COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 10-CI-1867

ENERGY AND ENVIRONMENT CABINET — **PLAINTIFF**
and
APPALACHIAN VOICES, INC., WATERKEEPER ALLIANCE, INC., KENTUCKIANS FOR THE COMMONWEALTH, INC., KENTUCKY RIVERKEEPER, INC., PAT BANKS, LANNY EVANS, THOMAS H. BONNY, and WINSTON MERRILL COMBS — **PLAINTIFF-INTERVENORS**

v.

FRASURE CREEK MINING, LLC, ET AL. — **DEFENDANTS**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action is before the Court for a final ruling following a full hearing on the merits, and extensive briefing of the issues. The Court referred the case to mediation, and there have been four unsuccessful attempts to reach a resolution through mediation, including on-going attempts after the hearing on the merits. Similar claims involving ICG, another coal company, with similar violations were resolved through mediation, and the Court entered an Order approving the mediated settlement in that case on October 10, 2012. *See* Energy and Environment Cabinet v. ICG of Hazard, No. 10-CI-1868, Order, October 10, 2012. In addition to the failed mediation attempts, the respondent Frasure Creek Mining was the subject of an involuntary bankruptcy petition filed on February 14, 2013. Early in 2014, Frasure Creek's bankruptcy action became final. On August 19, 2014, Frasure Creek's counsel filed a motion to withdraw as counsel because of Frasure Creek's "failure to fulfill its obligations regarding legal services, despite reasonable warning that the law firm will withdraw." The Court granted

Frasure Creek's counsel's motion to withdraw. The substantive and procedural history of this case also includes a failed attempt by the Energy and Environment Cabinet to prohibit this Court from allowing the citizen-intervenors to participate in this case. Energy and Environment Cabinet v. Shepherd, et al., 2011 WL 3586410 (Ky. App. 2011). With this background in mind, the Court now enters the following judgment, based on the findings of fact and conclusions of law set forth below.

FINDINGS OF FACT

1. The Commonwealth of Kentucky is delegated authority by the United States Environmental Protection Agency ("EPA") to administer the National Pollutant Discharge Elimination System, mandated by the Federal Water Pollution Control Act, §§101, et seq., 33 U.S.C.A. §§ 1251, et seq., (hereinafter, Clean Water Act or "CWA") in Kentucky and that the Commonwealth carries out this delegation pursuant to state law promulgated by the Kentucky General Assembly, by operation of the Kentucky Pollutant Discharge Elimination System ("KPDES") permitting program.

2. The Plaintiff, Cabinet, is an agency of the Commonwealth charged by statute with the duty to enforce laws for the protection of human health and the environment pursuant to KRS Chapter 224 and regulations promulgated pursuant to that statute. The Court takes judicial notice that the Cabinet has been statutorily charged with implementation and enforcement of the permitting system under the Clean Water Act (CWA) for Kentucky. (Bruce Scott Testimony, Day 1, p. 56)

3. The Cabinet filed a complaint against Frasure Creek in Franklin Circuit Court, seeking judicial approval of a settlement agreement negotiated between the Cabinet and Frasure

Creek concerning extensive violations of the CWA. The complaint alleged the Defendants violated terms and conditions of its KPDES permit and obligations imposed by KRS Chapter 224 and its implementing regulations governing wastewater discharge monitoring, analysis, and reporting, including two effluent limit exceedences, two performance audit inspections on laboratory quality assurance and quality control procedures, and many instances of recordkeeping. The complaint also alleged that some of the Defendant's quarterly Discharge Monitoring Reports (DMRs) were not signed by an authorized officer, others had transcribing or reporting errors, and some outfalls had no DMRs submitted.

4. Although the Cabinet oversees enforcement of the KPDES program, it is the regulated parties who are primarily responsible for monitoring and reporting their own discharges. The effectiveness and integrity of the entire CWA permitting program depends on the trustworthiness of the regulated entities and vigorous agency oversight and enforcement.

5. The Defendant, Frasure Creek Mining, LLC, is a privately held corporation headquartered in Scott Depot, West Virginia with surface coal mining facilities owned and operated in eastern Kentucky. It is one of the largest producers of surface mined coal in Kentucky. The mine operates pursuant to surface mining permits issued by the Kentucky Division of Mine Reclamation and Enforcement ("DMRE"), a division within the Cabinet's Department for Natural Resources. All wastewater discharges from surface coal mining operations must be authorized by KPDES permits from the Kentucky Division of Water ("DOW") within the Cabinet's Department for Environmental Protection.

