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, *et al* Defendants, And SIERRA CLUB *et al.*, Defendant-Intervenors.	)	Nos. 10-cv-1220-RBW 11-cv-0295-RBW 11-cv-0446-RBW 11-cv-0447-RBW

CITY OF PIKEVILLE'S AMENDED INTERVENING COMPLAINT

Comes now the Intervening Plaintiff, City of Pikeville, Kentucky ("City of Pikeville"), by and through counsel, and for its Intervening Complaint states as follows:

1. The Intervening Plaintiff, City of Pikeville, is a municipality of the third class operating and existing under the laws of the Commonwealth of Kentucky. It is the county seat of Pike County, Kentucky, and it derives substantial revenues, both directly and indirectly, from the coal mining industry. Specifically, about 25% of total coal production from Kentucky surface mining comes from Pike County. Over 4300 persons are directly employed in Pike County in the coal industry, but the coal industry also

indirectly provides 3 additional jobs for every miner employed. The City of Pikeville also derives substantial benefits from the occupational license fees that coal mining companies (and all other companies and employers who would not exist but for the patronage of coal mine employees) must pay for the privilege of operating and being employed within the corporate boundaries of the City of Pikeville. Further, the City of Pikeville obtains substantial revenues from the Coal Severance Tax Program which is a tax placed upon coal produced from Eastern Kentucky. These revenues are used to fund public projects and develop employment opportunities. In 2006, for example, Pike County generated over $53 million in coal severance taxes, and a little more than $5.7 million of those tax monies was returned to Pike County and the City of Pikeville for use in public projects. (*See* Kentucky Coal Facts, Edition 10, prepared by the Kentucky Office of Energy Policy, Division of Fossil Fuels & Utility Services and the Kentucky Coal Association, attached hereto as **Exhibit 1**).

2. The City of Pikeville intervened in this action so as to challenge recent actions by the Defendant, United States Environmental Protection Agency ("EPA") which have resulted in substantial delays in and rejection of coal mining permits issued by the Commonwealth of Kentucky (“the Commonwealth”) for new and/or expanded surface coal mining facilities in Eastern Kentucky, and which has caused, and will continue to cause, damage to the Eastern Kentucky coal mining industry, which in turn will adversely impact coal production, tax revenues and jobs in Pike County and the City of Pikeville. City of Pikeville brings this action on behalf of its citizens and taxpayers whose economic welfare and general well-being, right to due process and equal protection are threatened by EPA’s actions.

3. The City of Pikeville re-alleges and incorporates by reference all of its allegations contained in its original Intervening Complaint as if set out fully herein. It also incorporates by reference the allegations set forth in the Amended Intervening Complaint filed by the Commonwealth and the Amended Complaint filed by the Kentucky Coal Association (KCA) as if set out fully herein.

4. In their Amended Complaints, both the Commonwealth and KCA allege that, since April 1, 2010, not a single Section 402 KPDES permit for new surface coal mines in Eastern Kentucky has been allowed to be issued. EPA has levied a moratorium on any such permits unless they contain a pre-permit "Reasonable Potential Analysis" ("RPA") and numerical effluent limits on conductivity. This heavy-handed approach is mandated by the Interim and now Final Guidance. However, it is not authorized by the Clean Water Act ("CWA"), which grants to states - not EPA - the primary role in establishing and monitoring the water quality standards within its own borders.

5. According to the Commonwealth and KCA, prior to April 1, 2010, EPA had not objected to issuance of any Section 402 KPDES permits for coal mining activity in Kentucky for several decades. Yet every Section 402 KPDES Individual Permit for a new or expanded surface mine in Eastern Kentucky has been blocked by EPA since April 1, 2010. In all, EPA objected to 21 Section 402 KPDES Individual Permits in September and October 2011, even though they were each nearly identical in content to ones EPA approved just weeks before April 1, 2011.

6. EPA still has taken no action on the 21 Section 402 KPDES Individual Permits which EPA objected to in September and October 2010. Certainly, the involved

Eastern Kentucky 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. The Commonwealth requested a hearing on each such permit objection, yet EPA has taken no steps to convene the required hearings.

7. 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.

8. 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 the Eastern Kentucky economy and the City of Pikeville.

9. On or about July 21, 2011, and after public notice and comment, EPA issued its Final Guidance. (*See* Final Guidance, attached as **Exhibit 2**). 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 the aforementioned EPA moratorium on Section 402 KPDES permits for new and expanded surface coal mines in Eastern Kentucky that do not contain the permit limitations EPA demands.

10. In essence, in the Final Guidance EPA instructs 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" and EPA's conductivity presumptions (derived from data generated from West Virginia and thus potentially dissimilar to the discharge at issue) 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, and using the actual site-specific data from that mine to determine if the discharge truly does have a "reasonable potential" to violate state water quality standards. It is thus a mandatory, binding rule.

