

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

WEST VIRGINIA  
HIGHLANDS CONSERVANCY,  
WEST VIRGINIA RIVERS  
COALITION, and SIERRA CLUB

Plaintiffs,

v.

CIVIL ACTION NO. \_\_\_\_\_

RANDY C. HUFFMAN,  
Secretary, West Virginia  
Department of Environmental  
Protection

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This is a citizen's suit for declaratory and injunctive relief against Randy Huffman, in his official capacity as the Secretary of the West Virginia Department of Environmental Protection ("WVDEP") for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act") or ("CWA"), at five bond forfeiture sites in West Virginia.

2. As described below, Plaintiffs allege that Defendant has discharged and continues to discharge pollutants into waters of the United States in violation of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and the conditions of the West Virginia/National Pollutant Discharge Elimination System ("WV/NPDES") Permits issued to the Defendant pursuant to Section 402 of the Clean Water Act.

**JURISDICTION AND VENUE**

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

4. On January 22, 2016, Plaintiffs gave notice of the violations and their intent to file suit to the Administrator of the U.S. Environmental Protection Agency (“EPA”) to the Regional Administrator of EPA’s Region III Office, and to Defendant as required by section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A).

5. More than 60 days have passed since notice was served and EPA has not commenced and is not diligently prosecuting a civil or criminal action to redress the violations. In addition, EPA did not commence 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 January 22, 2016 notice letter.

6. Venue is appropriate in this District pursuant to Section 505(c)(1) of the CWA, 33 U.S.C. § 1365(c)(1) because the sources of the violations are located within this District in Preston and Barbour Counties of West Virginia.

### **PARTIES**

7. Defendant Randy Huffman is the Secretary of the West Virginia Department of Environmental Protection. He is responsible for the agency’s compliance with the CWA and administers the EPA-approved WV/NPDES program under Section 402 of the CWA, 33 U.S.C. § 1342(b) and 46 C.S.R. Series 10. He also has a mandatory, nondiscretionary duty to utilize money from WVDEP’s Special Reclamation Fund to treat water pollution, specifically including acid mine drainage, at coal mining sites where reclamation bonds have been forfeited and the proceeds of those bonds are less than the actual costs of reclamation. 38 C.S.R. § 2-12.4.d; 67 Fed. Reg. 37612.

8. Plaintiff West Virginia Highlands Conservancy, Inc. (“WVHC”) is a nonprofit organization incorporated in West Virginia. It has approximately 1,500 members. It works for the conservation and wise management of West Virginia’s natural resources, and is one of West Virginia’s oldest environmental activist organizations. The West Virginia Highlands Conservancy is dedicated to protecting our clean air, clean water, forests, streams, mountains, and the health and welfare of the people who live here and for those who visit to recreate.

9. Plaintiff West Virginia Rivers Coalition makes its mission the conservation and restoration of West Virginia’s exceptional rivers and streams. It not only seeks preservation of high quality waters, but also the improvement of waters that should be of high quality. It has approximately 2,500 members.

10. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with more than 600,000 members and supporters nationwide, including approximately 2,000 members who reside in West Virginia and belong to its West Virginia Chapter. The Sierra Club is dedicated to exploring, enjoying and protecting wild places of the Earth; to practicing and promoting the responsible use of 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 water in West Virginia.

11. Plaintiffs have members, including Cindy Rank, Sally Wilts, and Duane Lazzell, who use, enjoy, and benefit from the water quality on Morgan Run, Muddy Creek, L. Fork of Sandy Creek, Maple Run, Sandy Creek, Kanawha Creek and the Cheat, Monongahela, and Tygart Rivers. They would like to recreate in areas downstream from the portion of the streams into which Defendant discharges pollutants harmful to aquatic life, including iron, acidity (measured as pH),

nitrogen ammonia, and suspended solids. Excessive amounts of these pollutants degrade the water quality of these streams and make the water aesthetically unpleasant and environmentally undesirable and also impair their suitability for aquatic life. Because of this pollution, Plaintiffs' members refrain from and/or restrict their usage of these streams and the associated natural resources. As a result, the environmental, health, aesthetic, and recreational interests of these members are adversely affected by Defendants' excessive discharges of these and other pollutants. If Defendant's unlawful discharges ceased, the harm to the interests of Plaintiffs' members would be redressed. Injunctions would redress Plaintiffs' members' injuries by preventing and/or deterring future violations of the limits of Defendants' permits.

12. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5).

