

FILED
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FRANKLIN CIRCUIT COURT
SALLY JUMP, CLERK

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 11-CI- 01731

**APPALACHIAN VOICES, INC., KENTUCKIANS
FOR THE COMMONWEALTH, INC.,
WATERKEEPER ALLIANCE, INC.,
KENTUCKY RIVERKEEPER, INC., and PAT
BANKS, in her capacity as the Kentucky Riverkeeper, PETITIONERS and PLAINTIFFS,**

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Pat Banks, Kentucky Riverkeeper
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v.

PETITION FOR REVIEW and COMPLAINT

ENERGY AND ENVIRONMENT CABINET

Serve:

AND

Dr. Len Peters, Secretary
Kentucky Energy and Environment Cabinet
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Jack Conway, Kentucky Attorney General
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

and NALLY & HAMILTON ENTERPRISES, INC., RESPONDENTS and DEFENDANTS.

Serve:

For service on:

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Nally & Hamilton Enterprises, Inc.
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PETITION FOR REVIEW and COMPLAINT

Petitioners and Plaintiffs Appalachian Voices, Inc., Kentuckians For The Commonwealth, Inc., Waterkeeper Alliance, Inc., Kentucky Riverkeeper, Inc., and Pat Banks, in her capacity as the Kentucky Riverkeeper (collectively, “Petitioners”), hereby petition this Court, by and through counsel and pursuant to KRS 224.10-470, for review of the final order of the Respondent and Defendant Energy and Environment Cabinet (“Cabinet”) entered by the Secretary of the Cabinet in File No. DOW-42445-039. A copy of the final order, not including the appendices, is attached here as Exhibit A.

INTRODUCTION

1. For at least the past five years, Respondent and Defendant Nally & Hamilton Enterprises, Inc. (“Nally”) has been submitting false and incomplete reports to the Cabinet regarding the pollution discharged from its mining operations in eastern Kentucky. These false and incomplete reports violate the federal Clean Water Act, Kentucky state environmental law, and the terms of discharge permits issued to Nally by the Cabinet.

2. The Cabinet did not detect these violations until Petitioners brought them to light in March 2011, after analyzing Nally’s discharge reports. On May 6, 2011, the Cabinet filed an administrative complaint against Nally. The complaint alleged over four thousand violations of Kentucky environmental laws and applicable permits. Petitioners were granted full party status as intervenors in July 2011.

3. On September 6, 2011 the Cabinet and Nally presented to the Hearing Officer an Agreed Order which purported to resolve not only the thousands of violations alleged in the complaint but also thousands of additional, unspecified violations. The settlement was negotiated in secret,

without Petitioners' participation. Petitioners submitted to the Hearing Officer, for further submission to the Secretary, detailed written objections to the Agreed Order.

4. The Secretary signed the Agreed Order on November 14, 2011. The order was filed with the Office of Administrative Hearings and mailed to the parties on November 16, 2011.

5. The Secretary had no basis to sign the Agreed Order. No factual evidence in the record, much less substantial evidence, supports a finding that the Agreed Order is a fair resolution of Nally's thousands of violations, or that it will be an effective deterrent of future violations. To Petitioners' knowledge, the Cabinet never investigated certain factual issues crucial to an appropriate resolution of Nally's violations. Neither the Cabinet lawyers who settled the case nor the Secretary of the Cabinet have revealed what factors they considered in reaching or signing the Agreed Order. The Cabinet, in fact, has not even attempted to justify the Agreed Order by expressly claiming that it is fair and will be effective. Certain terms of the Agreed Order make clear, on its face, that it is not fair, and will not be effective.

6. The Secretary entered the order without explanation and without any indication that he considered Petitioners' objections. The sparse record is insufficient for this Court to conduct a meaningful review of the order.

7. The final order of the Cabinet is therefore arbitrary and capricious and denies Petitioners due process of law.

8. Petitioners request that this Court vacate and set aside the Cabinet's final order and remand the case to the Cabinet. This Court should require that the agency either (1) provide an adequate explanation, including factual support, to justify the final order in light of Petitioners' objections, or (2) allow further discovery in the case and, if necessary, a hearing on the merits.

