

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
CIVIL ACTION NO. 10-CI-01868  
DIVISION 1**

**ENERGY AND ENVIRONMENT CABINET,**

**PLAINTIFF**

**and**

**APPALACHIAN VOICES, INC.;**  
**KENTUCKIANS FOR THE**  
**COMMONWEALTH, INC.;** **KENTUCKY**  
**RIVERKEEPER, INC.;** **WATERKEEPER**  
**ALLIANCE, INC.;** **PAT BANKS;** **THOMAS**  
**H. BONNY;** **WINSTON MERRILL COMBS;**  
**and LANNY EVANS,**

**PLAINTIFF INTERVENORS**

**v.**

**ICG HAZARD, LLC;**  
**ICG KNOTT COUNTY, LLC;**  
**ICG EAST KENTUCKY, LLC; and**  
**POWELL MOUNTAIN ENERGY, LLC;**

**DEFENDANTS.**

**CONSENT JUDGMENT**

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**WHEREAS,** the Parties to this Consent Judgment (“Consent Judgment” or “Agreement”), the Kentucky Energy and Environment Cabinet (“Cabinet”); Appalachian Voices, Inc.; Kentuckians for the Commonwealth, Inc.; Waterkeeper Alliance, Inc.; Kentucky Riverkeeper, Inc.; Pat Banks, individually and in her capacity as Kentucky Riverkeeper; Thomas H. Bonny; Winston Merrill Combs; and Lanny Evans (collectively, “Plaintiff Intervenors” or

“Appalachian Voices”); and ICG Hazard, LLC; ICG Knott County, LLC; ICG East Kentucky, LLC; and Powell Mountain, LLC, state as follows:

## **I. STATEMENT OF FACTS**

1. The Cabinet is an Agency of the Commonwealth charged by statute with the duty to protect public health and the environment, pursuant to KRS Chapter 224, KRS Chapter 350, the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251–1379, and regulations promulgated thereto.

2. ICG Hazard, LLC; ICG Knott County, LLC; ICG East Kentucky, LLC; and Powell Mountain, LLC (collectively, “ICG”) are each Delaware limited liability corporations in good standing with their principal offices located St. Louis, Missouri and with mining facilities in Perry County, Knott County, Pike County, Martin County, Breathitt County, Leslie County, Harlan County, Kentucky and in Lee County, Virginia.

3. ICG operates surface coal mining operations in Eastern Kentucky pursuant to Surface Disturbance Permits issued by the Cabinet’s Department for Natural Resources (“DNR”), Division of Mine Permits (“DMP”). ICG discharges stormwater and other wastewater from its surface coal mining operations to the waters of the Commonwealth pursuant to Kentucky Pollutant Discharge Elimination System (“KPDES”) permits issued by the Kentucky Division of Water. A listing of the DMP Permits and the corresponding KPDES Permits that have been issued to ICG that are the subject of this Consent Judgment are set forth in Appendix A, which is incorporated herein as if fully set out in this Consent Judgment.

4. On or about October 7, 2010, Appalachian Voices served ICG and the Cabinet with a Notice of Intent to Sue letter (“NOI #1”) pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365, alleging violations of KPDES permit requirements by ICG at numerous ICG coal mining operations. Appalachian Voices announced in NOI #1 that it intended to file a citizen suit within 60 days of the notice to enforce the violations alleged therein. A copy of NOI

#1 is attached to this Consent Judgment as Appendix B and incorporated as if fully set out in this Consent Judgment.

5. On or about October 8, 2010 to December 3, 2010, the Cabinet's Division of Enforcement ("DENF") reviewed Discharge Monitoring Reports ("DMR" or "DMRs") submitted by ICG covering the reporting period of January 1, 2008 through June 30, 2010. This included reviewing DMRs submitted for the same permits, and with respect to the same types of issues, identified by Appalachian Voices in NOI #1. DENF identified multiple alleged violations for failure to monitor and report discharges in accordance with permit terms and conditions and issued Notices of Violation ("NOV" or "NOVs") to ICG on or about November 29, 2010.

6. On December 3, 2010, the Cabinet filed a Complaint in the Franklin Circuit Court, case No. 10-CI-01868, including the allegations made in NOI #1 and additional allegations based on the Cabinet's independent investigation of the claims made in NOI #1. A copy of the December 3, 2010 Complaint in the Franklin Circuit Court is attached to this Consent Judgment as Appendix C and incorporated as if fully set out in this Consent Judgment. On December 14, 2010, Appalachian Voices filed a Motion to Intervene in the Franklin Circuit Court case. On February 11, 2011, an Order was entered allowing Appalachian Voices to Intervene in the Franklin Circuit Court case to comment on the Proposed Consent Judgment tendered to the Franklin Circuit Court contemporaneously with the Complaint on December 3, 2010.

7. From August 31 through September 2, 2011, the Franklin Circuit Court conducted an evidentiary hearing on whether the Consent Judgment filed by the Cabinet in the instant case, Civil Action No. 10-CI-01868, is fair, adequate, reasonable and in the public interest. The Court has not ruled on that issue.

8. On or about June 28, 2011, Appalachian Voices served ICG and the Cabinet with a second NOI ("NOI #2") pursuant to the Clean Water Act citizen suit provision, 33 U.S.C.

§ 1365, alleging additional violations of KPDES permit requirements by ICG at numerous ICG coal mining operations. Appalachian Voices announced in NOI #2 that it intended to file a Clean Water Act citizen suit against ICG within 60 days to enforce the violations alleged therein. A copy of NOI #2 is attached to this Consent Judgment as Appendix D and is incorporated as if fully set out in this Consent Judgment.

