

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT ELKINS**

**SIERRA CLUB, OHIO VALLEY
ENVIRONMENTAL COALITION,
INC., and WEST VIRGINIA
HIGHLANDS CONSERVANCY, INC.,**

Plaintiffs,

v.

CIVIL ACTION NO. _____

ICG EASTERN, LLC,

Defendant.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR CIVIL
PENALTIES**

INTRODUCTION

1. This is an action for declaratory judgment and mandatory injunctive relief and for civil penalties against Defendant ICG Eastern, LLC (“ICG”), for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereinafter “the Clean Water Act” or “the CWA”), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. (hereinafter “SMCRA”).

2. As detailed below, Plaintiffs allege that ICG discharged and continues to discharge selenium—a pollutant designated as toxic by the U.S. Environmental Protection Agency, 40 C.F.R. § 401.15—into waters of the United States in persistent violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and of the conditions and limitations of a West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit issued to

Defendant by the State of West Virginia pursuant to Section 402 of the Clean Water Act.

3. Plaintiffs further allege that ICG's discharges of unlawful quantities of selenium into the waters adjacent to its mine sites violate the performance standards under SMCRA and the terms and conditions of its surface mining permits.

JURISDICTION AND VENUE

5. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 33 U.S.C. § 1365 (Clean Water Act citizens' suit provision), and 30 U.S.C. § 1270 (SMCRA citizens' suit provision).

6. On April 14, 2010, Plaintiffs gave notice of the violations and its intent to file suit to the Defendant, the United States Environmental Protection Agency ("EPA"), the Office of Surface Mining, Reclamation, and Enforcement ("OSMRE"), and the West Virginia Department of Environmental Protection ("WVDEP"), as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), and Section 520(b)(1)(A) of SMCRA, 30 U.S.C. § 1270(b)(1)(A).

7. More than sixty days have passed since notice was served and neither EPA, nor OSMRE, nor WVDEP has commenced or diligently prosecuted a civil or criminal action to require compliance. Although WVDEP filed a complaint in the Webster County Circuit Court against ICG regarding selenium discharges regulated by WV/NPDES Permit WV0094889 on June 11, 2010, and has recently made available for public comment a Consent Decree between the WVDEP and ICG, the WVDEP has not diligently prosecuted the violations common between its June 2010 complaint and this complaint. Moreover, the proposed Consent Decree does not require compliance as that term is used in Section 505(b)(1) of the Clean Water Act. Moreover, WVDEP's action and proposed Consent Decree does not prosecute ICG for violations of Order

No. 731, as Plaintiffs do in this action. Finally, neither EPA nor WVDEP commenced an administrative penalty action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), or comparable state law to redress the violations prior to the issuance of the April 14, 2010 notice letter.

8. Venue in this District is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the Clean Water Act violations— Outfalls 001, 002, 005, 014, 021, 031, 034, and 036 of WV/NPDES Permit WV0094889—are located in this District, and pursuant to 30 U.S.C. § 1270(c) because the coal mining operations complained of are located in this District.

PARTIES

9. ICG Eastern, LLC (“ICG”), is a Delaware Limited Liability Company doing business in Scott Depot, West Virginia.

10. ICG is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5), and Section 701(19) of SMCRA, 30 U.S.C. § 1291(19).

11. At all relevant times, ICG owned and operated the Knight-Ink No. 1 Surface Mine in Webster County, West Virginia, which is regulated by Surface Mining Permit S201988 and which discharges pollutants from various outfalls that are subject to the effluent limitations of WV/NPDES Permit WV0094889.

12. Plaintiff Ohio Valley Environmental Coalition (hereinafter “OVEC”) is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 1,500 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership

development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

13. Plaintiff West Virginia Highlands Conservancy, Inc., (hereinafter “WVHC”) is a nonprofit organization incorporated in West Virginia. It has approximately 2,000 members. It works for the conservation and wise management of West Virginia’s natural resources.

14. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide and approximately 1,900 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth’s resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club’s concerns encompass the exploration, enjoyment and protection of surface waters in West Virginia.

