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October 16, 2024

Greg Whirley, Manager
SOUTH FORK COAL COMPANY, LLC
1295 Ashford Hill Road
Ashford, WV 25009

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under the Clean Water Act for Violations of WV/NPDES Permits Nos. WV0096971, WV1024744, & WV1030159 and the Surface Mining Control and Reclamation Act for Violations of Surface Mining Statutes, Regulations, and Mining Permits Nos. S013878, S303393, S300511, S301219, and S301016 by South Fork Coal Company, LLC.

Dear Mr. Whirley:

In accordance with Section 505(b)(1) of the Clean Water Act, 33 U.S.C. § 1365(b)(1), and 40 C.F.R. Part 135, Appalachian Voices and the West Virginia Highlands Conservancy hereby notify you that South Fork Coal Company, LLC (“South Fork”) has violated and continues to violate “an effluent standard or limitation” under § 505(a)(1)(A) of the Clean Water Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms and conditions of its West Virginia/National Pollutant Discharge Elimination System (“WV/NPDES”) Permits Nos. WV0096971, WV1024744, and WV1030159 issued by the West Virginia Department of Environmental Protection (“WVDEP”) for its Lost Flats, Blue Knob, and Rocky Run Surface Mines, respectively, in Greenbrier County, West Virginia.

Furthermore, pursuant to § 502 of the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, Appalachian Voices and the West Virginia Highlands Conservancy further notify you that South Fork has violated and continues to violate the performance standards mandated by SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA”), *see* 30 C.F.R. §§ 816.41, 816.42; W. Va. Code §§ 22-3-13(a), (b)(10), (g); W. Va. Code St. R. §§ 38-2-14.5, 38-2-14.15.f, 2-3.33, other requirements mandated by SMCRA and WVSCMRA, *see* W. Va. Code St. R. § 38-2-5.4.a–c, at the above-listed mines under West Virginia Surface Mining Permits Nos. S013878, S303393, S300511, and S301219, as well as at the Laurel Creek Contour No. 1 Mine under Surface Mining Permit No. S301016.

If, within sixty (60) days of this notice, South Fork does not bring itself into full compliance with the Clean Water Act, SMCRA, WVSCMRA, any federal or state regulations promulgated

pursuant thereto, and any permits issued thereunder, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens' suit in federal court seeking declaratory and injunctive relief, as well as civil penalties, for these violations.

I. LOST FLATS SURFACE MINES

A. Background

South Fork's discharges from the Lost Flats #1 and #2 Surface Mines are regulated under WV/NPDES Permit No. WV0096971. WVDEP reissued that permit most recently on July 1, 2020, with an expiration date of June 24, 2025. The permit was first issued to Drennen Enterprises on January 14, 1991. Since that time, the permit has been transferred five times: first to Greenbrier Coal Company in 1991, then to ANR Coal Company, LLC, in 1997, then to Coastal Coal-West Virginia, LLC, in 2001, then to Brooks Run Mining Company, LLC, in 2005, and finally to South Fork on October 13, 2011. The associated SMCRA permits for the Lost Flats Surface Mines are Mining Permits Nos. S013878 and S303393.

Outfall 032 discharges stormwater runoff from the mine operation area into Becky Run, a tributary of the South Fork of the Cherry River. The South Fork of the Cherry River is designated as a trout stream by the West Virginia Department of Natural Resources. Becky Run is currently listed as impaired for Iron (trout) on West Virginia's Clean Water Act § 303(d) List, and is a documented trout water. The effluent limits for iron at Outfall 032 in Permit No. WV0096971 are 0.95 mg/l monthly average and 1.64 mg/l daily maximum. The effluent limitations for manganese at that outfall are 2.0 mg/l monthly average and 3.47 mg/l daily maximum.

Per its discharge monitoring reports for the Lost Flats Surface Mines, South Fork has regularly violated permit limitations at Outfall 032. Between March 2020 and July 2024, South Fork violated the effluent limitations for iron and manganese at Outfall 032 as set forth below:

Month	Outfall	Parameter	Type	Limit	Reported	Unit	% Over
July 2024	032	Manganese	Monthly Avg.	2.0	2.16	mg/l	8%
May 2024	032	Iron	Month Avg.	0.95	1.5	mg/l	57.89%
May 2024	032	Iron	Daily Max.	1.64	1.67	mg/l	1.82%
April 2024	032	Iron	Month Avg.	0.95	1.68	mg/l	76.84%
April 2024	032	Iron	Daily Max.	1.64	1.68	mg/l	2.44%
March 2024	032	Iron	Month Avg.	0.95	2.16	mg/l	127%
March 2024	032	Iron	Daily Max.	1.64	2.16	mg/l	31.70%
Feb. 2024	032	Iron	Monthly Avg.	0.95	2.30	mg/l	142%
Feb. 2024	032	Iron	Daily Max.	1.64	2.31	mg/l	40.85%
Dec. 2023	032	Iron	Monthly Avg.	0.95	1.77	mg/l	86.32%
Dec. 2023	032	Iron	Daily Max.	1.64	1.77	mg/l	7.93%
Nov. 2023	032	Iron	Monthly Avg.	0.95	2.05	mg/l	115.79%
Nov. 2023	032	Iron	Daily Max.	1.64	2.34	mg/l	42.68%
Oct. 2023	032	Iron	Daily Max.	1.64	1.7	mg/l	3.66%
Aug. 2023	032	Iron	Monthly Avg.	0.95	1.12	mg/l	17.89%
Aug. 2023	032	Iron	Daily Max.	1.64	1.69	mg/l	3.05%