9. On or about May 15 to August 10, 2011, DENF reviewed all DMRs submitted by ICG covering the reporting period of January through March 2011 (1<sup>st</sup> Quarter 2011 DMRs). On or about August 15 to October 4, 2011, DENF reviewed all DMRs submitted by ICG covering the period of April through June 2011 (2<sup>nd</sup> Quarter 2011 DMRs). On or about November 15 to December 15, 2011, DENF reviewed all DMRs submitted by ICG covering the period of July 2011 through September 2011 (3<sup>rd</sup> Quarter 2011 DMRs). This included review of DMRs submitted for the same permits, and with respect to the same types of issues, as those identified in NOI #2. DENF identified multiple alleged violations for failure to comply with all effluent limits contained in the permit and failure to monitor and report discharges in accordance with permit terms and conditions.

10. On July 8, August 8, and August 10, 2011, DENF issued NOVs for 26 of ICG's surface mine operations, for the violations occurring January 2011 through March 2011 (1<sup>st</sup> Quarter 2011). On August 26, 2011 the Cabinet filed an Administrative Complaint initiating an action against ICG and asserting claims for the violations set forth in the NOVs issued to ICG. The Administrative Complaint was filed in the Cabinet's Office of Administrative Hearings, File Number DOW-33598-047. The NOVs were attached to the Complaint and incorporated therein. The Administrative Complaint and NOVs are attached and incorporated herein as Appendix E. The Administrative Complaint alleges DMR-related violations identified by Appalachian Voices in its NOI #2 that were substantiated by DENF, as well as other, additional KPDES Permit violations identified by DENF through its independent investigation of the allegations in NOI #2.

On October 3, 2011, Appalachian Voices filed a motion to intervene as a full party in the Cabinet's administrative enforcement proceeding, File Number DOW-33598-047. By order entered on October 18, 2011, the presiding Hearing Officer allowed Appalachian Voices to intervene in the proceeding.

11. On October 12, 2011, ICG filed its answer to the Administrative Complaint, File No. DOW-33598-047, in which ICG denied liability and set forth various affirmative defenses to the Cabinet's enforcement claims.

12. On October 25, 2011, Appalachian Voices filed a citizen suit pursuant to 33 U.S.C. § 1365, *Appalachian Voices, Inc. v. ICG, LLC, et al.*, Dkt. No. 7-11-cv-168, against ICG in the United States District Court for the Eastern District of Kentucky. Appalachian Voices alleges the claims set forth in NOI #1 and NOI #2 in its federal complaint, which is attached and incorporated herein as Appendix F. The federal court discontinued Appalachian Voices' federal action with prejudice, however Appalachian Voices or ICG may move the court to restore the case on or before October 10, 2012.

13. By Order of the Court, the Parties met in July 2011 and again beginning in January 2012 to mediate their claims. In mediation, the Parties sought to resolve the pending claims against ICG in Franklin Circuit Court, the Office of Administrative Hearings, and the United States District Court for the Eastern District of Kentucky.

14. DENF issued additional NOVs on October 4, 2011 for 19 of ICG's surface mine operations for violations occurring April 2011 through June 2011 (2<sup>nd</sup> Quarter 2011), and on December 15, 2011 for 17 of its surface mine operations for violations occurring July 2011 through September 2011 (3<sup>rd</sup> Quarter 2011). The NOVs are attached as Appendix G to this Consent Judgment.

15. Based upon its investigations of laboratories conducting wastewater monitoring and testing services for the coal mining industry, the Cabinet has determined that quality control

and quality assurance procedures at wastewater laboratories are often inadequate, in part due to a lack of clear regulatory standards and certification programs for wastewater laboratories. Due to these findings, the Cabinet proposed and the Kentucky General Assembly adopted legislation during the 2011 Regular Session giving the Cabinet authority to establish standards and a certification program for laboratories conducting analyses of wastewater for KPDES program purposes. The legislation was codified at KRS 224.10-670, which became effective June 8, 2011. The Cabinet expects to propose regulations in 2012 to implement the certification program, which will address laboratory quality assurance and quality control issues.

16. The Cabinet, ICG, and Appalachian Voices have negotiated this Agreement in good faith and at arm's-length. This Consent Judgment resolves all of the claims asserted by the Cabinet in the Franklin Circuit Court, Civil Action No. 10-CI-01868; the Cabinet's Administrative Complaint at the Office of Administrative Hearings, File Number DOW-33698-047; and by Appalachian Voices in their civil enforcement action, filed in the United States District Court for the Eastern District of Kentucky, Dkt. No. 7-11-cv-00168. These include the claims asserted in the NOVs issued by the Cabinet to ICG on or about November 29, 2010, and on July 8, August 8, August 10, October 4, and December 15, 2011. This Consent Judgment also resolves other potential claims of the same type as those alleged in the above-referenced actions and above-referenced NOVs for violations that may have occurred at ICG facilities covered by the permits listed in Appendix A between January 1, 2008 and June 30, 2012 (1<sup>st</sup> Quarter 2008 through 2<sup>nd</sup> Quarter 2012).

17. ICG does not admit any liability to the Cabinet or to Appalachian Voices arising out of the transactions or occurrences set forth herein, but agrees to the entry of this Consent Judgment to resolve all claims as described above in Paragraph 16 of this Consent Judgment. The parties acknowledge that entry of this Consent Judgment will avoid further litigation of these claims between the Parties.

