



Kenneth G. Woodring, President  
Frasure Creek Mining, LLC  
4978 Teays Valley Road  
Scott Depot, WV 25560

March 24, 2010

**By Certified Mail – Return Receipt Requested**

**Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1).**

Dear Mr. Woodring,

The Sierra Club and Kentuckians For The Commonwealth (“KFTC”), in accordance with Section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Frasure Creek Mining has violated, and continues to violate, “an effluent standard or limitation” under Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A). If, within sixty days of the postmark of this letter, Frasure Creek Mining does not bring itself into full compliance with the Act, the Sierra Club and Kentuckians For The Commonwealth intend to file a citizens’ suit seeking civil penalties for Frasure Creek Mining’s ongoing and continuing violations and for an injunction compelling it to come into compliance with the Act.

Section 301 of the CWA prohibits the discharge of any pollutant into a water of the United States by any person without a permit. The deposition of mining overburden, dirt, and/or rock into waters of the United States, and the construction of impoundments associated with sediment and other ponds in waters of the United States, is the “discharge of fill material,” as that phrase is used in the Act. 40 C.F.R. § 232.2. The discharge of fill material is regulated under section 404 of the Act, 33 U.S.C. § 1344, and requires a permit issued by the United States Army Corps of Engineers under that section.

**Violations at Frasure Creek Mining’s Surface Mine Operation Permitted Under Kentucky Surface Mining Permit # 898-0811:**

On September 17, 2009, the Kentucky Department of Natural Resources, Division of Mine Reclamation and Enforcement (“KY DMRE”) conducted an inspection at the Frasure Creek Mining surface mining operation permitted under Kentucky surface mining permit number 898-0811. The KY DMRE inspector observed that Frasure Creek Mining “has constructed Ponds 1, 2, 3, 59 and 59A and has constructed Hollowfills 1 and 2 in stream channels, prior to the issuance of a 404 permit from the United States Army Corp. of Engineers.” The KY DMRE issued a notice of non-compliance, but to our knowledge has not pursued an enforcement action

against Frasure Creek Mining. It is our understanding that Frasure Creek Mining has not, to date, received a permit under Section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of dredged or fill material into the navigable waters of the United States at the disposal sites specified by KY DMRE in its September 17, 2009 notice of non-compliance.

Sometime prior to September 17, 2009, therefore, Frasure Creek Mining began discharging fill material, including rock and dirt, into waters of the United States in Kentucky without a permit under Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). This discharge of fill material was associated with the construction of valley fills, construction of sediment ponds, and other activities for which Frasure Creek Mining lacks a Section 404 permit. Frasure Creek Mining violated and continues to violate the CWA by allowing this fill material to remain in the streams without such a permit for every day from the beginning of its fill activities (no later than September 17, 2009) to the present. Each day that any fill material remains in a water of the United States constitutes a separate violation of the Act. See e.g., Sasser v. Administrator, United States E.P.A., 990 F.2d 127, 129 (4th Cir. 1993) (“Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.”). Because Sierra Club and KFTC intend to seek remedies in their citizen suit for violations of the Clean Water Act accruing from the date the filling started, and because Sierra Club and KFTC do not know that date, discovery will be necessary to determine the actual date that the violations began.

#### **Violations at Frasure Creek Mining’s Surface Mining Operation Permitted Under Kentucky Surface Mining Permit # 836-0341:**

On September 21, 2009, KY DMRE conducted an inspection at the Frasure Creek Mining surface mining operation permitted under Kentucky surface mining permit 836-0341. The KY DMRE inspector observed that Frasure Creek Mining had constructed “Embankment Pond-1” “in the watershed of Hale Fork of Floyd County” without “a permit from the U.S Corps of Engineers regarding Section 404 of the Clean Water Act.” The KY DMRE issued a notice of non-compliance, but to our knowledge has not pursued an enforcement action against Frasure Creek Mining. It is our understanding that Frasure Creek Mining has not, to date, received a permit under Section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of dredged or fill material into the navigable waters of the United States at the disposal sites specified by KY DMRE in its September 21, 2009 notice of non-compliance.

