

**COMMONWEALTH OF KENTUCKY
ENERGY AND ENVIRONMENT CABINET
FILE NO. DOW-42445-039**

ENERGY AND ENVIRONMENT CABINET, and

PLAINTIFF

APPALACHIAN VOICES, INC., et al.

PLAINTIFF-INTERVENORS

v.

NALLY & HAMILTON ENTERPRISES, INC.

DEFENDANT

AGREED ORDER

WHEREAS, the Parties to this Agreed Order, the Energy and Environment Cabinet (hereinafter “Cabinet”) and Nally & Hamilton Enterprises, Inc. (hereinafter “Nally”), state:

STATEMENT OF FACTS

1. The 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, KRS Chapter 350, the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et. seq.* and regulations promulgated thereto.

2. Nally is a Kentucky corporation in good standing with its principal office located in Bardstown, Kentucky.

3. Nally operates surface coal mining operations in Eastern Kentucky pursuant to Surface Disturbance Permits issued by the Division of Mine Permits (“DMP”), a Division within the Cabinet’s Department for Natural Resources (“DNR”). Stormwater and other wastewater discharges from Nally’s surface coal mining operations are required to be authorized pursuant to Kentucky Pollutant Discharge Elimination

System (“KPDES”) Permits issued by the Kentucky Division of Water (“DOW”), within the Cabinet’s Department for Environmental Protection. A listing of the DMP Permits and corresponding KPDES Permits that have been issued to Nally that are the subject of this Agreed Order are set forth in Appendix A and are incorporated as if fully set out in this Agreed Order.

4. On or about November 17, 2010, authorized representatives of DOW conducted a Performance Audit Inspection (hereinafter “PAI”) on DMP Permit no. 867-0469 and KPDES Permit No. KYG046418. This included an inspection of the contract wastewater laboratory, Technical Water Laboratories, Inc. (“TWL”), utilized by Nally to conduct monitoring, testing, recordkeeping, and reporting with respect to discharge monitoring reports (hereinafter “DMRs”) submitted by Nally to the Cabinet pursuant to its KPDES Permits. TWL has been used for all of Nally’s KPDES permits since 2001. DOW staff conducted a follow-up inspection of TWL’s laboratory on November 29, 2010.

5. On or about March 17, 2011, authorized representatives of the Cabinet reviewed DMRs submitted by Nally with respect to DMP Permit No. 807-0307 and KPDES Permit No. KYG046155 and identified multiple alleged violations relating to, among other things, failure to submit required monitoring data and failure to accurately report monitoring results on DMRs.

6. On or about March 9, 2011, the Cabinet was served with a Notice of Intent to Sue pursuant to Section 505(b) of the Clean Water Act, 33 U.S.C. §1365(b), on behalf of several environmental advocacy organizations and individuals (hereinafter collectively “Appalachian Voices” or “Intervenors”) alleging violations of KPDES Permit

requirements by Nally at 15 of Nally's surface coal mining operations. A copy of the March 9, 2011 Notice of Intent to Sue is attached to this Agreed Order as Appendix B and incorporated as if fully set out in this Agreed Order. In the Notice of Intent to Sue letter, Appalachian Voices alleged that Nally had committed violations of the Clean Water Act by submitting incorrect or incomplete DMRs or by failing to submit DMRs for permitted outfalls. The Notice of Intent to Sue letter indicated that Appalachian Voices would file suit pursuant to 33 U.S.C. §1365 within 60 days of the date of the Notice letter for ongoing violations as alleged.

7. After receipt of the Notice of Intent to Sue letter, the Cabinet continued with its investigation of Nally's compliance with its KPDES Permits and water quality regulations. Between March 14, 2011 and April 26, 2011, the Cabinet's Division of Enforcement (hereinafter "DENF") reviewed DMRs submitted by Nally covering the period of January 2008 through December 2010 for the same permits referenced in the Notice of Intent to Sue. This included reviewing DMRs with respect to the same types of issues identified in the March 9, 2011 Notice of Intent to Sue served by Appalachian Voices.