18. The Parties agree that this Agreement is fair, adequate, reasonable, and in the public interest. Upon entry of this Consent Judgment, the Parties agree to dismiss with prejudice all claims referenced herein that are currently before the Cabinet's Office of Administrative Hearings, the Franklin Circuit Court, and the United States District Court for the Eastern District of Kentucky.

19. This Consent Judgment is intended to supersede and replace the Proposed Consent Judgment filed by the Cabinet and ICG on December 3, 2010 in the Franklin Circuit Court, Civil Action No. 10-CI-01868.

**NOW THEREFORE**, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED AND DECREED AS FOLLOWS:

## **II. JURISDICTION AND VENUE**

20. This Court has jurisdiction over the subject matter of the Cabinet's claims against ICG in this action pursuant to KRS 224.99-010(9). The Franklin Circuit Court is the proper venue for the Cabinet's claims. The Court has personal jurisdiction over the Parties to this Consent Judgment. Provided, however, nothing contained herein shall be construed as a finding or holding as to whether this Court has subject matter jurisdiction over, or is the appropriate venue for, claims brought pursuant to Section 505 (the citizen suit provision) of the Clean Water Act, 33 U.S.C. § 1365.

21. For purposes of this Consent Judgment, or any action to enforce this Consent Judgment, the Parties consent to the Court's jurisdiction over this Judgment or such action and over the Parties, and consent to the venue.

### **III. APPLICABILITY**

22. The provisions of this Consent Judgment apply to and are binding upon the Cabinet, Plaintiff Intervenors, and ICG and its successors-in-interest or purchasers of its facilities.

23. ICG shall provide a copy of this Consent Judgment to all officers, employees and agents whose duties include compliance with any provisions of this Consent Judgment, as well as to any contractor retained to perform work required under this Consent Judgment.

### **IV. DEFINITIONS**

24. Terms used in this Consent Judgment that are defined in the Clean Water Act and the Surface Mining Control and Reclamation Act or in regulations issued pursuant thereto shall have the meanings assigned to them therein, unless otherwise provided in this Agreement. Whenever the following terms are used in this Consent Judgment, the following definitions shall apply:

- a. "Average monthly discharge limit" shall mean average monthly discharge limitation as defined in 40 C.F.R. § 122.2;
- b. "Cabinet" shall mean the Commonwealth of Kentucky Energy and Environment Cabinet, an agency of the Commonwealth, or its successor;
- c. "Complaint" shall mean the complaint filed by the Plaintiff in this action, unless noted otherwise;
- d. "Consent Judgment" or "Agreement" shall mean this Consent Judgment;
- e. "Daily discharge limit" shall mean daily discharge limitation as defined in 40 C.F.R. § 122.2;



- f. “Day” shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next business day except for purposes of calculating periods of compliance under Section VI of this Agreement;
- g. “DMR” means a Discharge Monitoring Report for one of the KPDES permits identified herein;
- h. “Facility” or “Facilities” shall mean ICG’s mining operations, including but not limited to, surface and underground mines, coal processing and preparation plants, coal transportation facilities, reclaimed sites and all associated operations;
- i. “KPDES permit” shall mean any individual or general Kentucky Pollutant Discharge Elimination System permit issued to ICG Hazard and ICG Knott, ICG East or Powell Mountain for wastewater discharges from their coal mining operations, including those KPDES permits listed in Appendix A, pursuant to KRS Chapter 224 and Section 402 of the CWA;
- j. “NELAC or A2LA certification” or “NELAC or A2LA certified” shall refer to the National Laboratory Accreditation Program offered by The NELAC Institute, or the laboratory accreditation program offered by the American Association for Laboratory Accreditation (A2LA).
- k. “Outlet” or “Outfall” shall mean any outfall or discharge point at any facility operated by ICG in the Commonwealth of Kentucky that is required to be permitted under the KRS Chapter 224;
- l. “Paragraph” shall mean a portion of this Consent Judgment identified by a number or letter;
- m. “Parties” shall mean the Cabinet, Plaintiff Intervenors, and ICG;

- n. “Quarter” shall mean a calendar quarter. In computing any period of time under this Consent Judgment, where the last day of a calendar quarter would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day;
- o. “Section” shall mean a portion of this Consent Judgment identified by a Roman numeral; and
- p. “State” shall mean the Commonwealth of Kentucky.

## **V. REMEDIAL MEASURES**

### **Corrective Action Plan**

25. Upon entry of this Consent Judgment, the Corrective Action Plan (“CAP”) previously sent to the Cabinet on January 18, 2011 shall be deemed submitted to the Cabinet for review and approval. Notwithstanding the Cabinet’s review, ICG shall implement the CAP upon submittal for all its surface coal mining operations. The CAP shall contain and address:

- a. The procedures and protocols that ICG shall implement to achieve compliance with the monitoring, testing, recordkeeping, and reporting requirements for DMRs under its KPDES Permits;
- b. Practices employed to confirm DMRs contain complete and accurate information for all operations, including operations that share discharge outfalls, and to provide prompt submittal of corrected DMR information where required under 401 KAR 5:065 Section 2(1), and 40 CFR 122.41(1)(8);
- c. Procedures or processes used to confirm that information provided on future DMRs is consistent with RAM #150 issued by the Cabinet on May 3, 2011, which is attached hereto and incorporated as Appendix H;

- d. A copy of each laboratory's Standard Operating Procedures ("SOP") and Quality Assurance / Quality Control Protocols that are to be used and followed by each laboratory, including copies of the chain of custody form, bench sheet form, other laboratory forms, summary sheets, and maintenance and calibration log forms that contain all information required by 401 KAR 5:065, and 40 C.F.R. 122.41(e) and (j), as incorporated therein;
- e. Procedures and associated documentation to confirm that each laboratory has developed and is implementing the SOP and is using approved methodologies for all analyses; and
- f. Procedures and documentation to confirm that each laboratory has developed and is implementing appropriate Quality Assurance/ Quality Control Protocols.

