Attachment A

National Mining Association v. Lisa Jackson, et al.
10-cv-01220-RBW

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William G. Feltner
President and Manager
ICG Hazard, LLC
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December 3, 2010

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suits Under Clean Water Act Section 505(a)(1) and Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations Stemming From the Unpermitted Discharge of Selenium

Dear Mr. Feltner,

The Sierra Club, in accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notifies you that ICG Hazard is in violation of Section 301 of the Act, 33 U.S.C. § 1311, as a result of the unpermitted discharge of selenium from outfalls at the Thunder Ridge surface mine, SMCRA permit number 866-0281, in Leslie County, Kentucky. The Kentucky Pollutant Discharge Elimination System ("KPDES") permit associated with the Thunder Ridge mine, KYG043540, does not authorize selenium discharges. If within sixty days of the postmark of this letter you do not bring your discharges into full compliance with the Act, either by obtaining and complying with a KPDES permit with proper selenium effluent limitations or by ceasing to discharge selenium through treatment or otherwise, we intend to file a citizen suit seeking civil penalties for your ongoing violation and an injunction compelling you to comply with the Act.

We further notify you, in accordance with section 520 of the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that ICG Hazard is in ongoing violation of certain federal and state regulations promulgated under SMCRA and the Kentucky surface mining laws in KRS Chapter 350 ("the Kentucky Program") and conditions in Kentucky surface mining permit number 866-0281 as a result of its discharges of selenium and contributions to specific conductivity. If, within sixty days, ICG Hazard does

not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and state law, and all conditions of permit number 866-0281, we intend to file a citizen suit in federal court seeking an injunction compelling ICG Hazard's compliance.

I. ICG Hazard Is in Ongoing Violation of the Clean Water Act Due to Selenium Discharges From Its Thunder Ridge Surface Mine

Section 301 of the Act, 33 U.S.C. § 1311, prohibits the discharge of any pollutant from a point source to a navigable water except when in compliance with a permit.[1] Permitting authorities may not exempt any pollutant discharges from this prohibition. NRDC v. Costle, 568 F.2d 1369, 1373–77 (D.C. Cir. 1977). Selenium has been designated a toxic pollutant by the U.S. Environmental Protection Agency. 40 C.F.R. § 401.15.[2] ICG Hazard's KPDES outfalls are all point sources under the Act. See 33 U.S.C. 1262(14) (defining point source as "any discernible, confined and discreet conveyance, including but not limited to any . . . ditch, channel, tunnel, conduit, . . . [or] discrete fissure."); see also 40 C.F.R. § 122.2. The receiving streams of ICG Hazard's discharges are all navigable waters.[3] See 33 U.S.C. 1262(7) (defining navigable waters as "waters of the United States"); see also 40 C.F.R. 122.2. Finally, as explained in section II below, ICG Hazard's KPDES general coal permit KYG043540 does not authorize the discharge of selenium. Thus, any selenium discharge from ICG Hazard's outfalls on permit KYG043540 violates Section 301.

ICG Hazard's own effluent tests establish that it has discharged selenium to Lower Bad Creek in harmful quantities. In late 2009, ICG Hazard sought Amendment 9 to SMCRA 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, Kentucky Division of Water ("KDOW") required ICG Hazard to submit an effluent characterization of its existing discharges 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. See ICG Hazard

[1] As demonstrated by the discharges described below, ICG Hazard has also violated a similar provision of Kentucky state law, which mandates that "[n]o person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter." KRS § 224.70-110.

[2] Selenium injures aquatic life and bioaccumulates up the food chain, harming people and animals that consume aquatic organisms. The potential effects of excess selenium on aquatic life are severe and include reproductive failure, birth defects, damage to gills and internal organs, and ocular disease. In humans, selenium can be extremely toxic at higher levels, causing hair and fingernail loss, kidney and liver damage, and damage to the nervous and circulatory systems.

[3] In the event that any of the receiving streams are found not to be navigable waters, these channels are themselves point sources that convey ICG Hazard's pollutants to a water of the United States.