6. Surface mining operations approved to discharge effluent may not exceed the terms and conditions of Kentucky's General Permit, KYG0400000. This General Permit contains

effluent limitations, monitoring and reporting requirements, and other provisions permittees must observe to comply with the CWA, including filing quarterly DMRs.

7. In April 2010, Plaintiff Interveners began investigating water-monitoring data for Frasure Creek. Plaintiff Interveners submitted open record requests under Kentucky's Open Record Laws, KRS 61.870-61.884, to the DEP, DOW, DNR and DMRE. After failing to receive some DMR reports, Plaintiff Interveners visited the DOW offices in various cities around Kentucky, finding the requested materials in the London office. (Eric Chance Testimony, Day 2, p. 107).

8. In some instances, the signature certificate date preceded the last sampling dates for the quarter. In all instances, Frasure Creek's DMRs were not signed by a corporate officer or duly authorized representative as required under 401 KAR 5:065 § 2(1) and 40 CFR § 122.22. All DMRs were signed by Jody Salisbury, an employee of Frasure Creek's contract laboratory, S&S Laboratory. (Eric Chance Testimony, Day 2, p. 111). Numerous DMRs were submitted with *identical* effluent-monitoring data for the same discharge point in consecutive quarters, or for different discharge points in the same quarter, indicating that the data recorded on these DMRs were most likely copied or reproduced without any pretense of compiling and recording accurate data.

9. On or about October 7, 2010 the Cabinet was served with Notices of Intent to Sue ("NOIS") Defendant pursuant to § 505(b) of the federal Water Pollution Control Act, 33 U.S.C. § 1365(b), on behalf of several environmental advocacy organizations and individuals alleging violations of Defendants' discharge permit requirements at several of Defendants' surface mining facilities.

10. Pursuant to 33 U.S.C. § 1365(b), the notice letters triggered a 60-day period during which the EPA and the Cabinet, as well as the Kentucky and US Attorneys General, could investigate the claims alleged and bring enforcement actions that, if diligently prosecuted, would preclude Plaintiff Interveners from bringing their claims.

11. Following receipt of the NOIs, the Cabinet undertook an investigation to confirm whether the Defendant had violated its discharge permit and applicable law as alleged in the NOIs. At the conclusion of its investigation the Cabinet issued Notices of Violations (NOVs) to each Defendant for all violations of KRS Chapter 224 and its implementing regulations and Defendants' KPDES permits identified during its investigation. The NOVs included citations for all violations alleged in the NOIs, with the exception of the allegations for fraud, and all additional violations discovered by the Cabinet's investigation. The Cabinet went beyond the NOIs to look at the "entire universe of ICG and Frasure Creek operations" in its investigation.

12. The Cabinet's investigation was supervised by Commissioner Bruce Scott, and included a two-day Performance Audit Inspection ("PAI") from October 14 to 15, 2010. Each PAI consisted of two teams that conducted an unannounced inspection of the laboratory facility, procedure, and records, as well as an observation of wastewater discharges into streams, ponds and outfalls. Inspectors were instructed to sample any visibly egregious discharges. One sample was taken from a Frasure Creek mine site and one from an ICG mine site. The Cabinet's review also included an investigation by the Division of Enforcement of each DMR submitted for Frasure Creek's 35 permits between January 2008 and June 2010. (Bruce Scott Testimony, Day 1, p. 20).

13. Frasure Creek voluntarily admitted that the one discharge exceedence discovered likely occurred at its mining operation, and quickly replaced its contractor, S&S laboratory, that had caused so many of the administrative violations. Frasure Creek admitted that the power of attorney given to the laboratory to sign the DMRs was in violation of their permit. (Mark Cleland Testimony, Day 2, p. 265).

14. The Defendant cooperated with the Cabinet's investigation and were issued a number of NOVs. On December 3, 2010, the last business day before the 60-day period ran, the Cabinet filed, in Franklin Circuit Court, this Complaint against Frasure Creek, seeking judicial approval of a consent decree negotiated with Frasure Creek. The Cabinet alleged that numerous violations were uncovered during its investigation. The Cabinet, in its Complaint, alleged 1,520 Clean Water Act violations at 39 Frasure Creek mines. The complaint requested the relief from this Court in the form of a civil penalty of up to $25,000 per day per violation and ordering Defendant to comply with all applicable statutes. The Cabinet simultaneously tendered a consent judgment to this Court for approval the same day the Complaints were filed. (Bruce Scott Testimony, Day 3, p. 83). The Consent Judgment that included a penalty and a requirement to submit a Corrective Action Plan. Frasure Creek began implementing the plan despite the continued pendency of the Consent Judgment. (Tom Gabbard, Day 2, p. 297).

