

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
*Electronically Filed***

NATIONAL MINING ASSOCIATION, et al.)	
)	
Plaintiff,)	
)	
COMMONWEALTH OF KENTUCKY, CITY OF PIKEVILLE,)	
)	
Plaintiff-Intervenors,)	
v.)	
)	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA JACKSON, in her official capacity as Administrator, U.S. Environmental Protection Agency, <i>et al</i>)	Nos. 10-cv-1220-RBW 11-cv-0295-RBW 11-cv-0446-RBW 11-cv-0447-RBW
)	
Defendants,)	
)	
And)	
)	
SIERRA CLUB <i>et al.</i> ,)	
)	
Defendant-Intervenors.)	

**AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1. The Plaintiff Kentucky Coal Association (“KCA”) hereby files and serves this Amended Complaint to further challenge the actions of 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 have caused, and will continue to cause, damage to the Kentucky coal mining industry and the Eastern Kentucky economy. In

particular KCA challenges EPA's prior 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" ("Interim Guidance") (75 Fed. Reg. 18500) and its current and ongoing use of the July 21, 2011 revised version of that same Memorandum ("the Final Guidance") 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.

2. KCA incorporates by reference all of the factual allegations contained in its original Complaint as if set out fully herein.

SECTION 402 NPDES AND KPDES PERMITS

3. 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. Importantly, while not all surface coal mines require a Section 404 permit – as not all involve the discharge of dredged or fill material – they all require a Section 402 NPDES permit to operate.

4. 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).

5. 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.

6. 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).

7. 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).

8. 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.”

9. 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 as 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. These permit limitations are known as water quality-based effluent limits, or WQBELs.

10. 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 KPDES PERMITS
PRIOR TO ISSUANCE OF THE INTERIM GUIDANCE

11. 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"), and which is attached as **Exhibit 1**. 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."

12. The MOA sets forth the process by which a draft Section 402 KPDES 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.

13. 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.

14. 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 2**).

15. 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.

16. 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 3**). KDOW issued the final General Permit following its receipt of this June 16, 2009 letter from EPA voicing no objections to its issuance.

17. 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.

18. 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* (attached as **Exhibit 4**) and used since its issuance in 1991.

19. In fact, KDOW's approach was submitted to EPA as part of a set of developed procedures for conducting RPAs in Kentucky, and these procedures were specifically approved by EPA for use in KPDES Section 402 permits on or about May 1, 2000. (See "Permitting Procedures for Determining 'Reasonable Potential', attached as **Exhibit 5**). Those procedures made clear that when insufficient data exists to make a determination as to the 'reasonable potential' of the discharge to violate water quality standards, Kentucky has the option to require 'monitor only' or a quarterly monitor and report requirement as an interim measure to provide for collection and evaluation of data prior to determination of an appropriate effluent limit. (*Id.*; see also Affidavit of R. Bruce Scott¹, attached as **Exhibit 6**).

20. 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

¹ The Exhibits to the Scott Affidavit were previously filed as an attachment to KCA's Individual Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment and can be found at Docket Entry 61.

dissolved solids be conducted and WQBELs also be included in the permit. (See e.g. January 14, 2010 Comment Letter, attached hereto as **Exhibit 7**).

21. 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 WQBELs as necessary. (See e.g., March 19, 2010 Letter to EPA, attached hereto as **Exhibit 8**).

22. 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.

23. Thus, prior to EPA promulgation of the Interim 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.

24. In fact, prior to April 1, 2010, 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 Interim Guidance on April 1, 2010.

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

25. On April 1, 2010, EPA released its Interim 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 Interim 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.” (See Interim Guidance, attached as **Exhibit 9**).

26. Such disclaimers were inconsistent, however, with EPA Director Jackson’s public pronouncements at the time of the issuance of the Interim Guidance that “no, or very few valley fills... are going to meet this standard.” It is also inconsistent with the language of the Interim Guidance as a whole, which was 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 Interim 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 did not grant the relevant field offices discretion on the use of the Interim Guidance. Upon information and belief, since April 1, 2010,

Region 4 was and is continuing to be 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 either the Interim Guidance or, after July 21, 2011, the Final Guidance.

