

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT LONDON**

SIERRA CLUB,

Plaintiff,

v.

CIVIL ACTION NO. _____

ICG HAZARD, LLC,

Defendant.

**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 Defendant ICG Hazard, LLC (“ICG Hazard” or “Defendant”), 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. (“SMCRA”) at its surface mine operating under SMCRA permit number 866-0281.

2. As detailed below, Sierra Club alleges that at that permitted mining operation Defendant discharged and continues 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 without a National Pollution Discharge Elimination System (“NPDES”) Permit issued pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342, in persistent violation of Section 301 of the CWA, 33 U.S.C. § 1311.

3. Sierra Club further alleges that Defendant's unlawful discharges of selenium into the waters adjacent to its mine violate SMCRA, performance standards under the Kentucky Program, and the terms and conditions of Defendant's surface mining permit.

4. Sierra Club further alleges that Defendant is discharging pollutants associated with the water quality metric of conductivity from the mine operating under permit number 866-0281 into waters of the United States at levels that cause or contribute to violations of Kentucky's narrative aquatic life water quality standards. Such discharges violate SMCRA, performance standards under the Kentucky Program, and the terms and conditions of Defendant's surface mining permit.

5. Finally, Sierra Club alleges that Defendant is in violation of Kentucky Program performance standards and surface mining permit conditions that require the installation, operation, and maintenance of adequate treatment facilities, in addition to sediment ponds, when necessary to prevent discharges that violate any state or federal law.

6. Prior to commencing this action, Sierra Club sent a notice of intent to sue to ICG Hazard.

JURISDICTION AND VENUE

7. 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).

8. On February 24, 2011, Sierra Club gave notice of the violations and their intent to file suit to the Defendant, the United States Environmental Protection Agency ("EPA"), the Office of Surface Mining, Reclamation, and Enforcement ("OSMRE"), and the Kentucky Energy

and Environment Cabinet (“the Cabinet”), 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).

9. More than sixty days have passed since notice was served and neither EPA, nor OSMRE, nor the Cabinet has commenced and diligently prosecuted a civil or criminal action to require compliance with the Clean Water Act or SMCRA. Moreover, neither EPA nor the Cabinet 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 Sierra Club’s notice letter.

10. 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. This action is properly filed in the London Division because Defendant resides in that division and the events or omissions giving rise to the claims occurred in that division.

PARTIES

11. ICG Hazard is a Delaware Corporation doing business in Hazard, Perry County, Kentucky.

12. ICG Hazard is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), and Section 701(19) of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1291(19).

13. At all relevant times, ICG Hazard owned and operated the Thunder Ridge surface mine in Leslie County, Kentucky, which is regulated by Kentucky Surface Mining Permit 866-0281, and which discharges pollutants from various outfalls subject to the limitations of KPDES

General Permit KYG043540.

14. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with approximately 600,000 members nationwide and approximately 5,000 members who belong to its Kentucky chapter, called the Cumberland 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 those objectives. The Sierra Club's concerns encompass the exploration, enjoyment and protection of surface waters in Kentucky.

15. Sierra Club's members suffer injuries to their aesthetic, recreational, environmental, and/or economic interests as a result of ICG Hazard's unlawful discharges of pollutants. Sierra Club's members enjoy hiking near, observing wildlife in, photographing, or otherwise using the waters affected by ICG Hazard's discharges, including Lower Bad Creek, Greasy Creek, and Roundhole Branch of Greasy Creek. Sierra Club's members refrain from those activities or enjoy them less because of ICG Hazard's unlawful discharges. Sierra Club's members are also very concerned about the impacts of pollution from ICG Hazard's discharges on their friends living near the Thunder Ridge Mine and on local wildlife. If ICG Hazard's unlawful discharges ceased, the harm to the interests of Sierra Club's members could be redressed. Injunctions and/or civil penalties would redress Sierra Club's members' injuries by preventing and/or deterring future violations of the Clean Water Act and SMCRA.

16. At all relevant times, Sierra Club is and was a "person" as that term is defined by the CWA, 33 U.S.C. § 1362(5), and SMCRA, 33 U.S.C. § 1291(19).

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STATUTORY AND REGULATORY FRAMEWORK

Clean Water Act

17. 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.

18. 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 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.