11. The Final Guidance also continues to mandate numerical conductivity limits for surface coal mines in Eastern Kentucky. It directs Kentucky permitting authorities that they must establish a numerical effluent limit once they determine that there is a "reasonable potential" that the discharge will violate state water quality standards – which, for conductivity, EPA believes can be assumed from "best available science." (*See* Final Guidance at p. 17.). EPA recommends "that a numerical effluent limit for conductivity be set at 300 µS/cm and/or not outside the range of 300-500 µS/cm". EPA continually refers to this as its conductivity "benchmark". (*Id.* at 18).

12. 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 regarding conductivity in the Final Guidance appears to be limited to permits for mining activities outside Eastern Kentucky. Section 402 NPDES permits for new surface coal mines located within Eastern Kentucky 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 effluent limits for conductivity. EPA Headquarters also refused to approve the settlement between EPA Region 4 and the Commonwealth which would have included an agreed upon permit template which - while containing virtually every other EPA request - did not mandate numerical effluent limits on conductivity absent site-specific data justifying such limits.

13. 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 Eastern Kentucky, 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 3**).

14. 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 4**). While the Final Guidance was not specifically mentioned, according to the Commonwealth and KCA, 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, the Commonwealth 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 regulations." (*See* Enclosure 1 to Exh. 3, at p. 2); and (2) because they lacked numerical effluent limits for conductivity. Specifically, in its September 28, 2011 objection letter, EPA told Kentucky 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 µS/cm" unless site specific data suggests that another permit limitation is justified. (*Id.* at p. 4).

15. As discussed in KCA and the Commonwealth's original Complaints, 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.

16. 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 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 effluent limits for conductivity, is arbitrary and capricious.

17. 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 the Commonwealth to Eastern 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 µS/cm range will violate existing narrative water quality standards; or (iii) failing that, to wrest control over Section 402 KPDES permitting from the Commonwealth 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 violates the Tenth Amendment; is arbitrary and capricious; and otherwise violates the CWA and the Administrative Procedures Act (APA).

18. 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 the Eastern Kentucky economy and the City of Pikeville. 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 caused, and will continue to cause, significant injury in the terms of loss of tax revenues (occupational taxes, ad valorem taxes on minerals and allocations of coal severance tax revenues) and the direct loss of coal production, revenues derived from coal production and loss of employment and employment opportunities to the City of Pikeville's citizens and taxpayers. 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 and to generate over $123 million in new coal severance tax dollars. These new jobs and tax revenues – all of which would have directly benefited the City of Pikeville and its citizens – are now in jeopardy due to EPA's actions described herein.

COUNT I
DECLARATORY JUDGMENT CONCERNING VIOLATION OF THE APA AND CWA

19. Intervening Plaintiff City of Pikeville incorporates by reference the allegations contained in paragraphs 1 through 18 as if set out fully herein.

20. 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, EPA 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.

21. 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.

22. EPA's new presumed benchmark of between 300-500 µS/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).

23. The CWA and its implementing regulations does not require Kentucky to impose water quality based effluent limits unless and until the Commonwealth 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 Commonwealth, 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 numerical effluent limits for conductivity, 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.

24. EPA's actions violate the Tenth Amendment guarantee of the rights of the states and the people to be free from improper exercise of federal authority and power.

25. 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 the Commonwealth to conduct a pre-permit RPA and/or to mandate numerical effluent limits 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, 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 the Tenth Amendment, and should be set aside.

(ii) EPA's presumption in the Final Guidance that water conductivity exceeding 300-500 µS/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

26. Plaintiff KCA incorporates by reference the allegations contained in paragraphs 1 through 25 as it set out fully herein.

27. 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.

28. 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) the Commonwealth performs an RPA using non site-specific data from other mine sites before issuance of the permit; and (ii) it 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.

29. The City of Pikeville will be irreparably harmed unless EPA is enjoined from imposing unpromulgated rules and usurping the authority of the Commonwealth to establish and implement water quality standards within its borders.

30. The welfare of the citizens and taxpayers of the City of Pikeville will be irreparably harmed unless EPA is enjoined from unlawfully objecting to Section 402 KPDES Individual Permits for surface coal mining operations throughout Eastern Kentucky.

31. Intervening Plaintiff City of Pikeville thus requests that this Court enter an Order permanently enjoining and restraining EPA, as well as EPA Administrator Jackson, from utilizing the Final Guidance in their oversight of Section 402 KPDES permit decisions. Specifically, Intervening Plaintiff City of Pikeville asks the court to enjoin and restrain EPA from (i) requiring the Commonwealth 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", as opposed to a post-permit RPA coupled with a permit reopener using site-specific data; and (ii) requiring the Commonwealth 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 it determines that, based on this RPA, such limits are required to implement Kentucky's narrative water quality standards.

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

Respectfully Submitted,

/s/ Mindy G. Barfield
Mindy G. Barfield (admitted pro hac vice)
DINSMORE & SHOHL LLP
Lexington Financial Center
250 W. Main Street, Suite 1400
Lexington, KY 40507

/s/ Sadhna G. True
Sadhna G. True
D.C. Bar No. 434669
DINSMORE & SHOHL LLP
250 West Main Street, Suite 1400
Lexington, Kentucky 40507
(859) 425-1000

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 Intervening Plaintiff,
The City of Pikeville, Kentucky

425530v1