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June 10, 2008

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Re: Sierra Club and Kentuckians For The Commonwealth Notice of Intent to Sue Clintwood Elkhorn Mining Company for Clean Water Act Violations.

Dear Mr. Shackelford and Mr. Malone,

Section 505(b) of the Clean Water Act (CWA), 33 U.S.C. § 1365(b), requires that 60 days prior to the filing of a citizen suit in federal district court under Section 505(a) of the CWA, the alleged violator, the U.S. Environmental Protection Agency, and the State in which the alleged violations occur must be given notice of the alleged violations. This letter is being sent on behalf of Sierra Club, 85 Second Street, 2nd Floor, San Francisco, CA 94105, phone: 415-977-5680 and Kentuckians For The Commonwealth (KFTC), P.O. Box 1450, London, KY 40743, Phone: 606-878-2161. Sierra Club and KFTC hereby place you on notice, pursuant to Section 505(b) of the CWA, that it believes that the Clintwood Elkhorn Mining Company, ("Clintwood Elkhorn"), SMCRA permit 898-4150 Amendment 1, in Pike County, Kentucky has violated and continues to violate "an effluent standard or limitation" under Section 505(a)(1)(A) of the CWA, 33 U.S.C. § 1365(a)(1)(A), in the following respects.

On May 22, 2008 Sierra Club Kentucky Conservation Organizer John Cleveland and local resident and KFTC member Raul Urias II visited the Clintwood Elkhorn mine site. Based on their review of permit maps and other company application materials and use of a handheld Global Positioning System (GPS), it appeared to them that the area had already been mined and partly reclaimed. They saw the two sediment ponds and two valley fills proposed in the company's permit application. On May 30, 2008, Darwin Messer of the U.S. Army Corps of Engineers Sassafras, Kentucky office told Emily Ulmer of the Sierra Club that on March 20,

2008 Clintwood Elkhorn reported to the Corps that it had completed the in-stream fill activity described in Army Corps of Engineers Public Notice No. LRL-2006-1296-odm, without first obtaining a § 404 permit. This was the first date that information about the unpermitted fills was made available to the Sierra Club and KFTC.

Sometime prior to March 20, 2008, therefore, Clintwood Elkhorn began discharging fill material, including rock and dirt, into streams in the Millers Creek watershed near Fishtrap Lake in Kentucky without a permit under Sections 402 or 404 of the CWA, 33 U.S.C. § 1342, 1344, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a). Clintwood Elkhorn violated and continues to violate the CWA by allowing this fill material to remain in the streams without such a permit for every day from the beginning of its fill activities (no later than March 20, 2008) to the present. Each day that any fill material remains in a water of the United States constitutes a separate violation of the Act. See e.g., Sasser v. Administrator, United States E.P.A., 990 F.2d 127, 129 (4th Cir. 1993) (“Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.”).

Sierra Club and KFTC do not currently know the date that filling began on this mining operation, but it was likely to have been during the period after the May 7, 2007 publication date of the Corps’ Public Notice No. LRL-2006-1296-odm and before March 20, 2008. Because Sierra Club and KFTC intend to seek remedies in its citizen suit for violations of the Clean Water accruing from the date the filling started, and because Sierra Club and KFTC do not know that date, discovery will be necessary to find the actual date the violations began.

Clintwood Elkhorn knows that all coal operators are required to apply for and receive a § 404 permit before filling any water of the United States. Issuance of such permits is by no means guaranteed. In fact, Sierra Club’s and KFTC’s position is that valley fills associated with coal surface mines are likely to cause significant environmental harm, both cumulatively and individually and that the United States Army Corps of Engineers must prepare an Environmental Impact Statement pursuant to NEPA for almost all § 404 permits for valley fills. Additionally, even if the Army Corps Engineers approves the permit application, it may do so only after it determines that environmental impacts have been avoided, minimized and/or mitigated. Clintwood Elkhorn’s filling of the streams at issue in this letter before the Corps has considered the permit application betrays a reckless disregard for the rule of law.

We intend, therefore, at the close of the 60-day notice period or shortly thereafter, to file a citizen suit under Section 505(a) of the CWA against your operation for the violations described in this letter. During the 60-day notice period, we would be willing to discuss effective remedies for the violations noted in this letter. However, we do not intend to delay the filing of a complaint in federal court if discussions are continuing when that period ends.

Sincerely,



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