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January 19, 2011

## **By Certified Mail – Return Receipt Requested**

**Re: 60-Day Notice of Intent to File Citizen Suits Under Clean Water Act Section 505(a)(1) and Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations Stemming From the Unpermitted Discharge of Selenium**

Dear Mr. Evans,

Sierra Club and Kentuckians for the Commonwealth (“KFTC”), in accordance with Section 505 of the Clean Water Act (the “Act” or the “CWA”), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Leeco, Inc. (“Leeco”) is in violation of Section 301 of the Act, 33 U.S.C. § 1311, as a result of the unpermitted discharge of selenium from two surface mines, permit numbers 867-0486 and 860-0478, in Knott and Letcher Counties, Kentucky. The Kentucky Pollutant Discharge Elimination System (“KPDES”) permits associated with permits 867-0846 and 860-0478, KYG045876 and KYG044250, respectively, do not authorize selenium discharges. If within sixty days of the postmark of this letter you do not bring your discharges into full compliance with the Act, either by obtaining and complying with a KPDES permit with proper selenium effluent limitations or by ceasing to discharge selenium through treatment or otherwise, we intend to file a citizen suit seeking civil penalties for your ongoing violation and an injunction compelling you to comply with the Act.

We further notify you, in accordance with section 520 of the federal Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that Leeco is in ongoing violation of certain federal and state regulations promulgated under SMCRA and the Kentucky surface mining laws in KRS Chapter 350 (“the Kentucky Program”) and conditions in Kentucky surface mining permits 867-0486 and 860-0478 as a result of its

discharges of selenium and contributions to specific conductivity. If, within sixty days, Leeco does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and state law, and all conditions of permits 867-0486 and 860-0478, we intend to file a citizen suit in federal court seeking an injunction compelling Leeco's compliance.

### **I. Leeco Is in Ongoing Violation of the Clean Water Act Due to Selenium Discharges From Its Surface Mines**

Section 301 of the Act, 33 U.S.C. § 1311, prohibits the discharge of any pollutant from a point source to a navigable water except when in compliance with a permit.<sup>1</sup> Permitting authorities may not exempt any pollutant discharges from this prohibition. *NRDC v. Costle*, 568 F.2d 1369, 1373–77 (D.C. Cir. 1977). Selenium has been designated a toxic pollutant by the U.S. Environmental Protection Agency. 40 C.F.R. § 401.15.<sup>2</sup> Leeco's KPDES outfalls are all point sources under the Act. *See* 33 U.S.C. 1262(14) (defining point source as “any discernible, confined and discreet conveyance, including but not limited to any . . . ditch, channel, tunnel, conduit, . . . [or] discrete fissure.”); *see also* 40 C.F.R. § 122.2. The receiving streams of Leeco's discharges are all navigable waters.<sup>3</sup> *See* 33 U.S.C. 1262(7) (defining navigable waters as “waters of the United States”); *see also* 40 C.F.R. 122.2. Finally, as explained in section II below, Leeco's KPDES general coal permits KYG045876 and KYG044250 do not authorize the discharge of selenium. Thus, any selenium discharge from Leeco's outfalls regulated by permits KYG045876 and KYG044250 violates Section 301.

Leeco's own effluent tests establish that it has discharged selenium to an unnamed tributary of Bull Creek. In 2009, Leeco sought Amendment 3 to SMCRA permit 867-0486 to add 22.8 acres of new surface disturbance. Concurrently, Leeco sought modification of KPDES coal general permit KYG045876 to authorize the pollutant discharges from its expanded mining. Also in 2009, Leeco sought Amendment 1 to permit 860-0478 and modification of KYG044250. As part of those processes, KDOW required Leeco to submit an effluent characterization of an existing discharge representative of the watersheds affected by the amendments. The effluent characterization used for both of these applications revealed that Leeco is discharging selenium

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<sup>1</sup> As demonstrated by the discharges described below, Leeco has also violated a similar provision of Kentucky state law, which mandates that “[n]o person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.” KRS § 224.70-110.