Form NOI-CM, August 19, 2009[4] at 9–13 (attached as Exhibit 1). 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.[5]

Furthermore, ICG Hazard attested in the Amendment 9 NOI-CM that the discharges it disclosed are representative of the normal effluent from outfalls 020, 043, 048, 052, and 053. Exhibit 1 at 14. Thus, Sierra Club believes that every discharge from those outfalls since the time of their construction constitutes an addition of selenium in violation of Section 301 of the CWA. In the absence of any serious efforts to prevent similar future violations, we believe that ICG Hazard continues to discharge selenium from those outfalls to Lower Bad Creek without a permit in violation of Section 301. Sierra Club also believes that ICG Hazard is illegally discharging selenium from other outfalls associated with permit 866-0281. ICG Hazard stated in the Amendment 9 Form NOI-CM that the effluent samples were representative of all discharges in the Lower Bad Creek watershed. Thus, we believe that all outfalls in that watershed are illegally discharging selenium.

Additionally, it is likely that ICG Hazard is illegally discharging selenium from all of permit 866-0281's outfalls – including outfalls located on: Lower Bad Creek and its tributaries; Bear and Signboard Branches of Raccoon Creek; Hensley Branch, Long Fork, and Garrison Fork of Camp Creek and associated tributaries; John's Creek and Right Fork on the Middle Fork of the Kentucky River; and Roundhole Branch of Greasy Creek. The coal seams being mined under permit 866-0281, Hazard 5A, 7, 8, 9, and 10, have all been identified by the United States Geological Survey as containing elevated concentrations of selenium. USGS Open File Report 2005-1330, Spatial Trends in Ash Yield, Sulfur, Selenium, and Other Selected Trace Element Concentrations in Coal Beds of the Appalachian Plateau Region, Table 2 (identifying the Hazard seams as "selenium greater than background"). Had ICG Hazard used the proper testing procedures for all of the data submitted as part of the effluent characteristics analysis for the Amendment 9 NOI-CM, the results would have likely revealed selenium discharges in the Raccoon Creek and Camp Creek watersheds. Form NOI-CM requires that the analysis of the

[4] This document is dated 8-19-09 but this date is suspect and does not likely represent the actual date of submission of this version of the NOI-CM. Three separate versions of the Amendment 9 NOI-CM obtained through an open records request to KDOW, including earlier versions without the updated selenium data, are all dated 8-19-09. Kentucky's Coal General Permit, KYG040000, requires each Form NOI-CM to be certified in Section VIII with a signature and date, among other information. See KYG040000 at III-2. Reusing the same signature page with the same date for multiple submissions made on different dates violates this requirement, frustrates proper review of the permit file, and demonstrates a lack of attention to the requirements of the KPDES program.

[5] ICG Hazard acknowledged that its sample from outfall 020 was "out of compliance" for selenium. See Letter from Kevin Bailey, Environmental Scientist with Environmental Resources Management Consulting Company, LLC to KDOW Permit Reviewer, December 29, 2009 (attached as Exhibit 2). Because ICG Hazard does not have a permit to discharge selenium, *any* such discharge is a violation of the CWA. Costle, 568 F.2d at 1373–77 ("Any discharge of a pollutant without a permit . . . is unlawful. Any discharge of a pollutant not in compliance with the conditions or limitations of such a permit is also unlawful.").

effluent characteristic for selenium be performed using EPA method 200.8, which has a detection level of 2 µg/L. See Form NOI-CM at 8, available at http://dep.ky.gov/formslibrary/Documents/CoalGPNOI_06172010_.pdf (listing "Required Analytical Method[s]"); Exhibit 1 at 10–13. However, ICG Hazard utilized EPA method 200.7 to analyze its effluent from outfalls 034, which discharges to Signboard Branch in the Raccoon Creek watershed, and 035, which discharges to an unnamed tributary in the Camp Creek watershed. In contrast to method 200.8, method 200.7 has a detection level of 10 µg/L. Exhibit 1 at 7–9. By employing the improper testing method, ICG Hazard failed to detect selenium discharges between two and ten µg/L. As recognized by Kentucky's water quality standards (WQSs), discussed in Section II below, selenium concentrations in this range can be harmful to aquatic life. Finally, although ICG Hazard did not submit effluent data from the Middle Fork of the Kentucky and Greasy Creek watersheds, the discharges to those watersheds originate from the same selenium-bearing strata as the outfalls identified above and thus likely contain selenium as well.