15. Plaintiffs’ members suffer injuries to their aesthetic, recreational, environmental, and/or economic interests as a result of ICG’s unlawful discharges of pollutants. Plaintiffs’ members fish, swim, observe wildlife, and/or otherwise use the waters affected by ICG’s discharges and are harmed by the high levels of pollutants that ICG is discharging in violation of its permits. Plaintiffs’ members refrain from swimming, wading, fishing, and/or engaging in other activities in and around the streams affected by ICG’s discharges to avoid exposure to pollutants. Plaintiffs’ members are also very concerned about the impacts of pollution from ICG’s discharges on their families, friends, neighbors, and local wildlife. If ICG’s unlawful discharges ceased, the harm to the interests of Plaintiffs’ members could be redressed. Injunctions and/or civil penalties would redress Plaintiffs’ members’ injuries by preventing

and/or deterring future violations of the limits in ICG's permits.

16. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5), and SMCRA, 30 U.S.C. § 1291(19).

STATUTORY AND REGULATORY FRAMEWORK

17. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit, such as a National Pollution Discharge Elimination System ("NPDES") Permit issued by the EPA or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

18. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit issuing authority may issue an NPDES Permit that authorizes the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA and such other conditions as the permitting authority determines necessary to carry out the provisions of the CWA.

19. Section 402 of the CWA, 33 U.S.C. § 1342, directs the Administrator of EPA to prescribe conditions for NPDES permits to ensure compliance with the requirements of the CWA, including conditions on data and information collection, reporting, and other such requirements as the Administrator deems appropriate.

20. Effluent limitations, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11), are restrictions on quantity, rate, and concentration of chemical, physical, biological, and other constituents of wastewater discharges. Effluent limitations are among the conditions and limitations prescribed in NPDES Permits issued under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

21. Section 303(a) of the CWA, 33 U.S.C. § 1313(a), requires that states adopt

ambient water quality standards and establish water quality criteria for particular water bodies that will protect the designated uses of the water. When technology-based effluent limitations are insufficient to keep receiving waters within those levels, the permit must include stricter water quality based effluent limits (“WQBELs”) that reflect water quality standards and criteria. 33 U.S.C. § 1311(b)(1)(C).

22. At all times relevant to this complaint, the State of West Virginia has been authorized by EPA to administer an NPDES program for regulating the discharges of pollutants into the waters of West Virginia. Permits issued under this program are known as “WV/NPDES” permits.

23. Holders of WV/NPDES Permits are required to monitor their discharges and report their average monthly discharges and maximum daily discharges on a quarterly basis. Those reports are called “Discharge Monitoring Reports,” or “DMRs.”

24. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any “citizen” to “commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.”

25. Section 505(f) of the CWA, 33 U.S.C. § 1365(f), defines an “effluent standard or limitation under this chapter,” for purposes of the citizen suit provision in Section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a), 33 U.S.C. § 1311(a), of the CWA, a WQBEL, and “a permit or condition thereof issued” under Section 402, 33 U.S.C. § 1342, of the CWA.

26. In an action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant to comply with the CWA and to assess civil penalties under Section 309(d) of the CWA, 33 U.S.C. § 1365(d). See 33 U.S.C. § 1365(a).

27. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation.

28. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, the court may assess a civil penalty of \$37,500 per day for each violation that occurred after January 12, 2009. See 40 C.F.R. § 19.4.

29. Under Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

30. Section 506 of SMCRA, 30 U.S.C. § 1256, prohibits any person from engaging in or carrying out surface coal mining operations without first obtaining a permit from the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) or from an approved state regulatory authority.

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

32. The legislative rules promulgated under the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”) provide that, as a general condition of all surface mining permits issued under the WVSCMRA, the permittee must comply with all applicable performance standards. 38 C.S.R. § 2-3.33.c.