<sup>2</sup> Selenium injures aquatic life and bioaccumulates up the food chain, harming people and animals that consume aquatic organisms. The potential effects of excess selenium on aquatic life are severe and include reproductive failure, birth defects, damage to gills and internal organs, and ocular disease. In humans, selenium can be extremely toxic at higher levels, causing hair and fingernail loss, kidney and liver damage, and damage to the nervous and circulatory systems.

<sup>3</sup> In the event that any of the receiving streams are found not to be navigable waters, the stream channels are themselves point sources that convey Leeco's pollutants to a water of the United States.

into an unnamed tributary of Bull Creek.<sup>4</sup> See Leeco 860-0478 Amendment 3 Form NOI-CM, August 6, 2009 at 2 (attached as Exhibit 1); Leeco 867-0486 Amendment 1 Form NOI-CM, November 10, 2009 at 2 (attached as Exhibit 2). Effluent from KYG045876 Outfall 015 contained selenium at a concentration of 15 µg/L.<sup>5</sup> Because of inconsistencies and missing information in Leeco and KDOW's documentation, it is possible that Outfall 015 was not the source of the selenium discharge reported in the effluent characterization. Through this letter, Sierra Club and KFTC are providing notice of their intent to sue over the selenium discharge reported in the effluent characterization, whatever the source, and all other like discharges. Knowledge of the actual location of the discharge reported in the Form NOI-CMs is within the control of Leeco and this notice provides sufficient information for Leeco to identify the source of the discharge.

Sierra Club and KFTC believe that Leeco is illegally discharging selenium not only from Outfall 015, but also from all other outfalls on permits 860-0478 and 867-0486 – including outfalls located on Bull Creek and its tributaries, Montgomery Creek and its tributaries, Black John Branch of Defeated Creek and its tributaries, and Upper Lick Fork and its tributaries. Leeco attested that the effluent characterization submitted for KYG045876 Outfall 015 is representative of the discharges from both of these permit areas. See Exhibit 1 at 1; Exhibit 2 at 1. To support its claim that the sample from Outfall 015 is a representative sample, Leeco argued that the coal seams, overburden, and geology of the permit areas are all similar. Indeed, the coal seams being mined under the permits, Hazard 5A, 7, and 8, have all been identified by the United States Geological Survey as containing elevated concentrations of selenium. USGS Open File Report 2005-1330, Spatial Trends in Ash Yield, Sulfur, Selenium, and Other Selected Trace Element Concentrations in Coal Beds of the Appalachian Plateau Region, Table 2 (identifying the Hazard seams as “selenium greater than background”). Thus, Sierra Club and KFTC believe that every discharge from the outfalls associated with permits 860-0478 and 867-0486 since the time of their construction has been in violation of Section 301 of the CWA. In the absence of any serious efforts to prevent similar future violations, we believe that Leeco continues to discharge selenium from those outfalls without a permit in violation of Section 301.

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<sup>4</sup> As best Sierra Club and KFTC can tell, Leeco used the same representative effluent sample for both of these applications. Only the Form NOI-CM associated with 867-0486 Amendment 1 identifies the sampling point as KYG045876 Outfall 015. Although the effluent characteristic data sheets in the two Form NOI-CMs contain slight differences, Sierra Club and KFTC believe those are attributable to carelessness. See, e.g., Exhibit 2 at 2–3 (listing Hardness as 1540 on Form NOI-CM but 1520 on the lab sheet). If Sierra Club and KFTC are mistaken and the two samples are distinct, that is only further evidence of CWA violations.

