

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY  
PIKEVILLE DIVISION  
CASE NO. \_\_\_\_\_  
*Electronically Filed*

**KENTUCKY COAL ASSOCIATION**

**Plaintiff**

**V.**

**UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY**

**and**

**LISA JACKSON, in her official capacity,  
Administrator  
U.S. Environmental Protection Agency**

**Defendants**

**Serve: Via Hand Delivery to:**

**U.S. Attorney Office for the Eastern District of Kentucky  
260 West Main Street, Suite 300  
Lexington, KY 40507-1612  
ATTN: Civil Process Clerk**

**and Via Certified Mail to:**

**U.S. Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001**

**U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460**

**Lisa Jackson, in her Official Capacity,  
Administrator  
U. S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460**

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1. The Plaintiff Kentucky Coal Association (“KCA”) commences this action to challenge recent actions by the Defendant, United States Environmental Protection Agency (“EPA”) which have resulted in substantial delays in and rejection of coal mining permits in Kentucky for new and/or expanded surface coal mining facilities, and which has caused, and will continue to cause, damage to the Kentucky coal mining industry. In particular KCA challenges EPA’s use and reliance upon its April 1, 2010 Memorandum entitled “Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order” (“Detailed Guidance”) (75 Fed. Reg. 18500) in its oversight of the issuance of National Pollutant Discharge Elimination System (“NPDES”) permits under Section 402 of the Clean Water Act (“CWA”) issued by the Commonwealth of Kentucky.

**THE PARTIES**

2. The Plaintiff KCA is a non-profit trade association representing the interests of the coal mining industry and related businesses throughout the Commonwealth of Kentucky. KCA’s membership includes numerous companies involved in both underground and surface coal mining activities in both eastern and western Kentucky. Collectively, KCA’s members produce more than 70% of Kentucky’s total coal production. Many of these members require

Section 402 NPDES permits to conduct their coal mining operations, including those operating in the counties of Floyd, Johnson, Knott, Letcher, Magoffin, Martin and Pike counties within this judicial district. KCA is organized under the laws of the Commonwealth of Kentucky and its principal office is in Lexington, Kentucky; however many of its affected members reside throughout the Pikeville Division of this court.

3. The Defendant EPA is a federal agency charged with administration and enforcement of many federal environmental laws, including the CWA. EPA's principal place of business and its headquarters is in Washington, D.C.

4. The Defendant Lisa Jackson ("Jackson") is sued herein in her official capacity as the current Administrator of EPA, who has ultimate authority and responsibility for the acts of EPA. Her principal place of business is at EPA's headquarters in Washington, D.C.

#### **JURISDICTION AND VENUE**

5. There is federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and/or 1346(2). Jurisdiction is also proper under 5 U.S.C. § 702 of the Administrative Procedures Act (APA), and under 28 U.S.C. § 2201 and 2202 for purposes of granting the declaratory and/or injunctive relief sought herein.

6. Venue is proper in this Court pursuant to 28 U.S.C. §1391(e) in that (i) a substantial part of the events giving rise to the claim occurred in this judicial district and/or (ii) a substantial portion of the real property where the affected surface mining operations are or would be conducted is in this judicial district and/or (iii) many of the plaintiff's members adversely affected by EPA's improper actions reside in this judicial district.

## SECTION 402 NPDES AND KPDES PERMITS

7. There are two categories of permits authorized by the CWA that are generally required to conduct coal mining activities in Kentucky: (i) Section 404 permits, issued by the U.S. Army Corps of Engineers, for the discharge of dredged and fill material; and (ii) Section 402 NPDES permits, which are issued by states authorized to administer the Section 402 NPDES permit program, and which govern point source discharges of pollutants into waters of the United States. In turn, there are two kinds of Section 402 NPDES permits issued by states: general permits and individual permits. This action relates to Section 402 NPDES general and individual permits.

8. EPA is charged with administration of the NPDES program under the CWA, but Congress also intended to “recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution.” 33 U.S.C. § 1251(b). In this vein, the CWA provides that EPA can authorize a state to assume permitting authority, and once it does so, EPA suspends its own NPDES permitting program. *Id.* at § 1342(c)(1).

9. Kentucky is one of the states which has assumed NPDES permitting authority and has primacy to administer Section 402 permits under the Kentucky Pollutant Discharge Elimination System (“KPDES”). Approximately 2133 coal mines in Kentucky are covered under Section 402 KPDES permits. Most, or approximately 2033 facilities, are subject to KPDES General Permit KYG040000 (“the General Permit”). The remaining approximately 100 facilities are covered under individual Section 402 KPDES permits.