#### **STATUTORY AND REGULATORY FRAMEWORK**

13. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the "discharge of any pollutant by any person" into waters of the United States except in compliance with the terms of a permit, such as a NPDES permit issued by EPA, or an authorized state pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

14. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue a NPDES Permit that authorizes the discharge of any pollutant directly into waters of the United States, upon the condition that such discharge will meet all applicable requirements of the CWA, and such other conditions as the permitting authority determines necessary to carry out the provisions of the CWA.

15. The Administrator of EPA authorized WVDEP, pursuant to Section 402(a)(2) of the Act, 33 U.S.C. § 1342(a)(2), to issue NPDES permits on May 10, 1982. 47 Fed. Reg. 22363.

The applicable West Virginia law for issuing NPDES permits in West Virginia is the Water Pollution Control Act, W.Va. Code § 22-11-1, et seq.

16. Section 505(a) of the CWA, 33 U.S.C. § 1365(a), authorizes any “citizen” to “commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.”

17. Section 505(f) of the CWA, 33 U.S.C. § 1365(f) defines an “effluent standard or limitation under this chapter,” for purposes of the citizen suit provision of section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a), 33 U.S.C. § 1311(a) of the CWA, and “a permit or condition thereof issued” under Section 402, 33 U.S.C. § 1342 of the CWA.

18. Pursuant to Section 505(d) of the CWA, 33 U.S.C. § 1365(d), the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate.”

### **FACTS**

19. Defendant has operational responsibility to treat discharges of acid mine drainage at bond forfeiture sites where reclamation of mined areas has not been completed.

20. Defendant holds NPDES permits, on the following bond forfeiture sites:

| WV/NPDES No. | Effective Date | Site          | County          | Receiving Waters/Watershed         |
|--------------|----------------|---------------|-----------------|------------------------------------|
| WV1023462    | 9/1/2011       | J.E.B., Inc.  | Preston         | Morgan Run/Cheat River             |
| WV1023543    | 9/1/2011       | T&T Fuels     | Preston         | Muddy Creek/Cheat River            |
| WV1023560    | 9/1/2011       | F&M Coal      | Preston         | L. Fork/Sandy Creek/Tygart River   |
| WV1025694    | 9/25/12        | Mangus Coal   | Barbour/Preston | Maple Run/Sandy Creek/Tygart River |
| WV1025830    | 3/22/13        | Decondor Coal | Preston         | Kanes Creek/Monongahela R.         |

21. The NPDES permit for each site limits the amount and concentrations of pollutants that Defendant may discharge from its operations into each receiving stream.

22. The following table identifies the data and nature of each violation, self-reported by the Defendant at each of these sites:

| eDMR# | Month    | NPDES #   | Facility     | Outlet | Parameter | Result | Units | Limit | Type |
|-------|----------|-----------|--------------|--------|-----------|--------|-------|-------|------|
| 21797 | 4/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Al        | 18.9   | mg/l  | 0.43  | Avg  |
| 21797 | 4/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Al        | 18.9   | mg/l  | 0.75  | Max  |
| 21797 | 4/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Fe        | 8.28   | mg/l  | 1.42  | Avg  |
| 21797 | 4/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Fe        | 8.28   | mg/l  | 2.46  | Max  |
| 21797 | 4/1/2015 | WV1023462 | J.E.B., Inc. | 15     | pH        | 3.16   | SU    | 6     | Min  |
| 21798 | 5/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Al        | 28.8   | mg/l  | 0.43  | Avg  |
| 21798 | 5/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Al        | 28.8   | mg/l  | 0.75  | Max  |
| 21798 | 5/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Fe        | 34.8   | mg/l  | 1.42  | Avg  |
| 21798 | 5/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Fe        | 34.8   | mg/l  | 2.46  | Max  |
| 21798 | 5/1/2015 | WV1023462 | J.E.B., Inc. | 15     | pH        | 2.12   | SU    | 6     | Min  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 66.4   | mg/l  | 0.43  | Avg  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 66.4   | mg/l  | 0.75  | Max  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Al        | 31.9   | mg/l  | 0.43  | Avg  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Al        | 31.9   | mg/l  | 0.75  | Max  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Fe        | 15.2   | mg/l  | 1.42  | Avg  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 15     | Fe        | 15.2   | mg/l  | 2.46  | Max  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 6      | pH        | 2.89   | SU    | 6     | Min  |
| 22738 | 6/1/2015 | WV1023462 | J.E.B., Inc. | 15     | pH        | 2.45   | SU    | 6     | Min  |
| 23140 | 7/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 33.2   | mg/l  | 0.43  | Avg  |
| 23140 | 7/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 33.2   | mg/l  | 0.75  | Max  |
| 23140 | 7/1/2015 | WV1023462 | J.E.B., Inc. | 6      | pH        | 3.27   | SU    | 6     | Min  |
| 23888 | 8/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 58     | mg/l  | 0.43  | Avg  |
| 23888 | 8/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 58     | mg/l  | 0.75  | Max  |
| 23418 | 8/1/2015 | WV1023462 | J.E.B., Inc. | 6      | pH        | 3.06   | SU    | 6     | Min  |
| 23888 | 9/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 69.6   | mg/l  | 0.43  | Avg  |
| 23888 | 9/1/2015 | WV1023462 | J.E.B., Inc. | 6      | Al        | 69.6   | mg/l  | 0.75  | Max  |
| 23888 | 9/1/2015 | WV1023462 | J.E.B., Inc. | 6      | pH        | 2.76   | SU    | 6     | Min  |
| 23173 | 7/1/2015 | WV1023543 | T&T Fuels    | 24     | Al        | 0.95   | mg/l  | 0.43  | Avg  |
| 23173 | 7/1/2015 | WV1023543 | T&T Fuels    | 24     | Al        | 0.95   | mg/l  | 0.75  | Max  |
| 23173 | 7/1/2015 | WV1023543 | T&T Fuels    | 24     | N Am      | 131.6  | mg/l  | 6.49  | Avg  |
| 23173 | 7/1/2015 | WV1023543 | T&T Fuels    | 24     | N Am      | 131.6  | mg/l  | 13.01 | Max  |
| 23645 | 8/1/2015 | WV1023543 | T&T Fuels    | 24     | Al        | 6.7    | mg/l  | 0.43  | Avg  |
| 23645 | 8/1/2015 | WV1023543 | T&T Fuels    | 24     | Al        | 6.7    | mg/l  | 0.75  | Max  |

|       |          |           |               |    |      |       |      |       |     |
|-------|----------|-----------|---------------|----|------|-------|------|-------|-----|
| 23645 | 8/1/2015 | WV1023543 | T&T Fuels     | 24 | Fe   | 10.4  | mg/l | 1.42  | Avg |
| 23645 | 8/1/2015 | WV1023543 | T&T Fuels     | 24 | Fe   | 10.4  | mg/l | 2.46  | Max |
| 23645 | 8/1/2015 | WV1023543 | T&T Fuels     | 24 | N Am | 133.9 | mg/l | 6.49  | Avg |
| 23645 | 8/1/2015 | WV1023543 | T&T Fuels     | 24 | N Am | 133.9 | mg/l | 13.01 | Max |
| 24126 | 9/1/2015 | WV1023543 | T&T Fuels     | 24 | Al   | 0.86  | mg/l | 0.75  | Max |
| 24126 | 9/1/2015 | WV1023543 | T&T Fuels     | 24 | N Am | 219   | mg/l | 6.49  | Avg |
| 24126 | 9/1/2015 | WV1023543 | T&T Fuels     | 24 | N Am | 219   | mg/l | 13.01 | Max |
| 22524 | 4/1/2015 | WV1023560 | F&M Coal      | 6  | Al   | 0.93  | mg/l | 0.43  | Avg |
| 22524 | 4/1/2015 | WV1023560 | F&M Coal      | 6  | Al   | 0.93  | mg/l | 0.75  | Max |
| 22524 | 4/1/2015 | WV1023560 | F&M Coal      | 10 | N Am | 43.87 | mg/l | 5.86  | Avg |
| 22524 | 4/1/2015 | WV1023560 | F&M Coal      | 10 | N Am | 43.87 | mg/l | 11.76 | Max |
| 22028 | 5/1/2015 | WV1023560 | F&M Coal      | 6  | Al   | 0.67  | mg/l | 0.43  | Avg |
| 23173 | 7/1/2015 | WV1023560 | F&M Coal      | 10 | N Am | 39.25 | mg/l | 5.86  | Avg |
| 23173 | 7/1/2015 | WV1023560 | F&M Coal      | 10 | N Am | 39.25 | mg/l | 11.76 | Max |
| 23645 | 8/1/2015 | WV1023560 | F&M Coal      | 10 | N Am | 83.68 | mg/l | 5.86  | Avg |
| 23645 | 8/1/2015 | WV1023560 | F&M Coal      | 10 | N Am | 83.68 | mg/l | 11.76 | Max |
| 24124 | 9/1/2015 | WV1023560 | F&M Coal      | 6  | Al   | 0.55  | mg/l | 0.43  | Avg |
| 22028 | 5/1/2015 | WV1025694 | Mangus Coal   | 3  | Al   | 3.76  | mg/l | 0.43  | Avg |
| 22028 | 5/1/2015 | WV1025694 | Mangus Coal   | 3  | Al   | 3.76  | mg/l | 0.75  | Max |
| 22028 | 5/1/2015 | WV1025694 | Mangus Coal   | 3  | pH   | 4.7   | SU   | 6     | Min |
| 22029 | 6/1/2015 | WV1025694 | Mangus Coal   | 3  | Al   | 1.24  | mg/l | 0.43  | Avg |
| 22029 | 6/1/2015 | WV1025694 | Mangus Coal   | 3  | Al   | 1.24  | mg/l | 0.75  | Max |
| 22029 | 6/1/2015 | WV1025694 | Mangus Coal   | 3  | pH   | 5.5   | SU   | 6     | Min |
| 24122 | 9/1/2015 | WV1025694 | Mangus Coal   | 3  | Al   | 13.2  | mg/l | 0.43  | Avg |
| 24122 | 9/1/2015 | WV1025694 | Mangus Coal   | 3  | Al   | 13.2  | mg/l | 0.75  | Max |
| 24122 | 9/1/2015 | WV1025694 | Mangus Coal   | 3  | Fe   | 80.1  | mg/l | 3     | Avg |
| 24122 | 9/1/2015 | WV1025694 | Mangus Coal   | 3  | Fe   | 80.1  | mg/l | 5.26  | Max |
| 24122 | 9/1/2015 | WV1025694 | Mangus Coal   | 3  | pH   | 4.5   | mg/l | 6     | Min |
| 23173 | 7/1/2015 | WV1025694 | Decondor Coal | 2  | Al   | 17.8  | mg/l | 0.43  | Avg |
| 23173 | 7/1/2015 | WV1025694 | Decondor Coal | 2  | Al   | 17.8  | mg/l | 0.75  | Max |
| 23173 | 7/1/2015 | WV1025694 | Decondor Coal | 2  | Fe   | 81.3  | mg/l | 1.42  | Avg |
| 23173 | 7/1/2015 | WV1025694 | Decondor Coal | 2  | Fe   | 81.3  | mg/l | 2.46  | Max |
| 23173 | 7/1/2015 | WV1025694 | Decondor Coal | 2  | SS   | 60    | ml/l | 0.5   | Max |