<sup>5</sup> Sierra Club and KFTC note that Leeco failed to use the proper testing procedure for its effluent characterization. Form NOI-CM requires that the analysis of the effluent characteristic for selenium be performed using EPA method 200.8, which has a detection level of 2 µg/L. See Form NOI-CM at 8, available at [http://dep.ky.gov/formslibrary/Documents/CoalGPNOI\\_06172010\\_.pdf](http://dep.ky.gov/formslibrary/Documents/CoalGPNOI_06172010_.pdf) (listing “Required Analytical Method[s]”). However, Leeco utilized EPA method 200.7 to analyze its effluent. In contrast to method 200.8, method 200.7 has a detection level of 10 µg/L. Exhibit 1 at 2. By employing the improper testing method, Leeco risked failing to detect selenium discharges between 2 and 10 µg/L. As recognized by Kentucky's water quality standards (WQSs), selenium concentrations in this range can be harmful to aquatic life.

## **II. KPDES Permits KYG045876 and KYG044250 Do Not Authorize Leeco to Discharge Selenium**

Sierra Club and KFTC are aware that Leeco's permits KYG045876 and KYG044250 authorize the discharge of certain pollutants from the outfalls identified above. However, those permits do not shield Leeco from liability for the discharges at issue in this notice letter. Under Section 402(k) of the CWA, 33 U.S.C. § 1362(k), compliance with the effluent limits contained in a valid NPDES permit constitutes compliance with Section 301. See also 40 C.F.R. § 122.5. Compliance with the effluent limits within the permit does not, however, excuse the permit holder from liability for the discharge of pollutants not contemplated by the permitting authority at the time of permit issuance. The Fourth Circuit Court of Appeals addressed the application of Section 402(k) and 40 C.F.R. § 122.5 to the discharge of pollutants not listed in a permit in Piney Run Preservation Ass'n v. County Com'rs of Carroll County, MD, 268 F.3d 255 (4th Cir. 2001). The court held that "discharges not within the reasonable contemplation of the permitting authority during the permit application process . . . do not come within the protection of the permit shield." Id. at 268. In order for a permit to shield an entity from liability for the discharge of pollutants not limited in the permit, the entity must disclose at the time of permit issuance that it will discharge those pollutants. Id. When Leeco originally applied for permits KYG045876 and KYG044250, it did not disclose that it would discharge selenium.<sup>6</sup> The absence of such disclosure is sufficient to establish that selenium discharges were not within the reasonable contemplation of the permitting authority.

## **III. Leeco's Discharges of Selenium and Contributions to Specific Conductivity Violate Federal and State Surface Mining Performance Standards and Conditions of Kentucky Surface Mining Permits 860-0478 and 867-0486**

### **1. Background**

In 1977, Congress enacted SMCRA to "assure that surface coal mining operations are so conducted as to protect the environment." 30 U.S.C. § 1202(d). SMCRA encourages "cooperative federalism" by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved Kentucky's state mining regulation program, which can be found in KRS Chapter 350. See 30 C.F.R. § 917.10. To serve the statutory goal of environmental protection, SMCRA and the State Act impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817 and 405 KAR Chapters 7 through 24.

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<sup>6</sup> Leeco's disclosure of selenium discharges in the Form NOI-CM effluent characterizations submitted to KDOW as part of the amendment modification process does not create a permit shield for earlier-permitted outfalls. When a NPDES permit is modified, only the conditions subject to modification are reopened. 40 C.F.R. § 122.62. Thus, if Leeco's disclosure of its potential to discharge selenium were to create a permit shield, that shield would apply only to the outfalls added through Amendment 1 to 867-0486 and Amendment 3 to 860-0478.

Under the Kentucky surface mining regulations, all performance standards in 405 KAR Chapters 7 through 24 are incorporated into each permit. 405 KAR 8:010 § 18 states that “the conditions set forth in this section. . . shall be applicable to each permit issued by the cabinet pursuant to this chapter whether or not the conditions have been set forth in the permit.” One of the conditions of Section 18 is that the permittee shall comply with all performance standards in 405 KAR Chapters 7 through 24. Thus, any violation of the state performance standards is also a violation of the conditions of permits 860-0478 and 867-0486.