19. EPA regulations at 40 C.F.R. § 122.28 allow EPA or an authorized state to issue general NPDES permits to categories or subcategories of dischargers. To receive coverage under a general permit, a discharger must submit a Notice of Intent (NOI) to be covered in accordance with the terms of the permit.

20. At all times relevant to this complaint, the State of Kentucky has been authorized by EPA to administer a NPDES program for regulating the discharges of pollutants into the waters of Kentucky. Permits issued pursuant to that program are called Kentucky Pollution Discharge Elimination System (KPDES) Permits.

21. On July 1, 2009, the Kentucky Cabinet’s Department of Environmental Protection, Division of Water (KDOW) issued the most recent version of the KPDES Coal General Permit to authorize various subcategories of coal mining operations to discharge certain pollutants subject to effluent limitations and other permit requirements. The current version of the KPDES Coal General Permit is effective August 1, 2009 to July 31, 2014.

22. For existing mining operations covered under prior versions of the KPDES Coal General Permit, like ICG Hazard's mine operating under surface mine permit number 866-0281, the prior authorization to discharge was automatically extended under the current KPDES Coal General Permit.

23. Holders of KPDES Permits, including the Coal General Permit, are required to monitor their discharges for certain pollutants bimonthly and report those discharges on a quarterly basis. Those reports are called "Discharge Monitoring Reports," or "DMRs."

24. The Notice of Intent for coverage under the KPDES Coal General Permit (Form NOI-CM) requires applicants for new or expanded coverage to submit an analysis of the "effluent characteristics" of the operation. Applicants must "[c]ollect, analyze and report at least one sample of effluent from an outfall in each watershed." Such samples must be analyzed for a set of pollution parameters that is broader than those that must be reported in the permittee's DMRs. If the NOI-CM is for an activity without existing discharges, "the applicant may use data collected [from] a similar existing activity within the watershed."

25. 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. Unless otherwise specified, all Kentucky surface waters are designated for the uses of warm water aquatic habitat, primary contact recreation, secondary contact recreation, and domestic water supply. 401 KAR 10:026 § 5(2)(a).

26. The State of Kentucky has adopted both general narrative water quality standards and pollutant-specific numeric water quality criteria. Water quality standards contain both designated uses and discharge limitations designed to achieve those uses.

27. By default, all waterways are "designated for the uses of warm water aquatic

habitat, primary contact recreation, secondary contact recreation and domestic water supply,” unless otherwise designated. 401 KAR 10:026 § 5(2)(a).

28. The narrative standard applicable to all surface waters mandates that Kentucky’s waters “shall not be aesthetically or otherwise degraded by substances that . . . [i]njure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish, and other aquatic life.” 401 KAR 10:031 § 2(1)(d).

29. The narrative standard applicable to warm water aquatic habitat mandates that “[t]otal dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected.” 401 KAR 10:031 § 4(1)(f).

30. Additionally, Kentucky has established numeric criteria for the toxic pollutant selenium at levels necessary to protect warm water aquatic habitat. The acute criterion is 20 µg/l (micrograms per liter) and the chronic criterion is 5 µg/l. 401 KAR 10:031 § 6, Table 1.

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) of the CWA, 33 U.S.C. § 1311(a).

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, 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 \$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.”

Surface Mine Control and Reclamation Act

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 Kentucky has administered an approved surface mining regulatory program. See 30 C.F.R. § 917.10. These laws, codified in Chapter 350 of the Kentucky Revised Statutes, are collectively known as the “Kentucky Program.”

39. The rules promulgated under the Kentucky Program provide that, as a general condition of all surface mining permits, the permittee must comply with all applicable performance standards. 405 KAR 8:010 § 18.

40. Several performance standards in the Kentucky Program require that all mining activities be conducted in compliance with state and federal water quality standards.

41. Among the performance standards mandated by the Kentucky Program is that

“[i]n no case shall federal and state water quality statutes, regulations, standards, or effluent limitations be violated.” 405 KAR 16:060 § 1(3).

42. The Kentucky Program’s performance standards also mandate that “[d]ischarges of water from areas disturbed by surface mining activities shall at all times be in compliance with all applicable federal and state water quality standards.” 405 KAR 16:070 § 1(1)(g).

43. The Kentucky Program’s performance standards also mandate that “[s]urface water quality shall be protected by handling earth materials, groundwater discharges, and run-off in a manner that . . . [w]ill not cause or contribute to a violation of any federal or state effluent limitations or water quality standards.” 405 KAR 16:060 § 6(1)(c).