33. Among the performance standards mandated by SMCRA and the WVSCMRA is that mining activities must be conducted in such a manner so as to “prevent material damage to

the hydrologic balance outside the permit area.” 30 C.F.R. §§ 816.41(a) and 817.41(a); 38 C.S.R. § 2-14.5.

34. Another performance standard mandated by SMCRA and the WVSCMRA is that “[d]ischarge from areas disturbed by . . . mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 30 C.F.R. §§ 816.42 and 817.42; 38 C.S.R. § 2-14.5.b.

35. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), authorizes any person adversely affected to bring an action in federal court to compel compliance with SMCRA against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to [SMCRA].”

36. Section 520(d) of SMCRA, 30 U.S.C. § 1270(d), authorizes the Court to award the costs of litigation, including attorney fees and expert witness fees, “to any party, whenever the court determines such an award is appropriate.”

37. WVDEP is the agency in the State of West Virginia that administers that State’s CWA and SMCRA programs, and issues WV/NPDES Permits and WVSCMRA Permits.

FACTS

38. At all relevant times, ICG has held WV/NPDES Permit Number WV0094889 to regulate water pollution from its Knight-Ink No. 1 Surface Mine.

39. At all relevant times, ICG has held WVSCMRA Permit S201988 for its Knight-Ink No. 1 Surface Mine.

40. WV/NPDES Permit Number WV0094889 places limits on the concentrations of selenium that ICG can discharge from Outfalls 001, 002, 005, 014, 021, 031, 034, and 036 into Big Beaver Creek, Oldhe Fork of Beaver Creek, and Board Fork of Beaver Creek – all navigable

waters of the United States.

41. The selenium limits on Outfalls 031, 034, and 036 of WV/NPDES Permit WV0094889 have been in effect since July 2006.

42. On or about April 5, 2007, WVDEP issued Order No. 731 to ICG. That Order delayed the effective date of the permit's final selenium effluent limitations for Outfalls 001, 002, 005, 014, and 021 until April 5, 2010.

43. Order No. 731 placed additional obligations on ICG regarding selenium treatment and compliance. Among other things, Order No. 731 required ICG to commence construction of selenium treatment facilities by October 5, 2008, and to complete installation of the requisite selenium treatment facilities by April 5, 2010.

44. On information and belief, Plaintiffs allege that ICG failed to commence construction of selenium treatment facilities on Outfalls 001, 002, 005, 014, and 021 by October 5, 2008.

45. On information and belief, Plaintiffs allege that ICG failed to complete installation of selenium treatment facilities on Outfalls 001, 002, 005, 014, and 021 by April 5, 2010.

46. In late 2009 or early 2010, ICG applied to WVDEP to extend its selenium compliance deadline to July 1, 2012.

47. In February 2010, WVDEP provided public notice of its intent to extend ICG's selenium compliance deadline to July 1, 2012.

48. In March 2010, and again in May 2010, US EPA formally objected to the extension of ICG's selenium compliance deadline, effectively prohibiting WVDEP from modifying ICG's permit.

49. As a result of US EPA's objections, WVDEP denied ICG's application for an extension of its selenium compliance deadline.

50. ICG filed two meritless appeals of WVDEP's denial with the West Virginia Environmental Quality Board ("EQB").

51. Prior to April 5, 2010, ICG and WVDEP colluded to obtain a "stay" of ICG's selenium limits from the EQB, notwithstanding US EPA's objections.

52. On information and belief, Plaintiffs allege that the "stay" awarded by the West Virginia Environmental Quality Board on Defendant's administrative appeal is procedurally and substantively ineffective to delay the effective date the selenium limits on Outfalls 001, 002, 005, 014, and 021.

53. On April 5, 2010, the selenium effluent limitations on Outfalls 001, 002, 005, 014, and 021 in WV/NPDES Permit WV0094889 became final and effective.

54. The DMRs that ICG submitted to WVDEP reveal that ICG has discharged selenium in excess of the final effluent limitations for selenium from Outfalls 001, 002, 005, 014, and 021 on 50 occasions, between April 5, 2010, and December 31, 2010, accruing 834 days of violations.