26. Upon written notification that the Cabinet does not accept the CAP, ICG shall have twenty (20) days to submit an amended CAP, which may contain a reasonable compliance schedule for any amended provisions. Upon resubmittal, the Cabinet may, in whole or in part, (1) approve, or (2) disapprove and provide comments to ICG identifying the deficiencies. Upon such resubmittal, if any part of the CAP is disapproved, the Cabinet may deem ICG to be out of compliance with this Consent Judgment for failure to timely submit such portion and may assess stipulated penalties. If ICG has received no response from the Cabinet within thirty (30) days of submittal of the CAP or amended CAP, such plan shall become effective upon the expiration of that thirty (30) day period.

### **Laboratory Certification**

27. In addition to the CAP requirements set forth above, ICG shall, at all times during the effective period of this Consent Judgment, for the purposes of conducting sampling, testing, and reporting of effluent pursuant to the requirements of ICG's KPDES permits, contract with laboratories that have attained NELAC or A2LA certification for all measurements and

parameters that are required by its KPDES permit or applicable law to be tested and reported quarterly on its DMRs, except that ICG may continue to use Blackburn Contracting, Inc., which is not a NELAC or A2LA certified laboratory, for the purposes of monitoring and reporting effluent at the following facilities: KPDES Permit No. KYG045265 (SMCRA Permit No. 860-0441), KPDES Permit No. KYG044728 (SMCRA Permit No. 860-5296) which has been transferred to KPDES Permit No. KYG044728 (SMCRA Permit No. 860-5366), KPDES Permit No. KYG044982 (SMCRA Permit No. 860-5297), KPDES Permit No. KYG045973 (SMCRA Permit No. 860-5298), KPDES Permit No. KYG046609 (SMCRA Permit No. 860-5326), KPDES Permit No. KYG046374 (SMCRA Permit No. 860-5324), KPDES Permit No. KYG046395 (SMCRA Permit No. 860-5312), and KPDES Permit No. KYG041041 (SMCRA Permit No. 860-8014). In the event that one of ICG's contract laboratories loses its certification or is otherwise unable or unwilling to fulfill its duties or in the event Blackburn is no longer contracted to monitor and report effluent at one of the above-mentioned facilities, ICG shall have 30 days to contract with another laboratory that is NELAC or A2LA certified.

28. ICG shall require that its contract laboratory promptly obtain any necessary certifications consistent with administrative regulations to be promulgated by the Cabinet to implement KRS 224.10-670 with respect to monitoring and analysis of wastewater from coal mining operations.

29. ICG and Appalachian Voices agree to maintain an Auditing Contract that calls for independent, third-party diagnostic testing pursuant to and in accordance with the Auditing Contract as set forth in Exhibit 1. The Auditing Contract is a separate contract among ICG, Appalachian Voices and Smith Management Group or its successor(s). The Auditing Contract shall require that the Cabinet and Appalachian Voices shall be provided quarterly reports of the third-party diagnostic testing. It shall also include a provision that allows all auditing data, including but not limited to sampling data, to be made available to the Cabinet, without a fee and

upon written request. DMR data submitted by ICG shall include data from the third-party tester where required by law, if any. Nothing in this Consent Judgment shall be construed to create for Smith Management Group or its successor any right or obligation not otherwise imposed by law.

## **VI. CIVIL PENALTIES/STIPULATED PENALTIES**

30. Within thirty (30) days of entry of this Consent Judgment, ICG shall be obligated to pay the Cabinet a civil penalty in the amount of five hundred seventy-five thousand dollars (\$575,000), for the violations alleged above. The civil penalty payment shall be made by cashier's check, certified check, or money order. The check or money order shall be made payable to "Kentucky State Treasurer" and shall be sent to the attention of the Director, Division of Enforcement, Department for Environmental Protection, 300 Fair Oaks Lane, Frankfort, Kentucky 40601 by the deadlines specified herein. The payment shall identify that it is being made pursuant to this Consent Judgment and Civil Action No. 10-CI-01868.

31. In lieu of payment of the civil penalty due and owed to the Cabinet pursuant to Paragraph 30, above, and in full satisfaction of said obligation, within thirty (30) days of entry of this Consent Judgment, ICG shall pay the entire civil penalty amount of five hundred and seventy-five thousand dollars (\$575,000) for two Supplemental Environmental Projects ("SEP"s) as follows:

- a. Three hundred and thirty-five thousand dollars (\$335,000) of the civil penalty amount shall be paid to the Eastern Kentucky Personal Responsibility in a Desirable Environment Program ("PRIDE") and used to fund the PRIDE Community Grant Program for projects that eliminate straight pipes of residential sanitary waste to waters in Eastern Kentucky. Projects designated by the Cabinet's Division of Enforcement shall be given priority for PRIDE funding purposes.

- b. Two hundred and forty thousand dollars (\$240,000) of the civil penalty amount shall be paid into Franklin Circuit Court and disbursed to the Department for Natural Resources to be used to fund the Department for Natural Resources Cumulative Hydrologic Impact Assessment (“CHIA”) program. The Franklin Circuit Court shall disburse funds to the Department for Natural Resources upon Motion of the Cabinet and shall retain jurisdiction to disburse funds under this Paragraph even where this Consent Judgment has otherwise terminated. ICG shall notify the Cabinet and Plaintiff Intervenors when ICG has completed SEP payments to PRIDE and to the Court.