15. The Cabinet's investigation took at least six weeks, and took longer than most investigations performed by the Cabinet because very few cases are this large in the scope of violations. (Jeff Cummins, Day 3, p. 33).

16. On or about December 14, 2010 Intervening Plaintiffs, Kentuckians for the Commonwealth, Inc., Kentucky Riverkeeper, Inc., Waterkeeper Alliance, Inc., Pat Banks, Lanny Evans, Thomas H. Bonny and Winston Merrill Combs, collectively "Appalachian Voices" moved to intervene in this case and simultaneously filed Intervening Complaints against Defendants pursuant to the citizen suit provision of the federal Water Pollution Control Act, § 505(b), 30 U.S.C.A. § 1365(b) (the "Clean Water Act" or "CWA").

17. Plaintiff Interveners include both individuals and organizations. Individual intervenors Winston "Merill" Combs, Lanny Evans, Thomas H. Bonny, and Pat Banks are members of the Kentucky Riverkeeper, and use and enjoy the Kentucky River and its tributaries for a variety of recreational, scientific, cultural and household purposes. Organizational interveners are non-profit organizations whose primary missions include preservation of valuable water resources in the Commonwealth of Kentucky.

18. Defendant and Cabinet each filed a response objecting to the Motion to Intervene.

19. On January 7, 2011, this Court heard oral arguments on the merits of the motion to intervene.

20. On February 11, 2011, the Court entered an Order granting intervention. The Court also scheduled a hearing on whether the Court should approve the Consent Judgment, under the standard set out in United States v. Lexington-Fayette Urban County Government, 591 F.3d 484 (6th Cir. 2010); that is, whether the proposed Consent Judgment is fair, adequate, reasonable, and in the public interest. The parties were allowed a period of ninety days to conduct discovery on that issue.

21. From August 31 to September 2, 2011, the Court conducted a hearing on the issue of whether the Consent Judgments met the standard set forth in Lexington-Fayette Urban County Government.

22. Mark Cleland is the Environmental Control Manager for the Compliance and Operations Branch of the Division of Enforcement. Mr. Cleland helped develop and establish the DMR program. (Mark Cleland Testimony, Day 1, p. 106). Mr. Cleland was solely responsible for characterizing and counting the violations of the Defendant. (Mark Cleland Testimony Day 2, p. 257).

23. Jeff Cummins is the Assistant Director of the Cabinet's Division of Enforcement in the Department of Environmental Protection. He is also the Acting Director and been involved in assessing and negotiating civil penalties for the Cabinet since 1998. In his experience, negotiated settlements bring about compliance in a quicker and more effective manner. The position of Director of Enforcement has been vacant since 2007. (Jeff Cummins Testimony, Day 3, p. 8, 13-16).

24. Mr. Cummins oversaw resolution of this enforcement, and made determinations regarding appropriate penalty amounts. (Jeff Cummins Testimony, Day 1, p. 178-9). The Cabinet's initial penalty amount for Frasure Creek was $525,000. (Id. at p. 180). Mr. Cummins stated he calculated the penalties on a per violation basis, ranging from $100 to $5,000. (Id. at 200-1).

25. KRS 224.99-010 provides for assessment of a civil penalty for each violation of water quality statutes and regulations at a maximum of $25,000 per violation per day. The total maximum penalty for Frasure Creek, based on the violations in the Cabinet's press release (Plaintiff

Interveners' Exhibit 1) is $38,000,000 for 1,520 violations. This does not assume that the violations are ongoing, but rather discrete incidents as the Cabinet found. (Jeff Cummins Testimony, Day 1, p. 197).

26. The penalties here are statistically higher than most penalties in Cabinet settlements. The Cabinet sees six-figure penalties in less than one percent of its cases. (Jeff Cummins Testimony Day 3, p. 6-9). The DEP resolves approximately five hundred cases per year. But "only a percent of the violations seen in the field are actually referred to the Division of Enforcement. The vast majority of violations that are seen are resolved in the field. Only a small percent of the Division of Enforcement actions are referred to the office of general counsel for court action." (Bruce Scott Testimony, Day 3, p. 64)

27. The Cabinet took the position that it did not have sufficient evidence to support a claim of intentional submission of knowingly false data, or fraud, by the Defendant or its contract lab for DMRs. (Jeff Cummins Testimony, Day 1, p. 204-5). The Cabinet took this position notwithstanding the admission of Frasure Creek that its reports were submitted by an unauthorized party, that the signatures of the DMRs were often dated prior to the sampling that was being reported, and that multiple DMRs appear to be simply photocopies of prior reports without any evidence that actual sampling took place. The conditions observed by the Cabinet's inspectors during the performance audit of Frasure Creeks' so-called "laboratory" demonstrated either a plan or scheme to submit fraudulent information in the DMRs, or incompetence so staggering as to defy belief.