27. In particular, the Interim Guidance asserted 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 concluded in the Interim Guidance that such permits should have contained effluent limits for these pollutants. (*Id.* at 8).

28. 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 Interim Guidance stated 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 Interim Guidance as available to permitting authorities for addressing RPAs for new or expanded discharges. In sum, the Interim Guidance concluded 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).

29. The Interim Guidance also criticized 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 contended in the Interim 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 Interim Guidance further directed 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 directed regional offices to “object to issuance of [a] proposed permit” if it fails to comply with the CWA “as noted” in the Interim Guidance (*Id.* at 8).

30. In essence, the Interim Guidance established 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 concluded in the Interim 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 sought to establish numerical effluent limits relating to conductivity (and other pollutants) is clear on the face of the Interim Guidance, which noted 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).

31. 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 2nd. (See April 2, 2010 Giattina E-mail and Letter, attached hereto collectively as **Exhibit 10**). 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.”

32. In the accompanying letter, EPA stated that the new permit requirements imposed by KDOW in the permits issued in late 2009 and early 2010 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, whole effluent toxicity (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.”

33. EPA specifically noted in this April 2, 2010 letter that it (the Region 4 field office) had now received the Interim 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.*).

34. EPA's use of the Interim 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 11**).

35. From April 1 to October 1, 2010, KDOW posted 56 additional Section 402 KPDES Individual Permits for public notice and comment. The permits which EPA did not object to after April 1, 2010, and which they allowed to be issued, were for underground mines, preparation plants or surface mines in Western Kentucky – none of which are subject to the Interim Guidance. In contrast, EPA objected to all 21 of the proposed Section 402 KPDES Individual Permits for new or expanded surface coal mines in Eastern Kentucky (all of which were covered by the Interim Guidance), thus blocking their issuance and the proposed mining. 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 to the 21 permits that its objections "consider...the emerging science regarding the impacts of coal mining on

water quality” citing the Pond-Passmore Study and the Draft Report. (See Objection Letters for the 21 Permits, attached hereto collectively as **Exhibit 12**).

36. Specifically, EPA objected to the aforementioned 21 post-April 1, 2010 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 12, 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 Interim Guidance. (See Interim 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 Interim Guidance) 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 12, at p. 4, n. 5).

37. 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 Interim 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 Interim Guidance at 8, 11-12). EPA’s post-April 1, 2010 objection to these 21 KPDES Individual Permits was thus based, in part, on the purported failure of KDOW to include numerical effluent limits on conductivity as a condition of the permit.

38. While the 21 individual objection letters (those found at Exhibit 12) did not specifically cite by name the Section 402 NPDES program changes mandated by the Interim Guidance, EPA’s Region 4 used the Interim Guidance – its scientific conclusions, presumptions and directives – in responding to KDOW and objecting to the 21 Section 402 KPDES Individual Permits in September and October 2010.

39. That EPA relied upon the Interim Guidance in objecting to these KPDES permits is clear when comparing the directives of the Interim Guidance and the objections themselves. The Interim Guidance directed 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 directed 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 directed 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 Interim

Guidance, pp. 7-12). EPA's objections to the 21 Section 402 KPDES Individual Permits incorporated these Interim Guidance directives.

40. That EPA relied upon the Interim Guidance for its post-April 1, 2010 objections to the 21 Section 402 KPDES Individual Permits is also clear when comparing it to EPA's actions prior to April 1st. EPA did not object to the Section 402 KPDES Individual Permits issued two weeks before publication of the Interim Guidance. After publication of the Interim Guidance, EPA found permits containing the identical permit conditions inconsistent with the CWA.

41. At the time the Interim Guidance was being used as a legislative rule to deny the 21 Section 402 KPDES Individual Permits discussed herein, it had not been subjected to external peer review and its use was thus arbitrary and capricious and premature. Also, it was published in the Federal Register contemporaneously with its issuance and effective date, and thus EPA began using the Interim Guidance as a basis to deny permits before all stakeholders in the process had received notice of it or the opportunity to comment on it. EPA's use of the Interim Guidance in denying Section 402 KPDES Individual Permits was thus in violation of the Administrative Procedures Act (APA) at 5 U.S. C. §§553 and 706.