9. The specific grounds upon which review is sought, and the errors assigned, follow.

JURISDICTION AND VENUE

10. This Court has jurisdiction and venue is proper here pursuant to KRS 224.10-470.

11. Petitioners' interests are adversely affected by the Cabinet's final order. As described below, Nally's violations have injured and continue to injure Petitioners and their members. The final order purporting to resolve these violations will be inadequate, and will not prevent such harms from occurring in the future. Unless the Agreed Order is vacated and Nally's violations adequately addressed, Petitioners will continue to be harmed by Nally's illegal actions.

PARTIES

12. Petitioner Appalachian Voices is a non-profit membership corporation organized under the laws of the State of North Carolina, with its principal office in Boone, North Carolina. Appalachian Voices has approximately 1,200 individual members and works to solve environmental problems that impact people who live in the central and southern Appalachian Mountains, including in eastern Kentucky.

13. Petitioner Waterkeeper Alliance is a national, non-profit membership corporation organized under the laws of the State of New York, with its principal office in New York City. Waterkeeper Alliance is an umbrella organization composed of nearly two hundred local Waterkeeper organizations. Waterkeeper Alliance works to restore and protect the waters of the United States, including the Kentucky and Cumberland Rivers and their tributaries. Waterkeeper Alliance promotes compliance with environmental laws such as the Clean Water Act, responds to citizen complaints, identifies threats to water bodies, and protects the public's right to a pollution-free environment.

14. Petitioner Kentucky Riverkeeper is a non-profit membership corporation organized under the laws of the Commonwealth of Kentucky, with its principal office in Richmond, Kentucky, in

Madison County. Kentucky Riverkeeper has approximately 450 members. Kentucky Riverkeeper's purposes include the protection and restoration of the Kentucky River watershed and the communities that depend upon it.

15. Petitioner Pat Banks sues in her capacity as the Kentucky Riverkeeper.

16. Petitioner Kentuckians For The Commonwealth (KFTC) is a non-profit membership corporation organized under the laws of the Commonwealth of Kentucky, with its principal office in London, Kentucky, in Laurel County. KFTC is a social, economic, and environmental justice organization with approximately 7,000 members statewide. KFTC's purposes include promoting the participation of citizens in democratic institutions and promoting social justice and quality of life for all Kentuckians, including by addressing environmental harms that affect Kentucky citizens.

17. Members of Appalachian Voices, Waterkeeper Alliance, Kentucky Riverkeeper, and KFTC reside near and/or use and enjoy waters downstream from Nally's coal mining discharges into tributaries of the Kentucky and Cumberland Rivers. These members have used and continue to use the affected waterways for activities such as fishing, boating, kayaking, swimming, and other recreation or activities that involve being on or in the water. In addition, some members drink the affected water and/or eat fish caught in the water.

18. These members' use and enjoyment of Kentucky's waterways is impaired by Nally's failure to report accurately and completely the pollution it is dumping into Kentucky waters, as alleged in the Cabinet's complaint. Nally's violations mean that Petitioners' members do not know whether recreating in or using waterways downstream from Nally's discharges will subject them or their families to injury from unsafe levels of pollutants. Nally's violations therefore impair the members' environmental, health, and recreational interests.

19. Some Petitioners' organizational interests are also impaired by Nally's monitoring and reporting violations. Appalachian Voices and Waterkeeper Alliance rely on accurate and timely discharge monitoring reports to fulfill a shared organizational purpose, which is to inform the public about water pollutants and water quality and work to remedy any hazardous conditions in Kentucky waters. Incomplete and inaccurate discharge reports like Nally's impair these organizations' efforts to research compliance with relevant discharge permits, report the results of that research to members, propose any necessary legislation with respect to the discharges, and bring litigation to prevent any violation of discharge limitations and thereby protect their members' interests in the affected waterways.

20. The interests that Appalachian Voices, Waterkeeper Alliance, Kentucky Riverkeeper, and KFTC seek to protect in this action are germane to each organization's purpose. Neither the claims asserted nor the relief requested requires the participation of individual members of these organizations as parties to this case.

21. Respondent Cabinet is an agency of the Commonwealth of Kentucky. The Cabinet has authority under KRS Chapter 224 to administer and enforce that Chapter, which pertains to environmental protection and water quality within the Commonwealth.