8. On or about April 25, 2011, DOW issued a Notice of Violation (hereinafter "NOV") to Nally based upon its findings in the November 17, 2010 PAI, which included findings that there were inadequate records for chain of custody, laboratory bench sheets, and laboratory logs, and improper quality assurance and quality control procedures relating to testing conducted by TWL as part of its DMR services being conducted for Nally. In the NOV, DOW asserted that these conditions constituted violations of 401 KAR 5:065 Section 2 for each of the 15 permits included in the NOI in

addition to the permits for which the PAI was performed, DMP Permit No. 867-0469 and KPDES Permit No. KYG046418.

9. On or about April 29, 2011, the Cabinet issued NOV's to Nally for 16 of Nally's surface mine operations that alleged violations of KPDES Permits and water quality regulations for violations such as failure to submit required monitoring data, failure to accurately report monitoring results on DMRs, and failure to obtain timely KPDES Permits. The operations cited included the 15 operations that were the subject of the Appalachian Voices' Notice of Intent to Sue. On May 6, 2011, the Cabinet filed an Administrative Complaint initiating the above-styled action against Nally and asserting claims for the violations set forth in the NOV's issued to Nally. The NOV's were attached to the Administrative Complaint and incorporated therein. The Administrative Complaint alleges the same DMR-related violations identified by Appalachian Voices in its Notice of Intent to Sue letter, as well as other additional KPDES Permit violations.

10. On May 10, 2011, Appalachian Voices filed a citizen suit against Nally pursuant to 33 U.S.C. § 1365 in the United States District Court for the Eastern District of Kentucky to pursue the claims set forth in its Notice of Intent to Sue letter. The Cabinet is not a party to that litigation.

11. On June 15, 2011, Nally filed its Answer to the Administrative Complaint denying liability and setting forth various affirmative defenses to the Cabinet's enforcement claims relating to monitoring, testing, recordkeeping, and reporting for DMRs and KPDES permitting. The Administrative Complaint alleges 4,630 violations by Nally of KPDES Permit requirements relating to monitoring, testing, recordkeeping, and reporting for DMRs, and failure to obtain KPDES Permits for certain outfalls at its

surface coal mining operations. The Administrative Complaint also alleged one effluent limit violation by Nally. The Administrative Complaint asserted these claims with respect to 16 of Nally's 66 surface mining operations. See Appendix A.

12. On June 10, 2011, Appalachian Voices filed a motion to intervene as a full party in the Cabinet's administrative enforcement proceeding initiated against Nally. By Order entered July 7, 2011, Appalachian Voices was allowed by the Hearing Officer to intervene in this proceeding as of right.

13. Beginning in April 2011, Nally and the Cabinet met on various occasions to discuss the allegations in the Cabinet's NOV's and the Notice of Intent to Sue letter from Appalachian Voices and potential settlement of those claims. Nally provided the Cabinet with information as to the causes of transcription errors and DMR reporting omissions and also provided reports on its corrective measures that were implemented to address the NOV's and the claims in the Notice of Intent to Sue letter.

14. Since initiation of the administrative enforcement case, Nally and the Cabinet continued with settlement discussions relating to the Cabinet's claims. As part of those negotiations, Nally informed the Cabinet that it fully expected the same types of DMR monitoring, testing, recordkeeping, and reporting issues that were alleged in the Administrative Complaint occurred at its other surface coal mining operations because the same contract laboratory was utilized with respect to those operations for DMR monitoring, testing, recordkeeping, and reporting services since 2001. The Cabinet has found based on its investigation that the same type of DMR violations have been prevalent throughout Nally's operations since at least January 2006.

15. Between April 2011 and August 23, 2011, the Cabinet conducted additional reviews of DMRs submitted by Nally since January 2006 for its other surface mining operations, not the 16 included in the Administrative Complaint, which are identified in Appendix A.

16. Following the filing of the Administrative Complaint on May 6, 2011, the Cabinet through its investigation determined that it would not seek a penalty for allegations of noncompliance for which Nally affirmed that ponds had either not been built and/or had been removed for which the Cabinet did not have contradictory evidence. Going forward these reporting requirements are addressed in Reclamation Advisory Memorandum (RAM) #150 issued by the Cabinet on May 3, 2011, which is attached as Appendix C.