KENTUCKY'S FUTILE EFFORTS TO RESOLVE ISSUES WITH EPA

42. That EPA Headquarters intended to prevent the issuance of any Section 402 KPDES Individual Permits for new or expanded surface coal mines in Eastern Kentucky after April 1, 2010 unless they strictly comply with the directives of the Interim Guidance, and its field offices have no discretion to deviate from this position, is amply demonstrated by Kentucky's ultimately futile attempt to reach agreement with EPA

Region 4 regarding the aforementioned 21 pending Section 402 KPDES Individual Permit objections.

43. In December 2010, Kentucky officials reached out to EPA and were assured by EPA Region 4 that EPA Headquarters would support a negotiated agreement between Kentucky and EPA Region 4 officials to resolve the permit dispute and allow the 21 permits to be issued.

44. On or about January 10, 2011, the Cabinet provided EPA Region 4 with a series of options to be considered for purposes of resolving the Kentucky Section 402 permit dispute. (See Scott Affidavit; see *also* January 10, 2011 e-mail, attached as **Exhibit 13**). A spreadsheet list of options was prepared and sent to EPA on January 12, 2011. It is attached as **Exhibit 14** and states:

“1. Option 1 tab would represent KY’s primary template for the permitting of coal mining operations under the CWA 402 program. This would involve an approach using:

- a. An RPA up front in the drafting of the permit, and
- b. Imposition of a combination of WET, instream biological analysis, narrative standard, and adaptive BMP with biological trigger for purposes of implementing the narrative water quality standard for conductivity.

2. Option 2 tab would represent an option that a coal mining operating might accept of their own choosing in lieu of Option 1. This would involve:

- a. RPA up front in the drafting of the permit, and
- b. Imposition of a numeric interpretation of the narrative water quality standard directly as a permit limit for conductivity (or other appropriate chemical specific parameter if available and sufficient, such as sulfate) along with the possibility of a compliance schedule for purposes of implementing the narrative water quality standard for conductivity. There would also be a standard BMP plan requirement. This could be done at the applicant’s request in lieu

of WET, instream biological analysis, the narrative standard, and a BMP plan with a biological trigger built in.”

45. In late 2010, Kentucky officials traveled to Atlanta to meet with EPA Region 4 officials, after which EPA Region 4 officials traveled to Kentucky. Lengthy meetings were conducted between the two in an effort to resolve the pending permit objections. Ultimately, a revised Section 402 KPDES permit template was drafted to address all of EPA’s various objections. (See Scott Affidavit).

46. On March 4, 2011, Kentucky received a phone call from EPA Region 4 indicating they were in agreement with Kentucky’s revised approach. On March 10, 2011, Kentucky received an email from EPA Region 4 identifying some last minute revisions they wanted to provide final clarity to the resolution and asked for Kentucky to send the final revised CWA 402 permit template. (See Scott Affidavit). The e-mail is attached as **Exhibit 15**.

47. In late March 2011 Kentucky sent to EPA Region 4 for final review and acceptance its revised permit template, in response to EPA follow-up comments. It is attached as **Exhibit 16**. Kentucky received a phone call from EPA Region 4 staff late Friday, April 1, 2011, that EPA had accepted Kentucky’s revised approach to resolve the pending permit objections. (See Scott Affidavit).

48. On April 11, 2011, however, Kentucky received another phone call from EPA Region 4 indicating that some reservations were now being expressed at EPA Headquarters on the revised permit template. (See Scott Affidavit).

49. On May 4, 2011, EPA Region 4 officials traveled to Kentucky to meet with Cabinet officials. At the meeting, EPA did not seek to continue ongoing settlement discussions or to negotiate any potential changes to the revised permit template to

which EPA Region 4 had already agreed. Instead, EPA Region 4 officials' only message during the May 4th meeting was that the revised permit template approach had been rejected by EPA headquarters and there was no settlement. This was contrary to what EPA Region 4 had represented to the Cabinet on two prior occasions. (See Scott Affidavit).