44. The Kentucky Program’s performance standards further mandate that “[a]dequate facilities, in addition to sedimentation ponds, shall be installed, operated, and maintained to treat any water discharged from disturbed areas when necessary to ensure that the discharge complies with all federal and state laws and regulations and the limitations of this administrative regulation.” 405 KAR 16:070 § 1(2).

45. The Kentucky Program’s performance standards further require that “[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of run-off, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and 405 KAR 16:070, the operator shall use and maintain the necessary water-treatment facilities or water quality controls for as long as treatment is required under this chapter.” 405 KAR 16:060 § 6(2).

46. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), authorizes any person having an interest which is or may be 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].”

47. 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.”

FACTS

ICG Hazard’s Permits

48. At all relevant times, ICG Hazard has held Surface Mining Permit 866-0281 to operate the Thunder Ridge Surface Mine.

49. At all relevant times, ICG Hazard has held KPDES Permit KYG043540 for its Thunder Ridge Mine. Permit KYG043540 authorizes certain pollutant discharges subject to the terms of the KPDES Coal General Permit.

50. Permit KYG043540 authorizes the discharge of certain pollutants to Lower Bad Creek and several of its tributaries, Greasy Creek, and Roundhole Branch of Greasy Creek.

51. Lower Bad Creek and its tributaries, Greasy Creek, and Roundhole Branch of Greasy Creek are waters of the United States and have been designated as warm water aquatic habitat for the purpose of Kentucky’s water quality standards.

ICG Hazard’s Discharges of Selenium

52. In late 2009, ICG Hazard sought Amendment 9 to Surface Mining Permit 866-0281 to add over 140 acres of new surface disturbance. Concurrently, ICG Hazard sought modification of KPDES Coal General Permit KYG043540 to authorize the pollutant discharges from its expanded mining. As part of that process, KDOW required ICG Hazard to submit an analysis of its effluent characteristics in the watersheds affected by the amendment. The effluent characterization revealed that five outfalls from the Thunder Ridge Mine are discharging selenium into Lower Bad Creek or its tributaries. Specifically, the characterization showed that

effluent from Outfall 020 contained 29.2 µg/L selenium, effluent from Outfall 043 contained 8 µg/L selenium, effluent from Outfall 048 contained 6 µg/L selenium, effluent from Outfall 052 contained 8 µg/L selenium, and effluent from Outfall 053 contained 11 µg/L selenium.

53. The outfall numbers listed in the preceding paragraph are those ICG Hazard provided in its effluent characterization. Because of discrepancies in the Form NOI-CM, Kentucky Program mine maps, and KPDES DMRs submitted by ICG Hazard, Sierra Club cannot positively identify the sediment structures that correspond to those outfalls or determine if the outfall numbers in Form NOI-CM correspond to those used in ICG Hazard's DMRs. For instance, Form NOI-CM lists the latitude and longitude of the sample associated with "Outfall 020" as 37.069 and 83.365. Those values match the values listed for Pond 1809 in the Form NOI-CM's sediment structure inventory. The location associated with those values is the westernmost sediment pond on Lower Bad Creek, which ICG Hazard's mine maps identify as Pond 1809. However, ICG Hazard's DMRs associate Outfall 020 with Pond 1808 on Roundhole Branch. Moreover, both ICG Hazard's DMRs and the Form NOI-CM's sediment structure inventory list the receiving stream for Pond 1809 as Hensley Branch instead of Lower Bad Creek. In this complaint, Sierra Club will refer to the outfall numbers used in the Form NOI-CM when describing the selenium violations revealed through that document. However, due to inconsistencies like the ones described above, Sierra Club does not believe that all of those outfall numbers are accurate.

54. On January 7, 2011, in response to a citizen request, the Kentucky Cabinet's Department for Natural Resources, Division of Mine Reclamation and Enforcement (DMRE) performed an inspection of the Thunder Ridge Mine. DMRE sampled and analyzed effluent from six outfalls along Lower Bad Creek and labeled the results according to SMCRA sediment

structure number. Four samples contained detectable levels of selenium, two of which were greater than the chronic water quality criterion. Effluent from Pond 1400 contained 2 µg/L selenium, effluent from Pond 1805A contained 7 µg/L selenium, effluent from Pond 1809 contained 15 µg/L selenium, and effluent from Pond 1810 contained 4 µg/L selenium. According to ICG Hazard's DMRs, those ponds correspond to KPDES Outfalls 010, 017, 022, and 024, respectively. However, because of the types of discrepancies identified above, Sierra Club cannot positively conclude that those are the correct outfall numbers for those sediment structures. Sierra Club will therefore refer to the outfalls that DMRE tested by their sediment structure number.