Sometime prior to September 21, 2009, therefore, Frasure Creek Mining began discharging fill material, including rock and dirt, into waters of the United States in Kentucky without a permit under Section 404 of the CWA, 33 U.S.C. § 1344, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). This discharge of fill material was associated with the construction of embankment ponds, and other activities for which Frasure Creek Mining lacks a Section 404 permit. Frasure Creek Mining violated and continues to violate the CWA by allowing this fill material to remain in the streams without such a permit for every day from the beginning of its fill activities (no later than September 21, 2009) to the present. Each day that any fill material remains in a water of the United States constitutes a separate violation of the Act. See e.g., Sasser v. Administrator, United States E.P.A., 990 F.2d 127, 129 (4th Cir. 1993) (“Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.”). Because Sierra Club and KFTC intend to seek remedies in their citizen suit for

violations of the Clean Water Act accruing from the date the filling started, and because Sierra Club and KFTC do not know that date, discovery will be necessary to determine the actual date that the violations began.

### **Violations at Frasure Creek Mining's Surface Mining Operation Permitted Under Kentucky Surface Mining Permit # 877-0182:**

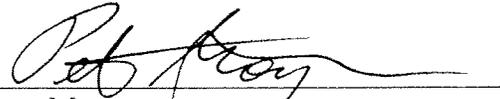
On September 21, 2009, KY DMRE conducted an inspection at the Frasure Creek Mining surface mining operation permitted under Kentucky surface mining permit 877-0182. The KY DMRE inspector observed that Frasure Creek Mining had "plac[ed] material in and / or disturb[ed] in jurisdictional waters of the United States" without "a permit from the U.S Corps of Engineers regarding Section 404 of the Clean Water Act." Specifically, the inspector observed that Frasure Creek Mining had constructed "Excess spoil fill # 6 and silt ponds # 16 and 16-A." The KY DMRE issued a notice of non-compliance, but to our knowledge has not pursued an enforcement action against Frasure Creek Mining. It is our understanding that Frasure Creek Mining has not, to date, received a permit under Section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of dredged or fill material into the navigable waters of the United States at the disposal sites specified by KY DMRE in its September 21, 2009 notice of non-compliance.

Sometime prior to September 21, 2009, therefore, Frasure Creek Mining began discharging fill material, including rock and dirt, into waters of the United States in Kentucky without a permit under Section 404 of the CWA, 33 U.S.C. § 1342, 1344, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). This discharge of fill material was associated with the construction of valley fills, construction of sediment ponds, and other activities for which Frasure Creek Mining lacks a Section 404 permit. Frasure Creek Mining violated and continues to violate the CWA by allowing this fill material to remain in the streams without such a permit for every day from the beginning of its fill activities (no later than September 21, 2009) to the present. Each day that any fill material remains in a water of the United States constitutes a separate violation of the Act. See e.g., Sasser v. Administrator, United States E.P.A., 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation."). Because Sierra Club and KFTC intend to seek remedies in their citizen suit for violations of the Clean Water Act accruing from the date the filling started, and because Sierra Club and KFTC do not know that date, discovery will be necessary to determine the actual date that the violations began.

Frasure Creek Mining knows that all coal operators are required to apply for and receive a CWA Section 404 permit before filling any water of the United States. Issuance of such permits is by no means guaranteed. In fact, the U.S. Army Corps of Engineers and Environmental Protection Agency are currently conducting an enhanced review of all pending applications for Section 404 permits for surface mines in Appalachia. Additionally, the U.S. Army Corps of Engineers may only approve a permit application after the agency determines that environmental impacts have been avoided, minimized and/or mitigated. Frasure Creek Mining's filling of the streams at issue in this letter before the Corps has considered the permit application betrays a reckless disregard for the rule of law.

If Frasure Creek Mining has taken any steps to eradicate the underlying cause of the violations identified in this letter, or if Frasure Creek Mining believes that anything in this letter is inaccurate, please let the Sierra Club and Kentuckians For The Commonwealth know, through their attorneys. If Frasure Creek Mining does not advise the groups of any remedial steps during the 60-day period, the Sierra Club and Kentuckians For The Commonwealth will assume that no such steps have been taken and that violations are continuing. Additionally, the groups would be happy to meet with Frasure Creek Mining or its representatives to attempt to resolve these issues within the 60-day notice period. However, we do not intend to delay the filing of a complaint in federal court under Section 505(a) of the CWA if discussions are continuing when that period ends.

Sincerely,



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