10. The Section 402 NPDES permit system governs point source discharges through the establishment of technology-based effluent limitations which are placed on the constituent makeup of the particular wastewater discharge. 33 U.S.C. § 1311(b)(2).

11. Water quality standards are set by the states. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.4. EPA has no authority to establish water quality standards unless the Administrator of EPA “determines that a new or revised standard is necessary to meet the requirements of the Act [i.e, CWA],”and only then after the new standard is subjected to formal notice and comment rulemaking under the APA. 33 U.S.C. § 1313(c)(4).

12. State water quality standards can be expressed as either specific numerical limits or as a general narrative statement. Kentucky, for example, has established a number of narrative water quality standards, including but not limited to the following:

(a) 401 KAR 10:031, Section 4(1)(f). “Total dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected.”

(b) 401 KAR 10:031, Section 2. “Surface waters shall not be aesthetically or otherwise degraded by substances that ...injure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life.”

13. The states, as Section 402 NPDES permitting authorities, determine in the first instance whether the proposed discharge will, after complying with the technology-based effluent limitations, have a reasonable potential to cause an in-stream excursion above a numeric or narrative criterion within an applicable water quality standard, see 40 C.F.R. 122.44(d), and the analysis conducted is referred to an “RPA.” When application of a

technology-based effluent limitation to a discharge will not ensure compliance with applicable water quality standards, the state must develop permit limitations to comply with water quality standards. 33 U.S.C. §1312.

14. While the states have primary authority to develop water quality standards and to issue Section 402 NPDES permits where such authority has been delegated to the state, EPA does have a limited role in reviewing the state's actions. In particular, EPA has authority, under certain circumstances, to object to a particular Section 402 NPDES permit that authorizes discharges to waters within the state. 33 U.S.C. 1342(d)(2). If the EPA does not object within the required deadlines, the state may proceed to issue the permit. If the EPA does object, and the state does not request a hearing or otherwise respond appropriately within the required deadlines, EPA will assume authority to issue the permit. *Id.*

**EPA'S RESPONSE TO SECTION 402 NPDES PERMITS  
PRIOR TO ISSUANCE OF THE DETAILED GUIDANCE**

15. On or about February 14, 2008, EPA and the Commonwealth of Kentucky, Environmental and Public Protection Cabinet ("the Cabinet") entered into a Memorandum of Agreement relating to Kentucky's administration of the Section 402 NPDES permitting program ("the MOA"). The MOA specifically recognizes that "[t]he Cabinet has the primary responsibility to establish the State NPDES program priorities" and the Cabinet is charged with "ensur[ing] that the conditions of a draft permit are written in compliance with the applicable water quality standards of all affected states."

16. The MOA sets forth the process by which a draft Section 402 NPDES permit is submitted for review to EPA and issued by the Cabinet, and the time periods which govern the process. EPA may submit comments to a draft permit, or object to its issuance. If EPA only

comments on the permit, the Cabinet can proceed to issue it. In the event EPA files an objection to a permit it shall include the specific grounds for the objection, including “the reasons for the objection, and the sections of the CWA or regulations which support the objection, and the actions which must be taken to eliminate the objection, including, if appropriate, the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator. The EPA objection must be based upon one or more of the criteria identified in 40 C.F.R. §123.44(c).” If EPA objects to the permit, the state may not issue the permit. The state may request a hearing, but if it does not do so or otherwise appropriately respond to the objection within the required deadlines, EPA may assume authority over the permit.

17. In early 2009, the Kentucky Department for Environmental Protection, Division of Water (“KDOW”), the specific division within the Cabinet charged with review, issuance or denial of Section 402 KPDES permits, issued a draft of the current version of the General Permit.

18. Consistent with the MOA, on April 3, 2009, EPA wrote KDOW with comments about the draft General Permit, including its concern that “[r]ecent studies have shown that there is a direct correlation between stream impairment and discharge of TDS/SC due to coal mining and coal processing,” citing the Pond-Passmore Study and a handful of other similar studies, and requesting that the General Permit be revised to include additional data submission and monitoring requirements for specific conductance (SC) and total dissolved solids (TDS) that would enable KDOW to determine whether surface coal mine operators subject to coverage under the General Permit may cause or contribute to violations of

Kentucky's water quality standards. EPA asked KDOW to withdraw the draft General Permit and to develop a new one, with input from EPA, "that would be consistent with the requirements of the Clean Water Act." (See April 3, 2009 Letter, attached hereto as Exhibit 1).

19. Thereafter, KDOW revised the General Permit so as to address the concerns raised in EPA's April 3, 2009 letter, adding several new requirements, including effluent and in-stream chemical monitoring and in-stream biological monitoring. On May 15, 2009, KDOW sent EPA the proposed General Permit, as revised, including the new permit requirements developed to address EPA's stated concerns.