Jun. 2023	032	Iron	Monthly Avg.	0.95	2.01	mg/l	111.58%
Jun. 2023	032	Iron	Daily Max.	1.64	2.01	mg/l	22.56%
Apr. 2023	032	Iron	Monthly Avg.	0.95	1.22	mg/l	28.42%
Feb. 2023	032	Iron	Monthly Avg.	0.95	1.45	mg/l	52.63%
Jan. 2023	032	Iron	Monthly Avg.	0.95	2.75	mg/l	189.47%
Jan. 2023	032	Iron	Daily Max.	1.64	3.05	mg/l	85.98%
Dec. 2022	032	Iron	Monthly Avg.	0.95	2.08	mg/l	118.95%
Dec. 2022	032	Iron	Daily Max.	1.64	2.23	mg/l	35.98%
Nov. 2022	032	Iron	Daily Max.	1.64	1.75	mg/l	6.71%
Oct. 2022	032	Iron	Monthly Avg.	0.95	1.21	mg/l	27.37%
Aug. 2022	032	Iron	Monthly Avg.	0.95	1.47	mg/l	54.74%
May 2022	032	Iron	Monthly Avg.	0.95	1.06	mg/l	11.58%
Mar. 2022	032	Iron	Monthly Avg.	0.95	1.03	mg/l	8.42%
Feb. 2022	032	Iron	Monthly Avg.	0.95	1.24	mg/l	30.53%
Jan. 2022	032	Iron	Monthly Avg.	0.95	1.07	mg/l	12.63%
Oct. 2021	032	Iron	Monthly Avg.	0.95	1.34	mg/l	41.05%
Jul. 2021	032	Iron	Monthly Avg.	0.95	0.989	mg/l	4.11%
Mar. 2020	032	Iron	Monthly Avg.	0.95	0.988	mg/l	4.00%

Additionally, on April 30, 2024, WVDEP issued Notice of Violation #39 related to Surface Mining Permit No. S013878 based on South Fork's failure to comply with the revegetation requirements of the federal and state surface mining laws. WVDEP converted that Notice of Violation into Failure to Abate Cessation Order #44 on July 25, 2024. On August 26, 2024 and September 23, 2024, WVDEP issued inspection follow-up reports stating that the agency had instituted the show cause process for this permit due to this violation remaining unabated.

B. Clean Water Act Violations

Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), provides that “any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter” For purposes of this citizen suit provision, an “effluent standard or limitation” means, among other things, an unlawful action under § 301(a) of the Clean Water Act, *id.* § 1311(a), or a “permit or condition thereof” issued pursuant to § 402 of the Clean Water Act, *id.* § 1342(a). *Id.* §§ 1365(f)(2), (f)(7).

Section 301(a) of the Clean Water Act, *id.* § 1311(a), prohibits the “discharge of any pollutant by any person” into waters of the United States, except in compliance with the terms and conditions of a permit, including a WV/NPDES permit issued pursuant to Section 402 of the Clean Water Act, *id.* § 1342. Section 402(a) of the Clean Water Act, *id.* § 1342(a), provides that the permit-issuing authority, including the WVDEP, may issue a NPDES permit authorizing the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable Clean Water Act requirements. Consequently, any discharge that exceeds the effluent limitations of an applicable WV/NPDES permit or violates a permit condition, such as monitoring and reporting requirements, constitutes an unlawful discharge in violation of § 301 of the Clean Water Act.

Based on South Fork's discharge monitoring reports, it is clear that South Fork has repeatedly violated and continues to violate the iron effluent limitations, and also has recently violated the manganese effluent limitations, set out in Permit No. WV0096971. If South Fork does not cease its violations within sixty (60) days, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens' suit in federal court seeking declaratory and injunctive relief, as well as civil penalties, for the violations.

C. SMCRA Violations

Like the Clean Water Act, § 520(a)(1) of SMCRA, 30 U.S.C. § 1270(a)(1), authorizes "any person having an interest which is or may be adversely affected [to] commence a civil action . . . against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter." West Virginia has, at all relevant times, administered an approved surface mining regulatory program pursuant to SMCRA, through WVSCMRA. 30 C.F.R. § 948.10. WVSCMRA mandates that all surface mining permits require the surface mining operation to "meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director." W. Va. Code § 22-3-13(a). WVDEP's regulations issued under WVSCMRA similarly provide that "[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of [WVSCMRA], and this rule." W. Va. Code St. R. § 38-2-3.33.c. As such, all performance standards are incorporated as permit conditions for mining permits issued under West Virginia's SMCRA program.