55. On information and belief, Plaintiffs allege that ICG has violated the final effluent limitations on Outfalls 001, 002, 005, 014, and 021 of WV/NPDES Permit WV0094889 on one or more occasions since January 1, 2011.

56. The DMRs that ICG submitted to WVDEP reveal that ICG has discharged selenium in excess of the final effluent limitations for selenium from Outfalls 031, 034, and 036 on 36 occasions between March 2008 and December 31, 2010, accruing 624 days of violation.

57. On information and belief, Plaintiffs allege that ICG has violated the final effluent

limitations on Outfalls 031, 034, and 036 of WV/NPDES Permit WV0094889 on one or more occasions since January 1, 2011.

58. On the basis of ICG's pattern of exceedances of its effluent limitations in WV/NPDES Permit Number WV0094889 and the absence of any evidence of any meaningful efforts by ICG to eradicate the cause of the violations, Plaintiffs allege that ICG is in continuing or intermittent violation of the Clean Water Act and SMCRA.

59. Plaintiffs sent a notice of intent letter (hereinafter, "NOI"), postmarked on April 14, 2010, to ICG notifying it that its discharges of selenium, its violations of Order No. 731, and its violations of the effluent limitations in WV/NPDES Permit WV0094889 violate the Clean Water Act and SMCRA.

60. The NOI also notified Defendant of Plaintiffs' intent to sue Defendant for those violations at the end of the 60-day period required by statute.

61. The NOI was sent by certified mail, return receipt requested, to the following persons: Bradley Harris, Manager, Knight-Ink No. 1 Surface Mine, ICG Eastern, LLC; Secretary Randy Huffman, WVDEP; Shawn M. Garvin, Regional Administrator of EPA Region III; Lisa P. Jackson, Administrator of EPA; Ken Salazar, Secretary of the United States Department of Interior; Joseph Pizarchik, Director of the Office of Surface Mining Reclamation and Enforcement; and Corporation Service Company, Registered Agent for ICG Eastern, LLC. The NOI was also sent to the Regional Director for the Appalachian Region of the Office of Surface Mining Enforcement and Reclamation via first class mail, postage prepaid.

62. On information and belief, Plaintiffs allege that the WVDEP has not diligently prosecuted an action to require compliance with the limitations at issue in Plaintiffs' April 14, 2010 NOI, or with Order No. 731.

63. The WVDEP filed an action against ICG in the Circuit Court of Webster County, West Virginia (hereinafter, “Webster County action”) on June 11, 2010. This action was filed three days prior to the date Plaintiffs could have filed a citizen suit after submitting the April 14, 2010 NOI.

64. To resolve WVDEP’s Webster County action, the WVDEP released for comment a proposed Consent Decree between itself and ICG on December 29, 2010. The Consent Decree, by its language, postpones the implementation of the selenium limits. Under the Consent Decree, ICG does not have to comply with the final effective selenium limits in its NPDES Permit for Outfalls 001, 002, 005, 006, and 014 until August 1, 2012. Further, ICG does not have to comply with the final effective selenium limits in its NPDES Permit for Outfalls 021, 031, 034, and 036 until December 1, 2012. This language delays enforcement of the permit limit approximately 2.5 years.

65. As discussed above, prior to the Webster County action and Plaintiffs’ NOI, the US EPA objected twice to a proposed permit modification in which the WVDEP and ICG attempted to modify WV/NPDES Permit WV0094889. At the heart of that permit modification was the postponement of the effective date of the selenium limits on Outfalls 001, 002, 005, 006, 014, and 021 in WV/NPDES Permit WV0094889 by two years. The delays in the enforcement of the permit limits described in the proposed Consent Decree exceed the delay objected to by the EPA in ICG’s permit modification request.

66. The WVDEP and ICG, via the proposed Consent Decree, are ignoring EPA’s objection to WVDEP’s announced intent to delay enforcement of the selenium permit limits.

67. Subsequent to the public notice of the proposed Consent Decree, EPA instructed WVDEP to consider its technical comments on wetlands and bioreactors prior to entering the

proposed Consent Decree.