20. On or about June 16, 2009, and within thirty (30) days of its receipt of the revised General Permit, EPA sent a letter to KDOW which stated "[i]n accordance with the EPA/Commonwealth of Kentucky NPDES MOA, we have completed our review of the above draft permit and have no objections to the proposed permit conditions. The draft permit satisfies EPA's concerns that were discussed in our April 3, 2009 letter to KDOW." (See June 16, 2009 Letter, attached hereto as Exhibit 2). KDOW issued the final General Permit following its receipt of this June 16, 2009 letter from EPA voicing no objections to its issuance.

21. In late 2009, KDOW also proposed numerous Section 402 KPDES individual permits ("Individual Permits") for coal mining activities in Kentucky. These permits included requirements for effluent and in-stream chemical monitoring and in-stream biological monitoring, as well as whole effluent toxicity (WET) testing. With regard to conductivity and dissolved solids, KDOW did not possess sufficient data from the new or expanded sources to conduct an RPA for these pollutants. However, KDOW provided that the RPA would be conducted after issuance of the permit and based on the actual, site-specific data generated

from the permitted site. Permit reopeners were also included, allowing KDOW to impose new permit conditions, including numerical effluent limits, upon the receipt of new data and completion of its RPA.

22. KDOW's approach – conducting its RPA from site-specific data garnered from the new or expanded discharge after issuance of the permit, along with inclusion of a permit reopener for the potential future imposition of effluent limits - is fully consistent with EPA's recommendations to state permitting authorities found in its *Technical Support Document for Water Quality-Based Toxics Control*, and used since its issuance in 1991.

24. EPA did not object to the pending Section 402 KPDES Individual Permits, which would have had the effect of preventing their issuance. Instead, from December 21, 2009 through March 18, 2010, EPA sent comment letters to KDOW with recommendations on the numerous Section 402 KPDES Individual Permits. In those comments, EPA asserted that there was a reasonable potential that discharges from surface mining activities will cause or contribute to an excursion of Kentucky's narrative water quality standard for conductivity, citing the Pond-Passmore Study and a handful of other studies; and recommending that an RPA for specific conductance and total dissolved solids be conducted and water quality-based effluent limitations also be included in the permit. (See e.g. January 14, 2010 Comment Letter, attached hereto as Exhibit 3).

25. KDOW responded to EPA's comments by indicating that the permits contained requirements for the collection of necessary site-specific data to perform the RPAs, along with permit reopeners to add numeric water quality effluent limits as necessary. (See e.g., March 19, 2010 Letter to EPA, attached hereto as Exhibit 4).

26. On March 19, 2010, KDOW issued the numerous Section 402 KPDES Individual Permits for coal mining facilities without objection by EPA. By not objecting to these permits, EPA acknowledged that they complied with CWA requirements.

27. Thus, prior to EPA promulgation of the Detailed Guidance on April 1, 2010, discussed below, EPA did not object to the Section 402 KPDES General Permit or Individual Permits, neither of which provided numerical effluent limits as a method of implementing Kentucky's narrative water quality standards for conductivity or toxicity. The numerous Section 402 KPDES Individual Permits, also issued without EPA objection, did not provide for conducting an RPA for conductivity, total dissolved solids or sulfates at the time of permit issuance, but instead provided for a post-permit RPA using site-specific data from the new or expanded discharge, coupled with permit reopeners.

28. In fact, EPA had not objected to issuance of any Section 402 KPDES permits for coal mining activities in Kentucky for several decades. The entire landscape of EPA's oversight of Section 402 KPDES permits changed, however, after EPA issued its Detailed Guidance on April 1, 2010.

**EPA'S RESPONSE TO SECTION 402 KPDES PERMITS**  
**AFTER ISSUANCE OF THE DETAILED GUIDANCE**

29. On April 1, 2010, EPA released its Detailed Guidance to provide "detailed guidance" to EPA Regions 3, 4 (which includes Kentucky) and 5 on its review of Appalachian coal mining activities, including their review of Section 402 NPDES permits issued by states. Concurrent with its release, EPA published the Detailed Guidance in the Federal Register for public comment. 75 Fed. Reg. 18500. EPA characterized the document as an "interim final document" and announced that it would issue final guidance after receipt of public comments

and the results of an external peer review by the Science Advisory Board. It further asserted that it is “not a regulation” and “does not impose legally binding requirements on EPA.”