Al Aluminum

Avg Monthly Average

Fe Iron

Max Daily Maximum

N Am Nitrogen, Ammonia

SS Suspended Solids

SU Standard Units

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### **FIRST CLAIM FOR RELIEF**

23. Plaintiffs incorporate by reference all allegations included in paragraphs 1 through 22 *supra*.

24. Defendant's wastewater discharges identified in the above paragraphs are discharges from a point source or sources into navigable waters of the United States within the meaning of Section 301 of the Clean Water Act, which prohibits the discharge of any pollutant by any person, except in compliance with a permit. 33 U.S.C. § 1311.

25. The pollution limits within the Defendant's permits are "effluent standards or limitations" for purposes of section 505(a)(1) of the Clean Water Act because they are conditions of a permit issued under section 402 of the Act. 33 U.S.C. § 1365(f).

26. Each and every discharge in excess of the effluent limitations in Defendant's NPDES permits is actionable under section 505(a)(1) of the Clean Water Act. 33 U.S.C. § 1365(a)(1).

27. A violation of an average monthly effluent violation is considered to be a violation on each and every day of that month.

28. Unless enjoined, the Defendant will remain in continuing violation of the CWA.

29. On information and belief, Plaintiffs allege that Defendant is in continuing and/or intermittent violation of the CWA as a result of its violations of effluent limitations in its NPDES permits because Defendant has taken no meaningful action to eradicate the underlying causes of the violations.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order:

1. Declaring that Defendant has violated and continues to violate the CWA;



2. Enjoining Defendant from operating its facilities in such a manner as will result in further violations of the effluent limitations in its NPDES permits;

3. Ordering Defendant to immediately comply with conditions and effluent limitations within its permits;

4. Awarding Plaintiffs their attorney and expert witness fees and all other reasonable expenses incurred in pursuit of this action; and

5. Granting other such relief as the Court deems just and appropriate.

DATED: APRIL 20, 2016

Respectfully submitted,

/s/ Derek O. Teaney

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