## 2. Selenium

By discharging selenium without a permit, Leeco violated both federal and state performance standards and the conditions of permits 860-0478 and 867-0486. The federal performance standards under SMCRA require that “[d]ischarges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations.” 30 C.F.R. § 816.42. The regulations under the State Act mirror the federal standard by mandating that “[i]n no case shall federal and state water quality statutes, regulations, standards, or effluent limitations be violated.” 405 KAR 16:060 § 1(3). See also *id.* at § 6(1)(c) (“Surface water quality shall be protected by handling earth materials, groundwater discharges, and run-off in a manner that. . . [w]ill not cause or contribute to a violation of any federal or state effluent limitations or water quality standards.”); 405 KAR 16:070 § 1(1)(g) (“Discharges of water from areas disturbed by surface mining activities shall at all times be in compliance with all applicable federal and state water quality standards[.]”). As explained in Section I of this letter, Leeco’s unpermitted selenium discharges violate the general prohibition in Section 301 of the CWA, which is a federal water quality statute.

Leeco further violated federal and state performance standards and the conditions of permits 860-0478 and 867-0486 by failing to minimize adverse impacts on surface water, minimize disturbances to the hydrologic balance, and prevent material damage to the hydrologic balance relative to its selenium discharges. Federal performance standards require that “[a]ll surface mining and reclamation activities shall be conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas. . . [and] to prevent material damage to the hydrologic balance outside the permit area . . . .” 30 C.F.R. § 816.41(a). See also 30 C.F.R. § 816.41(f)(1) (“Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided . . . .”); *id.* at § 715.17(g) (same); *id.* at § 715.14(j) (“[T]oxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution or otherwise violate the provisions of § 715.17 of this part.”). Similarly, the Kentucky Program requires that toxic-forming materials “shall be handled; disposed of; treated; and covered with nontoxic-forming, nonacid-forming, and noncombustible materials in a manner which . . . [m]inimizes adverse impacts on surface and

ground water, minimizes disturbances to the hydrologic balance, and prevents material damage to the hydrologic balance.” 405 KAR 16:190 § 3(1)(a). See also 405 KAR 16:060 § 1(1)(a) (“All surface mining activities shall be planned and conducted to minimize disturbance of the hydrologic balance in both the permit area and adjacent areas, in order to. . . [p]revent material damage to the hydrologic balance outside the permit area.”). Leeco’s discharges of toxic selenium in harmful quantities demonstrate a clear failure to manage toxic-forming materials in a way that minimizes adverse impacts on surface water, minimizes disturbance to the hydrologic balance, and prevents material damage to the hydrologic balance.

### 3. Specific Conductivity on Permit 860-0478

Leeco’s contributions to conductivity levels in the streams receiving its discharges violate state and federal performance standards and the conditions of permit 860-0478. The elevated conductivity levels cause violations of Kentucky’s narrative water quality standards as well as material damage to the hydrologic balance. The EPA recently stated that “high levels of conductivity, dissolved solids, and sulfates are a primary cause of water quality impairments downstream from mine discharges.” EPA, April 1, 2010 Detailed Guidance on Improving Review of Appalachian Surface Coal Mining Operations under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order, p. 5. Scientific research indicates that in-stream conductivity levels above 300  $\mu\text{S}/\text{cm}$  impair stream functions, harm aquatic life, and prevent the maintenance of designated uses.

The conductivity levels in Leeco’s discharges from its mine routinely and significantly exceed 300  $\mu\text{S}/\text{cm}$ . For example, the Discharge Monitoring Reports (DMRs) Leeco submitted to KDOW for June 2010<sup>7</sup> reveal discharges with conductivity levels in excess of 300  $\mu\text{S}/\text{cm}$ , ranging from 430  $\mu\text{S}/\text{cm}$  to 2640  $\mu\text{S}/\text{cm}$ , from every KPDES outfall that recorded a discharge. Such discharges lead directly to harmful conductivity levels in the receiving streams of mine 860-0478. Leeco’s June 2010 DMRs contain stream monitoring data showing conductivity levels ranging from 351  $\mu\text{S}/\text{cm}$  to 2170  $\mu\text{S}/\text{cm}$  in Kelly Fork, Montgomery Creek, and Lower Bull Creek. The conductivity levels in all of these streams are thus high enough to adversely affect stream function and injure aquatic life.