30. Such disclaimers are inconsistent, however, with EPA Director Jackson’s public pronouncements at the time of the issuance of the Detailed Guidance that “no, or very few valley fills, ... are going to meet this standard.” It is also inconsistent with the language of the Detailed Guidance as a whole, which is replete with pronouncements on what regional administrators should do in the course of reviewing Section 402 NPDES permits, including a recommendation to object to those permits if they do not contain the specific limitations contained in the Detailed Guidance. This document states on its face that it would serve in “clarifying EPA’s expectations” and that it was “effective immediately” and that EPA expected Regions 3, 4 and 5 to “begin using this interim final guidance immediately in your review of Appalachian surface coal mining activities.” (*Id.* at 1-2.) In fact, EPA’s national office has not granted the relevant field offices discretion on the use of the Detailed Guidance. Upon information and belief, Region 4 has been instructed by its national headquarters to delay or otherwise obstruct the issuance of any Section 402 KPDES permit for surface coal mining facilities in Eastern Kentucky submitted by KDOW to EPA for review after April 1, 2010 that does not incorporate the provisions of the Detailed Guidance.

31. In particular, the Detailed Guidance asserts that state Section 402 NPDES permits it had reviewed “did not incorporate provisions that would implement the relevant narrative water quality standards relating to discharges that increase the levels of conductivity, total dissolved solids and sulfates.” EPA found state permits to be deficient in two principal ways: (a) the state permitting authority had not conducted a sufficient RPA at the time of permit

issuance; and (b) even in the absence of an RPA, “available science” supplied a sufficient causal link for state permitting authorities to determine that coal mining discharges which increase conductivity, dissolved solids or sulfates would likely violate narrative water quality standards” and thus EPA concludes in the Detailed Guidance that such permits should have contained effluent limits for these pollutants. (*Id.* at 8).

32. While post-permit RPAs coupled with permit reopeners had long been sanctioned by EPA for new or expanded discharges (as evidenced by its own *Technical Support Document* and its decision not to object to KDOW’s March 19, 2010 issuance of numerous Section 402 KPDES Individual Permits), the Detailed Guidance states that “permitting authority should require the applicant to characterize the anticipated pollutant concentrations and loads using data from similar discharges and/or based on characteristics of local soils and geology, “ including from adjacent mine sites or from ambient data collected as part of the Section 404 or SMCRA permit applications, and if none is available, that permitting authorities should collect the data themselves or could reject the application. (*Id.* at 9). A post-permit RPA with a permit reopener is not included among the options listed in the Detailed Guidance as available to permitting authorities for addressing RPAs for new or expanded discharges. In sum, the Detailed Guidance concludes that “in general, an NPDES permit that fails to show evidence of a parameter-specific reasonable potential analysis will be inconsistent with the requirements of the CWA.” (*Id.* at 8).

33. The Detailed Guidance also criticizes state permitting authorities for not incorporating provisions that would implement state narrative water quality standards, particularly relating to discharges that increase conductivity, total dissolved solids and sulfates.

Specifically, EPA contends in the Detailed Guidance that “scientific literature” should be considered as relevant information in implementing narrative water quality standards, and that two such scientific reports – specifically the 2008 study entitled *Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family and Genus Level Macroinvertebrate Bioassessment Tools* (the Pond-Passmore Study) and a draft report of EPA’s called *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams* (“the Draft Study”) – have linked conductivity levels in streams below surface coal mining operations and adverse impacts to aquatic life in those streams. (*Id.* at 5-6, 11). According to EPA, these studies demonstrate that “conductivity impacts of projects with predicted conductivity levels below 300  $\mu\text{S}/\text{cm}$  generally will not cause a water quality standard violation and that in-stream conductivity levels above 500  $\mu\text{S}/\text{cm}$  are likely to be associated with adverse impacts that may rise to the level of exceedances of narrative water quality standards.” (*Id.* at 12). The Detailed Guidance further directs Regions 3, 4 and 5 to work with state permitting authorities to “ensure that the permit includes conditions that protect against conductivity levels exceeding 500  $\mu\text{S}/\text{cm}$ .” (*Id.*). It even directs regional offices to “object to issuance of [a] proposed permit” if it fails to comply with the CWA “as noted” in the Detailed Guidance (*Id.* at 8).

34. In essence, the Detailed Guidance establishes a presumption that any discharge which exceeds the 500  $\mu\text{S}/\text{cm}$  conductivity level is violative of state narrative water quality standard for conductivity, including Kentucky’s narrative water quality standard; and that effluent limits should thus be established for this pollutant. EPA further concludes in the Detailed Guidance that most such effluent limits should be numerical, and that it is in only the

most “limited cases” where it will be infeasible to establish a numerical effluent limit to implement a narrative water quality standard. That EPA seeks to establish numerical effluent limits relating to conductivity (and other pollutants) is clear on the face of the Detailed Guidance, which notes that “[e]stablishing enforceable numeric limits for conductivity, selenium and other parameters in state Section 402 permits will help to improve water quality and better protect public health and aquatic life in streams downstream from Appalachian surface coal mining operations.” (*Id.* at 7).