28. The Consent Judgment addresses all known violations discovered during the Cabinet's investigation. However, Mr. Cleland stated that of about 2,200 coal general permits, the

Cabinet does not know how many outfalls are associated with those permits and are required to have DMRs filed quarterly. The Cabinet does not maintain a list identifying those outfalls. (Mark Cleland Testimony, Day 1, p. 121).

29. Because Mr. Cleland failed to receive requested lists of outfall permits from DOW, he approximated the number of outfalls per mine for Frasure Creek based on permits with known numbers of outfalls. (Mark Cleland Testimony, Day 2, p. 79).

30. Without knowing the total number of outfalls associated with its permits, the Cabinet cannot know how many DMRs to expect each quarter or whether there was a failure to report DMRs. Without knowledge of the number of outfalls, the Cabinet cannot know the total number of violations when it negotiated, drafted, and submitted the Consent Judgment. (Mark Cleland Testimony, Day 1, p. 121)

31. Due to the Defendant's own DMR errors, it is impossible to know whether effluent limits were exceeded for KPDES permits from the Defendant's mining operation during the review period. (Ken Hodak Testimony, Day 3, p. 115-116)

32. Some missing DMRs are accounted for because outfalls had not been constructed, had not discharged, or had been removed, and the Cabinet had previously instructed coal companies that it did not expect to receive a DMR for those types of outfalls. (Jeff Cummins Testimony, Day 2, p. 78, 97-8).

33. The Cabinet allowed the companies to use bench sheets to the extent they were available to reconstruct that inaccurate data on DMRs. (Jeff Cummins Testimony, Day 2, p. 70). In instances where data was duplicated between quarters, the Cabinet reviewed bench sheets

and allowed data from bench sheets to amend duplicate or inaccurate data on DMRs. (Mark Cleland Testimony, Day 1, p. 160). While there were a number of questions about methodologies that were raised by the PAI lab inspection, Mark Cleland testified there was insufficient information regarding the labs to justify discounting the bench sheets as invalid or inaccurate. (Mark Cleland Testimony, Day 1, p. 162). The Cabinet accepted the bench sheets because "that was the best information that we had at the time." (Jeff Cummins Testimony, Day 2, p. 73). There was no evidence that the bench sheets reflected accurate, contemporaneous data, or that the laboratory employees who complied them had any background, training, or experience in recording such data.

34. The record indicates the Cabinet never considered disallowing these questionable bench sheets to supplement DMR data. (Mark Cleland Testimony, Day 1, p. 159-60). The Court finds that the bench sheet data, complied by the same persons who misreported the DMR data, is inherently unreliable, and should have been disregarded by the Cabinet based on its own findings in the PAI as to the woefully inadequate (or totally lacking) quality assurance and quality control measures observed by Frasure Creeks' contractors.

35. The Consent Judgment requires Frasure Creek to pay a fine for each administrative violation, (*See Infra. 25, 26*) completing remedial measures, and submit a Corrective Action Plan ("CAP") designed to ensure compliance with monitoring, testing, recordkeeping and DMR reporting requirements. (Tom Gabbard Testimony, Day 2, p. 297)

36. The remediation plan was to be included in the CAP, but Jeff Cummins could not find and did not know where the remedial measures were in the CAP. (Jeff Cummins Testimony, Day 3, p. 23). Mr. Gabbard stated that the CAP and Consent Judgment would generally prevent

future violations when asked how the Consent Judgment provides remedial action, though his examples of providing the proper sample handling, monitoring, and complying with the permit were not remediation measures. (Tom Gabbard Testimony, Day 2, p. 304-6).

37. The Corrective Action Plan requires very little beyond what is already required by law of the coal companies, except for a specified period of time, Frasure Creek must also submit its bench sheets, which contain the source data used to generate the DMRs, and report any permit violations to the Cabinet as they occur, instead of quarterly. (Bruce Scott Testimony, Day 1, p. 28).