ICG Hazard's Discharges of Pollutants Associated With Conductivity

55. Conductivity is a water quality metric. It is a measure of the salinity of a solution, expressed as the ability of the solution to conduct an electric current. Conductivity is measured in microSiemens per centimeter (µS/cm). Conductivity may be considered an estimate of the ionic strength of a salt solution.

56. Conductivity is variously known as "conductivity," "specific conductivity," and "specific conductance."

57. In Appalachian streams receiving drainage from surface mines and valley fills, conductivity values are highly correlative to the concentrations of four primary ions or "salts": calcium (Ca⁺), magnesium (Mg⁺), sulfate (SO₄²⁻), and bicarbonate (HCO₃⁻). Each of those ions is a pollutant under the Clean Water Act. 33 U.S.C. §1362(6).

58. Conductivity or specific conductance levels above 300 µS/cm in Appalachian streams have been shown to have adverse effects on aquatic life. The adverse effects are such that they result in the loss of an entire genera of aquatic invertebrates.

59. Since October 2009, ICG Hazard's KPDES permit KYG043540 has contained an

effective “report only” limit on conductivity, requiring it to report the levels of conductivity both in its discharges and in certain receiving streams.

60. ICG Hazard’s DMRs indicate that at least nine outfalls have discharged pollutants associated with the water quality metric of conductivity into Lower Bad Creek and its tributaries at levels that cause or contribute to violations of Kentucky’s narrative water quality standards. Those are Outfalls 010, 011, 014, 015, 017, 018, 021, 034, and 044.

61. Additionally, Sierra Club believes that Outfall 022 has also discharged pollutants associated with the water quality metric of conductivity into Lower Bad Creek or one of its tributaries at levels that cause or contribute to violations of Kentucky’s narrative water quality standards. ICG Hazard’s DMRs list the receiving stream for Outfall 022 as Hensley Branch, which is not on Lower Bad Creek. However, for reasons identified in paragraphs 53 and 54 above, Sierra Club believes that Outfall 022, which the DMR’s associate with Pond 1809, in fact discharges to Lower Bad Creek or one of its tributaries.

62. ICG Hazard’s DMRs indicate that at least three outfalls have discharged pollutants associated with the water quality metric of conductivity into Greasy Creek and its tributaries at levels that cause or contribute to violations of Kentucky’s narrative water quality standards. Those are Outfalls 019, 020, and 031.

Sierra Club’s 60-Day Notice Letter

63. Sierra Club sent a notice of intent letter (“NOI”), postmarked on February 24, 2010, to ICG Hazard notifying it that its pollutant discharges violate the Clean Water Act, SMCRA, and its Kentucky Surface Mining permit 866-0281.

64. The NOI also notified ICG Hazard of Sierra Club’s intent to sue the company for those violations at the end of the 60-day period required by statute.

65. The NOI was sent by certified mail, return receipt requested, to the following

persons: William G. Feltner, President and Manager of ICG Hazard, LLC; Dr. Len Peters, Secretary of the Kentucky Energy and Environment Cabinet; R. Bruce Scott, Commissioner of Department for Environmental Protection, Kentucky Energy and Environment Cabinet; Sandy Gruzesky, Director of the Division of Water, Kentucky Energy and Environment Cabinet; Gwen Keyes Fleming, Regional Administrator of EPA Region IV; 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; Joseph L. Blackburn, Director of the Lexington Field Office of the Office of Surface Mining; Thomas Shope, Director of the Appalachia Regional Office of the Office of Surface Mining; Jack Conway, Attorney General for the Commonwealth of Kentucky; and Corporation Service Company, Registered Agent for ICG Hazard, LLC.

FIRST CLAIM FOR RELIEF

(Clean Water Act Violations Related to Unpermitted Selenium Discharges)

66. Sierra Club incorporates by reference all allegations contained in paragraphs 1 through 65 supra.

67. ICG Hazard's selenium discharges identified in the above paragraphs are discharges from a point source or sources into a navigable water of the United States within the meaning of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), which prohibits the discharge of any pollutant by any person, except in compliance with a permit.