35. On April 2, 2010, James D. Giattina, Director of EPA Region 4’s Water Protection Division, sent an e-mail to KDOW, attaching a copy of a letter, also dated April 2<sup>nd</sup>. (*See* April 2, 2010 Giattina E-mail and Letter, attached hereto collectively as Exhibit 5). In the e-mail, Director Giattina referenced the Section 402 KPDES Individual Permits recently issued by KDOW without objection by EPA, and noted that EPA “will not be requesting further review of these permits” but would be “working with you to fully address our concerns under our regs for future permits.”

36. In the accompanying letter, EPA stated that the new permit requirements imposed by KDOW in the recently issued permits had not addressed all of EPA’s concerns. Despite having failed to object to these permits just weeks before, it now characterized their contents -- increased effluent monitoring, WET testing, post-permit RPAs coupled with permit reopeners-- as deficient. Of particular concern, according to EPA, was “the missing reasonable potential analyses associated with narrative water quality standards and appropriate numeric effluent limits associated with these standards, including but not limited to conductivity and total dissolved solids.”

37. EPA specifically noted in this April 2, 2010 letter that it (the Region 4 field office) had now received the Detailed Guidance document from its national office, and that “the issues that we raised in our recent comment letters are based on existing regulatory requirements and are consistent with this guidance”; that it would “provide the framework that will assist states in drafting Appalachian coal mining NPDES permits” and that reviews of “future draft NPDES permits for coal mining will continue to emphasize the need for DOW to interpret narrative water quality standards (including but not limited to conductivity and total dissolved solids) to conduct reasonable potential analyses associated with narrative water quality standards, and to include appropriate numeric effluent limits associated with those standards.” (*Id.*).

38. EPA’s use of the Detailed Guidance as a legislative-type rule was almost immediate. For example, on April 8, 2010 EPA sent a formal notice of objection to coverage under the General Permit for a Kentucky surface coal mine operator, citing the fact that the General Permit “does not include a reasonable potential analysis or an effluent limit for specific conductivity.”(See April 8, 2010 Letter, attached hereto as Exhibit 6).

39. On or about April 16, 2010 KDOW posted 23 additional Section 402 KPDES individual permits for public notice and comment. On or May 13, 2010, EPA issued Interim Objections to 12<sup>1</sup> of those permits, virtually all of which were for new or expanded surface coal mining facilities in Eastern Kentucky. EPA claimed it lacked sufficient information to determine whether these draft permits met the requirements of the CWA. Among the information

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<sup>1</sup> EPA requested an extension of time to respond to the remaining 11 Section 402 KPDES permits, and ultimately it did not object to them. Notably, none of these 11 permits were for surface coal mining facilities in Eastern Kentucky and thus subject to the Detailed Guidance.

requested by EPA was an “adequate reasonable potential analysis,” using data from adjacent mine sites or facilities or from ambient data collected as part of the Section 404, SMCRA or Kentucky Department of Natural Resources permit applications. EPA told KDOW to consider “recent scientific studies developed by EPA” about conductivity and that “in-stream SC levels above 500  $\mu\text{S}/\text{cm}$  are likely to be associated with adverse impacts that exceed narrative WQS.” Treating the 500  $\mu\text{S}/\text{cm}$  limit as a presumptive water quality standard, EPA noted that if KDOW concluded that a higher level of conductivity would not violate Kentucky’s narrative water quality standard, it must submit a detailed analysis and justification for its view. (See May 13, 2010 Letter, attached as Exhibit 7).

40. On September 28 and 29, 2010, and in 10 virtually identical letters, EPA issued final objections to 10 of the 12 pending draft permits, virtually all of which involved new or expanded surface coal mining facilities in Eastern Kentucky subject to the Detailed Guidance<sup>2</sup>. According to EPA, its “objections relate to KDOW’s failure to conduct an adequate reasonable potential analysis (RPA), in accordance with 40 CFR § 122.44(d), to determine whether the proposed discharge will cause, have the reasonable potential to cause, or contribute to a violation of state water quality standards (WQS), and KDOW’s failure to include in the permit effluent limits necessary to ensure that the proposed discharge will not cause or contribute to a violation of WQS, as required by the CWA §301(b), 40 CFR § 122.44(A) and (d), and 40 CFR 122.44(d)(1).” EPA also asserted in its objection letters that its objections “consider...the emerging science regarding the impacts of coal mining on water quality” citing the Pond-

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<sup>2</sup> The remaining 2 permits were for coal preparation plants which are not subject to the Detailed Guidance.