17. On or about August 23, 2011, the Cabinet was served with a second Notice of Intent to Sue pursuant to Section 505(b) of the Clean Water Act by Intervenors alleging additional violations by Nally of KPDES permitting requirements at certain operations of the same types as alleged in the Administrative Complaint. A copy of the second Notice of Intent to Sue is attached to this Agreed Order as Appendix D.

18. Based upon investigations the Cabinet has conducted to date of laboratories conducting wastewater monitoring and testing services for the coal mining industry, the Cabinet also determined that quality control and quality assurance procedures at wastewater laboratories are often inadequate in part due to a lack of clear regulatory standards and certification programs for wastewater laboratories. Due to these findings, the Cabinet proposed and the Kentucky General Assembly adopted legislation during the 2011 Regular Session to create standards and a certification program for

laboratories conducting analyses of wastewater for KPDES program purposes. The legislation was codified at KRS 224.10-670, which became effective June 8, 2011. The Cabinet expects to promulgate regulations to implement the certification program in 2012, which will address quality assurance and quality control issues in claims asserted in the Administrative Complaint with respect to Nally's laboratory. Nally has submitted corrective action plans to the Cabinet and has reported to the Cabinet that its laboratory has altered its procedures to address the NOVs.

19. The Cabinet and Nally have negotiated in good faith and reached a settlement of the claims asserted in the Administrative Complaint and the same types of claims that were revealed upon the Cabinet's review of DMRs submitted for all of Nally's other operations covered by permits listed in Appendix A. These include the claims asserted in the two Notice of Intent to Sue letters from Intervenors and Notices of Violation issued to Nally for additional violations at its surface mining operations on August 5, 2011; August 19, 2011; and August 24, 2011 which are attached hereto as Appendices E, F, & G.

20. In order to resolve the Cabinet's claims and findings of violations referenced above, Nally has agreed to pay a civil penalty to the Cabinet and to submit and implement a Corrective Action Plan as more fully described herein for compliance with KRS Chapter 224, KRS Chapter 350, the Clean Water Act, implementing regulations, and its KPDES Permits with respect to wastewater discharges from its surface coal mining operations.

21. Nally does not admit any assertions of fact and does not admit any liability to the Cabinet arising out of the transactions or occurrences set forth herein, but agrees to

the entry of this Agreed Order to resolve the violations alleged. The Cabinet acknowledges that entry of this Agreed Order will avoid protracted litigation between the Parties and ensure implementation of appropriate remedial measures.

NOW THEREFORE, in the interest of settling all civil claims and controversies involving the violations described above, the Parties hereby consent to the entry of this Agreed Order and agree as follows:

REMEDIAL MEASURES

22. Nally shall review its wastewater monitoring, testing, recordkeeping, and reporting procedures with its contract laboratory for its surface coal mining operations and KPDES Permits listed in Appendix A and shall prepare a corrective action plan (“CAP”) that will be submitted to the Cabinet for review and approval within thirty (30) days of entry of this Agreed Order. Notwithstanding the Cabinet’s review, Nally shall implement the CAP upon submittal for all its surface coal mining operations. The CAP shall contain and address:

- a. The procedures and protocols that Nally shall implement to achieve compliance with the monitoring, testing, recordkeeping, and reporting requirements for DMRs under its KPDES Permits;
- b. Practices employed to confirm DMRs contain complete and accurate information for all operations, including operations that share discharge outfalls, and providing prompt submittal of corrected DMR information where required under 401 KAR 5:065 Section 2(1), and 40 CFR 122.41(1)(8);

- c. Procedures or processes used to confirm that information is provided on future DMRs is consistent with RAM #150 or any future amendments to the RAM;
- d. A copy of the laboratory's Standard Operating Procedures ("SOP") and Quality Assurance / Quality Control Protocols that are to be used and followed by the laboratory, including copies of the chain of custody form, bench sheet form, other laboratory forms, summary sheets, and maintenance and calibration log forms that contain all information as provided for in 401 KAR 5:065, and specifically 40 C.F.R. 122.41(e) and (j), as incorporated therein;
- e. Procedures and associated documentation to confirm that its laboratory has developed and is implementing the SOP and is using approved methodologies for all analyses; and
- f. Procedures and documentation to confirm that its laboratory has developed and is implementing appropriate Quality Assurance / Quality Control Protocols.