II. KPDES Permit KYG043540 Does Not Authorize ICG Hazard to Discharge Selenium

Sierra Club is aware that ICG Hazard's permit KYG043540 authorizes the discharge of certain pollutants from the outfalls identified above. However, that permit does not shield ICG Hazard from liability for the discharges at issue in this notice letter. Under Section 402(k) of the CWA, 33 U.S.C. § 1362(k), compliance with the effluent limits contained within a valid NPDES permit constitutes compliance with Section 301. See also 40 C.F.R. § 122.5. Compliance with the effluent limits within the permit does not, however, excuse the permit holder from liability for the discharge of pollutants not contemplated by the permitting authority at the time of permit issuance. The Fourth Circuit Court of Appeals addressed the application of Section 402(k) and 40 C.F.R. § 122.5 to the discharge of pollutants not listed in a permit in Piney Run Preservation Ass'n v. County Com'rs of Carroll County, MD, 268 F.3d 255 (4th Cir. 2001). The court held that "discharges not within the reasonable contemplation of the permitting authority during the permit application process . . . do not come within the protection of the permit shield." Id. at 268. In order for a permit to shield an entity from liability for the discharge of pollutants not limited in the permit, the entity must disclose at the time of permit issuance that it will discharge those pollutants. Id. When ICG Hazard applied to have outfalls 020, 043, 048, 052, and 053 covered under KYG043540, it did not disclose that it would discharge selenium.[6] The absence of such disclosure is sufficient to establish that selenium discharges were not within the reasonable contemplation of the permitting authority.

[6] ICG Hazard's disclosure of selenium discharges in the Form NOI-CM effluent characterization submitted to KDOW as part of the amendment nine modification process does not create a permit shield for earlier-permitted outfalls. When a NPDES permit is modified, only the conditions subject to modification are reopened. 40 C.F.R. § 122.62. Thus, to the extent that ICG Hazard's disclosure of its potential to discharge selenium created a permit shield, that shield applies only to the outfalls added through Amendment 9.

Moreover, ICG Hazard's discharges of selenium, ranging from 6 to 29.2 µg/L, could not have been within the "reasonable contemplation" of the KDOW at the time it issued ICG Hazard's permit because such discharges exceed Kentucky's water quality standards. Had KDOW been aware when ICG Hazard first applied for coverage under the coal general permit that the company would discharge selenium in excess of WQSs, the agency would have been obligated to include effluent limits for selenium. The lack of any such limits in ICG Hazard's permit further demonstrates that 866-0281's selenium discharges were not within the reasonable contemplation of KDOW.

Pursuant to Section 303 of the CWA, 33 U.S.C. § 1313, and KRS Chapter 224, Kentucky has adopted WQSs that limit the allowable concentrations of pollutants in the waters of the Commonwealth. Those standards provide generally that Kentucky's surface 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, Section 2(1)(d). To implement the general prohibition, Kentucky's WQSs include both acute and chronic criteria for selenium. 401 KAR 10:031, Section 6, Table 1. The acute selenium criterion, 20 µg/L, represents the maximum concentration to which aquatic life can be exposed for one hour without suffering adverse effects. The chronic criterion, 5.0 µg/L, represents the maximum concentration to which aquatic life can be exposed for a 96-hour period without suffering adverse effects. The sample submitted for Outfall 020 violates the acute criterion. Furthermore, although ICG Hazard has not performed 96-hour in-stream testing, if the samples submitted for Outfalls 043, 048, 052, and 053 are truly representative of normal discharge as the company asserted in Amendment 9 Form NOI-CM, then the effluent from those outfalls contributes to violations of the chronic criterion. See Exhibit 1. Chronic violations are particularly likely where the discharge constitutes the entire flow of the stream, as is the case with many ponds at the toe of a valley fill.