Passmore Study and the Draft Report. (See September 28, 2010 EPA Objection letter, attached hereto as Exhibit 8).

41. Specifically, EPA objected to the 10 permits because it concluded that KDOW had not conducted an adequate RPA for certain pollutants, including conductivity (SC), total dissolved solids (TDS) and sulfates. (See Objection letter, Exhibit 8, at p. 3-4). EPA noted that where site-specific data is unavailable (such as for the new or expanded discharges involved here), KDOW can obtain data for these RPAs from adjacent mining facilities or from the ambient data collected as part of the Section 404 or SMCRA permit applications; independently gather the data; or reject the application: the very same directives included in the Detailed Guidance. (See Detailed Guidance at 9). EPA specifically rejected KDOW's longtime approach of conducting post-permit RPAs for new or expanded facilities using site-specific data (an approach it did not object to in the weeks immediately preceding issuance of the Detailed Guidelines) as "inconsistent with the CWA" because of "existing information regarding the relationship between the coal mining discharges and water quality impairments, together with available information regarding the effluent and receiving streams." (See Objection letter, Exhibit 8, at p. 4, n. 5).

42. EPA also objected to these permits because they failed to include numerical effluent limits to implement Kentucky's narrative water quality standards. According to EPA, KDOW must submit a revised permit which includes effluent limits for any pollutant for which there is a reasonable potential for the discharge to cause or contribute to an excursion above water quality standards. (*Id.* at 6). In the Detailed Guidance, EPA concluded that "the available science will demonstrate that there is a reasonable likelihood" that discharges involving

conductivity levels above 500  $\mu\text{S}/\text{cm}$  will violate state water quality standards, irrespective of the RPA's findings. (See Detailed Guidance at 8, 11-12). EPA's objection to the 10 permits is thus based, in part, on the failure of KDOW to include numerical effluent limits on conductivity as a condition of the permit.

43. While the objection letters did not specifically cite by name the Section 402 NPDES program changes mandated by the Detailed Guidance, EPA's Region 4 used the Detailed Guidance – its scientific conclusions, presumptions and directives – in responding to KDOW and objecting to the 10 Section 402 KPDES permits on or about September 28-29, 2010.

44. That EPA relied upon the Detailed Guidance in objecting to the 10 Section 402 KPDES permits is clear when comparing the directives of the Detailed Guidance and the objections themselves. The Detailed Guidance directs its field offices that there is sufficient scientific evidence for them to presume that conductivity levels exceeding 500  $\mu\text{S}/\text{cm}$  will have a reasonable likelihood to violate state water quality standards and that high levels of conductivity, total dissolved solids and sulfates have a reasonable likelihood to damage aquatic life. It directs EPA field offices that, because of these presumptions, states should be performing RPAs for new surface mine facilities at the time of permit issuance using existing data from adjacent mine sites, or failing that, they should reject the application. It also directs field offices that the scientific studies linking high conductivity with impairment of aquatic life themselves should be sufficient to require the states to impose numerical effluent limits for this pollutant. (See Detailed Guidance, pp. 7-12). EPA's objections to the 10 Section 402 KPDES permits incorporates these Detailed Guidance directives.

45. EPA's reliance upon the Detailed Guidance for its post-April 1, 2010 objection to Section 402 KPDES permits is also clear when comparing it to EPA's actions prior to April 1<sup>st</sup>. EPA did not object to the Section 402 KPDES Individual Permits issued two weeks before publication of the Detailed Guidance. After publication of the Detailed Guidance, EPA found permits containing the identical permit conditions inconsistent with the CWA. Clearly, EPA's abrupt program changes stem from the Detailed Guidance.

46. The Detailed Guidance – and all of its new criticisms of state permitting authorities such as KDOW and its new directives to EPA field offices on how to respond to Section 402 NPDES permit applications – is based upon a faulty premise, namely that high levels of conductivity (as well as other pollutants such as total dissolved solids and sulfates) are a primary cause of water quality and aquatic life impairments. This conclusion is based upon what EPA suggests is an abundance of scientific research and literature, and it primarily cites the 2008 Pond-Passmore Study, a handful of other similar studies and several draft EPA reports. In truth, some of these reports have not even been subject to peer review. They are based upon data generated through field tests on one species of mayfly, as opposed to data generated from more rigorous and controlled laboratory testing of a larger number of aquatic organisms, which can more accurately predict cause-and-effect relationships (as required by national guidelines). This methodology is inconsistent with established procedures for development of water quality standards.