22. Respondent Nally is a Kentucky corporation with its principal office in Nelson County at 109 S. 4th St., P.O. Box 157, Bardstown, Kentucky 40004. Nally owns or operates, or has owned or operated, coal mining facilities, including reclamation sites, in at least seven Kentucky counties: Bell, Harlan, Knott, Knox, Leslie, Letcher, and Perry. These facilities discharge polluted effluent into tributaries of the Kentucky and Cumberland Rivers.

BACKGROUND

23. The federal Clean Water Act, 33 U.S.C. § 1251 *et seq.*, prohibits the discharge of any pollutant by any person from a point source into waters of the United States unless the discharge complies with enumerated sections of the Act. Among other things, discharges must be authorized by the terms of a permit issued by the United States Environmental Protection Agency (EPA) or an EPA-delegated State permitting authority. 33 U.S.C. §§ 1311(a), 1362(12)(A), 1342. EPA has delegated permitting authority within Kentucky to the Commonwealth. *Id.* § 1342(b); Approval of Kentucky's NPDES Program, 48 Fed. Reg. 45,597 (Oct. 6, 1983); KRS 224.16-050.

24. Nally owns and operates coal mining facilities in eastern Kentucky that discharge polluted water into tributaries of the Kentucky and Cumberland Rivers. Nally's discharges are subject to the terms and conditions of permits issued by the Cabinet. The permits authorize Nally to discharge limited quantities of certain pollutants and require Nally to monitor and report to the Cabinet on the quantity of its discharge of these and other pollutants and parameters. This monitoring and reporting allows the government and citizens to determine, among other things, whether discharges are in violation of any applicable effluent limitations.

25. Under the federal Clean Water Act, citizens may sue dischargers who violate the Act or permits issued under the Act. 33 U.S.C. § 1365(a), (f). Before suing, citizens must send the discharger a "notice letter" outlining the violations. *Id.* § 1365(b). On March 9, 2011, Petitioners sent Nally a notice letter stating their intent to sue Nally for its Clean Water Act violations. Petitioners had discovered, by analyzing discharge reports, that Nally had repeatedly filed false and incomplete reports regarding the pollutants discharged from its mining operations.

For instance, Nally submitted many reports containing data that repeated exactly the data already submitted in a prior month. Petitioners sent copies of this letter to the Cabinet.

26. On May 6, 2011, the Cabinet initiated the proceeding below by filing an administrative complaint against Nally. The complaint detailed many of the same permit violations described in Petitioners' notice letter, including discharge reports that contained repeated, and therefore false, data. The complaint also alleged, among other things, Nally's failure to submit required data, Nally's failure to report accurately its monitoring results to the Cabinet, and Nally's failure to obtain timely permits. The complaint alleged over four thousand violations of Kentucky permits and environmental laws.

27. Beginning in April 2011, before the complaint was even filed, the Cabinet and Nally began negotiating a settlement agreement regarding these violations.

28. Petitioners were granted full party status as intervenors in the administrative proceeding on July 7, 2011. They were granted the right to intervene on the basis that they met the standards for mandatory intervention. *See* 401 KAR 100:010 Section 11(2)(a)2 (where party has "an interest which is or may be adversely affected by the outcome of the proceeding" the hearing officer shall grant intervention).

29. Petitioners propounded discovery requests on Nally and the Cabinet to determine facts relevant to the Cabinet's allegations, Nally's alleged defenses, what caused Nally's violations of the law, and the appropriate civil penalties and remedies. Nally partially responded to these discovery requests. The Cabinet provided no discovery responses.

30. On August 23, Petitioners sent another notice letter to Nally which outlined additional violations, and sent a copy to the Cabinet.

31. On September 6, Nally and the Cabinet submitted to the Office of Administrative Hearings an Agreed Order which purported to resolve “the claims asserted in the Administrative Complaint” as well as “the same types of claims that were revealed upon the Cabinet’s review” of discharge reports submitted for all of Nally’s operations, including “the claims asserted in the two Notice of Intent to Sue letters” from Petitioners. Exhibit A (Agreed Order) ¶ 19.

32. The Agreed Order provided that 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.” Exhibit A (Agreed Order) ¶ 21.

33. On October 4, 2011, Petitioners submitted detailed objections to the Agreed Order, with exhibits, to the Office of Administrative Hearings for further submission to the Secretary. The objections outlined why entry of the Agreed Order would constitute arbitrary agency action.