50. Clearly, EPA Region 4 was overruled by EPA Headquarters when it attempted to utilize its discretion in oversight of Section 402 KPDES Individual Permits and agree to a permit approach which did not mandate both a pre-permit RPA and numerical effluent limits on conductivity for every surface coal mine in Eastern Kentucky. EPA Region 4 in fact has no discretion on this issue and was prevented from approving any Section 402 KPDES Individual Permits for new and expanded surface coal mines in Eastern Kentucky that did not contain certain restrictions mandated by the Interim Guidance, namely a pre-permit RPA *and* numerical effluent limits on conductivity.

51. EPA still has taken no action on the 21 Section 402 KPDES Individual Permits which EPA objected to in September and October 2010. Pursuant to the MOA between the Cabinet and EPA, if KDOW requests a hearing to contest an objection lodged by EPA to a KPDES Section 402 Individual Permit, then EPA must schedule a hearing. Certainly, KDOW and the involved coal operators expected and deserved a prompt hearing and a means to contest EPA's objection within a reasonable time. However, it has been nearly one (1) year since EPA sent its objections to the 21 KPDES Section 402 Individual Permits. KDOW requested a hearing on each such permit objection, yet EPA has taken no steps to convene the required hearings.

52. Bowed by the never ending delay, a few of the coal operators involved with the aforementioned 21 Section 402 KPDES Individual Permit objections eventually withdrew their applications. Others have reduced the size of their projects so they could qualify for permit coverage under Kentucky's General Permit. However, at least 14 of the 21 Section 402 KPDES Individual Permits remain in limbo, without any means to resolve their differences with EPA.

53. EPA's actions in delaying and preventing the issuance of any Section 402 KPDES Individual Permits for new surface mines in Eastern Kentucky based on the flawed and illegal Interim Guidance, coupled with its failure to conduct the mandated hearings on its permit objections, has caused, and will continue to cause, damage to KCA members and the Eastern Kentucky economy.

**ISSUANCE OF THE FINAL GUIDANCE AND EPA'S CONTINUED
REJECTION OF EASTERN KENTUCKY SECTION 402 PERMITS**

54. On or about July 21, 2011, and after public notice and comment, EPA issued its Final Guidance. (See Final Guidance, attached as **Exhibit 17**). Like its predecessor (the Interim Guidance), it is replete with disclaimers about its binding effect, including that the Final Guidance "does not impose legally binding requirements and will not be implemented as binding in practice." (*Id.* at p. 1). Despite the benefit of public notice and comment, the Final Guidance differs little from the Interim Guidance. While it boasts of prompt action on permits; its tone is conciliatory; and its wording suggests a more flexible and collaborative approach, a close and thorough review of the language of the Final Guidance, and EPA's subsequent use of it in objecting to additional KPDES Section 402 Individual Permits for surface mines in Eastern Kentucky, belie EPA's characterization of the Final Guidance as advisory and non-

binding. In truth, EPA's Final Guidance is simply a continuation of EPA policy changes first announced in the Interim Guidance and effective since April 1, 2010 and which have led to what is basically an EPA moratorium on Section 402 KPDES permits for new and expanded surface coal mines in Eastern Kentucky that do not contain the permit limitations and WQBELs EPA demands.

55. For example, the Final Guidance continues EPA's focus on the CWA's "reasonable potential analysis" or RPA requirement. According to the Final Guidance:

"To ensure that limitations are as stringent as necessary to meet water quality standards, consistent with 40 C.F.R. § 122.44(d)(1), permitting authorities should not defer reasonable potential analyses until after permit issuance. Under the CWA and its implementing regulations, an NPDES permit must contain limits as stringent as necessary to meet applicable water quality standards. CWA § 301(b)(1)(C); 40 C.F.R. § 122.44(d)(1). EPA recommends that the administrative record for a permit include evidence of a parameter-specific reasonable potential analysis in order to ensure compliance with these provisions."

(See Final Guidance at p. 14).