If ICG fails to pay the full civil penalty amount into the SEP projects as required, above, the full unpaid balance of the civil penalty shall be due and payable to the Kentucky State Treasurer at a ratio of 2:1 upon notice from the Cabinet. All stipulated penalties shall be paid to the Cabinet for the purposes of the Kentucky Heritage Land Conservation Fund (“KHLCF”).

32. ICG shall pay stipulated penalties to the Cabinet as set forth below:

- a. For failure to timely comply with the deadline in Paragraph 26 for submission of an amended CAP, a stipulated penalty in the amount of one thousand dollars (\$1,000) per day may be assessed.
- b. For any discharge limit violation, for the period beginning in the third quarter 2012 and continuing until termination of this Consent Judgment as provided in Paragraphs 69 and 70 herein, according to the following schedule:
  - i. For each daily violation<sup>1</sup> of permit limits for pH, manganese, iron, Total Suspended Solids (“TSS”), acidity, alkalinity, or Settleable Solids (“SS”), a penalty of one thousand and seven hundred fifty dollars (\$1,750); and

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<sup>1</sup> “Daily violation” or “Daily maximum violation” shall mean **(i)** any exceedance of a daily discharge limit, as determined under applicable state or federal law, for any parameters set forth in ICG’s KPDES permits, and identified by a DMR Sample; **(ii)** any failure to attain a minimum daily discharge limitation for pH set forth in ICG’s KPDES permits, as determined under applicable state law, and as identified by a DMR Sample; or **(iii)** any

- ii. For each monthly violation<sup>2</sup> of permit limits for iron , manganese, or TSS, a penalty of two thousand and five hundred dollars (\$2,500).

33. Stipulated Penalties for violations identified in Paragraph 32 above, shall be assessed for the period beginning in the Third Quarter of 2012 and continuing until termination of this Consent Judgment as provided in Paragraphs 69 and 70.

34. Stipulated penalties are in addition to and not in lieu of any other penalty which the Cabinet could assess. Payment of Stipulated Penalties shall resolve and satisfy the individual KPDES violations for which the stipulated penalties are assessed. The Cabinet may, in its discretion, waive stipulated penalties that would otherwise be due. The Cabinet will notify ICG and Plaintiff Intervenors within a reasonable time after the decision to waive any penalty. If Plaintiff Intervenors object to such waiver, the decision will be subject to the dispute resolution process set forth in Paragraph 42.

35. Stipulated penalties shall be calculated on a quarterly basis and paid in accordance with the same procedures set forth in Paragraph 30 that apply to the civil penalty. Within thirty (30) days after submitting quarterly DMRs, ICG shall report the number of violations and calculation of stipulated penalties for the preceding quarter to the Cabinet and Plaintiff Intervenors.

36. If either the Cabinet or Plaintiff Intervenors do not agree with the number of violations or the calculation of stipulated penalties submitted by ICG they shall provide ICG with a written explanation of the reason for disagreement within thirty (30) days of receiving ICG's report. The Cabinet shall make the final determination regarding the number of violations and the calculation of stipulated penalties. A failure to reach agreement on the number of violations

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failure to attain an acidity less than alkalinity set forth in ICG's KPDES permits, as determined under applicable state law, and as identified by a DMR Sample. "DMR Sample" shall mean a sample taken by ICG in accordance with approved test procedures under 40 C.F.R. Part 136.

<sup>2</sup> "Monthly average violation" shall mean any exceedance, as determined by a DMR Sample, of an average monthly discharge limitation for any parameters set forth in ICG's KPDES permits.

or the calculation of stipulated penalties shall be governed by the dispute resolution procedures set forth in Paragraph 42. If the Parties cannot agree on the amount of stipulated penalties through the procedures set forth in Paragraph 42, and ICG believes the assessment of any stipulated penalty is erroneous or contrary to law, it may challenge the Cabinet's determination of violations and/or calculation of stipulated penalties by filing a motion in Franklin Circuit Court to contest the determination. The filing of a motion in Franklin Circuit Court does not automatically relieve ICG from timely payment of the stipulated penalty or from the continued accrual of any stipulated penalties unless agreed to by the Parties or stayed by the Court.

37. If the Cabinet or Plaintiff Intervenors fail to respond to ICG's report within thirty (30) days, the Cabinet and Plaintiff Intervenors shall be deemed to have approved of the reported number of violations and calculation of stipulated penalties. The payment of stipulated penalties shall be made by ICG within thirty (30) days of receiving approval of its report from the Cabinet and Plaintiff Intervenors, the expiration of thirty (30) days with no response from the Cabinet or Plaintiff Intervenors, the expiration of thirty (30) days following an agreement reached through the dispute resolution process set forth in Paragraph 42, or a final determination by the Court under Paragraph 36.

38. A daily violation or monthly average violation as reported on ICG DMRs shall constitute one (1) violation for purposes of this Section. If a violation occurs at a Pond that is listed on more than one Permit, that shall constitute one (1) violation for purposes of this Section.

39. ICG shall comply with the terms and conditions of its KPDES Permits relating to discharge monitoring, testing, recordkeeping, and reporting.

40. ICG shall achieve compliance with Paragraph 27 requiring the use of certified laboratories within thirty (30) days of entry of this Consent Judgment. Also within thirty (30) days of entry of this Consent Judgment, ICG shall authorize Smith Management Group or its successors to commence the Auditing Program as described in the Auditing Contract.