23. Upon written notification that the Cabinet does not accept the CAP, Nally shall have twenty (20) days to submit an amended CAP, which may contain a reasonable compliance schedule for any amended provisions. Upon resubmittal, the Cabinet may, in whole or in part, (1) approve or (2) disapprove and provide comments to Nally identifying the deficiencies. Upon such resubmittal, if any part of the CAP is disapproved, the Cabinet may deem the Defendant to be out of compliance with this Agreed Order for failure to timely submit such portion and may assess stipulated

penalties. If Nally has received no response from the Cabinet within thirty (30) days of the Division's receipt of the CAP or amended CAP, such plan shall become effective upon the expiration of that thirty (30) day period.

24. Nally shall require that its contract laboratory promptly obtain any necessary certifications consistent with administrative regulations to be promulgated by the Cabinet to implement KRS 224.10-670 with respect to wastewater from coal mining operations.

25. Nally shall implement procedures to ensure that it will prevent pond outfalls from being constructed and discharging prior to receipt of an individual KPDES Permit or receipt of a notice that coverage under the General KPDES Permit for coal mining has been issued by DOW. Notwithstanding any permit terms and conditions, Nally shall separately notify the DOW when outfalls are to be removed from a KPDES permit and shall submit DMRs on those outfalls consistent with RAM #150 or future amendments to RAM #150 until the KPDES Permit is terminated. Nally shall maintain sufficient records to confirm the KPDES Permit coverage date, pond/outfall construction date, pond/outfall certification date, and pond/outfall removal date for all ponds/outfalls constructed or removed following execution of this Agreed Order. Such records and documentation may be maintained at Nally's engineering offices and shall be made available to the Cabinet upon request. The records for each such pond/outfall shall be maintained for three (3) years following KPDES Permit termination.

26. On or before March 31, 2012, the Cabinet may conduct a follow-up Performance Audit Inspection (PAI) on Nally to ensure compliance with the terms and conditions described herein.

27. Nally shall comply with the terms and conditions of its KPDES Permits relating to discharge monitoring, testing, recordkeeping, and reporting.

28. The Corrective Action Plan and other submittals required of Nally pursuant to this Agreed Order shall be sent to:

Director, Division of Enforcement
Kentucky Department for Environmental Protection
300 Fair Oaks Lane
Frankfort, Kentucky 40601

29. Except for lab certification under paragraph 24, Nally shall be in compliance within 120 days of entry of this Agreed Order, with all remedial requirements described in this Agreed Order.

CIVIL PENALTIES/STIPULATED PENALTIES

30. Within thirty (30) days of the entry of this Agreed Order by the Secretary of the Cabinet, Nally shall commence making payments on a civil penalty to the Cabinet in the total amount of Five Hundred Seven Thousand Dollars (\$507,000.00). The Civil Penalty payments shall be made in four (4) equal installments of One Hundred Twenty-Six Thousand Seven Hundred Fifty Dollars (\$126,750.00) each as follows:

- a. Each civil penalty payment shall be made by cashier's check, certified check, or money order. The check or money order shall be made payable to "Kentucky State Treasurer" and shall be sent to the attention of the Director, Division of Enforcement, Department for Environmental Protection, 300 Fair Oaks Lane, Frankfort, Kentucky 40601 by the deadlines specified herein. The payment shall identify that it is being made pursuant to the Agreed Order in File No. DOW-42445-039.

- b. The first installment shall be paid within thirty (30) days after the Agreed Order is entered;
- c. The second installment shall be paid within six (6) months after the Agreed Order is entered;
- d. The third installment shall be paid within twelve (12) months after the Agreed Order is entered; and
- e. The fourth installment shall be paid within eighteen (18) months after the Agreed Order is entered.