68. On information and belief, Plaintiffs allege that the proposed Consent Decree in the Webster County action is not reasonably or in good faith calculated to require compliance with the selenium permit limits.

69. On information and belief, Plaintiffs allege that the proposed Consent Decree in the Webster County action is not capable of requiring compliance with the CWA or SMCRA.

70. The WVDEP has taken no action to prosecute ICG for failing to meet requirements within Order No. 731 for building and maintaining selenium treatment structures.

71. On information and belief, Plaintiffs allege that there is a realistic prospect that violations of ICG's WV/NPDES Permit WV0094889 selenium effluent limit will continue notwithstanding the proposed Consent Decree in the Boone County action. Consequently, that Consent Decree cannot and will not moot this action.

72. In the proposed Consent Decree, ICG shall pay a sum of \$288,750.00 to WVDEP to cover "relevant civil penalty assessment factors, including, but not limited to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance."

73. Between April 5, 2010 and December 31, 2010, ICG has accrued 834 days of violation at Outfalls 001, 002, 005, 014, and 021 of WV/NPDES Permit WV0094889, exposing it to a potential civil penalty of \$31,275,000.00 penalty for its violations at those outfalls.

74. Between March 1, 2008 and January 12, 2009, ICG accrued 94 days of violation of the selenium limits on Outfalls 031, 034, and 036. Between January 13, 2009, and December 31, 2010, ICG accrued 506 days of violations of the selenium limits on those outfalls.

Accordingly, ICG's unlawful selenium discharges from Outfalls 031, 034, and 036 have exposed

it to a potential civil penalty of \$22,030,000.00.

75. ICG's total potential civil penalty for its selenium violations through December 31, 2010, is \$53,305,000.00.

76. The penalty assessed against ICG in the proposed Webster County Consent Decree is just over one half of one percent of the potential penalty.

77. On information and belief, Plaintiffs allege that the economic benefit to ICG from its selenium violations alone greatly exceeds—indeed, dwarfs—the minuscule civil penalty imposed in the proposed Consent Decree, which purports to resolve violations of four different pollutants.

78. On information and belief, Plaintiffs allege that the interim limits and stipulated penalty provisions of the proposed Consent Decree, as applied to WV/NPDES Permit WV0094889, are not reasonably calculated to require compliance because the penalties are not stringent enough to coerce ICG to comply.

79. The stipulated penalty amounts set out in the proposed Consent Decree are considerably lower than the regulatory penalty amounts and are inadequate to remove the economic benefit of non-compliance.

80. Although the Webster County Circuit Court has scheduled a hearing regarding the proposed Consent Decree for April 4, 2011, WVDEP has publicly stated that US EPA's comments on the decree will necessitate further negotiation before the decree can be entered.

81. On February 25, 2011, the EQB purported to place ICG's appeals on an "inactive docket" at the joint request of WVDEP and ICG. The Board left its purported stay in place, however. That action confirms that the "stay" is a major modification of ICG's permit, and is accordingly procedurally and substantially defective and incapable of delaying the effective date

of ICG's selenium limits.

FIRST CLAIM FOR RELIEF

(Clean Water Violations of WV/NPDES Permit Number WV0094889)

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

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

84. The selenium limits in WV/NPDES Permit Number WV0094889 are "effluent standards or limitations" for purposes of section 505(a)(1) of the Clean Water Act because they are a condition of a permit issued under section 402 of the Act. 33 U.S.C. § 1365(f).

85. Each and every discharge in excess of the effluent limitations in WV/NPDES Permit Number WV0094889 is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

86. A violation of an average monthly effluent limitation in a permit is considered to be a violation on each and every day of that month.

87. ICG's DMRs establish that ICG has violated either the monthly average or daily maximum effluent limitations for selenium on Outfalls 001, 002, 005, 014, 021, 031, 034, and 036 86 times since those limitations went into effect. Those 86 instances, detailed in Appendix A, amount to 1,458 days of violation..