34. On November 14, 2011, the Secretary signed the Agreed Order. He provided no explanation for the decision, and no response to Petitioners’ objections. On November 16, 2011, the final order was filed with the Office of Administrative Hearings and mailed to the parties.

FIRST ASSIGNMENT OF ERROR

No evidence supports a finding that the Agreed Order will fairly resolve Nally’s past violations or deter future violations.

35. There is insufficient factual information in the record to inform a decision by the Secretary that the Agreed Order will remedy Nally’s past violations or deter future violations. Specifically, the record fails to demonstrate whether or how the Secretary or the Cabinet considered: what caused Nally’s violations; whether Nally’s reporting violations masked serious pollution discharge violations; and what amount of civil penalty is necessary to deter the violations. There is, moreover, no evidence that the Secretary or the Cabinet investigated any of

these facts. The Agreed Order itself does not establish any such facts, and provides that Nally does not admit any facts at all.

36. **The cause of the violations:** There is no indication the Secretary or the Cabinet investigated whether Nally's thousands of violations were committed intentionally. The evidence strongly indicates that Nally's violations were intentional.

37. First, Nally repeatedly submitted the exact same effluent data for two different discharge points, or "outfalls." Different outfalls should not have the exact same effluent data, and thus at least one of these data sets is false. It is unlikely to have been an unintentional mistake, because in order to submit such discharge reports someone at Nally or its contract laboratory would have to change all or most of the other information on the repeated outfall report—such as the mine name, the receiving water name, the permit numbers, and the latitude and longitude of the outfall—and yet leave in place only the false effluent data.

38. Second, at least some of Nally's bench sheets, which are hand-written notes containing the data supposedly gathered in the lab or in the field—contain patently false numbers or false dates. For example, a number of Nally's hand-written bench sheets containing different dates have data that match each other exactly, and therefore at least one of them is false. It is unlikely that someone hand-wrote two sets of identical data for different dates unintentionally. As another example, Nally produced a bench sheet containing what appears to be the crossed out date "5-1-10" replaced with the hand-written date "4-31-10"—a date that doesn't exist.

39. Third, there are discrepancies between Cabinet-issued inspection reports and discharge reports submitted by Nally. On at least one occasion, the Cabinet issued a report showing that Nally was discharging water from a particular outfall on a particular day that did not meet effluent limitations criteria. Yet Nally submitted a discharge report for the same outfall and the

same day reporting no discharge. The fact that Nally submitted a “no flow” report for an outfall that was discharging water at illegal pollution levels strongly suggests intentional falsification.

40. The record indicates that the Secretary and the Cabinet failed to conduct any investigation into the possibility of intentional falsification. Yet if Nally’s reports were intentionally falsified, this would impact both the appropriate penalty and remedy for such violations. Because the Secretary had insufficient information regarding what caused Nally’s violations to make a reasoned decision about the proper penalty and remedy, it was arbitrary for him to sign the Agreed Order.

41. **Masking discharge violations:** There is no evidence in the record that the Secretary or the Cabinet investigated the degree to which Nally’s monitoring and reporting violations masked serious and harmful pollution discharge violations. Without such information, it is impossible to know how much damage Nally caused to the environment and therefore what an appropriate penalty or effective remedy for the violations would be. Moreover, there is some evidence that Nally’s monitoring and reporting violations did cover up discharge violations.

42. The Cabinet, in order to approximate whether Nally’s past discharges exceeded permit limits, should have at least tested Nally’s current discharges to see whether they regularly exceed such limits. On information and belief, the Cabinet did not do so. Petitioners attempted to perform such tests themselves, but Nally refused to comply, and Petitioners were unable to compel the discovery of such information before the Agreed Order was filed.

43. If Nally’s reporting violations masked discharge violations, the reporting violations would necessarily have been more harmful and more likely to have been intentional. This would warrant higher civil penalties and remedial measures addressed to sampling and testing procedures. For the Secretary to enter the Agreed Order without this information was arbitrary.

44. **Amount necessary to deter violations:** There is no evidence that the Cabinet determined the facts necessary to inform a decision whether the civil penalty in the Agreed Order will deter future violations by Nally. Specifically, there is no evidence demonstrating the amount of money Nally saved by violating the law for at least the past five years, or how much of an impact the Agreed Order's fine will have on Nally's finances.