"For new (proposed) discharges, permitting authorities should use all valid and representative data. Section 3.2 of the TSD provides guidance to permit writers regarding how to conduct a reasonable potential analysis without effluent data. For surface coal mining operations, pre-issuance reasonable potential analysis should be conducted using data secured through evaluation of similarly situated facilities in adjacent watersheds or similar mining practices in the same ecological or geological setting."

(*Id.* at p. 15).

In essence, in the Final Guidance EPA is instructing its field offices that the CWA requires that an RPA be conducted before a permit is issued, and that for new surface coal mines, the state permitting authority should utilize either data from "adjacent watersheds" to conduct this pre-permit RPA or, it can utilize "best available science" (i.e., the Pond-Passmore study and its progeny and the conductivity presumption) to establish "reasonable potential to violate state water quality standards". The Final

Guidance neither contains any caveat or exceptions to this directive, nor does it grant EPA field offices any discretion to approve permits for new surface mines on a case-by-case basis which provide for an RPA after issuance of a Section 402 KPDES Individual Permit. It is thus a mandatory, binding rule.

56. The Final Guidance also continues to mandate numerical conductivity limits for surface coal mines in Eastern Kentucky. It directs state permitting authorities that they must establish a WQBEL once they determine that there is a “reasonable potential” that the discharge will violate state water quality standards – which EPA believes can be assumed from “best available science.” (See Final Guidance at p. 17.). While acknowledging that a WQBEL may be expressed in a narrative form “when it is infeasible to derive a numeric limit,” EPA goes on to state that “in many cases calculation of numeric effluent limits for conductivity is feasible, in light of the extensive scientific evidence”. (*Id.*). It also “recommends” that a numerical effluent limit for conductivity be set at 300 $\mu\text{S}/\text{cm}$ and/or not outside the range of 300-500 $\mu\text{S}/\text{cm}$. EPA continually refers to this as its conductivity “benchmark”. (*Id.* at 18).

57. While EPA claims it paid heed to the Science Advisory Board’s admonition that data linking increased levels of conductivity from surface mines to injury to downstream aquatic life may be limited geographically and requires further validation outside the region the data was generated from, EPA only anticipates undertaking further validation of its conductivity benchmark “outside West Virginia and Kentucky” and the Final Guidance indicates EPA will continue to use the conductivity benchmark in the Kentucky and West Virginia portions of ecoregions 68, 69 and 70.

58. While EPA states in the Final Guidance that permits are assessed on a case-by-case basis, and that a numerical effluent limit for conductivity above the benchmark or other “alternate scientifically defensible approaches” may be permissible in certain situations, EPA’s revised approach appears to be limited to permits for mining activities outside the ecogregions 68, 69 and 70 of West Virginia and Kentucky. Section 402 NPDES permits for new surface coal mines located within the West Virginia and Kentucky portions of ecoregions 68, 69 and 70 must include the conductivity benchmark or EPA will object to them. After all, EPA objected to the 21 Section 402 KPDES Individual Permits in 2010, in part because they did not incorporate numerical WQBELs for conductivity, total dissolved solids and sulfates. EPA Headquarters also refused to approve the Section 402 KPDES Individual Permit template negotiated and agreed upon between Kentucky and EPA Region 4, and this template, too - while containing virtually every other EPA request - did not mandate numerical effluent limits on conductivity absent site-specific data justifying such limits.

59. EPA is also now utilizing the Final Guidance to object to Section 402 KPDES Individual Permits. As recently as July 1, 2011, KDOW posted 54 additional Section 402 KPDES Individual Permits for notice and comment. EPA commented on 35 of those permits, thus permitting them to be issued. However, all 35 were for either underground coal mining or for coal mining activities outside ecoregions 68, 69 and 70, or for coal preparation plants, and thus not subject to the Final Guidance. (See September 28, 2011 Letter from James D. Giattina to Sandy Gruzesky, attached as **Exhibit 18**).

