

**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.** 3:10-cv-0836

**INDEPENDENCE COAL COMPANY, INC.,  
and JACKS BRANCH 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 Independence Coal Company, Inc. (“Independence”) and Jacks Branch Coal Company (“Jacks Branch”), 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 Independence and Jacks Branch 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 three 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 this action, Plaintiffs Sierra Club, Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy sent a notice of intent to sue to Jacks Branch Coal Company. All claims against Jacks Branch 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 Coal River Mountain Watch sent a notice of intent to sue against Independence Coal Company, Inc. All claims against Independence Coal Company, Inc. are brought by Sierra Club, Ohio Valley Environmental Coalition, and Coal River Mountain Watch.

#### **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. Independence Coal Company, Inc. (“Independence”), is a West Virginia Limited Liability Company doing business in Madison, West Virginia.

11. Jacks Branch Coal Company (“Jacks Branch”) is a West Virginia Limited Liability Company doing business in Leivasy, West Virginia.

12. Both Independence and Jacks Branch are subsidiaries of Massey Energy Company, a Delaware corporation.

13. Both Independence and Jacks Branch 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, Independence owned and operated the Twilight MTR Surface Mine in Boone and Raleigh Counties, West Virginia, which is regulated by Surface Mining Permit S502396 which discharges pollutants from various outfalls that are subject to the

effluent limitations of WV/NPDES Permit WV1016890.

15. At all relevant times, Independence owned and operated the Red Cedar Surface Mine No. 1 in Boone County, West Virginia, which is regulated by Surface Mining Permit S503907 and which discharges pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV1017152.

16. At all relevant times, Jacks Branch owned and operated the Kanawha Division Surface Mines in Kanawha County, West Virginia, which are regulated by Surface Mining Permits S000684, S004577, S008379, S061570, S303790, U002985, U005584, U300197, and Z000481 and which discharge pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV0093912.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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 their 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.

22. 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**

23. 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.

24. 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.

25. 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.

26. 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).

27. 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).

28. 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.

29. 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.”

30. 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.”

31. 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.

32. 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).

33. 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.

34. 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 \$37,500 per day for each violation that occurred after January 12, 2009. See 40 C.F.R. § 19.4.

35. 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.”

36. 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.

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

38. 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.

39. 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.

40. 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.

41. 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].”

42. 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.”

43. 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 WV1016890**

44. At all relevant times, Independence has held WV/NPDES Permit Number WV1016890 to regulate water pollution from its Twilight MTR Surface Mine.

45. At all relevant times, Independence has held WVSCMRA Permits S502396, among others, for its Twilight MTR Surface Mine.

46. WV/NPDES Permit Number WV1016890 places limits on the concentrations of selenium that Independence can discharge into Mats Creek from Outfall 004 and James Creek from Outfalls 008 and 015. Each of those waterways is a navigable water of the United States.

47. On or about April 5, 2007, WVDEP issued Amended Order No. 47 to

Independence. That Order delayed the effective date of the permit's final selenium effluent limitations until April 5, 2010.

48. Amended Order No. 47 placed additional obligations on Independence regarding selenium treatment and compliance. Among other things, Amended Order No. 47 required Independence 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.

49. On information and belief, Plaintiffs allege that Independence failed to commence construction of selenium treatment facilities on Outfalls 004, 008, and 015 by October 5, 2008.

50. On information and belief, Plaintiffs allege that Independence failed to complete installation of selenium treatment facilities on Outfalls 004, 008, and 015 by April 5, 2010.

51. On April 5, 2010, the selenium effluent limitations in WV/NPDES Permit WV1016890 became final and effective.

52. The DMRs that Independence submitted to WVDEP reveal that Independence has discharged selenium in excess of the final effluent limitations for selenium from Outfalls 004, 008, and 015 on multiple occasions, including during March 2010.

53. On information and belief, Plaintiffs allege that Independence has violated the final effluent limitations on Outfalls 004, 008, and 015 of WV/NPDES Permit WV1016890 on one or more occasions since April 5, 2010.

54. On the basis of Independence's pattern of exceedances of its effluent limitations in WV/NPDES Permit Number WV1016890 and the absence of any evidence of any meaningful efforts by Independence to eradicate the cause of the violations, Plaintiffs allege that Independence is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

**WV/NPDES Permit Number WV1017152**

55. At all relevant times, Independence has held WV/NPDES Permit Number

WV1017152 to regulate water pollution from its Red Cedar Surface Mine No. 1.

56. At all relevant times, Independence has held WVSCMRA S503907 for its Red Cedar Surface Mine No. 1.

57. WV/NPDES Permit Number WV1017152 places limits on the concentrations of pollutants that Independence can discharge into Trace Branch of Spruce Laurel Fork from Outfalls 023, 042, and 046, and into Bull Creek of Pond Fork from Outfalls 029, 031, and 037. Each of those waterways is a navigable water of the United States.

58. On or about April 5, 2007, WVDEP issued Amended Order No. 1066 to Independence. That Order delayed the effective date of the permit's final selenium effluent limitations until April 5, 2010.

59. Amended Order No. 1066 placed additional obligations on Independence regarding selenium treatment and compliance. Among other things, Amended Order No. 1066 required Independence 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.

60. On information and belief, Plaintiffs allege that Independence failed to commence construction of selenium treatment facilities on Outfalls 023, 029, 031, 037, 042, and 046 by October 5, 2008.

61. On information and belief, Plaintiffs allege that Independence failed to complete installation of selenium treatment facilities on Outfalls 023, 029, 031, 037, 042, and 046 by April 5, 2010.

62. On April 5, 2010, the selenium effluent limitations in WV/NPDES Permit WV1017152 became final and effective.

63. The DMRs that Independence submitted to WVDEP reveal that Independence has

discharged selenium in excess of the final effluent limitations for selenium from Outfalls 023, 029, 031, 037, 042, and 046 on multiple occasions, including during March 2010.

64. On information and belief, Plaintiffs allege that Independence has violated the final effluent limitations on Outfalls 023, 029, 031, 037, 042, and 046 of WV/NPDES Permit WV1017152 on one or more occasions since April 5, 2010.

65. On the basis of Independence's pattern of exceedances of its effluent limitations in WV/NPDES Permit Number WV1017152 and the absence of any evidence of any meaningful efforts by Independence to eradicate the cause of the violations, Plaintiffs allege that Independence is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

**WV/NPDES Permit Number WV0093912**

66. At all relevant times, Jacks Branch has held WV/NPDES Permit Number WV0093912 to regulate water pollution from its Kanawha Division Surface Mines.

67. At all relevant times, Jacks Branch has held WVSCMRA Permits S000684, S004577, S008379, S061570, S303790, U002985, U005584, U300197, and Z000481 for its Kanawha Division Surface Mines.

68. WV/NPDES Permit Number WV0093912 places limits on the concentrations of pollutants that Jacks Branch can discharge into Bullpush Fork of Smithers Creek from Outfalls 004 and 012; into Sixmile Hollow of Hughes Creek from Outfall 005; into Hughes Fork of Bells Creek from Outfall 007; and into Hughes Creek from Outfalls 014, 022, 033 and 034. Each of those waterways is a navigable water of the United States.

69. On or about April 5, 2007, WVDEP issued Amended Order No. 18 to Jacks Branch. That Order delayed the effective date of the permit's final selenium effluent limitations until April 5, 2010.

70. Amended Order No. 18 placed additional obligations on Jacks Branch regarding

selenium treatment and compliance. Among other things, Amended Order No. 18 required Jacks Branch 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.

71. On information and belief, Plaintiffs allege that Jacks Branch failed to commence construction of selenium treatment facilities on Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 by October 5, 2008.

72. On information and belief, Plaintiffs allege that Jacks Branch failed to complete installation of selenium treatment facilities on Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 by April 5, 2010.

73. On April 5, 2010, the selenium effluent limitations in WV/NPDES Permit WV0093912 became final and effective.

74. The DMRs that Jacks Branch submitted to WVDEP reveal that Jacks Branch has discharged selenium in excess of the final effluent limitations for selenium from Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 on multiple occasions, including during March 2010.

75. On information and belief, Plaintiffs allege that Jacks Branch has violated the final effluent limitations on Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 of WV/NPDES Permit WV0093912 on one or more occasions since April 5, 2010.

76. On the basis of Jacks Branch's pattern of exceedances of its effluent limitations in WV/NPDES Permit Number WV0093912 and the absence of any evidence of any meaningful efforts by Jacks Branch to eradicate the cause of the violations, Plaintiffs allege that Jacks Branch is in continuing and/or intermittent violation of the Clean Water Act and SMCRA.

**Plaintiffs' 60-Day Notice Letter**

77. Plaintiffs sent a notice of intent letter (hereinafter, "NOI"), postmarked on April 14, 2010, to Independence notifying it that its discharges of selenium, its violations of Order No.

47 and Amended Order No. 1066, and its violations of the effluent limitations in WV/NPDES Permits WV1016890 and WV1017152 violate the Clean Water Act and SMCRA.

