharges identified in the above paragraphs are discharges from a point source or sources into navigable waters of the United States within the meaning of Section 301 of the Clean Water Act, which prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311.

136. The selenium limits in WV/NPDES Permit Number WV1004956 are "effluent

standards or limitations” for purposes of section 505(a)(1) of the Clean Water Act because they are a condition of a permit issued under section 402 of the Act. 33 U.S.C. § 1365(f).

137. Each and every discharge in excess of the effluent limitations in WV/NPDES Permit Number WV1004956 is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

138. A violation of an average monthly effluent limitation in a permit is considered to be a violation on each and every day of that month.

139. On information and belief, Plaintiffs allege that Mingo Logan has violated the selenium effluent limitations in WV/NPDES Permit WV1004956 on one or more occasion since April 5, 2010.

140. Unless enjoined, Mingo Logan will remain in continuing violation of the Clean Water Act.

141. On information and belief, Plaintiffs allege that Mingo Logan is in continuing and/or intermittent violation of the Clean Water Act as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1004956 because Mingo Logan has taken no meaningful action to eradicate the underlying cause of the violations.

142. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), Mingo Logan is liable for civil penalties of up to \$37,500 per day of violation for its violations of the effluent limitations in WV/NPDES Permit Number WV1004956.

SEVENTH CLAIM FOR RELIEF
(Violations of Amended Order No. 45)

143. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

144. Amended Order No. 45 that Mingo Logan received from WVDEP constitutes an

“order issued by the Administrator or a State with respect to [effluent] standard[s] or limitation[s]” for purposes of Section 505(a)(1) of the CWA and, hence, violations of Amended Order No. 45 are actionable in a Clean Water Act citizen suit.

145. Mingo Logan’s failure to commence construction of selenium treatment facilities on Outfalls 001 and 015 of WV/NPDES Permit WV1004956 by October 5, 2010, is a violation of the terms of Amended Order No. 45

146. Mingo Logan is in ongoing violation of the requirement that it commence construction of selenium treatment facilities on Outfalls 001 and 015 of WV/NPDES Permit WV1004956 by October 5, 2010.

147. Mingo Logan’s failure to complete construction of selenium treatment facilities on Outfalls 015 of WV/NPDES Permit WV1004956 by April 5, 2010, is a violation of the terms of Amended Order No. 45.

148. Mingo Logan is in ongoing violation of the requirement that it complete installation of a selenium treatment system for Outfalls 001 and 015 of WV/NPDES Permit WV1004956 by April 5, 2010.

149. Unless enjoined, Mingo Logan will remain in continuing violation of Amended Order No. 1.

EIGHTH CLAIM FOR RELIEF

(SMCRA Violations Related to WV/NPDES Permit Number WV1004956)

150. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

151. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), allows citizen suits in federal court against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.”

152. As discussed above, federal and state regulations under SMCRA include performance standards that (1) prohibit surface mining operations that cause violations of effluent standards in Clean Water Act permits and (2) prohibit operations from causing material damage to the hydrologic balance outside of the permit area.

153. Under 38 C.S.R. § 2-3.33.c, all performance standards are incorporated as conditions in permits issued under the State Act.

154. WV/NPDES Permit Number WV1004956 regulates Mingo Logan's discharges from its Left Fork No. 2 Mine (WVSCMRA Permit Nos. S508187 and U508886).

155. On information and belief, Plaintiffs allege that Mingo Logan has violated the effluent limitations in WV/NPDES Permit WV1004956 on one or more occasion since April 5, 2010.

156. Consequently, Mingo Logan has committed one or more violations of the performance standards incorporated in the regulations under SMCRA.

157. Because those performance standards are permit conditions, Mingo Logan is also in violation of the terms and conditions of WVSCMRA Permits S508187 and U508886.

158. Unless enjoined, Mingo Logan will remain in ongoing and continuing violation of SMCRA.

159. On information and belief, Plaintiffs allege that Mingo Logan is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1004956 because Mingo Logan has taken no meaningful action to eradicate the underlying cause of the violations.

NINTH CLAIM FOR RELIEF

(Clean Water Act Violations of WV/NPDES Permit Number WV1011120)

160. Plaintiffs incorporate by reference all allegations contained in paragraphs 1

through 88 supra.

161. Mingo Logan's wastewater discharges identified in the above paragraphs are discharges from a point source or sources into navigable waters of the United States within the meaning of Section 301 of the Clean Water Act, which prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311.

162. The selenium limits in WV/NPDES Permit Number WV1011120 are "effluent standards or limitations" for purposes of section 505(a)(1) of the Clean Water Act because they are a condition of a permit issued under section 402 of the Act. 33 U.S.C. § 1365(f).

