

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

SIERRA CLUB, and)	<i>ELECTRONICALLY FILED</i>
KENTUCKIANS FOR THE)	
COMMONWEALTH,)	
)	Civil Action No. _____
Plaintiffs,)	
)	
v.)	
)	
CLINTWOOD ELKHORN)	
MINING COMPANY,)	
)	
Defendant.)	
_____)	

COMPLAINT

Introduction

1. This is a citizen's suit, brought under Section 505 of the Federal Water Pollution Control Act (the Act), as amended, 33 U.S.C. § 1365. Plaintiffs challenge Defendant's discharges of fill material into waters of the United States without first obtaining a permit. Plaintiffs seek a declaratory judgment, injunctive relief, the imposition of civil penalties and the award of costs, including attorneys' and expert witness' fees, for Defendant's violations of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

Jurisdiction and Venue

2. This Court has subject matter jurisdiction under Section 505(a) of the Act, 33 U.S.C. § 1365(a).

3. On June 10, 2008, Plaintiffs gave notice of the violations and their intent to file suit to the President and registered agent of Clintwood Elkhorn Mining Company.

4. At the same time, Plaintiffs sent copies of the notice to the United States

Environmental Protection Agency (EPA), to the Kentucky Environmental and Public Protection Cabinet, and to the United States Army Corps of Engineers (the Corps), as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A).

5. More than 60 days have passed since notice was served and neither EPA nor the State of Kentucky has commenced or is diligently prosecuting a civil or criminal action to redress the violations. In addition, neither EPA nor the State of Kentucky commenced an administrative civil penalty action under Section 309(g)(6) of the Act, 33 U.S.C. § 1319(g)(6), to redress the violations prior to the issuance of the notice letter.

6. Venue is appropriate in the Eastern District of Kentucky pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because Defendants' discharges and fill activities challenged in this action are located in this District.

Plaintiffs

7. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 1.3 million members and supporters nationwide and approximately 5,380 members who reside in Kentucky and belong to its Cumberland 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 Kentucky.

8. Plaintiff Kentuckians for the Commonwealth, Inc. (KFTC) is a nonprofit membership corporation which is organized under the laws of the Commonwealth of Kentucky, has its main office in London, Laurel County, Kentucky, and has approximately 2,500 members

statewide. KFTC's purposes include promoting social justice and quality of life for all Kentuckians, such as by addressing problems of land and mineral use and ownership, and through the participation of citizens in promoting democratic institutions.

9. Plaintiffs' members will suffer injury to their aesthetic, recreational, environmental and/or economic interests as a result of Defendant's unpermitted discharges. Plaintiffs have members that live in and frequently travel throughout eastern Kentucky in order to enjoy the natural beauty of the area, including mountains, forests, rivers and streams, and the extraordinary array of wildlife living in the area. These members observe and experience the adverse impacts of mountaintop removal mining and other surface mining activities, including changes to the landscape, deforestation, impaired or destroyed streams and discharges of air and water pollutants in or near areas where the Plaintiffs' members live, travel and recreate. Plaintiffs' members suffer harm to their aesthetic, recreational, environmental and/or economic interests when Defendant conducts destructive valley fill activities and associated mining activities that do not comply with the law.

Defendant

10. Defendant Clintwood Elkhorn (Clintwood Elkhorn) Mining Company is a corporation incorporated in the Commonwealth of Kentucky and is a wholly-owned subsidiary of TECO Coal Corporation. Clintwood Elkhorn is the operator of a surface coal mine near Fishtrap Lake in Pike County, Kentucky.

Facts

11. Sometime prior to March 20, 2008, Clintwood Elkhorn began discharging fill material, including rock and dirt, into waters of the United States, including headwater streams in the Millers Creek watershed near Fishtrap Lake in Kentucky, without a permit under Sections

402 or 404 of the Act, 33 U.S.C. §§ 1342, 1344.

12. Defendant has violated and continues to violate the Act by allowing this fill material to remain in the streams without such a permit.

13. Defendant's discharges and fill activities have caused significant environmental harm, both cumulatively and individually.

14. Defendant's discharges and fill activities were neither designed nor constructed to avoid, minimize, or mitigate impacts to waters for the United States, as required by the 404(b)(1) Guidelines, 40 C.F.R. Part 230.

15. Defendant's discharges and fill activities have caused destruction of waters of the United States and surrounding forests, decreases in water quality, loss or reduction of fish, wildlife, and their habitats, and loss or reduction of other functions and values associated with waters of the United States and the surrounding forests.

Claim

16. The Federal Water Pollution Control Act is intended to protect the waters of the United States, including headwater streams. The primary objective of the Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

17. One of the six national goals to achieve this objective is the attainment of "water quality which provides for the protection and propagation of fish, shellfish, wildlife and for recreation in and on the water." 33 U.S.C. § 1251(a)(2).

18. To achieve its objective and goals, Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into navigable waters of the United States, unless the discharge is in compliance with certain sections of the Act, including Section 404, 33 U.S.C. §

1344. The term "pollutant" is defined to include, among other things, dredged material, fill material, rock, sand, soil and vegetative matter. 33 U.S.C. § 1362(6); 33 C.F.R. § 323.2.

19. Under Section 404, all discharges of dredged or fill materials into waters of the United States which are not exempt under Section 404(f)(1) must be authorized under either an individual or a general Section 404 permit. Section 404 permits are issued by the Corps, in accord with guidelines issued by EPA.

20. Section 505(a) of the Act, 33 U.S.C. § 1365(a), authorizes any citizen to commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation under the Act or an order issued by EPA with respect to such a standard or limitation. Section 505(f)(1) of the Act, 33 U.S.C. § 1365(f)(1), defines "effluent standard or limitation under this Act" to mean an unlawful act under Section 301(a) of the Act, 33 U.S.C. § 1311(a).

21. Defendant is in violation of an effluent standard or limitation under the Act because it has discharged pollutants into navigable waters without obtaining a permit as required by Sections 301(a) and 404 of the Act, 33 U.S.C. §§ 1311(a) and 1344.

22. Each day that any fill material remains in a water of the United States constitutes a separate violation of the Act.

Relief

Wherefore, Plaintiffs respectfully request this Court to grant the following relief:

A. Issue a declaratory judgment that Defendant has violated, and continues to be in violation of, Sections 301 and 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311 and 1344;

B. Order Defendant to pay appropriate civil penalties for each day it has been in violation of the Act pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and

1365(a);

C. Order Defendant to perform mitigation sufficient to offset the loss of aquatic resources resulting from its unpermitted discharges.

D. Award Plaintiffs their costs, including reasonable attorneys' and expert witness' fees, as authorized by Section 505(d) of the Act, 33 U.S.C. § 1365(d); and

E. Award such other relief as this Court deems appropriate.

Respectfully submitted, this 9th day of September, 2008

/s/ W. Henry Graddy, IV
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