



## KENTUCKIANS FOR THE COMMONWEALTH

P.O. Box 1450 • London, KY 40743  
606-878-2161 • [www.kftc.org](http://www.kftc.org)

*Action for Justice*

January 19, 2011

Honorable Phillip Shepherd  
Franklin Circuit Court  
Frankfort, Kentucky 40601

Dear Judge Shepherd,

In 2011, KFTC will turn 30 years old. One constant throughout those 30 years has been our work to protect the water resources in areas of the state where coal is mined. Our members have been sickened by contaminants that have entered their wells; have had to spend out of their own pockets thousands of dollars to treat or replace wells, cover medical costs and pursue legal remedies; have had livestock or pets sickened by drinking surface water; have seen streams favored for recreational uses ruined by pollutants; have had ponds and gardens destroyed when surface water runoffs damaged crops and contaminated soil; and have experienced an increased severity and frequency of flooding. This names just some of the water-related impacts of coal mining. There are broader consequences as well, including for communities hundreds of miles downstream, in the way of increased water treatment costs, lost recreation and economic value, increased erosion, etc.

All this is happening as a normal course of business while we have multiple departments, agencies, laws and officials who are charged with seeing that none of it happens in the first place. Yet the quality of the water in many areas where coal is mined is actually getting worse. The Kentucky Division of Water's most recent 303b Report to Congress, for example, shows that 82 percent of streams in the Big Sandy Basin are "impaired," with "resource extraction" being the primary cause. Various departments in the Energy and Environment Cabinet are the ones permitting this pollution under ineffective, lenient standards, with little or no consideration of cumulative impacts, and spotty enforcement.

In 2004, for example, a resident in Pike County took legal action under Clean Water Act provisions against Sidney Coal for repeated exceedances of KPDES effluent limitations, both daily maximums and monthly averages. These violations had occurred in 30 of the 44 months surveyed and had been self-reported by the company. Yet no action was taken by any agency in the Cabinet to stop and remedy the nearly four years of repeated violations. It took third-party intervention, including a federal lawsuit, to achieve compliance.

In 2008, after heavy rains in Floyd County, Cabinet inspectors (including some in helicopters) were a daily presence at a Miller Brothers mine where a pond was in danger of breaching. Discharges from the mining operation had turned the streams an obvious orange. Local residents assumed that since state inspectors were in the area the stream pollution would be addressed. Only after a week, when the stream had not changed back to a more normal color, did one resident file a complaint. It was not until then that the company was cited for its obvious and illegal discharge. Again, it took a third party to prompt any type of enforcement action.

Similarly, it was third parties who had to take action against Premier Elkhorn for constructing a valley fill in Pike County that had not been permitted. It is difficult to understand how Cabinet inspectors could not have noticed an unpermitted valley fill.

Judge Shepherd, we could fill pages with similar examples of both the blatant flaunting of the Clean Water Act and related laws by coal companies, and a complete failure to enforce those laws by the Energy and Environment Cabinet and its various departments. The Cabinet clearly subjugates the public interest to that of the coal industry.

We mention these examples to point out the context or culture within which the proposed Consent Judgments would be implemented. This long-standing culture is the most formidable barrier to protecting the public interest in the quality of Kentucky's water resources. In order for this public interest to be represented, the Motion to Intervene needs to be granted.

As has been pointed out in our legal filings, the negotiated fines in the Consent Judgments are minimal given the extensive and serious nature of the violations, particularly because the successful implementation of the Clean Water is only possible with honest and reliable self-monitoring. The Corrective Action Plan is weak and a token gesture at best. And the blanket pardon for un-cited violations over a five-year period, whether known or unknown, has no justification.

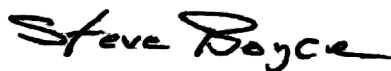
We do not feel it necessary to repeat the details of these arguments here. We mention them only to point out that nothing in the Consent Judgments would change this culture of non-enforcement within the Cabinet or the culture of non-compliance among coal companies. Our experience suggests that they were not intended to do so. These agreements would accomplish little beyond closing an immediate enforcement case that the Cabinet wants out of the public's attention.

We also strongly believe that the Cabinet's enforcement action was taken to shield ICG and Frasure Creek, and an entire industry, from Federal oversight. It is obvious to us that the Cabinet is acting in collusion with the defendants in their best interests. The evidence of fraud is plain and in the open and the Cabinet dismissal of this evidence as merely a clerical mishap reinforces all the concerns we have expressed in this letter and in our legal filings.

Therefore, we believe the active oversight of the Court and the involvement of interested third parties, such as KFTC and the other Applicants for intervention, are essential new factors that will begin to introduce accountability into the Cabinet and a reversal of the years of neglect and disdain for the spirit and letter of the Clean Water Act. Consent Judgments that actually discourage illegal activity and attempt to correct some of the damage done are necessary. Fines should be a deterrent not a normal cost of doing business.

By the very nature of activities associated with coal mining, water resources are going to be negatively impacted. Therefore it takes a proactive approach to compliance and enforcement to achieve the goals of the Clean Water Act. We ask the Court to work to strengthen the Consent Judgments and allow the Motion to Intervene so that the interest of the public and safe water may be represented.

Sincerely,



Steve Boyce  
Chairperson