Leeco’s contributions to those conductivity levels violate Kentucky’s narrative water quality standards. 405 KAR 10:031 § 2(1)(d) states that “[s]urface waters shall not be aesthetically or otherwise degraded by substances that. . . [i]njure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish, and other aquatic life.” Additionally, 405 KAR 10:031 § 4(1)(f), which protects the use of warm

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<sup>7</sup> June 2010 is the most recent month for which KDOW provided DMRs. The values for that month are generally representative of conductivity levels for all previous months. Copies of all DMRs should be in Leeco’s possession such that the company can determine every date on which it contributed to a violation of Kentucky’s narrative water quality standard.

water aquatic habitat, requires that “[t]otal dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected.” By causing conductivity in the receiving streams of mine 860-0478 to significantly exceed levels necessary to protect aquatic life, Leeco has violated both of these WQS provisions.

As shown in Section III.2 above, violations of WQSs are violations of state and federal performance standards and the conditions of permit 860-0478. First, Leeco violated the prohibition on violations of state WQSs found in 405 KAR 16:060 § 1(3) and 30 C.F.R. § 816.42. Second, Leeco’s consistent violation of WQSs necessarily constitutes material damage to the hydrologic balance and thus violates 405 KAR 16:060 § 1(1)(a) and 30 C.F.R. § 816.41(a). As explained above, by violating performance standards contained in 405 KAR Chapters 7 through 24, Leeco also violated the conditions of its surface mining permit 860-0478. See 405 KAR 8:010 § 18.

#### 4. Treatment

Finally, Leeco has a legal duty to treat its effluent to ensure that it does not violate effluent limitations or WQSs. Kentucky’s performance standards make clear that “[a]dequate facilities, in addition to sedimentation ponds, shall be installed, operated, and maintained to treat any water discharged from disturbed areas when necessary to ensure that the discharge complies with all federal and state laws and regulations and the limitations of this administrative regulation.” 405 KAR 16:070 § 1(2); see also 405 KAR 16:060 § 6(2) (“If drainage control, restabilization and revegetation of disturbed areas, diversion of run-off, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and 405 KAR 16:070, the operator shall use and maintain the necessary water-treatment facilities or water quality controls for as long as treatment is required under this chapter[.]”) The violations identified herein show unequivocally that the existing sediment ponds are insufficient to meet that requirement. Leeco is thus obligated to construct systems that will effectively treat its effluent to levels that comply with all applicable effluent limitations and water quality standards.

#### **IV. Conclusion**

If Leeco does not cease its unpermitted discharge within 60 days of the postmark of this letter, Sierra Club and KFTC intend to file a citizen suit under Section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief for all violations described in this letter. Sierra Club and KFTC, through this notice letter, further reserve the right to seek civil penalties for any further violations stemming from the same problem that may occur after today. See Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995). Likewise, if within 60 days Leeco does not cease all discharges in violation of SMCRA, federal and state surface mining performance standards, and the conditions of permits 860-0478 and

867-0846, we intend to file a citizen suit under Section 520(a)(1) of SMCRA seeking a court order compelling Leeco to comply with the law.

If Leeco has taken any steps to eradicate the illegal discharges identified above, or if Leeco believes that anything in this letter is inaccurate, please let us know. If you do not advise us of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are continuing. We would be happy to meet with Leeco's representatives to attempt to resolve these issues and discuss treatment options within the 60-day notice period. However, if violations are continuing at the time this letter ripens, Sierra Club and KFTC do not intend to delay filing suit.

Sincerely,



Mary Varson Cromer

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