The federal and state performance standards under SMCRA and WVSCMRA require all mining activities to be conducted in a manner that "prevent[s] material damage to the hydrological balance outside the permit area . . ." 30 C.F.R. § 816.41(a); W. Va. Code § 22-3-13(b)(10); W. Va. Code St. R. § 38-2-14.5. To that end, these performance standards require that all discharges of water from permitted mining operations "shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by [the U.S. EPA] set forth in 40 CFR part 434," W. Va. Code St. R. § 38-2-14.5.b; 30 C.F.R. § 816.42, and that "[a]dequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with [effluent limitations]," W. Va. Code St. R. § 38-2-14.5.c; 30 C.F.R. § 816.41(d)(1).

Accordingly, violations of NPDES permit-imposed effluent limitations and applicable water quality standards are violations of SMCRA and WVSCMRA. And, as discussed above, South Fork has violated and continues to violate the effluent limitations in WV/NPDES Permit No. WV0096971. Consequently, South Fork's past and ongoing violations of the effluent limitations in Permit No. WV0096971 are also violations of the federal and state SMCRA performance standards. Additionally, as evidenced by South Fork's past and ongoing violations of the effluent limitations in Permit No. WV0096971, South Fork has likewise failed and continues to fail to install, operate, or maintain adequate water treatment facilities in violation of the federal and state SMCRA performance standards.

Further, the federal and state SMCRA performance standards require that "[r]evegetation shall be kept current by establishing a temporary or permanent vegetative cover on regraded areas

by the end of the first growing season and a permanent cover by the end of the second growing season.” W. Va. Code St. R. § 38-2-14.15.f; *see also* 30 C.F.R. § 816.111.

As evidenced by WVDEP’s documented Notice of Violation #39 (Apr. 30, 2024) and Failure to Abate Cessation Order 44 (July 25, 2024), which remain in effect, South Fork has violated and continues to violate the revegetation performance standards and requirements under SMCRA, WVSCMRA, and the regulations issued thereunder at the Lost Flats #1 Surface Mine, Permit No. S013878. As such, South Fork is in continuing and/or intermittent violation of SMCRA and WVSMCRA.

If South Fork does not cease its violations within sixty (60) days, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens’ suit in federal court seeking declaratory and injunctive relief for these violations.

II. BLUE KNOB SURFACE MINE

A. Background

South Fork’s discharges from the Blue Knob Surface Mine are regulated under WV/NPDES Permit No. WV1024744. WVDEP reissued that permit most recently on June 2, 2023, with an expiration date of May 2, 2028. The permit was first issued to South Fork on July 16, 2012. On August 16, 2018, by Major Permit Modification #2, Outfalls 032, 037, 038, and 039 were added to the permit and Outfall 020 was relocated. The associated SMCRA permit for the Blue Knob Surface Mine is Mining Permit No. S300511.

Outfall 020 is a precipitation induced outlet that discharges into Blue Knob Branch, a tributary of Cold Knob Fork of the South Fork of the Cherry River. Outfall 032 is a precipitation induced outlet that discharges into Middle Branch, a tributary of Laurel Creek, which in turn is a tributary of the Cherry River. Outfall 037 is a precipitation induced outlet that discharges into an unnamed tributary of Blue Knob Branch, a tributary of Cold Knob Fork of the South Fork of the Cherry River. Outfall 038 is a precipitation induced outlet that discharges into an unnamed tributary of Blue Knob Branch, a tributary of Cold Knob Fork of the South Fork of the Cherry River. Outfall 039 is a precipitation induced outlet that discharges into an unnamed tributary of Becky Run, a tributary of the South Fork of the Cherry River. As noted above, the South Fork of the Cherry River is a designated trout stream, and Becky Run is both a documented trout stream and listed as impaired for Iron (trout) on the West Virginia Clean Water Act § 303(d) List. Additionally, Blue Knob Branch is currently listed as impaired for Iron (trout) on the West Virginia 303(d) List. And lastly, Middle Branch is currently listed as impaired for Iron (trout) on the West Virginia 303(d) List. Blue Knob Branch, Middle Branch, Laurel Creek, and Cold Knob Branch are all documented trout streams.

Under Permit No. WV1024744, the effluent limitations for iron at Outfalls 020, 038, and 039 are 0.95 mg/l monthly average and 1.64 mg/l daily maximum. The effluent limitations for total suspended solids at Outfall 020 are 35 mg/l monthly average and 70 mg/l daily maximum. The effluent limitations for aluminum at Outfall 032 are 0.12 mg/l monthly average and 0.20 mg/l

daily maximum. The effluent limitations for manganese at Outfalls 037 and 039 are 2.00 mg/l monthly average and 4.00 mg/l daily maximum.