EPA regulations applicable to all state programs prohibit the issuance of any permit that does not mandate compliance with state water quality standards. 40 C.F.R. § 122.4(d) ("No permit may be issued . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States[.]"). Likewise, all permits must contain limitations on all pollutants which are or may be discharged at levels that will "cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." Id. at § 122.44(d)(1)(i). Thus, if KDOW had been aware that ICG Hazard would cause or contribute to violations of Kentucky's selenium WQSs, the agency would have been required to include permit limits on the pollutant. The absence of any such limits is strong evidence that ICG Hazard's selenium discharges were not in the "reasonable contemplation" of KDOW. Thus, the selenium discharges from outfalls 020, 043, 048, 052, and 053 are not protected by Section 402(k)'s permit shield.

III. ICG Hazard's Discharges of Selenium and Contributions to Specific Conductivity Violate Federal and State Surface Mining Performance Standards and Conditions of Kentucky Surface Mining Permit 866-0281

1. Background

In 1977, Congress enacted SMCRA to "assure that surface coal mining operations are so conducted as to protect the environment." 30 U.S.C. § 1202(d). SMCRA encourages "cooperative federalism" by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved Kentucky's state mining regulation program, which can be found in KRS Chapter 350. See 30 C.F.R. § 917.10. To serve the statutory goal of environmental protection, SMCRA and the Kentucky Program impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817 and 405 KAR Chapters 7 through 24.

Under the Kentucky surface mining regulations, all performance standards in 405 KAR Chapters 7 through 24 are incorporated into each permit. 405 KAR 8:010 § 18 states that "the conditions set forth in this section. . . shall be applicable to each permit issued by the cabinet pursuant to this chapter whether or not the conditions have been set forth in the permit." One of the conditions of Section 18 is that the permittee shall comply with all performance standards in 405 KAR Chapters 7 through 24. Thus, any violation of the state performance standards is also a violation of the conditions of permit 866-0281.

2. Selenium

By discharging selenium without a permit and in violation of Kentucky's water quality standards, ICG Hazard violated federal and state performance standards and the conditions of permit 866-0281. The federal performance standards under SMCRA require that "[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations." 30 C.F.R. § 816.42. The regulations under the Kentucky Program mirror the federal standard by mandating 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). See also id. at § 6(1)(c) ("Surface 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 16:070 § 1(1)(g) ("Discharges 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[.]"). As explained in Section I of this letter, ICG Hazard's unpermitted selenium discharges violate the general prohibition in Section 301 of the CWA, which constitutes an "effluent limitation." See 33 U.S.C. § 1362(11) (defining effluent limitation as

"any restriction established by a State or the Administrator on quantities, rates, or concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters"). Likewise, as explained in Section II, ICG Hazard's discharge of selenium from Outfall 020 at 29.2 µg/L violates Kentucky's acute WQS.

ICG Hazard further violated federal and state performance standards and the conditions of permit 866-0281 by failing to minimize adverse impacts on surface water, minimize disturbances to the hydrologic balance, and prevent material damage to the hydrologic balance relative to its selenium discharges. Federal performance standards require that "[a]ll surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas. . . [and] to prevent material damage to the hydrologic balance outside the permit area[.]" 30 C.F.R. § 816.41(a). See also 30 C.F.R. § 816.41(f)(1) ("Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided[.]"); id. at § 715.17(g) (same); id. at § 715.14(j) ("[T]oxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution or otherwise violate the provisions of § 715.17 of this part."). Similarly, the Kentucky Program requires that toxic-forming materials "shall be handled; disposed of; treated; and covered with nontoxic-forming, nonacid-forming, and noncombustible materials in a manner which . . . [m]inimizes adverse impacts on surface and ground water, minimizes disturbances to the hydrologic balance, and prevents material damage to the hydrologic balance." 405 KAR 16:190 § 3(1)(a). See also 405 KAR 16:060 § 1(1)(a) ("All surface mining activities shall be planned and conducted to minimize disturbance of the hydrologic balance in both the permit area and adjacent areas, in order to. . . [p]revent material damage to the hydrologic balance outside the permit area."). ICG Hazard's discharges of toxic selenium in excess of water quality standards demonstrates a clear failure to manage toxic-forming materials in a way that minimizes adverse impacts on surface water, minimizes disturbance to the hydrologic balance, and prevents material damage to the hydrologic balance.