38. The Cabinet, in negotiating and drafting the proposed Consent Judgment, failed to consider the susceptibility of the sites to environmental harm, the geographic extent of the violations, the danger to the environment and human health, and scope of the violations. (Jeff Cummins Testimony, Day 1, p. 181-197).

39. The Cabinet considered each violation to be discrete or "single day" violations rather than ongoing violations. (Jeff Cummins Testimony, Day 1, p. 196-7; Mark Cleland Testimony, Day 1, p. 139).

40. The Cabinet did not calculate a dollar figure of the potential economic benefit the companies may have enjoyed as a result of their noncompliance. (Jeff Cummins Testimony, Day 1, p. 185). The Cabinet did not seek any information from the Defendant regarding the economic benefit, and considered any economic benefit to be minimal. (Bruce Scott Testimon, Day 1, p. 89). The Cabinet's unsupported assumption of lack of economic benefit to Frasure Creek was clearly erroneous.

41. Jeff Cummins testified that Defendant should have known that S&S Laboratory was incapable of performing the monitoring and reporting they were contracted by Frasure Creek to perform. (Jeff Cummins Testimony, Day 1, p. 206). The Court finds that Frasure Creek knew or should have known of the systemic failure of its contractor to comply with the regulatory requirements for DMRs.

42. Bruce Scott stated Kentucky is the "49th lowest state per permit in terms of federal funding from the federal government." (Bruce Scott Testimony, Day 3, p. 46). Commissioner Scott further testified that the Cabinet has been subjected to a series of major budget cuts during the last 10 years that have drastically and adversely affected the ability of the Cabinet to do its job in implementing the Clean Water Act. With only a handful of enforcement personnel, and a dwindling number of field inspectors, and with the position of Director of Enforcement unfilled since 2007, it is impossible for the Cabinet to effectively regulate permittees such as Frasure Creek who systematically violate the obligations of the CWA for monitoring and reporting environmental violations.

43. The Cabinet relies on the Defendant to report when it has committed a permit violation.

44. The Cabinet is responsible for authorizing, administering and enforcing 2,200 general coal mining permits, yet does not have a list of outfalls for which to track DMRs. (Mark Cleland Testimony, Day 2, p. 263-4).

45. Mr. Cummins testified when the Cabinet determined its penalty assessment for Frasure Creek that while the consideration of resource limitations was made, it did not necessarily lead to higher or lower penalties. (Jeff Cummins, Day 1, p. 207). The Cabinet has fewer staff today than it did in 1990, and far more responsibilities than it did in 1990. (Bruce Scott Testimony,

Day 3, p. 75). The Cabinet's legal staff is limited in its ability to conduct interviews and investigations, and considers that when looking at litigation versus settlement. (Jeff Cummins, Day 1, p. 207).

46. Gretchen Bartley is an Environmental Scientist II with the DOW and supervised the PAI of S&S. She also coordinated the PAI for the Frasure Creek mining site. (Gretchen Bartley Testimony, Day 2, p. 8). The split sample revealed problems with S&S' analysis of acidity. (Gretchen Bartley Testimony, Day 2, p. 12-13). Further, Ms. Bartley was not able to observe all testing procedures during the lab audit. "We could not actually watch them take the samples, but from what we could observe in the laboratory, their sample and handling method was incorrect." (Gretchen Bartley Testimony, Day 2, p. 37). She observed S&S had no verified chain of custody, had not calibrated new testing equipment, had problems with storage and handling of samples, and maintained inadequate documentation of testing, which made it impossible to reconstruct procedures or test results from DMRs. (Gretchen Bartley Testimony, Day 2, p. 19; 37).

47. Based on observations and interviews, S&S had been in operation for at least three years without proper quality assurance training. "We hold ourselves to the same standard as the USEPA: "if it isn't documented, it isn't done." S&S did not perform its job of properly documenting its sampling work. (Gretchen Bartley, Day 2, p. 53).

48. The Court finds as a matter of fact that S&S laboratory was incapable of performing, monitoring, and reporting tasks as contracted for by Frasure Creek. Frasure Creek contacted S&S and "told them they would have to do major improvements. We asked them to put together what they were going to do to improve. S&S did that, we realized it wasn't

sufficient and we told them they had to do better, they said they couldn't, and would have to go out of business." (Ken Hodak Testimony, Day 3, p. 103-4).

49. Commissioner Bruce Scott admitted that the Cabinet had "concerns as to whether or not the data was representative of what the outfall discharges actually are." (Bruce Scott Testimony, Day 1, p. 22).