Per its discharge monitoring reports for the Blue Knob Surface Mine, South Fork has regularly violated effluent limitations at Outfalls 037, 038, 039, 032, and 020, as set forth below:

Month	Outfall	Parameter	Type	Limit	Reported	Unit	% Over-Under
July 2024	037	Iron	Monthly Avg.	0.95	2.21	mg/l	132.63%
July 2024	037	Iron	Daily Max.	1.64	4.19	mg/l	155.49%
July 2024	038	Iron	Daily Max.	1.64	1.75	mg/L	6.7%
Apr. 2024	037	pH	Daily Min.	6	5.62	SU	6.76%
Feb. 2024	037	Manganese	Monthly Avg.	2.00	10.1	mg/l	405%
Feb. 2024	037	Manganese	Daily Max.	4.00	10.1	mg/l	152.5%
Jul. 2023	039	Manganese	Monthly Avg.	2.00	4.25	mg/l	112.50%
Jul. 2023	039	Manganese	Daily Max.	4.00	4.25	mg/l	6.25%
Jul. 2023	039	Iron	Monthly Avg.	0.95	1.97	mg/l	107.37%
Jul. 2023	039	Iron	Daily Max.	1.64	1.97	mg/l	20.12%
Feb. 2023	039	Manganese	Monthly Avg.	2.00	2.29	mg/l	14.50%
Apr. 2022	039	Manganese	Monthly Avg.	2.00	4.02	mg/l	101.00%
Apr. 2022	039	Manganese	Daily Max.	4.00	4.02	mg/l	0.50%
Nov. 2021	039	Manganese	Monthly Avg.	2.00	4.19	mg/l	109.50%
Nov. 2021	039	Manganese	Daily Max.	4.00	4.19	mg/l	4.75%
Oct. 2021	039	Manganese	Monthly Avg.	2.00	2.63	mg/l	31.50%
Jul. 2021	039	Manganese	Monthly Avg.	2.00	6.95	mg/l	247.50%
Jul. 2021	039	Manganese	Daily Max.	4.00	6.95	mg/l	73.75%
May 2021	039	Manganese	Monthly Avg.	2.00	5.00	mg/l	150.00%
May 2021	039	Manganese	Daily Max.	4.00	5.00	mg/l	25.00%
Apr. 2021	039	Manganese	Monthly Avg.	2.00	4.64	mg/l	132.00%
Apr. 2021	039	Manganese	Daily Max.	4.00	5.14	mg/l	28.50%
Apr. 2021	032	Aluminum	Monthly Avg.	0.12	1.21	mg/l	908.33%
Apr. 2021	032	Aluminum	Daily Max.	0.20	1.21	mg/l	505.00%
Apr. 2021	020	Iron	Monthly Avg.	3.00	3.34	mg/l	11.33%
Apr. 2021	020	TSS	Monthly Avg.	35.00	81.00	mg/l	131.43%
Apr. 2021	020	TSS	Daily Max.	70.00	103.00	mg/l	47.14%
Jan. 2020	032	Aluminum	Monthly Avg.	0.12	0.548	mg/l	356.67%
Jan. 2020	032	Aluminum	Daily Max.	0.20	0.70	mg/l	250.00%
Dec. 2019	039	Manganese	Monthly Avg.	0.95	10.4	mg/l	994.74%
Dec. 2019	039	Manganese	Daily Max.	1.64	10.4	mg/l	534.15%
Dec. 2019	032	Aluminum	Monthly Avg.	0.12	0.138	mg/l	15.00%

In addition to numeric effluent limitations, Permit No. WV1024744 also requires Whole Effluent Toxicity (“WET”) testing. Specifically, under the current permit, issued on June 2, 2023, South Fork is required to perform and report quarterly Chronic Toxicity testing on *Ceriodaphnia*

dubia for Outfalls 010, 011, 020–027, 030–035, and 039–048. The WET limits in Permit No. WV1024744 are 0.82 TUC monthly average and 1.64 TUC daily maximum. Prior to the most recent reissuance, Major Permit Modification #2 (issued on August 16, 2018) required South Fork to perform semi-monthly¹ WET tests at Outfalls 032, 033, and 034. The WET limits under Major Permit Modification #2 were also 0.82 TUC monthly average and 1.64 TUC daily maximum.

Since Permit No. WV1024744 was reissued on June 2, 2023, South Fork has not submitted WET test reports for any of the required outfalls. With the exception of Outfall 034 in April 2024, between August 2023 and July 2024, South Fork reported “no flow” at all outfalls. However, South Fork reported flow at Outfalls 037 and 039 in July 2023, and at Outfall 037 in June 2023, but did not report WET test results for either of these months at these outfalls. Nor did South Fork report WET test results for the flow event in April 2024 at Outfall 034. Though Permit No. WV1024744 requires quarterly WET tests, the permit does not specify the months in which those WET tests must occur.

Between August 2018 and May 2023, South Fork was required to perform WET tests on a semi-monthly basis at Outfalls 032, 033, and 034 and report the results in its discharge monitoring reports. Despite regularly reporting flow at Outfalls 032 and 034, South Fork failed to report the results of any WET tests. Outfall 033 was reported as “no flow” or “not constructed” at all relevant months. Specifically, South Fork failed to report the results of any WET tests in the months listed below:

Month	Outfall 032	Outfall 034
May 2023	No Flow	No WET Test Reported
Apr. 2023	No Flow	No WET Test Reported
Feb. 2023	No Flow	No WET Test Reported
Mar. 2022	No Flow	No WET Test Reported
Feb. 2022	No Flow	No WET Test Reported
Nov. 2021	No Flow	No WET Test Reported
Aug. 2021	No Flow	No WET Test Reported
May 2021	No Flow	No WET Test Reported
Apr. 2021	No WET Test Reported	No WET Test Reported
Mar. 2021	No Flow	No WET Test Reported
Dec. 2020	No Flow	No WET Test Reported
Oct. 2020	No Flow	No WET Test Reported
Sep. 2020	No WET Test Reported	No WET Test Reported
Aug. 2020	No WET Test Reported	No WET Test Reported
Jul. 2020	No WET Test Reported	No WET Test Reported
Jun. 2020	No WET Test Reported	No WET Test Reported
May 2020	No Flow	No WET Test Reported
Apr. 2020	No WET Test Reported	No WET Test Reported

¹ The Rationale Page for Major Permit Modification #2 states that the frequency at which South Fork was required to conduct and report WET tests for Outfalls 032, 03, and 034 was “quarterly.” However, in Section A of the permit itself, WVDEP lists the monitoring requirements for Outfalls 032, 033, and 034 to be “semi-monthly.”

Mar. 2020	No WET Test Reported	No Flow
Feb. 2020	No WET Test Reported	No Flow
Jan. 2020	No WET Test Reported	No Flow
Dec. 2019	No WET Test Reported	No Flow
Nov. 2019	No WET Test Reported	No Flow
Oct. 2019	No WET Test Reported	No Flow
Sep. 2019	No WET Test Reported	No Flow

B. Clean Water Act Violations

Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), provides that “any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter” For purposes of this citizen suit provision, an “effluent standard or limitation” means, among other things, an unlawful action under § 301(a) of the Clean Water Act, *id.* § 1311(a), or a “permit or condition thereof” issued pursuant to § 402 of the Clean Water Act, *id.* § 1342(a). *Id.* §§ 1365(f)(2), (f)(7).

Section 301(a) of the Clean Water Act, *id.* § 1311(a), prohibits the “discharge of any pollutant by any person” into waters of the United States, except in compliance with the terms and conditions of a permit, including a WV/NPDES permit issued pursuant to § 402 of the Clean Water Act, *id.* § 1342. Section 402(a) of the Clean Water Act, *id.* § 1342(a), provides that the permit-issuing authority, including the WVDEP, may issue a NPDES permit authorizing the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable Clean Water Act requirements and other such conditions as the permitting authority deems necessary to carry out the provisions of the Clean Water Act. Consequently, any discharge that exceeds the effluent limitations of an applicable WV/NPDES permit or violates a permit condition, such as monitoring and reporting requirements, constitutes an unlawful discharge in violation of § 301 of the Clean Water Act.

Additionally, South Fork’s past and ongoing failure to conduct and report WET tests as prescribed by Permit No. WV1024744 also constitutes a violation of permit conditions pursuant to §§ 301 and 402 of the Clean Water Act. The prior iteration of Permit No. WV1024744 required semi-monthly WET tests to be conducted and reported at Outfalls 032, 033, and 034. Based on the discharge monitoring reports submitted by South Fork, despite reporting flow at Outfalls 032 and 034 for many months between August 2018 and May 2023, South Fork failed to conduct and report any WET tests. The June 2023 reissuance of Permit No. WV1024744 requires quarterly WET tests to be conducted and reported for Outfalls 010, 011, 020–027, 030–035, and 039–048. However, likely because South Fork has reported “no flow” for the majority of outfalls and months since permit reissuance, South Fork has failed to conduct or report WET testing in accordance with the permit conditions. The federal and state NPDES rules require, however, that “[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.” 40 C.F.R. § 111.41(j)(1); W. Va. Code St. R. § 47-10-5.10.b. Accordingly, the WET testing should have been conducted when there was flow from these outfalls. In other words, because of the frequency of “no flow” being reported, South Fork should have conducted the required WET testing at the first instance of flow during each quarter it was required to report.

South Fork's failure to conduct and report WET testing constitutes past and ongoing violations of a permit condition contrary to §§ 301 and 402 of the Clean Water Act.

Thus, based on South Fork's discharge monitoring reports, it is clear that South Fork has repeatedly violated and continues to violate the iron, manganese, TSS, pH, and aluminum effluent limitations set out in Permit No. WV1024744 and has repeatedly violated and continues to violate the permit condition requiring WET testing. If South Fork does not cease its violations within sixty (60) days, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens' suit in federal court seeking declaratory and injunctive relief, as well as civil penalties, for these violations.

C. SMCRA Violations

Like the Clean Water Act, § 520(a)(1) of SMCRA, 30 U.S.C. § 1270(a)(1), authorizes "any person having an interest which is or may be adversely affected [to] commence a civil action . . . against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter." West Virginia has, at all relevant times, administered an approved surface mining regulatory program pursuant to SMCRA, through WVSCMRA. 30 C.F.R. § 948.10. WVSCMRA mandates that all surface mining permits require the surface mining operation to "meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director." W. Va. Code § 22-3-13(a). WVDEP's regulations issued under WVSCMRA similarly provide that "[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of [WVSCMRA], and this rule." W. Va. Code St. R. § 38-2-3.33.c. As such, all performance standards are incorporated as permit conditions for mining permits issued under West Virginia's SMCRA program.