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

89. On information and belief, Plaintiffs allege that ICG is in continuing and/or intermittent violation of the Clean Water Act as a result of its violations of the effluent

limitations in WV/NPDES Permit Number WV0094889 because ICG has taken no meaningful action to eradicate the underlying cause of the violations.

90. Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), ICG is liable for civil penalties of up to \$37,500 per day of violation for its violations of the effluent limitations in WV/NPDES Permit Number WV0094889 that occurred after January 12, 2009, and up to \$32,500.00 per day of violation that occurred prior to January 12, 2009.

SECOND CLAIM FOR RELIEF

(Violations of Order No. 731)

91. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 90 supra.

92. Order No. 731 that ICG received from WVDEP constitutes an “order issued by the Administrator or a State with respect to [effluent] standard[s] or limitation[s]” for purposes of Section 505(a)(1) of the CWA and, hence, violations of Order No. 731 are actionable in a Clean Water Act citizen suit.

93. ICG’s failure to commence construction of selenium treatment facilities on Outfalls 001, 002, 005, 014, and 021 of WV/NPDES Permit WV0094889 by October 5, 2008, is a violation of the terms of Order No. 731.

94. ICG is in ongoing violation of the requirement that it commence construction of selenium treatment facilities on Outfalls 001, 002, 005, 014, and 021 of WV/NPDES Permit WV0094889 by October 5, 2008.

95. ICG’s failure to complete construction of selenium treatment facilities on Outfalls 001, 002, 005, 014, and 021 of WV/NPDES Permit WV0094889 by April 5, 2010, is a violation of the terms of Order No. 731.

96. ICG is in ongoing violation of the requirement that it complete installation of a

selenium treatment system for Outfalls 001, 002, 005, 014, and 021 of WV/NPDES Permit WV0094889 by April 5, 2010.

97. Unless enjoined, ICG will remain in continuing violation of Order No. 731.

THIRD CLAIM FOR RELIEF

(SMCRA Violations Related to WV/NPDES Permit Number WV0094889)

98. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 97 supra.

99. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), allows citizen suits in federal court against any “person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.”

100. As discussed above, federal and state regulations under SMCRA include performance standards that (1) prohibit surface mining operations that cause violations of effluent standards in Clean Water Act permits and (2) prohibit operations from causing material damage to the hydrologic balance outside of the permit area.

101. Under 38 C.S.R. § 2-3.33.c, all performance standards are incorporated as conditions in permits issued under the State Act.

102. WV/NPDES Permit Number WV0094889 regulates ICG’s discharges from its Knight-Ink No. 1 Surface Mine (WVSCMRA Permit No. S201988).

103. ICG has violated the effluent limitations in WV/NPDES Permit WV0094889 on 86 occasions, accruing 1,458 days of violation.

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

105. Because those performance standards are permit conditions, ICG is also in violation of the terms and conditions of WVSCMRA Permit S201988.

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

107. On information and belief, Plaintiffs allege that ICG is in continuing and/or intermittent violation of SMCRA as a result of its violations of the effluent limitations in WV/NPDES Permit Number WV0094889 because ICG has taken no meaningful action to eradicate the underlying cause of the violations.

RELIEF REQUESTED

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

- (1). Declaring that ICG has violated and is in continuing violation of the Clean Water Act and SMCRA;
- (2). Enjoining ICG from operating its facilities in such a manner as will result in further violations of the effluent limitations in WV/NPDES Permit Number WV0094889;
- (3). Ordering ICG to immediately comply with all effluent limitations, monitoring and reporting requirements, and other terms and conditions of WV/NPDES Permit Number WV0094889;
- (4). Ordering ICG to immediately comply with all requirements of Order No. 731;
- (5). Ordering ICG to immediately comply with the terms and conditions of WVSCMRA Permit Number S201988;
- (6). Ordering ICG to pay appropriate civil penalties up to \$37,500 per day for each CWA violation that occurred on or after January 12, 2009, and up to \$32,500 per day for each CWA violation that occurred prior to January 12, 2009;
- (7). Ordering ICG to conduct monitoring and sampling to determine the environmental effects of their violations, to remedy and repair environmental contamination

and/or degradation caused by their violations, and restore the environment to its prior uncontaminated condition;