60. However, EPA objected to the remaining 19 Section 402 KPDES Individual Permits – all of which were for new or expanded surface coal mines in Eastern Kentucky. (See September 28, 2011 Letter from James D. Giattina to Sandy Gruzesky, attached hereto as **Exhibit 19**). While the Final Guidance was not specifically mentioned, EPA objected to these permits for the same reasons the 21 Section 402 KPDES Individual Permits were objected to in 2010: because they failed to comply with the directives found in the Interim and now Final Guidance, namely (1) in each, KDOW proposed to “conduct the RPA during the permit term, and not prior to the authorization of the discharge” and EPA concluded this approach “is inconsistent with the CWA and its implementing regulations².” (See Enclosure 1 to Exh. 19, at p. 2); and (2) because they lacked numerical effluent limits for conductivity. Specifically, in its September 28, 2011 objection letter, EPA told KDOW that “additional effluent limits are necessary to ensure that discharges do not contribute to violations of WQS”; that this is demonstrated by “best available science”; and that EPA would include in any permit it issued “effluent limits... to ensure that all discharges from these projects do not exceed a conductivity level of 300 μ S/cm” unless site specific data suggests that another WQBEL is justified. (*Id.* at p. 4).

61. While EPA contends - both in the Final Guidance and the September 28, 2011 objection letter – that it reviews permits on a case-by-case basis, EPA failed to send individual letters objecting to each permit. Instead EPA sent KDOW one letter containing its blanket objections for all 19 KDPEs Section 402 Individual Permits. The

² It should be noted that the pre-permit RPA requirement that EPA contends is mandated by the CWA was not an aspect of the 35 Section 402 KPDES Individual Permits that EPA permitted KDOW to issue in late September 2011 (those involving underground mining, for example), thus calling into question how a pre-permit RPA could in fact be a mandatory requirement of the CWA.

letter is full of examples where EPA refers to and criticizes "some" but not all of the draft permits for either a deficient fact sheet or not including sufficient data in its permit application. These objections are vague and not specific to any one applicant, and do not satisfy the MOA's requirement that EPA make "specific objections" in order to prevent KDOW from issuing them. (See Enclosure 1 to Exhibit 19)

62. As discussed herein, EPA's directive in the Final Guidance and its September 28, 2011 objection letter that "conducting the RPA during the permit term...does not comply with the CWA" is contrary to EPA's long-established procedures. Since at least 1991, if not before, EPA has directed state permit writers that they can issue Section 402 permits for new discharges before conducting an RPA as long as the permit contains a reopener so that additional permit restrictions can be imposed upon the operator should the RPA generate site-specific data which demonstrates that the discharge does in fact contribute to an excursion which violates state water quality standards. In 2000, EPA even specifically approved Kentucky's procedures for conducting RPAs, and those procedures included post-permit RPAs with permit reopeners.

63. EPA's use of or reliance upon the Interim and now its Final Guidance in (i) establishing a benchmark presumption concerning the level of conductivity (SC) which EPA believes is likely to violate Kentucky's narrative water quality standards; (ii) rejecting a post-permit RPA 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 either presumptions from scientific papers or data from adjacent watersheds (and thus non site-specific data);

and/or (iii) compelling the Cabinet to establish numerical WQBELs for conductivity, is arbitrary and capricious.

64. Through first the Interim Guidance, and now the Final Guidance, EPA has and 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 Individual Permit by KDOW to Kentucky surface coal mining operators until the state agrees to conduct pre-permit RPAs and to establish a new numerical water quality standard for conductivity which comports with the Interim and Final Guidance's presumption that conductivity levels which exceed the 300- 500 $\mu\text{S}/\text{cm}$ range 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 surface coal mining as a method of resource extraction in Eastern Kentucky and other Appalachian states. This attempt to usurp proper state authority over Section 402 KPDES permits is arbitrary and capricious, and otherwise violates the CWA and the APA.

65. EPA's use of the Interim Guidance and now the Final Guidance to object to and block such permits has to date caused, and will in the future cause, grave harm to KCA members and the Eastern Kentucky economy. EPA has prevented the issuance of any Section 402 KPDES Individual Permit for any new or expanded surface coal mine in Eastern Kentucky since April 1, 2010, and will continue to prevent issuance of such permits in the future. Without such permits, such coal mining activity may not take place. EPA's moratorium on Section 402 KPDES Individual Permits for surface coal mines in Eastern Kentucky has resulted in lost coal production, revenue and

employment to KCA's members. For example, the 19 Section 402 KPDES Individual Permits that EPA recently objected to were projected to create over 3800 new jobs in Eastern Kentucky. These new jobs are now in jeopardy due to EPA's actions described herein.