47. Given the serious flaws in the scientific underpinning for the Detailed Guidance (and thus EPA's changes to the Section 402 NPDES permit program), EPA's use of or reliance

upon the Detailed Guidance in the course of its oversight of the Section 402 KPDES program is arbitrary and capricious.

48. EPA's use of or reliance upon the Detailed Guidance in (i) establishing a presumption concerning the level of conductivity (SC) which is likely to violate Kentucky's narrative water quality standards; (ii) rejecting a post-permit RPA for conductivity, total dissolved solids and sulfates based on site-specific data (coupled with permit reopeners) for new or expanded surface coal mine facilities in Eastern Kentucky and instead requiring an RPA at the time of permit issuance using non site-specific data; and/or (iii) compelling the Cabinet to establish numerical effluent limits for conductivity, is arbitrary and capricious.

49. The Detailed Guidance has all the hallmarks of a legislative rule: it was promulgated at the national headquarters; it was characterized as "effective immediately"; and enforcement actions in the field are now based upon policy interpretations in this document. EPA's use of and reliance upon the Detailed Guidance after April 1, 2010 in objecting to the coverage of new or expanded Kentucky surface coal mine operations under the general permit, and in the 10 Section 402 NPDES individual permits, demonstrates that EPA is using the Detailed Guidance as a legislative rule. EPA's failure to subject this new rule to formal notice and comment rulemaking violates federal law.

50. Through its Detailed Guidance, EPA is attempting to either (i) establish a new water quality standard for conductivity on its own (which it cannot do absent notice and comment rulemaking pursuant to 33 U.S.C. § 1313(c)(4)) or (ii) halt the issuance of any Section 402 KPDES permit by KDOW to Kentucky state surface coal mining operators until the state establishes a new numerical water quality standard for conductivity which comports with the

Detailed Guidance's presumption that conductivity levels of 500  $\mu\text{S}/\text{cm}$  will violate existing narrative water quality standards; or (iii) failing that, to wrest control over Section 402 KPDES permitting from the Cabinet/KDOW so as to eliminate mountaintop removal as a method of surface coal mining in Kentucky and other Appalachian states. This attempt to usurp proper state authority over Section 402 permits is arbitrary and capricious, and otherwise violates the CWA and the APA.

51. EPA's use of the Detailed Guidance has to date caused, and will in the future cause, indefinite delays in the Section 402 KPDES permitting process, and/or has prevented and will prevent issuance of such permits altogether, causing significant injury in terms of loss of coal production, revenue and employment to KCA's members.

52. KCA has commenced this action seeking (i) a declaration that EPA's use of the Detailed Guidance in making decisions on Section 402 KPDES permits is contrary to federal law and (ii) an injunction preventing EPA from continuing to utilize the Detailed Guidance in such permitting decisions.

## **COUNT I**

### **DECLARATORY JUDGMENT CONCERNING VIOLATION OF THE APA AND CWA**

53. Plaintiff KCA incorporates by reference the allegations contained in paragraphs 1 through 52 as it set out fully herein.

54. According to one court, "[i]f an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will

declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

55. EPA is using the Detailed Guidance as a binding legislative rule in making Section 402 KPDES permit decisions. It is a document authored at EPA headquarters which is controlling in and limits the discretion of those in the field, including EPA Region 4. That it is legislative in effect is evidenced by the language of the Detailed Guidance itself; which is "effective immediately;" the public proclamations EPA made at the time of the release of the Detailed Guidance; the actions EPA has taken on state issued permits since April 1, 2010, including its recent objection to both general permit coverage and individual permits for new or expanded surface coal mines in Eastern Kentucky, even though EPA approved KPDES permits for surface coal mines in Eastern Kentucky containing identical provisions only weeks before publication of the Detailed Guidance on April 1, 2010. Upon information and belief, Region 4 staff have no discretion and have been directed by its national office to delay or impede Section 402 KPDES permits issued after April 1, 2010 for any surface coal mining facilities in Eastern Kentucky that do not conform to the Detailed Guidance.

56. The Detailed Guidance should not have been issued or utilized in a legislative manner by EPA absent compliance with the public notice and comment rulemaking requirements of §553 of the APA.

57. EPA's new presumed benchmark of 500  $\mu\text{S}/\text{cm}$  for water conductivity amounts to adoption of a new water quality standard, which EPA cannot promulgate absent a determination by the Administrator that a new or revised standard is necessary to comply with

CWA, and only then if it complies with the procedural requirements of notice and comment rulemaking. Failing to comply with the aforementioned procedural requirements for promulgation of a new water quality standard violates the CWA, 33 U.S.C. §1313(c)(4).