(8). Awarding Plaintiffs' attorney and expert witness fees and all other reasonable expenses incurred in pursuit of this action; and

(9). Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ DEREK O. TEANEY

DEREK O. TEANEY (W.Va. Bar No. 10223)

JOSEPH M. LOVETT (W.Va. Bar No. 6926)

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Counsel for Plaintiffs

APPENDIX A VIOLATIONS OF THE SELENIUM EFFLUENT LIMITATIONS IN W/INPDES PERMIT WV0094889

OUTFALL 001

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	DAYS OF VIOLATION
August 2010	Monthly Average	Selenium	µg/l	4.7	5.9	31
August 2010	Daily Maximum	Selenium	µg/l	8.2	9	1

OUTFALL 002

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	DAYS OF VIOLATION
April 2010	Monthly Average	Selenium	µg/l	4.7	6.85	25
May 2010	Daily Maximum	Selenium	µg/l	8.2	9	1
May 2010	Monthly Average	Selenium	µg/l	4.7	8.2	31
May 2010	Monthly Average	Selenium	µg/l	4.7	6.4	31
July 2010	Daily Maximum	Selenium	µg/l	8.2	8.1	31
July 2010	Monthly Average	Selenium	µg/l	4.7	10.2	1
September 2010	Daily Maximum	Selenium	µg/l	8.2	8.3	30
September 2010	Monthly Average	Selenium	µg/l	4.7	11	1
November 2010	Monthly Average	Selenium	µg/l	4.7	7.2	30
November 2010	Daily Maximum	Selenium	µg/l	8.2	9	1
December 2010	Monthly Average	Selenium	µg/l	4.7	7.9	31
December 2010	Daily Maximum	Selenium	µg/l	8.2	12	1

OUTFALL 005

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	DAYS OF VIOLATION
April 2010	Monthly Average	Selenium	µg/l	4.7	9.75	25
April 2010	Daily Maximum	Selenium	µg/l	8.2	9.1	1

April 2010	Daily Maximum	Selenium	µg/l	8.2	10.4	1
May 2010	Monthly Average	Selenium	µg/l	4.7	6.95	31
May 2010	Daily Maximum	Selenium	µg/l	8.2	9.2	1
June 2010	Monthly Average	Selenium	µg/l	4.7	7.5	30
July 2010	Daily Maximum	Selenium	µg/l	8.2	11.6	1
July 2010	Monthly Average	Selenium	µg/l	4.7	9.15	31
August 2010	Monthly Average	Selenium	µg/l	4.7	4.9	31
September 2010	Daily Maximum	Selenium	µg/l	8.2	10.3	1
September 2010	Monthly Average	Selenium	µg/l	4.7	7.65	30
October 2010	Monthly Average	Selenium	µg/l	4.7	6.4	31
November 2010	Monthly Average	Selenium	µg/l	4.7	7.45	30
December 2010	Monthly Average	Selenium	µg/l	4.7	15.2	31
December 2010	Daily Maximum	Selenium	µg/l	8.2	15	1
December 2010	Daily Maximum	Selenium	µg/l	8.2	15.4	1

OUTFALL 014

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	
August 2010	Monthly Average	Selenium	µg/l	4.7	4.8	31
August 2010	Daily Maximum	Selenium	µg/l	8.2	9	1
December 2010	Monthly Average	Selenium	µg/l	4.7	5.7	31

OUTFALL 021

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	
April 2010	Monthly Average	Selenium	µg/l	4.7	9.05	25
April 2010	Daily Maximum	Selenium	µg/l	8.2	11.4	1
May 2010	Monthly Average	Selenium	µg/l	4.7	9.7	31
May 2010	Daily Maximum	Selenium	µg/l	8.2	12.6	1