31. If Nally fails to pay any of the installments on or before the due date, the balance of the entire civil penalty may, at the election of the Cabinet, become immediately due and payable in full.

32. Nally shall be responsible for paying stipulated penalties to the Cabinet for failure to comply with this Agreed Order as set forth below:

- a. For failure to timely submit the Corrective Action Plan as set forth in paragraphs 22 and 23, a stipulated penalty in the amount of \$500 per day may be assessed for each day beyond the applicable thirty (30) or twenty (20) day deadline.
- b. For each instance in which Nally constructs a pond outfall prior to securing KPDES Permit coverage, a stipulated penalty in the amount of \$5,000 per day may be assessed.
- c. For each instance of a permit numeric effluent limitation exceedance related to the Agreed Order, a stipulated penalty in the amount of \$1,000 per violation may be assessed.

- d. For each separate violation cited as a result of a follow-up PAI, in which there was a failure to receive an acceptable PAI, after approval of the CAP, a stipulated penalty of \$1,000 may be assessed.

33. Stipulated penalties are in addition to and not in lieu of, any other penalty which could be assessed by the Cabinet. The Cabinet may, in its discretion, waive stipulated penalties that would otherwise be due.

34. If Nally believes the request for payment for a stipulated penalty is erroneous or contrary to law, it may challenge any such determination by filing a petition for hearing pursuant to KRS 224.10-420 in the Office of Administrative Hearings. The filing of a petition for hearing does not automatically excuse timely payment of the stipulated penalty or the continuing accrual of any stipulated penalties unless agreed to by the Cabinet or stayed by the Hearing Officer.

35. Stipulated penalties shall be paid in accordance with the same procedures set forth in paragraphs 30 and 31 that apply to civil penalties.

MISCELLANEOUS PROVISIONS

36. This Agreed Order addresses only the violations described above whether of KPDES or DMP Permits or DOW or DNR regulation. Other than those matters resolved by entry of this Agreed Order, nothing contained herein shall be construed to waive or to limit any remedy or cause of action by the Cabinet based on statutes or regulations under its jurisdiction and Nally reserves its defenses thereto. The Cabinet expressly reserves its right at any time to issue administrative orders and to take any other action it deems necessary that is not inconsistent with this Agreed Order, including the

right to order all necessary remedial measures, assess penalties for violations, or recover all response costs incurred, and Nally reserves its defenses thereto.

37. This Agreed Order shall not prevent the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit to Nally. Nally reserves its defenses thereto, except that Nally shall not use this Agreed Order as a defense to any permitting action described in this paragraph.

38. Nally waives its right to any hearing on the matters resolved herein. However, failure by Nally to comply strictly with any or all of the terms of this Agreed Order shall be grounds for the Cabinet to seek enforcement of this Agreed Order in Franklin Circuit Court and to pursue any other appropriate administrative or judicial action under KRS Chapter 224, KRS Chapter 350, and the regulations promulgated pursuant thereto, and Nally reserves its defenses thereto.

39. The Agreed Order may not be amended except by a written order of the Cabinet's Secretary or his designee. Nally may request an amendment by writing the Assistant Director of the Division of Enforcement at 300 Fair Oaks Lane, Frankfort, Kentucky 40601 and stating the reasons for the request. If such request for an amendment(s) is granted, the amended Agreed Order shall not affect any other provision of this Agreed Order unless expressly provided in the amended Agreed Order.

40. The Cabinet does not, by its consent to the entry of this Agreed Order, warrant or aver in any manner that Nally's compliance with this Agreed Order will ensure compliance with all provisions of KRS Chapter 224, KRS Chapter 350, or the regulations promulgated pursuant thereto. Notwithstanding the Cabinet's review and comment on any plans formulated pursuant to this Agreed Order, Nally shall remain

solely responsible for compliance with the terms of KRS Chapter 224, KRS Chapter 350, and the regulations promulgated pursuant thereto, this Agreed Order and any permit and compliance schedule requirements.