The federal and state performance standards under SMCRA and WVSCMRA require all mining activities to be conducted in a manner that "prevent[s] material damage to the hydrological balance outside the permit area . . ." 30 C.F.R. § 816.41(a); W. Va. Code § 22-3-13(b)(10); W. Va. Code St. R. § 38-2-14.5. To that end, these performance standards require that all discharges of water from permitted mining operations "shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by [the U.S. EPA] set forth in 40 CFR part 434," W. Va. Code St. R. § 38-2-14.5.b; 30 C.F.R. § 816.42, and that "[a]dequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with [effluent limitations]," W. Va. Code St. R. § 38-2-14.5.c; 30 C.F.R. § 816.41(d)(1).

Accordingly, violations of NPDES permit-imposed effluent limitations and applicable water quality standards are violations of SMCRA, WVSCMRA, and the mining permits issued thereunder. And, as discussed above, South Fork has violated and continues to violate the effluent limitations in WV/NPDES Permit No. WV1024744. Consequently, South Fork's past and ongoing violations of the effluent limitations in Permit No. WV1024744 are also violations of the federal and state SMCRA performance standards. Additionally, as evidenced by South Fork's past and ongoing violations of the effluent limitations in Permit No. WV1024744, South Fork has likewise failed and continues to fail to install, operate, or maintain adequate water treatment facilities in

violation of the federal and state SMCRA performance standards. As such, South Fork is in continuing and/or intermittent violation of SMCRA and WVSMCRA.

If South Fork does not cease its violations within sixty (60) days, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens' suit in federal court seeking declaratory and injunctive relief for these violations.

III. ROCKY RUN SURFACE MINE

A. Background

South Fork's discharges from the Rocky Run Surface Mine are regulated under WV/NPDES Permit No. WV1030159. WVDEP issued Permit No. WV1030159 on April 21, 2021, with an expiration date of April 19, 2026. The associated SMCRA permit for the Rocky Run Surface Mine is Mining Permit No. S301219. Outfalls 022 and 023 discharge surface water runoff from the mine operation area into Little Rocky Run, a tributary of the South Fork of the Cherry River. As established above, the South Fork of the Cherry River is a designated trout stream.

Under Permit No. WV1030159, the effluent limitations for aluminum at Outfall 022 and 023 are 0.17 mg/l monthly average and 0.29 mg/l daily maximum. Though South Fork was reporting "no flow" or "not constructed" at the majority of its outfalls for many months since Permit No. WV1030159 was first issued, South Fork began reporting flow in July 2023, though it provided neither flow data nor sampling data for July 2024. Since July 2023, when flow has been reported, South Fork has violated its permit effluent limitations for aluminum. Per its discharge monitoring reports for the Rocky Run Surface Mine, South Fork has violated those limitations, as set forth below:

Month	Outfall	Parameter	Type	Limit	Reported	Unit	% Over
June 2024	022	Aluminum	Monthly Avg.	0.17	0.607	mg/l	257.06%
June 2024	022	Aluminum	Daily Maximum	0.29	0.607	mg/l	109.31%
May 2024	022	Aluminum	Monthly Avg.	0.17	2.03	mg/l	1094.12%
May 2024	022	Aluminum	Daily Maximum	0.29	2.15	mg/l	641.38%
Apr. 2024	022	Aluminum	Monthly Avg.	0.17	0.362	mg/l	112.94%
Apr. 2024	022	Aluminum	Daily Maximum	0.29	0.427	mg/l	47.24%
Oct. 2023	022	Aluminum	Monthly Avg.	0.17	0.673	mg/l	295.88%
Oct. 2023	022	Aluminum	Daily Maximum	0.29	0.673	mg/l	132.07%
Oct. 2023	023	Aluminum	Monthly Avg.	0.17	1.05	mg/l	517.65%
Oct. 2023	023	Aluminum	Daily Maximum	0.29	1.05	mg/l	262.07%
Jul. 2023	023	Aluminum	Monthly Avg.	0.17	0.348	mg/l	104.71%
Jul. 2023	023	Aluminum	Daily Maximum	0.29	0.348	mg/l	20.00%

In addition to the above-listed numeric effluent limit violations, South Fork has also improperly reported Outfall 023 as "not constructed." Specifically, in August and September 2023—*after* reporting flow and aluminum violations at Outfall 023 in July 2023—South Fork reported Outfall 023 as "not constructed."

Lastly, South Fork has a history of violating SMCRA and the conditions of Mining Permit No. S301219. On August 27, 2024, WVDEP issued Notice of Violation #21 based on South Fork's failure to contemporaneously reclaim the permit area. On September 9, 2024, WVDEP issued Notice of Violation #22 based on South Fork's violation of the surface mining laws' prohibitions on conducting mining activities outside of bonded and permitted areas. On September 25, 2024, WVDEP issued Notice of Violation #23 based on South Fork's violation of the surface mining laws' requirement to construct and certify conveyance ditches in accordance with the approved mining plan.

B. Clean Water Act Violations

Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), provides that “any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter” For purposes of this citizen suit provision, an “effluent standard or limitation” means, among other things, an unlawful action under § 301(a) of the Clean Water Act, *id.* § 1311(a), or a “permit or condition thereof” issued pursuant to § 402 of the Clean Water Act, *id.* § 1342(a). *Id.* §§ 1365(f)(2), (f)(7).