June 2010	Monthly Average	Selenium	µg/l	4.7	7.35	30
June 2010	Daily Maximum	Selenium	µg/l	8.2	9.5	1
July 2010	Monthly Average	Selenium	µg/l	4.7	10.8	31
July 2010	Daily Maximum	Selenium	µg/l	8.2	14.4	1
August 2010	Monthly Average	Selenium	µg/l	4.7	6.55	31
September 2010	Monthly Average	Selenium	µg/l	4.7	6.85	30
September 2010	Daily Maximum	Selenium	µg/l	8.2	9.8	1
November 2010	Monthly Average	Selenium	µg/l	4.7	13.2	30
November 2010	Daily Maximum	Selenium	µg/l	8.2	13.2	1
November 2010	Daily Maximum	Selenium	µg/l	8.2	13.2	1
December 2010	Monthly Average	Selenium	µg/l	4.7	20.1	31
December 2010	Daily Maximum	Selenium	µg/l	8.2	17	1
December 2010	Daily Maximum	Selenium	µg/l	8.2	23.2	1

OUTFALL 031

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	
January 2009	Monthly Average	Selenium	µg/l	4.7	20.2	31
January 2009	Daily Maximum	Selenium	µg/l	8.2	20.2	1
June 2009	Monthly Average	Selenium	µg/l	4.7	6.2	30
February 2010	Monthly Average	Selenium	µg/l	4.7	6.1	28
March 2010	Monthly Average	Selenium	µg/l	4.7	16.15	31
March 2010	Daily Maximum	Selenium	µg/l	8.2	21	1
March 2010	Daily Maximum	Selenium	µg/l	8.2	11.3	1
May 2010	Daily Maximum	Selenium	µg/l	8.2	11.8	1
May 2010	Monthly Average	Selenium	µg/l	4.7	11.8	31
August 2010	Monthly Average	Selenium	µg/l	4.7	6.55	31
August 2010	Daily Maximum	Selenium	µg/l	8.2	9.1	1
September 2010	Monthly Average	Selenium	µg/l	4.7	6.3	30
September 2010	Daily Maximum	Selenium	µg/l	8.2	8.6	1

December 2010	Monthly Average	Selenium	µg/l	4.7	17.95	31
December 2010	Daily Maximum	Selenium	µg/l	8.2	18.8	1

OUTFALL 034

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	
March 2008	Monthly Average	Selenium	µg/l	4.7	5.3	31
May 2008	Monthly Average	Selenium	µg/l	4.7	7.8	31
May 2008	Daily Maximum	Selenium	µg/l	8.2	9.6	1
July 2008	Monthly Average	Selenium	µg/l	4.7	5	31
February 2010	Monthly Average	Selenium	µg/l	4.7	10.6	28
February 2010	Daily Maximum	Selenium	µg/l	8.2	10.6	1
March 2010	Monthly Average	Selenium	µg/l	4.7	5.1	31

OUTFALL 036

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	
January 2009	Monthly Average	Selenium	µg/l	4.7	10.6	31
January 2009	Daily Maximum	Selenium	µg/l	8.2	10.6	1
February 2009	Monthly Average	Selenium	µg/l	4.7	9.3	28
February 2009	Daily Maximum	Selenium	µg/l	8.2	9.3	1
January 2010	Monthly Average	Selenium	µg/l	4.7	6	31
March 2010	Monthly Average	Selenium	µg/l	4.7	10.65	31
March 2010	Daily Maximum	Selenium	µg/l	8.2	11.3	1
March 2010	Daily Maximum	Selenium	µg/l	8.2	10	1
May 2010	Monthly Average	Selenium	µg/l	4.7	23.15	31
May 2010	Daily Maximum	Selenium	µg/l	8.2	33.5	1
June 2010	Monthly Average	Selenium	µg/l	4.7	18.2	30
June 2010	Daily Maximum	Selenium	µg/l	8.2	18.2	1
December 2010	Monthly Average	Selenium	µg/l	4.7	11.9	31

December 2010	Daily Maximum	Selenium	µg/l	8.2	11.9	1
						1458