78. Plaintiffs sent an NOI, postmarked on April 14, 2010, to Jacks Branch notifying it that its discharges of selenium, its violations of and Amended Order No. 18, and its violations of the effluent limitations in WV/NPDES Permit WV0093912 violate the Clean Water Act and SMCRA.

79. 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.

80. The NOI for Independence was sent by certified mail, return receipt requested, to the following persons: Billy R. McCoy, President, Independence Coal Company, 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 the Massey Energy Services Legal Dep't, Registered Agent for Independence Coal Company, 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.

81. The NOI for Jacks Branch was sent by certified mail, return receipt requested, to the following persons: David C. Hughart, President, Jacks Branch 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 Massey Energy Services Legal Dep't, Registered Agent for Jacks Branch 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 WV1016890)

82. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 supra.

83. Independence'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.

84. The selenium limits in WV/NPDES Permit Number WV1016890 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).

85. Each and every discharge in excess of the effluent limitations in WV/NPDES Permit Number WV1016890 is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

86. 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.

87. On information and belief, Plaintiffs allege that Independence has violated the selenium effluent limitations in WV/NPDES Permit WV1016890 on one or more occasion since April 5, 2010.

88. Unless enjoined, Independence will remain in continuing violation of the Clean Water Act.

89. On information and belief, Plaintiffs allege that Independence 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 WV1016890 because Independence has taken no meaningful action to eradicate the underlying cause of the violations.

90. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), Independence 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 WV1016890.

**SECOND CLAIM FOR RELIEF**

(Violations of Order No. 47)

91. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 supra.

92. Order No. 47 that Independence 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 Order No. 47 are actionable in a Clean Water Act citizen suit.

93. Independence’s failure to commence construction of selenium treatment facilities on Outfalls 004, 008, and 015 of WV/NPDES Permit WV1016890 by October 5, 2010, is a violation of the terms of Order No. 47.

94. Independence is in ongoing violation of the requirement that it commence construction of selenium treatment facilities on Outfalls 004, 008, and 015 of WV/NPDES Permit WV1016890 by October 5, 2010.

95. Independence’s failure to complete construction of selenium treatment facilities on Outfalls 004, 008, and 015 of WV/NPDES Permit WV1016890 by April 5, 2010, is a violation of the terms of Order No. 47.

96. Independence is in ongoing violation of the requirement that it complete

installation of a selenium treatment system for Outfalls 004, 008, and 015 of WV/NPDES Permit WV1016890 by April 5, 2010.

97. Unless enjoined, Independence will remain in continuing violation of Order No. 47.

**THIRD CLAIM FOR RELIEF**

(SMCRA Violations Related to WV/NPDES Permit Number WV1016890)

98. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 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 WV1016890 regulates Independence’s discharges from its Twilight MTR Surface Mine (WVSCMRA Permit No. S502396).

103. On information and belief, Plaintiffs allege that Independence has violated the effluent limitations in WV/NPDES Permit WV1016890 on one or more occasion since April 5, 2010.

104. Consequently, Independence has committed one or more violations of the performance standards incorporated in the regulations under SMCRA.

105. Because those performance standards are permit conditions, Independence is also in violation of the terms and conditions of WVSCMRA Permit S502396.

106. Unless enjoined, Independence will remain in ongoing and continuing violation of SMCRA.

107. On information and belief, Plaintiffs allege that Independence is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1016890 because Independence has taken no meaningful action to eradicate the underlying cause of the violations.

**FOURTH CLAIM FOR RELIEF**

(Clean Water Act Violations of WV/NPDES Permit Number WV1017152)

108. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 supra.

109. Independence'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 WV1017152 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 WV1017152 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 Independence has violated the selenium effluent limitations in WV/NPDES Permit WV1017152 on one or more occasion since April 5, 2010.

114. Unless enjoined, Independence will remain in continuing violation of the Clean Water Act.

115. On information and belief, Plaintiffs allege that Independence 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 WV1017152 because Independence 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), Independence 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 WV1017152.

**FIFTH CLAIM FOR RELIEF**  
(Violations of Amended Order No. 1066)

117. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 supra.

118. Amended Order No. 1066 that Independence 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. 1066 are actionable in a Clean Water Act citizen suit.

119. Independence’s failure to commence construction of selenium treatment facilities on Outfalls 023, 029, 031, 037, 042 and 046 of WV/NPDES Permit WV1017152 by October 5, 2010, is a violation of the terms of Amended Order No. 1066.