68. ICG Hazard's KPDES permit KYG043540 does not authorize the discharge of selenium, as required for a legal discharge by Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

69. Under Section 505(f) of the Clean Water Act, 33 U.S.C. § 1365(f), an unlawful act under Section 301 is an "effluent standard or limitation" subject to enforcement through the citizen suit provision at Section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1).

70. The discharges identified in paragraphs 52 to 54 constitute nine separate

violations of Section 301(a) of the Clean Water Act.

71. On information and belief, Sierra Club alleges that ICG Hazard is in continuing or intermittent violation of the Clean Water Act as a result of ongoing selenium discharges because ICG Hazard has taken no meaningful action to eradicate the underlying cause of the discharges or to obtain a permit for the discharges.

72. Unless enjoined, ICG Hazard will remain in continuing or intermittent violation of the Clean Water Act.

73. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), ICG Hazard is liable for civil penalties of up to \$37,500 per day for its violations of Section 301 of the CWA, 33 U.S.C. § 1311.

SECOND CLAIM FOR RELIEF

(SMCRA Violations Related to Unpermitted Selenium Discharges)

74. Sierra Club incorporates by reference all allegations contained in paragraphs 1 through 73 supra.

75. Under 405 KAR 8:010 § 18, all performance standards are incorporated as conditions in permits issued under the Kentucky Program.

76. The Kentucky Program performance standard at 405 KAR 16:060 § 1(3) prohibits any surface mining activities that cause a violation of State or Federal water quality laws.

77. Section 301(a) of the Clean Water Act is a Federal water quality law.

78. As alleged above in Count I, paragraphs 67 through 73, ICG Hazard has discharged selenium without a permit, in violation of Section 301(a) of the CWA.

79. Consequently, ICG Hazard has violated the Kentucky Program performance standard at 405 KAR 16:060 § 1(3).

80. Because all performance standards are incorporated as permit conditions, ICG

Hazard has also violated the terms and conditions of its Kentucky Surface Mining Permit 866-0281.

81. On information and belief, Sierra Club alleges that ICG Hazard is in continuing or intermittent violation of SMCRA, the Kentucky Program, and Permit 866-0281 as a result of its selenium discharges in violation of Section 301(a) of the CWA because ICG Hazard has taken no meaningful action to eradicate the underlying cause of the violations.

82. Unless enjoined, ICG Hazard will remain in continuing or intermittent violation of SMCRA, the Kentucky Program, and Permit 866-0281.

THIRD CLAIM FOR RELIEF

(SMCRA Violations Related to Violations of Selenium Water Quality Standards)

83. Sierra Club incorporates by reference all allegations contained in paragraphs 1 through 82 supra.

84. As discussed above, the Kentucky Program performance standards at 405 KAR 16:060 § 6(1)(c) and 405 KAR 16:070 § 1(1)(g) prohibit pollutant discharges that cause or contribute to violations of State water quality standards.

85. Kentucky has a chronic selenium aquatic life standard of 5 µg/l and an acute selenium aquatic life standard of 20 µg/l.

86. ICG Hazard has discharged selenium at levels that exceed Kentucky's acute and/or chronic aquatic life water quality standard.

87. On information and belief, Sierra Club alleges that those discharges caused or contributed to violations of one or both of the aquatic life selenium water quality standards in their respective receiving streams.

88. Consequently, on information and belief, Sierra Club alleges that ICG Hazard has violated the Kentucky Program performance standards at 405 KAR 16:060 § 6(1)(c) and 405

KAR 16:070 § 1(1)(g).

89. Because those performance standards are permit conditions, ICG Hazard has also violated the terms and conditions of its Kentucky Program Permit 866-0281.

90. On information and belief, Sierra Club alleges that ICG Hazard is in continuing or intermittent violation of SMCRA, the Kentucky Program, and Permit 866-0281 as a result of its selenium discharges that cause or contribute to violations of Kentucky water quality standards because ICG Hazard has taken no meaningful action to eradicate the underlying cause of the violations.

91. Unless enjoined, ICG Hazard will remain in continuing or intermittent violation of SMCRA, the Kentucky Program, and Permit 866-0281.