Section 301(a) of the Clean Water Act, *id.* § 1311(a), prohibits the “discharge of any pollutant by any person” into waters of the United States, except in compliance with the terms and conditions of a permit, including a WV/NPDES permit issued pursuant to § 402 of the Clean Water Act, *id.* § 1342. Section 402(a) of the Clean Water Act, *id.* § 1342(a), provides that the permit-issuing authority, including the WVDEP, may issue a NPDES permit authorizing the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable Clean Water Act requirements and other such conditions as the permitting authority deems necessary to carry out the provisions of the Clean Water Act. Consequently, any discharge that exceeds the effluent limitations of an applicable WV/NPDES permit or violates a permit condition, such as monitoring and reporting requirements, constitutes an unlawful discharge in violation of § 301 of the Clean Water Act.

Thus, based on South Fork's discharge monitoring reports, it is clear that South Fork has violated the aluminum effluent limitations set out in Permit No. WV1030159 each time it has reported flow. As such, South Fork violations of the aluminum effluent limitations are likely ongoing. Further, South Fork's improper reporting that Outfall 023 was “not constructed” constitutes a violation of a permit condition. Additionally, South Fork's failure to report either flow data or sampling data in July 2024 constitutes an additional permit violation. If South Fork does not cease its violations within sixty (60) days, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens' suit in federal court seeking declaratory and injunctive relief, as well as civil penalties, for these violations.

C. SMCRA Violations

Like the Clean Water Act, § 520(a)(1) of SMCRA, 30 U.S.C. § 1270(a)(1), authorizes “any person having an interest which is or may be adversely affected [to] commence a civil action . . . against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter.” West Virginia has, at all relevant times, administered an

approved surface mining regulatory program pursuant to SMCRA, through WVSCMRA. 30 C.F.R. § 948.10. WVSCMRA mandates that all surface mining permits require the surface mining operation to “meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director.” W. Va. Code § 22-3-13(a). WVDEP’s regulations issued under WVSCMRA similarly provide that “[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of [WVSCMRA], and this rule.” W. Va. Code St. R. § 38-2-3.33.c. As such, all performance standards are incorporated as permit conditions for mining permits issued under West Virginia’s SMCRA program.

The federal and state performance standards under SMCRA and WVSCMRA require all mining activities to be conducted in a manner that “prevent[s] material damage to the hydrological balance outside the permit area” 30 C.F.R. § 816.41(a); W. Va. Code § 22-3-13(b)(10); W. Va. Code St. R. § 38-2-14.5. To that end, these performance standards require that all discharges of water from permitted mining operations “shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by [the U.S. EPA] set forth in 40 CFR part 434,” W. Va. Code St. R. § 38-2-14.5.b; 30 C.F.R. § 816.42, and that “[a]dequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with [effluent limitations],” W. Va. Code St. R. § 38-2-14.5.c; 30 C.F.R. § 816.41(d)(1).

Accordingly, violations of NPDES permit-imposed effluent limitations are violations of SMCRA, WVSCMRA, and the mining permits issued thereunder. And, as discussed above, South Fork has violated and continues to violate the effluent limitations in WV/NPDES Permit No. WV1030159. Consequently, South Fork’s past and ongoing violations of the effluent limitations in Permit No. WV1030159 are also violations of the federal and state SMCRA performance standards. Additionally, as evidenced by South Fork’s past and ongoing violations of the effluent limitations in Permit No. WV1030159, South Fork has likewise failed and continues to fail to install, operate, or maintain adequate water treatment facilities in violation of the federal and state SMCRA performance standards.

Furthermore, WVSCMRA regulations require that “[a]ll disturbed areas shall be regraded and stabilized in a manner which effectively controls erosion.” W. Va. Code St. R. § 38-2-14.15.f. Additionally, those regulations require contemporaneous reclamation activities that achieve backfilling and rough grading within 180 days of mineral removal, and prohibit more than 3000 feet of open highwall. *Id.* § 38-2-14.15.b.6.a. And the WVSCMRA and the regulations thereunder prohibit mining activities outside of bonded and permitted areas. *Id.* § 38-2-3.33.a. Finally, a surface mining permittee must comply with all terms of its approved mining and reclamation plans. W. Va. Code § 22-3-13(a); W. Va. Code St. R. § 38-2-3.33.

As evidenced by Notice of Violation #21 (Aug. 27, 2024), South Fork has violated and continues to violate the performance standards requiring contemporaneous reclamation. As evidenced by Notice of Violation #22 (Sept. 9, 2024), South Fork has violated and continues to violate the surface mining laws’ prohibitions on conducting mining activities outside of bonded and permitted areas. Finally, as evidenced by Notice of Violation #23, South Fork has violated and

continues to violate the surface mining laws' requirements to conform to approved mining plans by its failure to properly construct and/or certify Conveyance Ditches 22-2, 22-3, 23-1, and 23-2.

Because the federal and state SMCRA performance standards are incorporated as permit conditions of Mining Permit No. S301219, South Fork has violated and continues to violate the terms and conditions of Mining Permit No. S301219. As such, South Fork is in continuing and/or intermittent violation of SMCRA and WVSMCRA.