## **VII. ENFORCEMENT, GENERALLY**

41. If at any time any Party has evidence to show noncompliance with this Consent Judgment and its incorporated Appendices and Exhibits, such Party shall notify all other Parties in writing in accordance with the following paragraph. ICG's failure to comply with its obligations under the Auditing Agreement shall constitute a violation of this Consent Judgment.

42. If any dispute or disagreement arises between the Parties, the Party seeking relief shall notify all other Parties in writing of the dispute or disagreement at issue. The Notice shall include alleged facts to describe the dispute at issue and, if applicable, facts to support any allegation of noncompliance with this Consent Judgment and/or its incorporated Appendices and Exhibits. The Parties shall then have 30 days to resolve the issue informally. If informal resolution is not reached by the end of 30 days following the Notice, the alleging party shall have the right to move the Court for relief and any appropriate remedy, if applicable. The fact that the Cabinet is not a party to the Auditing Contract shall not bar any Party from using the quarterly reports or underlying data from Smith Management Group or its successors to support any motion before the Court, subject to the applicable rules of evidence.

43. If ICG receives Notices of Violations or any other reports of noncompliance from any governmental entity, ICG shall provide such Notices or reports to Smith Management Group for inclusion in its quarterly report to the Cabinet and Intervenors in accordance with the Auditing Contract.

## **VIII. MISCELLANEOUS PROVISIONS**

44. Except for those matters resolved through this Consent Judgment, nothing contained herein shall be construed to waive or limit any remedy or cause of action by Plaintiff Intervenors or the Cabinet, and ICG reserves its defenses thereto. Except for the matters resolved herein, the Cabinet expressly reserves its right at any time to issue Administrative Orders and to

take any other action it deems necessary, including the right to order all necessary remedial measures, assess penalties for violations, or recover all response costs incurred, and ICG reserves its defenses thereto.

45. Except for those matters resolved through this Consent Judgment, this Agreement shall not prevent the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit to ICG. ICG reserves its rights to defenses thereto. ICGs shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Cabinet in the subsequent proceeding were or should have been brought in the instant case, except with respect to the claims that have been specifically resolved herein.

46. As a material term of this Consent Judgment, the Parties state that the Consent Judgment is not intended to preclude nor shall it preclude, any defense offered by ICG in any other civil litigation excluding those actions as described in Paragraph 16, whether based upon principles of waiver, laches, *res judicata*, collateral estoppel, equitable estoppel, issue preclusion, claim preclusion, or any other preclusive doctrine. ICG further specifically reserves its right to raise any defense that may be available to it in any civil litigation regarding matters addressed herein involving any individual, person, or entity that is not party to this Consent Judgment.

47. This Consent Judgment is without prejudice to the rights of the Cabinet and Plaintiff Intervenors against ICG with respect to all matters other than those expressly specified above. ICG waives its right to contest liability for the violations alleged in Franklin Circuit Court, Civil Action No. 10-CI-01868; the Cabinet's Administrative Complaint at the Office of Administrative Hearings, File Number DOW-33698-047; and Plaintiff Intervenors' civil enforcement action in the United States District Court for the Eastern District of Kentucky, Docket No. 7-11-cv-00168. However, failure by ICG to comply strictly with the terms of this

Consent Judgment shall be grounds for Plaintiff Intervenors, the Cabinet, or both to seek enforcement of this Consent Judgment in the Franklin Circuit Court. Additionally, Plaintiff Intervenors and the Cabinet maintain all existing rights to pursue any other appropriate administrative or judicial action under the Clean Water Act, 33 U.S.C. §§ 1251–1376, KRS Chapter 224, KRS Chapter 350, and the regulations promulgated pursuant thereto. ICG reserves its right to be heard in defense of any such enforcement proceedings. Each separate provision, condition, or duty contained in this Consent Judgment may be the basis for an enforcement action for a separate violation and penalty pursuant to KRS Chapter 224, KRS Chapter 350 and the regulations promulgated pursuant thereto upon failure to comply with the terms of this Consent Judgment, unless specifically provided for otherwise in this Consent Judgment.

48. The provisions of this Consent Judgment shall apply to and be binding upon ICG, its purchasers, successors, and assigns. The acts or omissions of ICG's Officers, Directors, Agents, and/or employees shall not excuse performance of any provision of this Consent Judgment. The Cabinet and Plaintiff Intervenors reserve their right to seek enforcement of this Consent Judgment against ICG, its purchasers, successors and assigns, and ICG reserves its defenses thereto. ICG and its successors shall require, as a condition of any sale or transfer of ownership or interest, in whole or in part, of any facility subject to this Consent Judgment, that the purchaser or successor-in-interest execute an agreement, to be provided to Plaintiff Intervenors and the Cabinet, binding the purchaser or successor-in-interest to the terms of this Consent Judgment as a Party. Within thirty (30) days of the sale or transfer of such interest, in whole or in part, Plaintiff Intervenors, ICG and its purchaser or successor-in-interest shall modify the Auditing Agreement to divide the obligations thereunder between ICG and its purchaser or successor-in-interest on a pro rata basis and apply the performance standards of the Auditing Contract to ICG and its purchaser or successor-in-interest separately. Whether or not a transfer takes place, ICG shall remain fully responsible for the payment of the civil penalty of

five hundred seventy-five thousand dollars (\$575,000). In the event of a transfer, ICG shall remain fully responsible for performance of all remedial measures and the payment of all stipulated penalties identified in this Consent Judgment that are applicable to those ICG facilities retained by ICG pursuant to such transaction, if any.