COUNT I
DECLARATORY JUDGMENT CONCERNING VIOLATION OF THE APA AND CWA

66. Plaintiff KCA incorporates by reference the allegations contained in paragraphs 1 through 65 as if set out fully herein.

67. EPA used the Interim Guidance, and now the Final 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 document itself and by the actions EPA has taken on state issued permits since April 1, 2010, including its objection to at least 40 Section 402 KPDES Individual Permits for new or expanded surface coal mines in Eastern Kentucky since April 1, 2010, despite having approved KPDES permits for surface coal mines in Eastern Kentucky containing identical provisions only weeks before publication of the Interim 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 Individual Permits issued after April 1, 2010 for any surface coal mining facilities in Eastern Kentucky that do not conform to the Interim Guidance and then, after July 21, 2011, the Final Guidance.

68. The Interim 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.

69. EPA's new presumed benchmark of between 300-500 $\mu\text{S}/\text{cm}$ for water conductivity found in the Final Guidance amounts to adoption of a new water quality standard. Only states, not EPA, may promulgate water quality standards, unless the EPA Administrator makes a specific determination that Kentucky's [or another states'] standards are inadequate and do not comply with CWA, and only then if it complies with the procedural requirements of notice and comment rulemaking. No such determination has been made by EPA Administrator Jackson, nor has its numerical water quality standard been subject to notice and comment rulemaking. EPA's failure 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).

70. The CWA and its implementing regulations do not require states to impose WQBELs 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 WQBELs, 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.

71. 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) EPA's actions in adopting and using the Final Guidance to usurp the rightful role of the states, including Kentucky, in making the initial determination of when a new discharge has the reasonable potential to violate Kentucky's narrative water quality standards and in requiring KDOW to conduct a pre-permit RPA and/or to mandate numerical WQBELs for every Section 402 KPDES Individual Permit for a new or expanded surface coal mine in Eastern Kentucky, as opposed to post-permit RPAs using site-specific data and permit reopeners standards, and in objecting to every Section 402 KPDES Individual Permits for such operations unless they comply with these dictates, all as outlined herein, is arbitrary and capricious, violates 5 U.S.C. §706(2) of the APA and should be set aside.

(ii) EPA's presumption in the Final Guidance that water conductivity exceeding 300-500 $\mu\text{S}/\text{cm}$ 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 the required finding that Kentucky's standard does not comply with the CWA and without public notice and comment rulemaking violates 33 U.S.C. §1313(c)(4) of the CWA; and should be set aside.

COUNT II
INJUNCTIVE RELIEF CONCERNING VIOLATIONS OF THE APA AND CWA

72. Plaintiff KCA incorporates by reference the allegations contained in paragraphs 1 through 71 as it set out fully herein.

73. 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.

74. 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 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 (ii) KDOW develops numerical effluent limits for conductivity, total dissolved solids and/or sulfates. EPA's actions are designed to delay and impede the issuance of any permits for new surface coal mines 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.

75. Plaintiff KCA thus requests that this Court enter an Order permanently enjoining and restraining EPA, as well as Jackson, from utilizing the Final Guidance in its oversight of Section 402 KPDES permit decisions. Specifically, Plaintiff KCA asks the court to enjoin and restrain EPA from (i) requiring KDOW to perform a pre-permit RPA for new or expanded surface coal mining facilities in Eastern Kentucky using data from adjacent mine sites or the data which EPA defines as "best available science", including the Pond-Passmore study, as opposed to a post-permit RPA coupled with a permit reopener using site-specific data; and (ii) requiring KDOW to develop numerical effluent limits for conductivity, total dissolved solids and/or sulfates 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, 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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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed with the Clerk of Court on the 14th day of October, 2011 using the CM/ECF system which will send electronic notification to all counsel of record.

/s/ Mindy G. Barfield

Counsel for Plaintiff,
Kentucky Coal Association