If South Fork does not cease the above-described violations within sixty (60) days, Appalachian Voices and West Virginia Highlands Conservancy intend to file a citizens' suit in federal court seeking declaratory and injunctive relief for these violations.

IV. LAUREL CREEK CONTOUR NO. 1 MINE

A. Background

South Fork operates its Laurel Creek Contour No. 1 Mine under the terms and conditions of Mining Permit S301016. On April 30, 2024, WVDEP issued Notice of Violation #8 related to the Laurel Creek Countour No. 1 Mine based on South Fork's failure to comply with contemporaneous reclamation requirements. On July 25, 2024, WVDEP converted Notice of Violation #8 into Failure to Abate Cessation Order #11. On August 26, 2024 and September 23, 2024 WVDEP issued inspection follow-up reports stating that the agency had instituted the show cause process for this permit due to this violation remaining unabated. On April 30, 2024, WVDEP issued Notice of Violation #9 based on South Fork's failure to comply with the surface mining laws' revegetation requirements. On July 25, 2024, WVDEP converted Notice of Violation #9 into Failure to Abate Cessation Order #12. On August 26, 2024, and September 23, 2024, WVDEP issued inspection follow-up reports stating that the agency had instituted the show cause process for this permit due to this violation remaining unabated.

B. SMCRA Violations

SMCRA authorizes "any person having an interest which is or may be adversely affected [to] commence a civil action . . . against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this subchapter." 30 U.S.C. § 1270(a)(1). West Virginia has, at all relevant times, administered an approved surface mining regulatory program pursuant to SMCRA, through WVSCMRA. 30 C.F.R. § 948.10. WVSCMRA mandates all surface mining permits to require the surface mining operation "meet[s] all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the director." W. Va. Code § 22-3-13(a). WVDEP's regulations issued under WVSCMRA similarly provide that "[t]he permittee shall comply with the terms and conditions of the permit, all applicable performance standards of [WVSCMRA], and this rule." W. Va. Code St. R. § 38-2-3.33.c. As such, all performance standards are incorporated as permit conditions for mining permits issued under West Virginia's SMCRA program.

WVSCMRA regulations require contemporaneous reclamation activities including highwall reclamation within 180 days of final mineral removal. W. Va. Code St. R. § 38-2-

14.15.b.4. Additionally, the federal and state SMCRA performance standards require that “[r]evegetation shall be kept current by establishing a temporary or permanent vegetative cover on regraded areas by the end of the first growing season and a permanent cover by the end of the second growing season.” W. Va. Code St. R. § 38-2-14.15.f; *see also* 30 C.F.R. § 816.111.

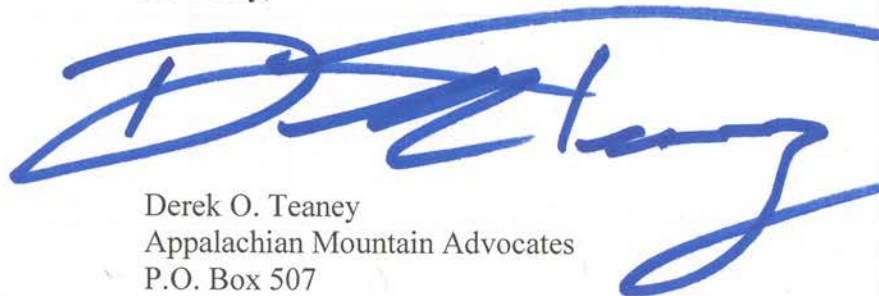
As evidenced by WVDEP’s documented Notice of Violation #8 (April 30, 2024) and Failure to Abate Cessation Order #11 (July 25, 2024), South Fork has violated and continues to violate the performance standards requiring contemporaneous reclamation. Moreover, as evidenced by Notice of Violation #9 (Apr. 30, 2024) and Failure to Abate Cessation Order #12 (July 25, 2024), South Fork has violated and continues to violate the surface mining laws’ revegetation requirements. Because the federal and state SMCRA performance standards are incorporated as permit conditions of Mining Permit No. S301219, South Fork has violated and continues to violate the terms and conditions of its mining permit. As such, South Fork is in continuing and/or intermittent violation of SMCRA and WVSMCRA.

If South Fork does not cease the above-described violations within sixty (60) days, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens’ suit in federal court seeking declaratory and injunctive relief for these violations.

V. CONCLUSION

As discussed above, if South Fork fails to come into compliance with the Clean Water Act, SMCRA, and all regulations and permit conditions issued thereunder, Appalachian Voices and the West Virginia Highlands Conservancy intend to file a citizens’ suit against South Fork seeking declaratory and injunctive relief, as well as civil penalties, pursuant to § 505(a)(1) of the Clean Water Act and § 520(a)(1) of SMCRA. If South Fork has taken any steps to eradicate the underlying cause or causes of the above-described violations, or if South Fork believes that anything in this letter is inaccurate, please let us know. If South Fork does not advise us of any remedial steps during the 60-day notice period, we will assume that no such steps have been taken and that violations are likely to continue. Further, we would be happy to meet with South Fork or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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