49. In the event a sale of assets or other transfer or assignment of interests is accompanied by a transfer of any KPDES permits subject to this Consent Judgment, the Cabinet shall make compliance with the applicable terms of the Consent Judgment a condition of permit transfer and shall release ICG from any obligation under the Consent Judgment incurred after the transfer and applicable to the transferred permit(s). This Consent Judgment does not limit or affect the rights of ICG, the Cabinet or Plaintiff Intervenors against any third party, not party to this Consent Judgment, nor does it limit the rights of any third party, not party to this Consent Judgment, against ICG, except as otherwise provided by law.

50. This Consent Judgment shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Judgment.

51. The Cabinet and Plaintiff Intervenors agree to allow the performance of the above-listed remedial measures and payment of the above-listed civil penalties by ICG to satisfy ICG's obligations to the Cabinet and Plaintiff Intervenors generated by the violations described herein.

52. This Consent Judgment shall be of no force and effect unless and until it is entered by the Franklin Circuit Court as evidenced by signatures thereon. If this Consent Judgment contains any date by which ICG is required to take any action under this Agreement and the Franklin Circuit Court enters the Consent Judgment after that date, then ICG is nonetheless obligated to perform the action by the date contained in this Consent Judgment.

53. ICG shall pay reasonable costs and attorneys' fees, including expert consultant fees and costs incurred by Plaintiff Intervenors for any enforcement action brought under Paragraph 42 in which Plaintiff Intervenors substantially prevail.

54. The Cabinet shall not be liable for and shall not pay any costs and or attorney fees of either, Plaintiff Intervenors or ICG, in any instance. The Cabinet shall be entitled to collect from ICG the costs (including attorneys fees) incurred in any action necessary to enforce this Consent Judgment.

55. In satisfaction of costs and attorneys' fees, no later than twenty (20) days from entry of this Consent Judgment, ICG shall deliver to Plaintiff Intervenors' counsel a check for One Hundred Twenty-Five Thousand Dollars (\$125,000), made payable to the Appalachian Citizens' Law Center. Appalachian Citizens' Law Center shall be wholly responsible for the proper distribution of any portions of the delivered sum to any and all other attorneys and other entities who may be entitled thereto. The sum delivered under this Paragraph shall be a complete settlement of Plaintiff Intervenors' claims for costs and fees incurred up to the Effective Date of this Consent Judgment.

56. This Consent Judgment constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Agreement and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Agreement or the settlement it represents, nor shall it be used in construing the terms of this Agreement.

57. The Cabinet does not, by its consent to the entry of this Consent Judgment, warrant or aver in any manner that ICG's compliance with this Consent Judgment will ensure compliance with all provisions of KRS Chapter 224, KRS Chapter 350 or the regulations promulgated pursuant thereto. Notwithstanding the Cabinet's review and comment on any plans

formulated pursuant to this Consent Judgment, ICG shall remain solely responsible for compliance with the terms of KRS Chapter 224, KRS Chapter 350 and the regulations promulgated pursuant thereto, this Consent Judgment and any permit and compliance schedule requirements.

58. The Parties agree that the remedial measures herein are facility-specific and designed to ensure that ICG complies with the statutes and regulations cited herein. This Consent Judgment applies specifically and exclusively to ICG's mining facilities identified in Appendix A and is inapplicable to any other facility.

59. Except as provided for in Paragraphs 53 through 55, any other costs, expenses and fees incurred by any Party relating to the investigations, complaints, negotiations, or implementation of this Agreement shall be borne by the Party incurring the costs, expenses, and/or fees.

60. Unless otherwise specified herein, whenever notifications, submissions, reports or communications are required by this Consent Judgment, they shall be provided in writing by US certified mail to the following:

For the Cabinet:

Jeffrey Cummins, Director  
Division of Enforcement  
300 Fair Oaks Lane  
Frankfort, KY 40601

For Plaintiff Intervenors:

Mary Varson Cromer, Esq.  
Appalachian Citizens' Law Center  
310 Main Street  
Whitesburg, KY 41858

For ICG:

Kevin M. McGuire, Esq.  
Laura P. Hoffman, Esq.  
Jackson Kelly, PLLC  
175 East Main Street, Suite 500  
P.O. Box 2150  
Lexington, KY 40588-9945

61. Any party may, by written notice to all other Parties or their successor(s), change its designated Notice recipient or notice address provided above.

62. Notices submitted pursuant to this Section shall be deemed submitted upon mailing unless otherwise provided in this Consent Judgment or by mutual agreement of the Parties in writing.

63. The Effective Date of this Consent Judgment shall be the date upon which the Consent Judgment is entered by the Court or a motion to enter this Consent Judgment is granted, whichever occurs first, as recorded in the Court's docket.

64. The terms of this Consent Judgment, including the attached and incorporated Appendices and Exhibits, may be modified only by a subsequent written agreement signed by all Parties. Where the modification constitutes a material change to this Consent Judgment, it shall be effective only upon approval by the Court. Any amended Consent Judgment shall not affect any other provision of this Agreement unless expressly provided for in the amended Consent Judgment.

65. If any term or other provision of this Consent Judgment is determined to be invalid, illegal or incapable of being enforced by any rule or law, or public policy, all other conditions and provisions of this Consent Judgment shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Consent Judgment so as to effect the original intent of the

parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the extent possible.

66. Each undersigned representative of the Cabinet, ICG and Plaintiff Intervenors certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Judgment and to execute and legally bind the Party he or she represents to this Consent Judgment.