FOURTH CLAIM FOR RELIEF

(SMCRA Violations Related to Violations of Narrative Water Quality Standards)

92. Sierra Club incorporates by reference all allegations contained in paragraphs 1 through 91 supra.

93. As discussed above, the Kentucky Program performance standards at 405 KAR 16:060 § 6(1)(c) and 405 KAR 16:070 § 1(1)(g) prohibit pollutant discharges that cause or contribute to violations of State water quality standards.

94. The narrative aquatic life water quality standards applicable to the streams receiving ICG Hazard's discharges provide generally that discharges shall not degrade waters in a way that harms aquatic or other wildlife and specifically that "[t]otal dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected." 401 KAR 10:031 § 2(1)(d); 401 KAR 10:031 § 4(1)(f).

95. As evidenced by its own DMRs and stream monitoring data, ICG Hazard has discharged pollutants associated with the water quality metric of specific conductance at levels

that cause adverse effects on aquatic invertebrates. Those adverse effects constitute violations of Kentucky's narrative aquatic life water quality standards.

96. Consequently, ICG Hazard has violated the Kentucky Program performance standards at 405 KAR 16:060 § 6(1)(c) and 405 KAR 16:070 § 1(1)(g).

97. Because those performance standards are permit conditions, ICG Hazard has also violated the terms and conditions of its Kentucky Program Permit 866-0281.

98. On information and belief, Sierra Club alleges that ICG Hazard is in continuing or intermittent violation of SMCRA, the Kentucky Program, and Permit 866-0281 as a result of its discharges of pollutants associated with the water quality metric of conductivity at levels that cause or contribute to violations of Kentucky's narrative aquatic life water quality standards because ICG Hazard has taken no meaningful action to eradicate the underlying cause of the violations.

99. Unless enjoined, ICG Hazard will remain in continuing or intermittent violation of SMCRA, the Kentucky Program, and Permit 866-0281.

FIFTH CLAIM FOR RELIEF

(SMCRA Violations Related to Failure to Install Adequate Treatment Facilities)

100. Sierra Club incorporates by reference all allegations contained in paragraphs 1 through 99 supra.

101. As discussed above, the Kentucky Program performance standards at 405 KAR 16:060 § 6(2) and 405 KAR 16:070 § 1(2) require the installation, operation, and maintenance of adequate treatment facilities, in addition to sediment ponds, when necessary to prevent discharges that violate any state or federal law.

102. As described above, ICG Hazard's discharges of selenium and pollutants associated with the water quality metric of conductivity have resulted in numerous violations of

the Clean Water SMCRA, the Kentucky Program, and Permit 866-0281, demonstrating the company's failure to install, operate, and maintain adequate treatment facilities.

103. Consequently, ICG Hazard has violated the Kentucky Program performance standards at 405 KAR 16:060 § 6(2) and 405 KAR 16:070 § 1(2)

104. Because those performance standards are permit conditions, ICG Hazard is also in violation of the terms and conditions of its Kentucky Program Permit 866-0281.

105. On information and belief, Sierra Club alleges that ICG Hazard is in continuing violation of SMCRA, the Kentucky Program, and Permit 866-0281 as a result of its failure to install, operate, and maintain adequate treatment facilities.

106. Unless enjoined, ICG Hazard will remain in continuing violation of SMCRA and the Kentucky Program.

RELIEF REQUESTED

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

- (1). Declaring that ICG Hazard has violated and is in continuing violation of the Clean Water Act and SMCRA;
- (2). Enjoining ICG Hazard from operating its facilities in such a manner as will result in further violations of the Clean Water Act and SMCRA, including unpermitted discharges and discharges in violation of water quality standards;
- (3). Ordering ICG Hazard to immediately apply for an individual KPDES permit for its selenium discharges;
- (4). Ordering ICG Hazard to immediately comply with the terms and conditions of its Surface Mining Permit 866-0281, including all applicable performance standards;
- (5). Ordering ICG Hazard to immediately begin installation of treatment facilities

adequate to prevent violations of state and federal law;

(6). Ordering ICG Hazard to pay appropriate civil penalties up to \$37,500 per day for each CWA violation;

(7). Ordering ICG Hazard to conduct monitoring and sampling to determine the environmental effects of its violations, to remedy and repair environmental contamination and/or degradation caused by its violations, and to restore the environment to its prior uncontaminated condition;

(8). Awarding Sierra Club's 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/ Mary Varson Cromer

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