50. A field inspector from the Cabinet, during PAI testing at the Frasure Creek mine facility, noted discoloration on the bottom of a stream and in the substrate of the rocks, prompting him to sample effluent from Pond 113, which revealed a violation in the daily maximum limit for manganese. (Gretchen Bartley Testimony, Day 2, p. 36-8).

51. Despite findings from the PAIs which found effluent violations, Jeff Cummins stated, "Given the lack of hard evidence on that, it was my determination that we would accept those bench sheets at face value unless we found specific evidence to contradict that determination." (Jeff Cummins Testimony, Day 2, p. 72, 7-13).

52. As a result of the PAI of Frasure Creek's mining site, the Cabinet issued a Notice of Noncompliance for violations of effluent limitation for a pH of 3.5 in Pond 8 at permit 860-0469. The DMR submitted for that same period from Frasure Creek reports a pH value of 6.44. (Plaintiff Intervenors' Exhibit 17). The Court finds that Frasure Creek misreported its pH data for Pond 8 during September 2009.

53. Mr. Eric Chance, an employee of Appalachian Voices, was responsible for compiling the data and generating the charts for Plaintiff Interveners' Exhibit 14. The Charts plot DMR data from permitted outfalls noted in the NOIs. (Eric Chance Testimony, Day 2, p. 103).

54. Mr. Chance was not offered as an expert witness, and thus his testimony is limited to the facts he observed and any opinion by Mr. Chance is allowed by KRE 701. (Eric Chance Testimony, Day 2, p. 103).

55. Having presented no evidence on the DMR data to the contrary, the Court finds the Chart complied by Mr. Chance speaks for itself, showing that reported water quality values in DMRs prior to the final quarter of 2010 show remarkable consistency, well below effluent limits. Beginning in the first quarter of 2011, after the intervening plaintiffs filed their NOI and the Cabinet began scrutinizing the data, the reported values become much more variable. (Eric Chance Testimony, Day 2, p. 124).

56. Frasure Creek presented no evidence to substantiate its testimony that the data pattern in the first quarter of 2011 can be explained by above average precipitation and external factors such as logging, road construction, gas well, and sabotage. (Ken Hodak Testimony, Day 3, p. 127).

57. The permit effluent limit exceedences on Frasure Creek's DMRs for the first quarter of 2011, while outside the scope of the Consent Judgment, indicate that with increased judicial, executive, and public scrutiny, the administrative reporting process is more accurate. The Court finds that is more likely than not that the transcription and other DMR errors masked discharge violations in the past. The Court finds that the coincidence between external factors and new testing laboratories goes against common sense and reasonable inference without substantiated evidence.

58. The integrity of the regulatory process is based on the accurate reporting of monitoring data. If the Cabinet suspects pollution violations but only investigates and assesses penalties for

administrative reporting violations, the Cabinet creates incentives for inaccurate reporting or failing to report as opposed to honest reporting that reveals pollution violations.

59. Tom Gabbard explained that he chose to only inspect one Frasure Creek facility because the Cabinet's investigation was on the Plaintiff Interveners' NOIs, which "focus on the lab, methodology, [and] analysis." (Tom Gabbard Testimony, Day 2, p. 292).

60. Mr. Gabbard stated that because the Cabinet's investigation was focused on the labs and reports, such that a PAI of one mine site was sufficient. (Tom Gabbard Testimony, Day 2, p. 292). The Cabinet chose not to expand the investigation to actual pollution violations, but only on violations associated with sampling, testing and reporting. Based on Commissioner Scott's testimony, the Court finds that the Cabinet lacks the personnel and budget conduct more vigorous oversight of the systematic regulatory violations that are at issue in this case.

61. The Cabinet, as the authorized agency charged with enforcing the CWA, has a critical responsibility to perform thorough investigations when all evidence, both through PAI split sampling and inaccurate reporting, suggests there may be substantial pollution in violation of permits. "So it would be correct to say that the cabinet did have actual knowledge? There were indications, yes." (Bruce Scott Testimony, Day 1, p. 103).

62. The Cabinet chose to limit its investigation to reporting errors, like those found in the DMRs brought to light by Plaintiff Interveners, and not investigate substantive pollution violations, though there were indications of such violations in the PAIs, and even that limited investigation tasked the staff significantly. (Bruce Scott Testimony, Day 3, p. 40).

63. Kentucky does not currently have a wastewater lab certification program and therefore the Cabinet's enforcement of the sampling and testing methods set out by the EPA is through the KPDES permittee, rather than through the permittee's contract lab. Further, the KPDES permittee takes responsibility for the accuracy of such reports through a signature requirement. (Bruce Scott Testimony, Day 3, p. 47-8).

64. Recent Kentucky legislation, enacted on February 11, 2011 grants the Cabinet authority to develop a wastewater lab certification program, but the program has not yet been implemented. (Bruce Scott Testimony, Hearing Day 1, p. 23). *See* KRS 224.10-670, as amended in 2011. An administrative regulation, effective January 1, 2014, has now been adopted. *See* 401 KAR 5:320.

65. The proposed Consent Judgment has no stipulated penalty. The Cabinet must pursue additional enforcement actions for new violations, and has initiated such an enforcement action for the 2011 self-reported violations. (Bruce Scott Testimony, Day 3, p. 88). However, nothing in the Consent Judgment guarantees that this situation will not repeat once the CAP expires.

66. Mark Cleland and Jeff Cummins testified that most of the violations were administrative and therefore were penalized less severely than numeric violations of effluent exceedances. (Bruce Scott Testimony, Day 1, p. 93; Mark Cleland Testimony, Day 1, p. 124).

67. Including a requirement for a stipulated penalty in the Consent Judgment could have eliminated the need to do a secondary enforcement on the pollution violations in 2011. (Bruce Scott Testimony, Day 1, p. 62).

68. The Court finds the factors adopted by the Secretary in NREPC v. Wendell Maggard, File No. DWM-19198-038 (June 2, 1994) are appropriate to determine whether the penalties sought are fair, adequate, reasonable and in the public interest. (Jeff Cummins Testimony, Day 1, p. 189-91).

69. The Court finds that the Integrated Report Congress submitted as Plaintiff Interveners' Exhibit 2 is a true and authentic copy and is what it purports to be in the absence of an alternate copy or other contrary evidence. The Cabinet stipulated the copy was an authentic version of the document. (Day 1, p. 67).

70. The Report states 93% of the Big Sandy River is impaired because it is not able to support aquatic life as it is designated. (Bruce Scott Testimony, Day 1, p. 44-6). The primary cause of sedimentation, which is the major cause of impairment, comes from coal mining. (Bruce Scott Testimony, Day 1, p. 47).

71. Frasure Creek operates mines in the Big Sandy watershed. (Bruce Scott Testimony, Day 1, p. 47-48).

72. The chronological extent of Defendants' violations weighs in favor of more severe, rather than lighter penalties. (*See* Bruce Scott Testimony, Day 1, p. 91)

73. The Cabinet considered the nature of violations, rather than the number. That is, the Cabinet focused on the fact that most of these violations are administrative, and viewed those repeated administrative violations as individual incidents. Jeff Cummins stated "[i]n most high-figure, high-dollar cases we'll see more extensive evidence of environmental harm." (Jeff Cummins Testimony, Day 3, p. 33). The Cabinet chose not to investigate evidence of

environmental harm, but the record in this case makes it abundantly clear that the Cabinet simply lacks the personnel and budget to effectively investigate and enforce these requirements of law. (See infra. 60).

74. The inherent danger of the violations at issue here to the environment is impossible to determine based on Frasure Creeks' wholesale abdication of its monitoring and reporting responsibilities, and the Cabinet's inability to fully investigate the environmental harm that is likely to have occurred.

75. A pollution violation via stream or waterway is not correctible. Gretchen Bartley testified "[w]hat's gone through the outfall has gone through the outfall…[I]n a situation if you have had a long-term discharge of ferruginous or manganous discharge, it's gone, it's lost." (Gretchen Bartley Testimony, Day 2, p. 40).

76. The evidence established that Frasure Creek paid $30,000 more *per month* than it previously paid the old lab, S&S Water Monitoring, after it was forced to terminate S&S for the massive, systemic reporting violations at issue here. The Defendant argued at various points that the comparison was not valid because of changes in the lab, number of outfalls, and the agreement, however, it presented no evidence to refute Plaintiff Interveners' calculations. (Ken Hodak Testimony, Day 3, p. 113-4). The Court finds that the economic benefit realized by Frasure Creek in using a substandard laboratory with systemic problems in its DMRs, far exceeds the civil penalty agreed to by the Cabinet.

CONCLUSION OF LAW

1. The Court's review of the proposed consent judgment which the Cabinet and Frasure Creek have tendered, must be governed by the standard set forth in United States v. Lexington-Fayette Urban County Government, 591 F.3d 484 (6th Cir. 2010). Under the standard adopted in that case, the question before the Court is whether the proposed consent decree is "fair, adequate, and reasonable, as well as consistent with the public interest." Id. at 489.

2. The failure of the Cabinet to provide any public notice or comment period prior to its approval of the terms of the proposed consent decree, support the conclusion that the primary concern of the Cabinet was the consent decree's impact on the regulated entity, Frasure Creek, and not on the public or the environment. The fact that these massive reporting violations were brought to light by citizens acting independently of the Cabinet further supports the conclusion that the public interest in the consent decree was not objectively considered by the Cabinet prior to the intervention by the citizen intervenors in this action.

3. "One of the most important considerations when evaluating whether a proposed consent decree is reasonable is 'the decree's likely effectiveness as a vehicle for cleansing the environment." United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1437 (6th Cir. 1991). Here, the Court concludes that the proposed consent decree is unlikely to be successful in producing a change in behavior by Frasure Creek, because the economic benefit that it obtains by taking short-cuts and submitting unreliable data far outweighs the costs of compliance, or the risk of any fines and penalties that the Cabinet will impose. This case demonstrates that the fines and penalties are an acceptable cost of doing business. The Cabinet lacks the budget and

personnel to effectively police Frasure Creeks' compliance, and the consent decree has no mechanism for third-party or public involvement in monitoring Frasure Creek's compliance.

4. In determining whether the proposed consent decree is consistent with the public interest, the Court must consider "whether the decree is 'consistent with the public objectives sought to be attained by Congress." United States v. Lexington Fayette Urban County Government, at 490, *quoting* Williams v. Vukovich, 720 F.2d 909, 923 (6th Cir. 1983). The stated policy of the Commonwealth of Kentucky is to "conserve the waters of the Commonwealth," and to "provide a comprehensive program in the public interest for the prevention, abatement and control of pollution." KRS 224.7-0100(1). Likewise, the purpose of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). The Court concludes that the consent decree, as negotiated by the Cabinet and presented to the Court, fails this test because the economic benefit of the violations outweighs the costs of compliance, the penalties are inadequate to deter future violations, the lack of resources of the Cabinet to police compliance, and because of the lack of any third-party or citizen involvement in monitoring compliance that could off-set those factors.

5. The Court concludes that the consent decree negotiated by the Cabinet and agreed to by Frasure Creek is not fair, reasonable, or in the public interest for the reasons stated above. This conclusion is further supported by inescapable reality that reporting violations so systemic and pervasive almost inevitably lead to degradation of the environment. The reason for the reporting requirement is to prevent pollution in the first place. When one company so systemically subverts the requirements of law, it not only jeopardizes environmental protection on the affected permits, it creates a regulatory climate in which the Cabinet sends the message that cheating pays. This puts the many companies that comply with the law at a competitive

disadvantage. The consent decree before the Court fails to impose penalties that would deter this conduct, and it further fails to recognize the important role of the public and interested citizens in monitoring enforcement and ensuring that this conduct will not be repeated, a concern that is especially heightened here in light of the Cabinet's admissions as to its lack of personnel and budget resources. Accordingly, this Court must conclude that the proposed consent judgment is not in the public interest.

CONCLUSION

For the reasons stated above, **IT IS ORDERED AND ADJUDGED** that joint motion of the Cabinet and Frasure Creek for entry of the proposed consent judgment is **DENIED**, and judgment is **GRANTED** in favor of the intervenors finding that the proposed consent judgment is not fair, reasonable or in the public interest. This action is **REMANDED** to the Cabinet for further proceedings consistent with this judgment. This is a final and appealable judgment, and there is no just cause for delay.

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division 1

DISTRIBUTION:

Mary A. Stephens
Josh Nacey
Department of Environmental Protection
300 Fair Oaks Lane
Frankfort, Kentucky 40601
mary.stephens@ky.gov
joshnacey@ky.gov)

Registered Agent for Frasure Creek Mining, LLC
National Corporate Research
828 Lane Allen Rd, Suite 219

Lexington, KY 40504

Anne Chestnut
Jack Bender
Bingham Greenebaum Doll
300 West Vine Street
Lexington, Kentucky 40507
AAC@gdm.com
JCB@gdm.com

Mary Varson Cromer
Appalachian Citizens Law Center
317 Main Street
Whitesburg, Kentucky 41858
mary@appalachianlawcenter.org

Lauren H. Waterworth
P.O. Box 254
Boone, North Carolina 28607
Lauren@bluemountainlawyer.com