45. According to information Petitioners received from Nally in discovery, it is likely that Nally saved at least \$300,000 in compliance costs since 2001 by violating the law's monitoring and reporting requirements. That figure only takes into account the differential in the monthly amount charged by Nally's lab before and after the Cabinet conducted an inspection in late 2010—after which time the lab began charging more money, presumably for conducting more careful analyses. This figure therefore underestimates the total savings to Nally because it does not take into account, among other things, the rate of return to Nally on saving hundreds of thousands of dollars over many years and any penalties Nally avoided paying as a result of the lab potentially covering up permit limit exceedences. Such information was never provided by the parties, and it is not in the record.

46. The Agreed Order will provide no value as a deterrent if it would have been more expensive for Nally to have complied with the law than to have violated it and paid a penalty. It is also unlikely to deter future violations if the fine has a small impact on Nally's bottom line.

47. The Cabinet also provided no explanation for why the settlement amount was only a small fraction of the maximum allowable penalty. Under Kentucky law the maximum penalty for each of Nally's violations is \$25,000 per day. KRS 224.99-010. The Cabinet's complaint alleged 4,630 violations, but the Agreed Order claimed to cover all similar "types" of violations, in all of Nally's mines, likely going back five years. Exhibit A (Agreed Order) ¶ 19. As a result,

the Agreed Order may purport to resolve as many as 31,680 violations. Assuming each violation lasted only one day, the maximum penalty would be \$792 million. The civil penalty actually assessed in the Agreed Order (\$507,000) is a minuscule percentage of that maximum: 0.06%.

48. The Cabinet gave no explanation as to why this dramatic downward departure from the maximum penalty amount was reasonable and appropriate, or why the fine imposed will adequately deter future violations.

SECOND ASSIGNMENT OF ERROR

The Agreed Order is deficient on its face.

49. The Agreed Order contains terms that, on their face, make clear that it will not resolve Nally's past violations fairly nor adequately deter future violations.

50. First, the Agreed Order does not state exactly what violations it purports to resolve. It claims to settle not only the violations alleged in the complaint but also "the same types of claims" found in discharge reports submitted for Nally's other operations. Exhibit A (Agreed Order) ¶ 19. The Agreed Order does not say that the Cabinet discovered a particular number of additional violations, nor does it describe any such violations. The additional violations "include"—but apparently are not limited to—those listed in Petitioners' two notice letters and in certain Notices of Violation issued by the Cabinet.

51. There was no information in the record, therefore, from which the Secretary could determine exactly how many violations the Cabinet was resolving. This information is necessary in order to determine whether the Agreed Order was a fair resolution of such violations. For the Secretary to absolve Nally of further penalties for unknown, undisclosed violations was arbitrary.

52. Second, the Agreed Order is arbitrary because it contains no meaningful remedial measures. It requires Nally to *develop* remedial measures in the future, and gives only broad

prescriptive goals for such remedies, not specific requirements. Exhibit A (Agreed Order) ¶¶ 22-23. The Secretary therefore lacked any basis to find that these unknown remedial measures would effectively resolve Nally's violations and prevent violations in the future, and his entry of the Agreed Order was arbitrary.

WHEREFORE, Petitioners respectfully pray for the following relief:

- (i) Vacate the Secretary's Order in File No. DOW-42445-039;
- (ii) Remand this case to the Cabinet to compel the production of evidentiary support for the Agreed Order and an explanation for why the Agreed Order is based on a reasonable investigation of the facts and will adequately remedy past violations and deter future violations; or failing that, require that the case be returned to the Hearing Officer for the continuance of fact discovery and a hearing on the merits;
- (iii) Award Petitioners costs and attorneys' fees; and
- (iv) Award any and all other relief to which Petitioners may be entitled.

Dated: December 8th, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, in addition to service of the Petition for Review and Complaint as provided in 224.10-470 and CR 4.01 and 4.04, a true and accurate copy of the foregoing Petition for Review and Complaint was served the 8th day of December, 2011, by first-class mail to those persons listed below:

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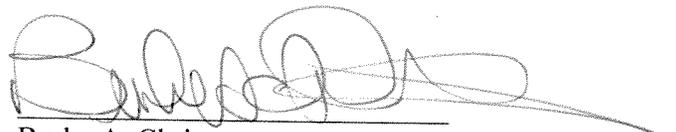
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