58. The conclusions reached by EPA in the Detailed Guidance concerning water conductivity -- its presumption that water conductivity exceeding 500  $\mu\text{S}/\text{cm}$  will likely cause an excursion which will violate state water quality standards (including Kentucky's narrative water quality standard for conductivity), requiring state permitting authorities (including the Cabinet and KDOW) to either conduct RPAs for conductivity at the time of permit issuance for new or expanded surface mining facilities and/or promulgate numerical effluent limits -- is based on flawed science and methodology and its use in Section 402 KPDES permitting decisions is at best premature before adequate peer review and public notice and comment is completed, and is arbitrary and capricious, and should be set aside under § 706(2) of the APA.

59. The CWA and its implementing regulations do not require states to impose effluent limits unless and until the state (in this instance, Kentucky) has determined that a certain pollutant has a reasonable potential to cause or contribute to an excursion of a water quality standard. It is the state permitting authority, not EPA, which makes this decision. In creating an illegal presumption that certain conductivity levels will violate Kentucky's narrative water quality standards, and using it to mandate RPAs for new surface mining facilities in Eastern Kentucky at the time of permit issuance and or the development of effluent limits, EPA is improperly usurping Kentucky's role in the development and policing of its own water quality standards; its actions are arbitrary and capricious, and should be set aside under § 706(2) of the APA.

60. Pursuant to 28 U.S.C. § 2201, there is an actual, justiciable controversy between the parties for which this Court has jurisdiction to declare the rights and legal relations of the parties. Plaintiff KCA respectfully requests that this Court declare that:

(i) The Detailed Guidance amounts to a legislative rule and that EPA has violated 5 U.S.C. §553 of the APA in failing to subject it to the procedural requirements of public notice and comment rulemaking; and/or

(ii) EPA's presumption in the Detailed Guidance that water conductivity exceeding 500  $\mu\text{S}/\text{cm}$  will likely cause an excursion which will violate state water quality standards (including Kentucky's narrative water quality standard for conductivity) amounts to adoption of a new water quality standard and that the adoption of such a standard without public notice and comment rulemaking violates 33 U.S.C. §1313(c)(4) of the CWA; and/or

(iii) EPA's actions in adopting and using the Detailed Guidance to usurp the rightful role of the states in establishing and policing state water quality standards, and which has the effect of delaying or halting the issuance of Section 402 KPDES permits for surface coal mining facilities in Eastern Kentucky, all as outlined herein at paragraphs 46-51, is arbitrary and capricious, violates 5 U.S.C. §706(2) of the APA and should be set aside.

## **COUNT II**

### **INJUNCTIVE RELIEF CONCERNING VIOLATIONS OF THE APA AND CWA**

61. Plaintiff KCA incorporates by reference the allegations contained in paragraphs 1 through 60 as it set out fully herein.

62. Pursuant to 28 U.S.C. § 2202, this Court has the power and authority to enter orders for further necessary or proper relief based on a declaratory judgment, including injunctive relief.

63. EPA has delayed and now blocked the issuance of Section 402 KPDES permits required for new surface coal mines to be developed and/or expanded surface coal mining facilities to operate in Eastern Kentucky, until and unless (i) KDOW performs an RPA using non site-specific data from other mine sites before issuance of the permit and demonstrates that conductivity levels in new discharges will not exceed 500  $\mu\text{S}/\text{cm}$ ; or (ii) KDOW develops numerical effluent limits for conductivity. EPA's actions are designed to delay and impede the issuance of any new surface coal mine in Eastern Kentucky and are arbitrary, capricious and illegal. As a result of these actions, KCA and its members have and will continue to suffer irreparable harm.

64. Plaintiff KCA thus requests that this Court enter an Order permanently enjoining and restraining EPA, as well as Jackson, from utilizing the Detailed Guidance in its oversight of Section 402 KPDES permit decisions, and from implementing the significant changes to the Section 402 KPDES program discussed in the Detailed Guidance unless and until it complies with federal law and/or public notice and comment rulemaking. Specifically, Plaintiff KCA asks the court to enjoin and restrain EPA from (i) requiring KDOW to perform a pre-permit RPA for conductivity, total dissolved solids or sulfates for new or expanded surface coal mining facilities in Eastern Kentucky using data from adjacent mine sites, as opposed to a post-permit RPA coupled with a permit reopener using site-specific data; and (ii) from requiring KDOW to develop numerical effluent limits for conductivity until it performs a post-permit RPA for these

pollutants using site-specific data and, only then, if KDOW determines that based on this RPA that such limits are required to implement Kentucky's narrative water quality standards.

WHEREFORE, Plaintiff KCA respectfully requests that this Court enter a judgment in its favor as set forth in Count I and II of the Complaint, and grant Plaintiff KCA any and all other relief to which it is entitled.

Respectfully Submitted,

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