3. Specific Conductivity

ICG Hazard's contributions to the conductivity levels in the streams receiving its discharges violate state and federal performance standards and the conditions of permit 866-0281. The elevated conductivity levels cause violations of Kentucky's narrative water quality standards as well as material damage to the hydrologic balance. The EPA recently stated that "high levels of conductivity, dissolved solids, and sulfates are a primary cause of water quality impairments downstream from mine discharges." EPA, April 1, 2010 Detailed Guidance on Improving Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, p. 5. Scientific research indicates that in-stream conductivity levels above 300 µS/cm impair stream functions, harm aquatic life, and prevent the maintenance of designated uses.

The conductivity levels in ICG Hazard's discharges from its Thunder Ridge mine routinely and significantly exceed 300 μS/cm. For example, the Discharge Monitoring Reports (DMRs) ICG Hazard submitted to KDOW for the second quarter of 2010 reveal discharges with conductivity levels in excess of 300 μS/cm, ranging from 424 μS/cm to 1815 μS/cm, from every KPDES outfall that recorded a discharge. Such discharges lead directly to harmful conductivity levels in the receiving streams of the Thunder Ridge mine. ICG Hazard's second quarter 2010 DMRs contain stream monitoring data showing conductivity levels ranging from 836 μS/cm to 1391 μS/cm in Garrison Fork, Long Fork, Bear Branch of Raccoon Creek, Signboard Branch, Trace Branch, Bonnett Rock Branch, Camp Creek, Deadening Creek, Roundhole Branch, John Creek, Right Fork, and Lower Bad Creek and its tributaries. The conductivity levels in all of these streams are thus high enough adversely affect stream function and injure aquatic life.

ICG Hazard's contributions to these conductivity levels violate Kentucky's narrative water quality standards. 405 KAR 10:031 § 2(1)(d) states that "[s]urface 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." Additionally, 405 KAR 10:031 § 4(1)(f), which protects the use of warm water aquatic habitat, requires that "[t]otal dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected." By causing conductivity in the receiving streams of the Thunder Ridge mine to significantly exceed levels necessary to protect aquatic life, ICG Hazard has violated both of these WQS provisions.

As discussed in Section III.2 above, violations of WQSs are violations of state and federal performance standards and the conditions of permit 866-0281. First, ICG Hazard violated the prohibition on violations of state WQSs found in 405 KAR 16:060 § 1(3) and 30 C.F.R. § 816.42. Second, ICG Hazard's violation of WQSs necessarily constitutes material damage to the hydrologic balance and thus violates 405 KAR 16:060 § 1(1)(a) and 30 C.F.R. § 816.41(a). As explained above, by violating performance standards contained in 405 KAR Chapters 7 through 24, ICG Hazard also violated the conditions of its surface mining permit 866-0281. See 405 KAR 8:010 § 18.

4. Treatment of Effluent

Finally, ICG Hazard has a legal duty to treat its effluent to ensure that it does not violate effluent limitations or WQSs. Kentucky's performance standards make clear 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); see also 405 KAR 16:060 at § 6(2) ("If 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[.]") The violations identified herein show unequivocally that the existing sediment ponds are insufficient to meet that requirement. ICG Hazard is thus obligated to construct systems that will effectively treat its effluent to levels that comply with all applicable effluent limitations and water quality standards.

IV. Conclusion

If ICG Hazard does not cease its unpermitted discharge of selenium within 60 days of the postmark of this letter, Sierra Club intends to file a citizen suit under Section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief for all violations described in this letter. Sierra Club, through this notice letter, further reserves the right to seek civil penalties for any further violations stemming from the same problem that may occur after today. See Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995). Likewise, if within 60 days ICG Hazard does not cease all discharges in violation of effluent limitations or water quality standards, we intend to file a citizen suit under Section 520(a)(1) of SMCRA seeking a court order compelling ICG Hazard to comply with the law.

If ICG Hazard has taken any steps to eradicate the illegal discharges identified above, or if ICG Hazard believes that anything in this letter is inaccurate, please let us know. If you do not advise us of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are continuing. We would be happy to meet with ICG Hazard's representatives to attempt to resolve these issues and discuss treatment options within the 60-day notice period. However, if violations are continuing at the time this letter ripens, Sierra Club does not intend to delay filing suit.

Sincerely,

Mary Varson Cromer

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