### **IX. RETENTION OF JURISDICTION**

67. The Court shall retain exclusive jurisdiction over this case until termination of this Consent Judgment, for purpose of enforcing its terms, resolving disputes arising under this Consent Judgment or entering orders modifying this Consent Judgment, pursuant to the following section titled TERMINATION or effectuating or enforcing compliance with terms of this Consent Judgment.

68. The Cabinet, Plaintiff Intervenors and ICG reserve all legal and equitable rights and defenses available to them to enforce or defend the provisions of this Consent Judgment.

### **X. TERMINATION**

69. This Consent Judgment shall terminate immediately and automatically on occurrence of any one of the following events, whichever occurs first:

- a. upon the effective date of the Kentucky Coal General KPDES Permit issued subsequently to and replacing the current Kentucky Coal General KPDES Permit; or
- b. three (3) years from date of entry of this Consent Judgment.

70. At any time prior to the automatic termination of this Agreement, ICG may submit written notice to the Court (with service on the Cabinet and Plaintiff Intervenors) that ICG has completed all terms and conditions of this Consent Judgment. This Consent Judgment



shall terminate fourteen (14) calendar days after the submission of the notice to the Court unless either the Cabinet or Plaintiff Intervenors object and file a motion to continue the term of the Consent Judgment. If such motion is filed, it must contain evidence to support any allegation that the terms and conditions of the Consent Judgment have not been completed and request a hearing on the issue at the earliest available date.

## **XI. APPENDICES AND EXHIBITS**

71. The following Exhibit is attached hereto and incorporated as part of this Consent Judgment:

Exhibit 1: Auditing Agreement

72. The following Appendices are attached hereto and incorporated as part of this Consent Judgment:

Appendix A: DMP Permits and the corresponding KPDES Permits that have been issued to ICG that are the subject of this Consent Judgment

Appendix B: Plaintiff Intervenors' October 7, 2010 Notice of Intent to Sue

Appendix C: Cabinet's December 3, 2010 Complaint

Appendix D: Plaintiff Intervenors' June 28, 2011 Notice of Intent to Sue

Appendix E: Cabinet's Administrative Complaint, File Number DOW-33598-047, and NOVs

Appendix F: Plaintiff Intervenors' Federal Complaint, United States District Court for the Eastern District of Kentucky, Docket No. 7-11-cv-168

Appendix G: NOVs for violations based on DMRs from April through September 2011

Appendix H: RAM #150

## **XII. FINAL JUDGMENT**

73. Upon approval and entry of this Consent Judgment by the Court, this Consent Judgment shall constitute a final judgment between the Cabinet, ICG and Plaintiff Intervenors.

74. The Court finds that there is no just reason for delay and therefore enters this Consent Judgment as a final judgment.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2012.

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PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

**AGREED TO BY ICG:**

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For ICG Hazard, LLC; ICG Knott County, LLC;  
ICG East Kentucky, LLC; and Powell Mountain Energy, LLC

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Date

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Kevin M. McGuire, Esq.  
Laura P. Hoffman, Esq.  
*Counsel for ICG*

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Date

**AGREED TO BY THE ENERGY AND ENVIRONMENT CABINET:**

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Leonard K. Peters, Secretary

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Date

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C. Michael Haines, Esq., General Counsel

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Date

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Mary Stephens, Esq., Attorney Manager  
Office of General Counsel, Water Legal Section

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Date

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Sandra Gruzesky, Director  
Division of Water

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Date

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Jeffrey A. Cummins, Director  
Division of Enforcement

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Date

**AGREED TO BY PLAINTIFF INTERVENORS:**

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Willa Coffee Mays, Executive Director  
APPALACHIAN VOICES, INC.

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Date

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Steve Boyce, KFTC Chair  
KENTUCKIANS FOR THE COMMONWEALTH, INC.

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Date

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Peter Harrison, Staff Attorney  
WATERKEEPER ALLIANCE, INC.

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Date

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Pat Banks, Executive Director  
KENTUCKY RIVERKEEPER, INC.

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Date

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PAT BANKS, Individually

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Date

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WINSTON MERRILL COMBS, Individually

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Date

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THOMAS H. BONNY, Individually

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Date

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LANNY EVANS, Individually

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Date

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Mary Varson Cromer, Esq.  
*Co-counsel for Plaintiff Intervenors*

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Date

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Lauren H. Waterworth, Esq.  
*Co-counsel for Plaintiff Intervenors*

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Date

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing **CONSENT JUDGMENT** was mailed, postage prepaid to the following on this the \_\_\_\_\_ day of \_\_\_\_\_, 2012.

Hon. Kevin M. McGuire  
Hon. Laura P. Hoffman  
Jackson Kelly PLLC  
175 East Main Street, Suite 500  
P.O. Box 2150  
Lexington, KY 40588-9945  
*Counsel for Defendants*

Hon. Mary V. Cromer  
Appalachian Citizens' Law Center  
317 Main Street  
Whitesburg, KY 41858  
*Co-counsel for Plaintiff Intervenors*

Hon. Lauren Waterworth  
Waterworth Law Office, PLLC  
P.O. Box 254  
Boone, NC 28607  
*Co-counsel for Plaintiff Intervenors*

Hon. Mary Stephens  
Hon. Lisa C. Jones  
Hon. C. Michael Haines  
Office of General Counsel  
200 Fair Oaks Lane, First Floor  
Frankfort, KY40601  
*Counsel for Plaintiff*

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CLERK  
Franklin Circuit Court