120. Independence is in ongoing violation of the requirement that it commence

construction of selenium treatment facilities on Outfalls 023, 029, 031, 037, 042 and 046 of WV/NPDES Permit WV1017152 by October 5, 2010.

121. Independence's failure to complete construction of selenium treatment facilities on Outfalls 023, 029, 031, 037, 042 and 046 of WV/NPDES Permit WV1017152 by April 5, 2010, is a violation of the terms of Amended Order No. 1066.

122. Independence is in ongoing violation of the requirement that it complete installation of a selenium treatment system for Outfalls 023, 029, 031, 037, 042 and 046 of WV/NPDES Permit WV1017152 by April 5, 2010.

123. Unless enjoined, Independence will remain in continuing violation of Amended Order No. 1066.

**SIXTH CLAIM FOR RELIEF**

(SMCRA Violations Related to WV/NPDES Permit Number WV1017152)

124. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 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 WV1017152 regulates Independence's discharges

from its Red Cedar Surface Mine No. 1 (WVSCMRA Permit No. S503907).

129. On information and belief, Plaintiffs allege that Independence has violated the effluent limitations in WV/NPDES Permit WV1017152 on one or more occasion since April 5, 2010.

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

131. Because those performance standards are permit conditions, Independence is also in violation of the terms and conditions of WVSCMRA S503907.

132. Unless enjoined, Independence will remain in ongoing and continuing violation of SMCRA.

133. On information and belief, Plaintiffs allege that Independence is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV1017152 because Independence has taken no meaningful action to eradicate the underlying cause of the violations.

**SEVENTH CLAIM FOR RELIEF**

(Clean Water Act Violations of WV/NPDES Permit Number WV0093912)

134. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 supra.

135. Jacks Branch'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 WV0093912 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 WV0093912 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 Jacks Branch has violated the selenium effluent limitations in WV/NPDES Permit WV0093912 on one or more occasion since April 5, 2010.

140. Unless enjoined, Jacks Branch will remain in continuing violation of the Clean Water Act.

141. On information and belief, Plaintiffs allege that Jacks Branch 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 WV0093912 because Jacks Branch 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), Jacks Branch 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 WV0093912.

**EIGHTH CLAIM FOR RELIEF**  
(Violations of Amended Order No. 18)

143. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 supra.

144. Amended Order No. 18 that Jacks Branch 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. 18 are actionable in a Clean Water Act citizen suit.

145. Jacks Branch’s failure to commence construction of selenium treatment facilities on Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 of WV/NPDES Permit WV0093912 by October 5, 2010, is a violation of the terms of Amended Order No. 18.

146. Jacks Branch is in ongoing violation of the requirement that it commence construction of selenium treatment facilities on Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 of WV/NPDES Permit WV0093912 by October 5, 2010.

147. Jacks Branch’s failure to complete construction of selenium treatment facilities on Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 of WV/NPDES Permit WV0093912 by April 5, 2010, is a violation of the terms of Amended Order No. 18.

148. Jacks Branch is in ongoing violation of the requirement that it complete installation of a selenium treatment system for Outfalls 004, 005, 007, 012, 014, 022, 033, and 034 of WV/NPDES Permit WV0093912 by April 5, 2010.

149. Unless enjoined, Jacks Branch will remain in continuing violation of Amended Order No. 18.

**NINTH CLAIM FOR RELIEF**

(SMCRA Violations Related to WV/NPDES Permit Number WV0093912)

150. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 81 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 WV0093912 regulates Jacks Branch's discharges from its Kanawha Division Surface Mines (WVSCMRA Permit Nos. S000684, S004577, S008379, S061570, S303790, U002985, U005584, U300197, and Z000481).

155. On information and belief, Plaintiffs allege that Jacks Branch has violated the effluent limitations in WV/NPDES Permit WV0093912 on one or more occasion since April 5, 2010.

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

157. Because those performance standards are permit conditions, Jacks Branch is also in violation of the terms and conditions of WVSCMRA Permits S000684, S004577, S008379, S061570, S303790, U002985, U005584, U300197, and Z000481.

158. Unless enjoined, Jacks Branch will remain in ongoing and continuing violation of SMCRA.

159. On information and belief, Plaintiffs allege that Jacks Branch is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV0093912 because Jacks Branch has taken no meaningful action to eradicate the underlying cause of the violations.

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**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 Order No. 47 and Amended Order Nos. 1066 and 18;

(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 \$37,500 per day for each CWA violation;

(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.

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Respectfully submitted,

**/s/ DEREK O. TEANEY**

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