163. Each and every discharge in excess of the effluent limitations in WV/NPDES Permit Number WV1011120 is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

164. A violation of an average monthly effluent limitation in a permit is considered to be a violation on each and every day of that month.

165. On information and belief, Plaintiffs allege that Mingo Logan has violated the selenium effluent limitations in WV/NPDES Permit WV1011120 on one or more occasion since April 5, 2010.

166. Unless enjoined, Mingo Logan will remain in continuing violation of the Clean Water Act.

167. On information and belief, Plaintiffs allege that Mingo Logan is in continuing and/or intermittent violation of the Clean Water Act as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1011120 because Mingo Logan has taken no meaningful action to eradicate the underlying cause of the violations.

168. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), Mingo Logan is

liable for civil penalties of up to \$37,500 per day of violation for its violations of the effluent limitations in WV/NPDES Permit Number WV1011120.

TENTH CLAIM FOR RELIEF
(Violations of Amended Order No. 30)

169. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

170. Amended Order No. 30 that Mingo Logan received from WVDEP constitutes an “order issued by the Administrator or a State with respect to [effluent] standard[s] or limitation[s]” for purposes of Section 505(a)(1) of the CWA and, hence, violations of Amended Order No. 30 are actionable in a Clean Water Act citizen suit.

171. Mingo Logan’s failure to commence construction of selenium treatment facilities on Outfall 012 of WV/NPDES Permit WV1011120 by October 5, 2010, is a violation of the terms of Amended Order No. 30.

172. Mingo Logan is in ongoing violation of the requirement that it commence construction of selenium treatment facilities on Outfall 012 of WV/NPDES Permit WV1011120 by October 5, 2010.

173. Mingo Logan’s failure to complete construction of selenium treatment facilities on Outfall 012 of WV/NPDES Permit WV1011120 by April 5, 2010, is a violation of the terms of Amended Order No. 30.

174. Mingo Logan is in ongoing violation of the requirement that it complete installation of a selenium treatment system for Outfall 012 of WV/NPDES Permit WV1011120 by April 5, 2010.

175. Unless enjoined, Mingo Logan will remain in continuing violation of Amended Order No. 30.

ELEVENTH CLAIM FOR RELIEF

(SMCRA Violations Related to WV/NPDES Permit Number WV1011120)

176. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 88 supra.

177. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), allows citizen suits in federal court against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.”

178. As discussed above, federal and state regulations under SMCRA include performance standards that (1) prohibit surface mining operations that cause violations of effluent standards in Clean Water Act permits and (2) prohibit operations from causing material damage to the hydrologic balance outside of the permit area.

179. Under 38 C.S.R. § 2-3.33.c, all performance standards are incorporated as conditions in permits issued under the State Act.

180. WV/NPDES Permit Number WV1011120 regulates Mingo Logan’s discharges from its Gut Fork Surface Mine (WVSCMRA Permit No. S506391).

181. On information and belief, Plaintiffs allege that Mingo Logan has violated the effluent limitations in WV/NPDES Permit WV1011120 on one or more occasion since April 5, 2010.

182. Consequently, Mingo Logan has committed one or more violations of the performance standards incorporated in the regulations under SMCRA.

183. Because those performance standards are permit conditions, Mingo Logan is also in violation of the terms and conditions of WVSCMRA Permit S506391.

184. Unless enjoined, Mingo Logan will remain in ongoing and continuing violation of SMCRA.

185. On information and belief, Plaintiffs allege that Mingo Logan is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1011120 because Mingo Logan has taken no meaningful action to eradicate the underlying cause of the violations.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this court enter an Order:

- (1). Declaring that Defendants have violated and are in continuing violation of the Clean Water Act and SMCRA;
- (2). Enjoining Defendants from operating their facilities in such a manner as will result in further violations of the effluent limitations in their WV/NPDES Permits;
- (3). Ordering Defendants to immediately comply with all effluent limitations, monitoring and reporting requirements, and other terms and conditions of their WV/NPDES Permits;
- (4). Ordering Defendants to immediately comply with all requirements of Amended Order Nos. 5, 45, and 30;
- (5). Ordering Defendants to immediately comply with the terms and conditions of their WVSCMRA Permits;
- (6). Ordering Defendants to pay appropriate civil penalties up to \$32,500 per day for each CWA violation that occurred on or before January 12, 2009, and \$37,500 per day for each CWA violation that occurred after January 12, 2009;
- (7). Ordering Defendants to conduct monitoring and sampling to determine the environmental effects of their violations, to remedy and repair environmental contamination and/or degradation caused by their violations, and restore the environment to its prior

uncontaminated condition;

(8). Awarding Plaintiffs' attorney and expert witness fees and all other reasonable expenses incurred in pursuit of this action; and

(9). Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ DEREK O. TEANEY

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