41. Nally shall give notice of this Agreed Order to any purchaser, lessee, or successor in interest prior to the transfer of ownership and/or operation of any part of its now-existing facilities occurring prior to termination of this Agreed Order, shall notify the Cabinet that such notice has been given, and shall follow all statutory and regulatory requirements for a transfer. Whether or not a transfer takes place, Nally shall remain fully responsible for payment of all civil penalties identified in this Agreed Order.

42. The Cabinet agrees to allow the performance of the above-listed remedial measures and payment of civil penalties by Nally to satisfy Nally's obligations to the Cabinet generated by the violations described above.

43. The Cabinet and Nally agree that the remedial measures agreed to herein are company-specific and designed to ensure that Nally complies with the statutes and regulations cited herein. This Agreed Order applies specifically and exclusively to Nally's mining operations and is inapplicable to any other company.


44. This Agreed Order shall be of no force and effect unless and until it is entered by the Secretary or his designee as evidenced by his signature thereon. If this Agreed Order contains any date by which Nally is to take any action or cease any activity, and the Secretary enters the Agreed Order after that date, then Nally is nonetheless obligated to have taken the action or ceased the activity by the date contained in this Agreed Order.

TERMINATION

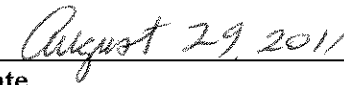
45. This Agreed Order shall terminate upon Nally's completion of all requirements described in this Agreed Order and its compliance with this Agreed Order for a period of one (1) year after entry. Nally may submit written notice to the Cabinet when it believes this standard for termination has been met. The Cabinet will notify Nally in writing of whether it intends to agree with or object to termination. The Cabinet reserves its right to enforce this Agreed Order, and Nally reserves its right to file a petition for hearing pursuant to KRS 224.10-420(2) contesting the Cabinet's determination.

FILE NO. DOW-42445-039

AGREED TO BY:

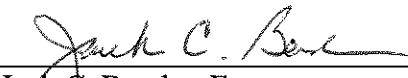


Stephen Hamilton, Secretary/Treasurer
Nally & Hamilton Enterprises, Inc.
109 South 4th Street
P. O. Box 157
Bardstown, Kentucky 40004




Date

HAVE SEEN:

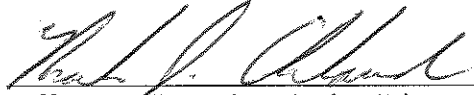


Jack C. Bender, Esq.
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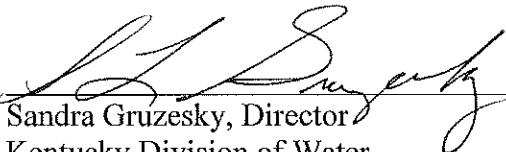
Date

APPROVAL RECOMMENDED BY:

for 

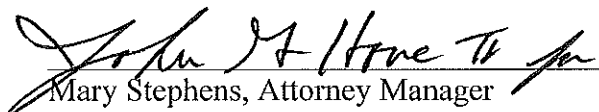
Jeffrey A. Cummins, Acting Director
Division of Enforcement

09/06/2011
Date



Sandra Gruzesky, Director
Kentucky Division of Water

9/6/11
Date



Mary Stephens, Attorney Manager
Water Legal Section
Environmental Protection Legal Division

9-6-11
Date



C. Michael Haines, General Counsel
Energy and Environment Cabinet

9-6-11
Date

HAVE SEEN:

Steve Blanton, Hearing Officer
Office of Administrative Hearings

Date

ORDER

Wherefore, the foregoing Agreed Order is entered as the final Order of the Energy and Environment Cabinet this _____ day of _____, 2011.

ENERGY AND ENVIRONMENT CABINET

LEONARD K. PETERS, SECRETARY

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **AGREED ORDER** was mailed, postage prepaid, to the following on this the ____ day of _____, 2011.

Stephen Hamilton, Secretary/Treasurer
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Office of General Counsel
Water Legal Section
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Frankfort, Kentucky 40601

DOCKET COORDINATOR,
OFFICE OF ADMINISTRATIVE HEARINGS

Distribution: