JS 44 (Rev. 02/19)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Ohio Valley Environmental Coalition, West Virginia Highlands Conservancy, Appalachian Voices, and Sierra Club

(b) County of Residence of First Listed Plaintiff Cabell
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
J. Michael Becher, Derek Teaney, Appalachian Mountain Advocates, P.O. Box 507, Lewisburg, WV 24901, 304-382-4798

DEFENDANTS

Lexington Coal Company

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ❒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 835 Patent - Abbreviated New Drug Application
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 485 Telephone Consumer Protection Act
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ☒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ❒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation - Transfer ❒ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
33 U.S.C. section 1365; 30 U.S.C. section 1270

Brief description of cause:
Discharge of pollutants in violation of the Clean Water Act and the Surface Mining Act

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ❒ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Chambers DOCKET NUMBER 3:18-077; 2:17-3013

DATE 08/06/2019

SIGNATURE OF ATTORNEY OF RECORD /s/ J. Michael Becher

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

OHIO VALLEY ENVIRONMENTAL COALITION, WEST VIRGINIA HIGHLANDS CONSERVANCY, APPALACHIAN VOICES, and SIERRA CLUB,

Plaintiffs,

v. **CIVIL ACTION NO. _____**

LEXINGTON COAL COMPANY, LLC,

Defendant.

COMPLAINT

INTRODUCTION

1. This is a citizen suit for declaratory and injunctive relief against Defendant Lexington Coal Company, LLC ("Lexington") for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereafter the Clean Water Act ("CWA")), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. (hereafter "SMCRA"), at its Low Gap Surface Mine No. 2 and No. 10 Mine in Mingo County, West Virginia.

2. As detailed below, Plaintiffs allege that Lexington has discharged and continues to discharge pollutants into waters of the United States in violation of (a) Section 301 of the CWA, 33 U.S.C. § 1311, (b) the conditions and limitations of its West Virginia/National Pollution Discharge Elimination System ("WV/NPDES") Permit Nos. WV1016288 and WV1020579 issued pursuant to Section 402 of the CWA, and (c) the conditions of the two state certifications issued pursuant to Section 401 of the CWA for Nationwide Permit (NWP) 21

authorizations under Section 404 of the CWA to discharge fill material associated with the No. 10 Mine into waters of the United States.

3. Plaintiffs further allege that Lexington's discharges of pollutants into waters adjacent to the Low Gap Surface Mine No. 2 and No. 10 Mine violate the performance standards under SMCRA and the terms and conditions of West Virginia surface mining permit Nos. S401395 and S501501.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 33 U.S.C. § 1365 (CWA citizens' suit provision), and 30 U.S.C. § 1270 (SMCRA citizens' suit provision).

5. On June 4, 2019, Plaintiffs gave notice of the violations and their intent to file suit in letters sent to the Defendant, the United States Environmental Protection Agency ("EPA"), the Office of Surface Mining Reclamation and Enforcement ("OSMRE"), and the West Virginia Department of Environmental Protection ("WVDEP"), as required by Section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), and Section 520(b)(1)(A) of SMCRA, 30 U.S.C. § 1270(b)(1)(A).

6. More than sixty days have passed since the notice letter was sent. EPA, OSMRE, and/or WVDEP have not commenced or diligently prosecuted a civil or criminal action to redress the violations. Moreover, neither EPA nor WVDEP commenced an administrative penalty action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), or a comparable state law to redress the violations prior to the issuance of the June 4, 2019 notice letter.

7. Venue in this District is proper pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the CWA violations are located in this District, and pursuant to 30 U.S.C. § 1270(c)

because the coal mining operations complained of are located in this District.

PARTIES

8. Lexington is a West Virginia Limited Liability Company engaged in the business of mining coal. Since October 24, 2017, Lexington has owned and operated the Low Gap Surface Mine No. 2 and No. 10 Mine.

9. Lexington is a person within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and Section 701(19) of SMCRA, 30 U.S.C. § 1291(19).

10. Plaintiff Ohio Valley Environmental Coalition is a nonprofit organization incorporated in Ohio. Its principal place of business is in Huntington, West Virginia. It has approximately 400 members. Its mission is to organize and maintain a diverse grassroots organization dedicated to the improvement and preservation of the environment through education, grassroots organizing, coalition building, leadership development, and media outreach. The Coalition has focused on water quality issues and is a leading source of information about water pollution in West Virginia.

11. Plaintiff West Virginia Highlands Conservancy, Inc., is a nonprofit organization incorporated in West Virginia. It has approximately 2,000 members. It works for the conservation and wise management of West Virginia's natural resources.

12. Plaintiff Appalachian Voices is a nonprofit North Carolina corporation committed to protecting the land, air, and water of the central and southern Appalachian region, and focused on reducing coal's impact on the region. Appalachian Voices has more than 1,000 members, the majority of which reside in the Appalachian region, including West Virginia. Its concerns include the protection and restoration of surface waters in West Virginia.

13. Plaintiff Sierra Club is a nonprofit corporation incorporated in California, with

more than 768,000 members and supporters nationwide including approximately 2,600 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.

14. Plaintiffs have members including Donna Branham, who use, enjoy, and benefit from the water quality in tributaries and downstream portions of the Tug Fork River. The Low Gap Surface Mine No. 2 discharges into tributaries of Ben Creek, which flows into the Tug Fork River. The No. 10 Mine discharges into tributaries of Pigeon Creek, which also flows into the Tug Fork River.

15. Plaintiffs' members would like to recreate in areas downstream from the portion of the streams into which the Low Gap Surface Mine No. 2 and No. 10 Mine discharge pollutants harmful to aquatic life, including total dissolved solids, conductivity and sulfate. Excessive amounts of these pollutants degrade the water quality of the Tug Fork River and its tributaries, make the water aesthetically unpleasant and environmentally undesirable and impair its suitability for aquatic life. Because of this pollution, Plaintiffs' members refrain from and/or restrict their usage of tributaries of the Tug Fork River and associated natural resources. As a result, the environmental, health, aesthetic, and recreational interests of these members are adversely affected by Lexington's excessive discharges of these and other pollutants into tributaries of the Tug Fork River from the Low Gap Surface Mine No. 2 and No. 10 Mine in violation of its WV/NPDES permits and its SMCRA permits. If Lexington's unlawful

discharges ceased, the harm to the interests of Plaintiffs' members would be redressed. An injunction would redress Plaintiffs' members' injuries by preventing future violations of the limits in Lexington's permits.

16. At all relevant times, Plaintiffs were and are "persons" as that term is defined by the CWA, 33 U.S.C. § 1362(5) and SMCRA, 30 U.S.C. § 1291(19).

STATUTORY AND REGULATORY FRAMEWORK

17. 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.

18. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the permit-issuing authority may issue an 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.

19. Section 303(a) of the CWA, 33 U.S.C. § 1313(a) requires that states adopt ambient water quality standards and establish water quality criteria for particular water bodies that will protect designated uses of the water.

20. 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 is the Water Pollution Control Act ("WPCA"), W.Va. Code § 22-11-1, et seq.

21. Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Corps to issue general

permits (NWPs) or individual permits for the discharge of fill material into waters of the United States. Before the Corps may issue a § 404 permit, it must obtain a certification from the state that the project will not violate that state's water quality standards. 33 U.S.C. § 1341 (CWA § 401).

22. 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."

23. 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 in Section 505(a) of the CWA, 33 U.S.C. § 1365(a), to mean, among other things, an unlawful act under Section 301(a) of the CWA, 33 U.S.C. § 1311(a), "a permit or condition thereof issued" under Section 402 of the CWA, 33 U.S.C. § 1342, and a "certification" under Section 401 of the CWA, 33 U.S.C. § 1341.

24. In an action brought under Section 505(a) of the CWA, 33 U.S.C. § 1365(a), the district court has jurisdiction to order the defendant to comply with the CWA.

25. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation in a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to $25,000 per day for each violation.

26. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114-74, the court may assess a civil penalty of up to $54,833 per day for each violation that occurred after November 2, 2015. See 40 C.F.R. § 19.4.

27. Under 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."

28. Section 506 of SMCRA, 30 U.S.C. § 1256, prohibits any person from engaging in or carrying out surface coal mining operations without first obtaining a permit from OSMRE or from an approved state regulatory authority.

29. At all relevant times, the State of West Virginia has administered an approved surface mining regulatory program under SMCRA. *See* 30 C.F.R. § 948.10.

30. Among the performance standards mandated by SMCRA and the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA") is that discharges of water from areas disturbed by . . . mining shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. § 434. 30 C.F.R. §§ 816.42 and 817.42; *see also,* 38 C.S.R. § 2-14.5.b.

31. The performance standards further require that "[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside the permit area." 38 C.S.R. § 2-14.5. At a minimum, "material damage" includes violations of water quality standards.

32. The legislative rules promulgated under WVSCMRA provide that, as a general condition of all surface mining permits issued under the WVSCMRA, the permittee must comply with all applicable performance standards. 38 C.S.R. § 2-3.33.c.

33. Section 520(a) of SMCRA, 30 U.S.C. § 1270(a), authorizes any person adversely affected to bring an action in federal court to compel compliance with SMCRA against any

"person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to [SMCRA]."

34. Section 520(d) of SMCRA, 30 U.S.C. § 1270(d), authorizes the Court to award the costs of litigation, including attorney fees and expert witness fees, "to any party, whenever the court determines such an award is appropriate."

35. WVDEP is the agency in the State of West Virginia that administers the State's CWA and SMCRA programs and issues WV/NPDES Permits and WVSCMRA Permits.

FACTS

36. Lexington's mining activities at its Low Gap Surface Mine No. 2 are regulated under West Virginia Surface Mining Permit S401395. WVDEP transferred that permit to Lexington on May 7, 2018.

37. Lexington's mining activities at its No. 10 Mine are regulated under West Virginia Surface Mining Permit S501501. WVDEP transferred that permit to Lexington on March 29, 2018.

38. Lexington's water discharge activities at its Low Gap Surface Mine No. 2 are regulated under WV/NPDES Permit No. WV1016288. WVDEP transferred that permit to Lexington on October 25, 2018.

39. Lexington's water discharge activities at its No. 10 Mine are regulated under WV/NPDES Permit No. WV1020579. WVDEP transferred that permit to Lexington on April 18, 2018.

40. Part C of WV/NPDES Permit Nos. WV1016288 and WV1020579 incorporates by reference 47 C.S.R. § 30-5.1.f, which provides that: "The discharge or discharges covered by a WV/NPDES permit are to be of such quality so as not to cause violation of applicable water

quality standards adopted by the Department of Environmental Protection, Title 47, Series 2." WVDEP's narrative water quality standards prohibit discharges of "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or that cause "significant adverse impacts to the chemical, physical, hydrologic, or biological components of aquatic ecosystems." 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

41. On or about July 16, 2003, the U.S. Army Corps of Engineers (the Corps) issued an authorization under the 2002 Nationwide Permit (NWP) 21 under § 404(e) of the CWA, 33 U.S.C. § 1344(e), for stream-impacting activities at the No. 10 Mine. WVDEP's July 22, 2003 individual § 401 certification to the Corps for the No. 10 Mine provided that certification was granted "subject to compliance with the conditions contained in the General Mitigation Plan signed May 29, 2003 and the Compensation/Mitigation Agreement dated June 23, 2003." Condition 13 of the General Mitigation Plan provides that "[t]he permittee will comply with water quality standards as contained in the West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 46, Series 1."

42. In addition, WVDEP's general § 401 certification for the 2002 NWPs contained standard conditions that must be met at mines with NWP authorizations. Condition 3 is that "[s]poil materials from the watercourse or onshore operations, including sludge deposits, will not be dumped into the watercourse or deposited in wetlands or other areas where deposit may adversely affect surface or ground waters of the state." Condition 5 is that "[f]ill is to be clean, nonhazardous, and of such composition that it will not adversely affect the biological, chemical or physical property of the receiving waters." Condition 13 is that "[t]he permittee will comply with water quality standards as contained in the West Virginia Code of State Regulations, Requirements Governing Water Quality Standards, Title 46, Series 1."

43. On March 15, 2007, WVDEP issued another § 401 certification for a modification to the No. 10 Mine. That certification contains the same condition requiring compliance with water quality standards.

Violations of Water Quality Standards at Lexington's Low Gap Surface Mine No. 2

44. Lexington's NPDES Permit No. WV1016288 regulates discharges from Outlets 002 and 024 of its Low Gap Surface Mine No. 2. Outlet 002 discharges into Low Gap Branch, which flows into Right Fork of Ben Creek. Outlet 024 discharges into Toler Creek, which flows into Left Fork of Ben Creek.

45. In 1994, prior to mining, Lexington's predecessor, Mingo Logan Coal Company, measured baseline water quality in the tributaries into which proposed Outlets 002 and 024 would discharge. For Outlet 002, the sampled location was LG/S-1, and for Outlet 024, the sampled location was LF/S-3A. The following table compares the 1994 baseline and 2018-19 post-mining water quality data for these locations, and shows significant increases in conductivity, sulfate and total dissolved solids:

Location	**Sampling Date**	**Avg Conductivity**	**Avg Sulfate**	**Avg pH**	**Avg TDS**
LF/S-3A	7/20-10/12/94	937	239	8.02	714
024	10/18	1681	758	8.2	1410
024	11/18	1554	687	8.3	1260
024	12/18	1522	702	8.15	1220
024	1/19	1471	651	8.35	1210
024	2/19	1367	572	8.36	1064
024	3/19	1336	601	8.4	1077
024	4/19	1779	870	7.97	1480
024	5/19	1727	763	8	1465
024	6/19	2102	912	7.74	1805
LG/S-1	4/29/94-10/12/94	1171	325	8.30	1155
002	10/18	2088	971	7.9	1785
002	11/18	1793	775	8.05	1495
002	12/18	1933	876	7.75	1615
002	1/19	1721	741	7.8	1430
002	2/19	1758	719	7.74	1430

002	3/19	1656	704	7.42	1375
002	4/19	2380	1110	7.67	1960
002	5/19	2070	889	7.9	1775
002	6/19	2250	1026	7.58	1975

Violations of Water Quality Standards at Lexington's No. 10 Mine

46. In June 2003, prior to the commencement of mining at its No. 10 Mine, Lexington's predecessor, White Flame Energy, Inc., submitted to WVDEP a statement of probable hydrologic consequences (PHC) and a baseline benthic report on stream conditions in the vicinity of its proposed six valley fills. In the PHC, White Flame reported the following concentrations of conductivity and sulfate in the tributaries to Pigeon Creek prior to mining:

Location	Description	Avg Conductivity	Avg Sulfate
EFB1	Mouth of Evans Ferrell Branch	215	62
BPB1-3, 1LPBP	Four sites on Big Pigeonroost Branch	303	76
CB1-2	Two sites on Curry Branch	147	60
SB1-2	Two sites on Slate Branch	167	50

47. In the baseline benthic report, the sampling locations included EFB4 in Evans Ferrell Branch below the footprints of Valley Fills 2 and 3, BPB2 in Big Pigeonroost Branch below the footprint of Valley Fill 4, CB2 in Curry Branch below the footprint of Valley Fill 6, EF1 at the mouth of Evans Ferrell Branch, and BPB1 at the mouth of Big Pigeonroost Branch. Lexington reported the following results of this sampling:

Location	Habitat Score	WVSCI score	Conductivity	Sulfate
EFB4	148	79.75	174	20
BPB2	162	91.85	166	34
CB2	149	72.97	163	42
EF1			116-232	32-62
BPB1			163-1441	5-256

48. In March 2007, prior to mining, White Flame submitted to WVDEP a second baseline benthic report on stream conditions in Slate Branch. The report found that habitat scores in Slate Branch ranged from 133 to 124, and that the WVSCI scores were 82.19 and

83.34. According to WVDEP's 2016 Section 303(d) List (p. 8), streams are not biologically impaired when their West Virginia Stream Condition Index (WVSCI) scores are above 72.

49. After mining began, discharges from outlets and instream monitoring points below the No. 10 Mine's valley fills have shown increased levels of conductivity, sulfates and total dissolved solids. Outlet 005 at that mine is downstream from Valley Fill 1 and discharges into Slate Branch, which flows into Rockhouse Fork, which flows into Pigeon Creek. Outlet 012 is downstream from Valley Fills 6A and 6B and discharges into Curry Branch, which flows into Rockhouse Fork, which flows into Pigeon Creek. Outlet 031 is downstream from Valley Fill 4 and discharges into Big Pigeonroost Branch, which flows into Rockhouse Fork, which flows into Pigeon Creek. Outlets 045 and 47 are downstream from Valley Fills 2 and 3 and discharge into Evans Ferrell Branch, which flows into Pigeon Creek.

50. Lexington's discharge monitoring reports since April 2018 show that the water in Slate Branch downstream from Outlet 005 at location DSB1 contained the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS):

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	1689	8.3	772	1350
May 18	1844	8.23	961	1680
Jun 18	2470	8.19	1425	2280
Jul 18	2730	8.14	1590	2505
Aug 18	2725	8.27	1590	2505
Sep 18	1691	8.23	807	1380
Oct 18	1763	8.21	988	1500
Nov 18	1014	8.32	438	773
Dec 18	1038	8.33	461	821
Jan 19	1457	8.33	675	1203
Feb 19	1201	8.425	556	947
Mar 19	1665	8.45	874	1425
Apr 19	1655	8.68	890	1445
May 19	1783	8.34	906	1580
Jun 19	2290	8.28	1115	2085

51. Lexington's discharge monitoring reports since April 2018 show that it discharged the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS) from Outlet 005 into Slate Branch:

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	1940	8.40	922	1606
May 18	2113	8.14	1063	1850
Jun 18	2500	8.17	1440	2315
Jul 18	2695	8.16	1490	2560
Aug 18	2940	8.1	1730	2660
Sep 18	1784	8.1	844	1585
Oct 18	2016	8.26	1165	1770
Nov 18	1749	8.33	915	1525
Dec 18	1309	8.37	595	1060
Jan 19	1500	8.435	720	1260
Feb 19	1528	8.41	788	1334
Mar 19	1754	8.72	916	1505
Apr 19	1948	8.82	1043	1710
May 19	1783	8.33	881	1555
Jun 19	2210	8.30	1103	1975

52. Lexington's discharge monitoring reports since April 2018 show that the water in Curry Branch downstream from Outlet 012 at location DCB1 contained the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS):

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	No flow			
May 18	No flow			
Jun 18	1016	8.27	352	718
Jul 18	1004	8.37	322	718
Aug 18	969	8.4	306	647
Sep 18	869	8.24	259	550
Oct 18	553	8.06	169	353
Nov 18	1052	8.2	463	767
Dec 18	394	7.9	92	254
Jan 19	478	8.085	112	291
Feb 19	393	8.13	103	241
Mar 19	564	8.62	173	368

Apr 19	564	8.67	169	366
May 19	650	8.42	183	427
Jun 19	933	8.34	351	708

53. Lexington's discharge monitoring reports since April 2018 show that it discharged the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS) from Outlet 012 into Curry Branch:

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	825	8.26	270	608
May 18	928	8.15	466	791
Jun 18	1458	8.12	632	1155
Jul 18	1650	8.21	724	1385
Aug 18	1780	8.08	883	1515
Sep 18	1080	8.34	442	800
Oct 18	1062	8.5	434	787
Nov 18	961	8.31	402	699
Dec 18	788	8.24	301	574
Jan 19	834	8.3	332	567
Feb 19	705	8.31	247	499
Mar 19	897	8.515	385	675
Apr 19	923	8.53	384	655
May 19	949	8.28	350	686
Jun 19	1160	8.35	481	918

54. Lexington's discharge monitoring reports since April 2018 show that the water in Big Pigeonroost Branch downstream from Outlet 031 at location BPB1 contained the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS):

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	1097	8.48	359	771
May 18	1352	8.34	477	1006
Jun 18	1715	8.32	668	1350
Jul 18	1729	8.39	748	1410
Aug 18	1679	8.50	688	1335
Sep 18	1404	8.45	528	1041
Oct 18	1337	8.35	511	995

Nov 18	1045	8.51	352	745
Dec 18	792	8.37	252	550
Jan 19	1003	8.445	359	721
Feb 19	837	8.595	271	588
Mar 19	1095	8.635	417	796
Apr 19	1128	8.94	437	844
May 19	1270	8.3	487	999
Jun 19	914	8.08	371	743

55. Lexington's discharge monitoring reports since April 2018 show that it discharged the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS) from Outlet 031 into Big Pigeonroost Branch:

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	2760	7.41	1030	1810
May 18	2220	7.10	991	1890
Jun 18	2520	7.05	1255	2195
Jul 18	2565	7.02	1325	2285
Aug 18	2625	7.07	1340	2265
Sep 18	1917	7.53	935	1670
Oct 18	1709	8.36	753	1455
Nov 18	1574	8.39	731	1270
Dec 18	1327	8.34	534	1060
Jan 19	1632	8.34	658	1284
Feb 19	1081	8.475	551	1046
Mar 19	1711	8.335	763	1435
Apr 19	1636	8.68	743	1320
May 19	1751	8.34	791	1540
Jun 19	1745	8.38	797	1515

56. Lexington's discharge monitoring reports since April 2018 show that the water in Evans Ferrell Branch downstream from Outlets 045 and 047 at location DEF1 contained the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS):

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	1620	8.41	657	1320
May 18	1913	8.27	825	1590

Jun 18	2105	8.25	1150	1845
Jul 18	2400	8.3	1350	2150
Aug 18	2340	8.31	1270	2090
Sep 18	1709	8.05	774	1415
Oct 18	1658	8.1	765	1370
Nov 18	1574	8.34	714	1275
Dec 18	1109	8.39	436	829
Jan 19	1493	8.525	694	1240
Feb 19	1259	8.57	542	973
Mar 19	1610	8.545	774	1325
Apr 19	1881	8.95	956	1600
May 19	1836	8.38	834	1550
Jun 19	2016	8.37	944	1805

57. Lexington's discharge monitoring reports since April 2018 show that it discharged the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS) from Outlet 045 into Evans Ferrell Branch:

	Cond	**pH**	**SO_4**	**TDS**
Apr 18	2031	8.42	892	1586
May 18	2068	8.18	1035	1865
Jun 18	2425	8.09	1310	2095
Jul 18	2760	8.22	1570	2520
Aug 18	2930	8.16	1675	2665
Sep 18	1873	8.26	835	1600
Oct 18	1920	8.26	899	1640
Nov 18	1837	8.51	895	1555
Dec 18	1397	8.36	634	1130
Jan 19	1593	8.53	728	1320
Feb 19	1856	8.48	899	1555
Mar 19	1788	8.195	891	1520
Apr 19	2200	8.77	1125	1915
May 19	941	8.33	953	1705
Jun 19	2161	8.32	1036	1870

58. Lexington's discharge monitoring reports since April 2018 show that it discharged the following average amounts of specific conductance (Cond), pH, sulfates (SO_4) and total dissolved solids (TDS) from Outlet 047 into Evans Ferrell Branch:

	Cond	pH	SO_4	TDS
Apr 18	2126	8.11	887	1586
May 18	2062	7.72	930	1785
Jun 18	2264	7.84	1155	1945
Jul 18	2340	8.33	1280	2075
Aug 18	2385	8.27	1330	2140
Sep 18	1828	8.41	463	1610
Oct 18	1876	8.325	890	1615
Nov 18	1718	8.455	802	1455
Dec 18	1424	8.45	620	1170
Jan 19	1581	8.56	684	1285
Feb 19	1774	8.525	786	1455
Mar 19	1714	8.37	804	1455
Apr 19	2002	8.85	1004	1685
May 19	1810	8.36	834	1585
Jun 19	2089	8.36	987	1755

59. High levels of conductivity, dissolved solids, alkalinity, and ionic chemicals (including sulfates, bicarbonate, magnesium and calcium) are a primary cause of water quality impairments downstream from mine discharges.

60. In 2011, EPA scientists summarized the existing science connecting conductivity and biological degradation in an EPA report entitled, "A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams." That report, which was peer-reviewed by scientists on EPA's Science Advisory Board, used EPA's standard method for deriving water quality criteria to derive a conductivity benchmark of 300 µS/cm. *Id.* at xiv-xv. According to the species sensitivity distribution in the benchmark, on average, five percent of species are lost when conductivity rises to 295 µS/cm, over 50% are lost at 2000 µS/cm, and close to 60% are lost at 3000 µS/cm. *Id.* at 18.

61. EPA considered potential confounding factors, including habitat, temperature, deposited sediments and pH, and concluded that none of them altered the relationship between conductivity and biological decline or the benchmark value of 300 µS/cm. *Id. at* 41, B-22. EPA

found that the loss of aquatic species from increased conductivity was "a severe and clear effect." *Id*. at A-37. EPA also conducted a detailed causal assessment and concluded that there is a causal relationship between conductivity and stream impairment in West Virginia. *Id*. at A-39. Finally, EPA's benchmark report analyzed the relationship between the WVSCI biological impairment threshold and conductivity levels, and found that a WVSCI score of 64 (close to the impairment threshold of 68) corresponds to streams with conductivity of about 300 μS/cm on average. *Id*. at A-36. A statistical analysis included in the benchmark determined that at a conductivity level of 300 μS/cm a stream has a 59% likelihood of being impaired and at 500 μS/cm a stream has a 72% likelihood of being impaired. *Id*. at A-36.

62. Highly conductive leachate from surface mines in Appalachia results from the weathering of pyritic material, which interacts with regional geology to form an alkaline mixture dominated by sulfate (SO_4), bicarbonate (HCO_3), magnesium (Mg) and calcium (Ca). This alkaline mine drainage can be characterized by high levels of sulfates, increased pH and high ionic strength. The drainage coming out of Outlets 002 and 024 at the Low Gap mine and Outlets 005, 012, 031, 045 and 047 at Mine No. 10 is dominated by sulfates and is both high in ionic strength and alkaline. It is therefore characteristic of alkaline mine drainage in the region.

63. Although publicly available permit records for the two mines contain no measurements of bicarbonate, magnesium, or calcium levels in the discharges, it can be inferred from the studies listed above that those ions are likely to be present in the discharge mixture at each of those outlets. The ionic mixture of such drainage is known to cause the loss of aquatic macroinvertebrates in Appalachian areas where surface coal mining is prevalent and ultimately the biological impairment of the receiving stream. The high concentration of ionic pollutants in

alkaline mine drainage also has significant adverse effects on fish assemblages and has toxic effects on aquatic life, including mayflies.

64. The EPA Benchmark report is supported by peer-reviewed studies, including a study by Bernhardt, et al., titled "How Many Mountains Can We Mine? Assessing the Regional Degradation of Central Appalachian Rivers by Surface Coal Mining," Environmental Science & Technology, 46 (15), pp. 8115–8122 (2012). That study's authors found that:

> The extent of surface mining within catchments is highly correlated with the ionic strength and sulfate concentrations of receiving streams. Generalized additive models were used to estimate the amount of watershed mining, stream ionic strength, or sulfate concentrations beyond which biological impairment (based on state biocriteria) is likely. We find this threshold is reached once surface coal mines occupy >5.4% of their contributing watershed area, ionic strength exceeds 308 μS cm^{-1}, or sulfate concentrations exceed 50 mg/L.

65. A 2016 study by Clements and Kotalik using simulated mine effluents in an experimental stream under controlled conditions measured the same adverse effects on aquatic organisms at conductivity levels of 300 μS/cm and lower.

66. Lexington's Low Gap Surface Mine No. 2 and No. 10 Mine are major development activities covering a significant portion of the area in the Ben Creek and upper Pigeon Creek watersheds. The high mining intensity in those watersheds and the related discharges from Outlets 002 and 024 at the Low Gap mine and Outlets 005, 012, 031, 045 and 047 at Mine No. 10 have likely caused or materially contributed to biological impairment in downstream tributaries of Ben Creek and Pigeon Creek and in the main stems of those Creeks.

Violations of Selenium Limits at Lexington's Low Gap Surface Mine and No. 10 Mine

67. In its monthly discharge monitoring reports, Lexington has reported violating its permit limits for total recoverable selenium at its Low Gap mine in the following months and at the following outlets:

	Month	Out-let	Para-meter	Limit	Units	Type	Reported	Units	% Over Limit
1	Oct 18	002	Se	4.7	ug/l	Avg	10.93	ug/l	133
2	Oct 18	002	Se	8.2	ug/l	Max	11.4	ug/l	39
3	Oct 18	002	Se	8.2	ug/l	Max	10.2	ug/l	24
4	Nov 18	002	Se	4.7	ug/l	Avg	7.8	ug/l	66
5	Nov 18	002	Se	8.2	ug/l	Max	10	ug/l	22
6	Dec 18	002	Se	4.7	ug/l	Avg	10.05	ug/l	114
7	Dec 18	002	Se	8.2	ug/l	Max	10.4	ug/l	27
8	Dec 18	002	Se	8.2	ug/l	Max	9.7	ug/l	18
9	Apr 19	002	Se	4.7	ug/l	Avg	11.8	ug/l	151
10	Apr 19	002	Se	8.2	ug/l	Max	12.2	ug/l	49
11	Apr 19	002	Se	8.2	ug/l	Max	11.4	ug/l	39
12	May 19	002	Se	4.7	ug/l	Avg	9.75	ug/l	107
13	May 19	002	Se	8.2	ug/l	Max	10.6	ug/l	29
14	May 19	002	Se	8.2	ug/l	Max	8.9	ug/l	9
15	Jun 19	002	Se	4.7	ug/l	Avg	9.5	ug/l	102
16	Jun 19	002	Se	8.2	ug/l	Max	10.5	ug/l	28
17	Jun 19	002	Se	8.2	ug/l	Max	8.5	ug/l	4
18	Oct 18	019	Se	4.7	ug/l	Avg	6.9	ug/l	47
19	Dec 18	019	Se	4.7	ug/l	Avg	6.45	ug/l	37
20	Apr 19	019	Se	4.7	ug/l	Avg	5.05	ug/l	7
21	Oct 18	024	Se	4.7	ug/l	Avg	8.1	ug/l	72
22	Nov 18	024	Se	4.7	ug/l	Avg	5.9	ug/l	26
23	Dec 18	024	Se	4.7	ug/l	Avg	7.8	ug/l	66
24	Dec 18	024	Se	8.2	ug/l	Max	8.5	ug/l	4
25	Apr 19	024	Se	4.7	ug/l	Avg	8.9	ug/l	89
26	Apr 19	024	Se	8.2	ug/l	Max	9	ug/l	10
27	Apr 19	024	Se	8.2	ug/l	Max	8.8	ug/l	7
28	May 19	024	Se	4.7	ug/l	Avg	9.85	ug/l	110
29	May 19	024	Se	8.2	ug/l	Max	11.2	ug/l	37
30	May 19	024	Se	8.2	ug/l	Max	8.5	ug/l	4
31	Jun 19	024	Se	4.7	ug/l	Avg	10.05	ug/l	114
32	Jun 19	024	Se	8.2	ug/l	Max	10.6	ug/l	29
33	Jun 19	024	Se	8.2	ug/l	Max	9.5	ug/l	16

68. In its monthly discharge monitoring reports, Lexington has reported violating its permit limits for total recoverable selenium at its No. 10 Mine in the following months and at the following outlets:

	Month	Out-let	Para-meter	Limit	Units	Type	Reported	Units	% Over Limit
1	Apr 18	005	Se	4.7	ug/L	Avg	11.1	ug/L	136
2	Apr 18	005	Se	8.2	ug/L	Max	14	ug/L	71
3	Apr 18	012	Se	4.7	ug/L	Avg	6.3	ug/L	34
4	Apr 18	031	Se	4.7	ug/L	Avg	11	ug/L	134
5	Apr 18	031	Se	8.2	ug/L	Max	11	ug/L	34
6	Apr 18	045	Se	4.7	ug/L	Avg	21.8	ug/L	364
7	Apr 18	045	Se	8.2	ug/L	Max	23.3	ug/L	184
8	Apr 18	045	Se	8.2	ug/L	Max	20.3	ug/L	148
9	Apr 18	047	Se	4.7	ug/L	Avg	17.9	ug/L	281
10	Apr 18	047	Se	8.2	ug/L	Max	19.4	ug/L	137
11	Apr 18	047	Se	8.2	ug/L	Max	17	ug/L	107
12	May 18	005	Se	4.7	ug/L	Avg	11.55	ug/L	146
13	May 18	005	Se	8.2	ug/L	Max	12.1	ug/L	48
14	May 18	005	Se	8.2	ug/L	Max	11	ug/L	34
15	May 18	012	Se	4.7	ug/L	Avg	8.15	ug/L	73
16	May 18	012	Se	8.2	ug/L	Max	8.6	ug/L	5
17	May 18	031	Se	4.7	ug/L	Avg	11.95	ug/L	154
18	May 18	031	Se	8.2	ug/L	Max	12.4	ug/L	51
19	May 18	031	Se	8.2	ug/L	Max	11.5	ug/L	40
20	May 18	045	Se	4.7	ug/L	Avg	25.5	ug/L	443
21	May 18	045	Se	8.2	ug/L	Max	26	ug/L	217
22	May 18	045	Se	8.2	ug/L	Max	25	ug/L	205
23	May 18	047	Se	4.7	ug/L	Avg	19.7	ug/L	319
24	May 18	047	Se	8.2	ug/L	Max	19.7	ug/L	140
25	Jun 18	005	Se	4.7	ug/L	Avg	15.6	ug/L	232
26	Jun 18	005	Se	8.2	ug/L	Max	15.7	ug/L	91
27	Jun 18	005	Se	8.2	ug/L	Max	15.5	ug/L	89
28	Jun 18	012	Se	4.7	ug/L	Avg	12.25	ug/L	161
29	Jun 18	012	Se	8.2	ug/L	Max	13.2	ug/L	61
30	Jun 18	012	Se	8.2	ug/L	Max	11.3	ug/L	38
31	Jun 18	031	Se	4.7	ug/L	Avg	13.8	ug/L	194
32	Jun 18	031	Se	8.2	ug/L	Max	14.2	ug/L	73
33	Jun 18	031	Se	8.2	ug/L	Max	13.4	ug/L	63
34	Jun 18	045	Se	4.7	ug/L	Avg	25.7	ug/L	447
35	Jun 18	045	Se	8.2	ug/L	Max	29.2	ug/L	256
36	Jun 18	045	Se	8.2	ug/L	Max	22.2	ug/L	171
37	Jun 18	047	Se	4.7	ug/L	Avg	18.84	ug/L	301
38	Jun 18	047	Se	8.2	ug/L	Max	21.5	ug/L	162
39	Jun 18	047	Se	8.2	ug/L	Max	16.2	ug/L	98
40	Jul 18	005	Se	4.7	ug/L	Avg	12.9	ug/L	174

41	Jul 18	005	Se	8.2	ug/L	Max	12.9	ug/L	57
42	Jul 18	012	Se	4.7	ug/L	Avg	13.65	ug/L	190
43	Jul 18	012	Se	8.2	ug/L	Max	13.7	ug/L	67
44	Jul 18	012	Se	8.2	ug/L	Max	13.6	ug/L	66
45	Jul 18	031	Se	4.7	ug/L	Avg	12.95	ug/L	176
46	Jul 18	031	Se	8.2	ug/L	Max	13.4	ug/L	63
47	Jul 18	031	Se	8.2	ug/L	Max	12.5	ug/L	52
48	Jul 18	045	Se	4.7	ug/L	Avg	31.7	ug/L	574
49	Jul 18	045	Se	8.2	ug/L	Max	33.5	ug/L	309
50	Jul 18	045	Se	8.2	ug/L	Max	29.9	ug/L	265
51	Jul 18	047	Se	4.7	ug/L	Avg	19.4	ug/L	313
52	Jul 18	047	Se	8.2	ug/L	Max	20.4	ug/L	149
53	Jul 18	047	Se	8.2	ug/L	Max	18.4	ug/L	124
54	Aug 18	005	Se	4.7	ug/L	Avg	12.55	ug/L	167
55	Aug 18	005	Se	8.2	ug/L	Max	12.9	ug/L	57
56	Aug 18	005	Se	8.2	ug/L	Max	12.2	ug/L	49
57	Aug 18	012	Se	4.7	ug/L	Avg	13	ug/L	177
58	Aug 18	012	Se	8.2	ug/L	Max	13	ug/L	59
59	Aug 18	031	Se	4.7	ug/L	Avg	12.6	ug/L	168
60	Aug 18	031	Se	8.2	ug/L	Max	13.1	ug/L	60
61	Aug 18	031	Se	8.2	ug/L	Max	12.1	ug/L	48
62	Aug 18	045	Se	4.7	ug/L	Avg	29.8	ug/L	534
63	Aug 18	045	Se	8.2	ug/L	Max	30.2	ug/L	268
64	Aug 18	045	Se	8.2	ug/L	Max	29.4	ug/L	259
65	Aug 18	047	Se	4.7	ug/L	Avg	17.3	ug/L	268
66	Aug 18	047	Se	8.2	ug/L	Max	17.5	ug/L	113
67	Aug 18	047	Se	8.2	ug/L	Max	17.1	ug/L	109
68	Sep 18	005	Se	4.7	ug/L	Avg	10	ug/L	113
69	Sep 18	005	Se	8.2	ug/L	Max	11.7	ug/L	43
70	Sep 18	005	Se	8.2	ug/L	Max	8.3	ug/L	1
71	Sep 18	012	Se	4.7	ug/L	Avg	8.85	ug/L	88
72	Sep 18	012	Se	8.2	ug/L	Max	9.2	ug/L	12
73	Sep 18	012	Se	8.2	ug/L	Max	8.5	ug/L	4
74	Sep 18	031	Se	4.7	ug/L	Avg	15	ug/L	219
75	Sep 18	031	Se	8.2	ug/L	Max	16.6	ug/L	102
76	Sep 18	031	Se	8.2	ug/L	Max	13.4	ug/L	63
77	Sep 18	045	Se	4.7	ug/L	Avg	19.75	ug/L	320
78	Sep 18	045	Se	8.2	ug/L	Max	21	ug/L	156
79	Sep 18	045	Se	8.2	ug/L	Max	18.5	ug/L	126
80	Sep 18	047	Se	4.7	ug/L	Avg	15.85	ug/L	237
81	Sep 18	047	Se	8.2	ug/L	Max	16.6	ug/L	102
82	Sep 18	047	Se	8.2	ug/L	Max	15.1	ug/L	84

83	Oct 18	005	Se	4.7	ug/L	Avg	12.6	ug/L	168
84	Oct 18	005	Se	8.2	ug/L	Max	14.2	ug/L	73
85	Oct 18	005	Se	8.2	ug/L	Max	11	ug/L	34
86	Oct 18	012	Se	4.7	ug/L	Avg	8.5	ug/L	81
87	Oct 18	012	Se	8.2	ug/L	Max	9.6	ug/L	17
88	Oct 18	031	Se	4.7	ug/L	Avg	13.8	ug/L	194
89	Oct 18	031	Se	8.2	ug/L	Max	16.2	ug/L	98
90	Oct 18	031	Se	8.2	ug/L	Max	11.4	ug/L	39
91	Oct 18	045	Se	4.7	ug/L	Avg	22.4	ug/L	377
92	Oct 18	045	Se	8.2	ug/L	Max	23.5	ug/L	187
93	Oct 18	045	Se	8.2	ug/L	Max	21.3	ug/L	160
94	Nov 18	005	Se	4.7	ug/L	Avg	8.8	ug/L	87
95	Nov 18	005	Se	8.2	ug/L	Max	11.2	ug/L	37
96	Nov 18	012	Se	4.7	ug/L	Avg	6.75	ug/L	44
97	Nov 18	012	Se	8.2	ug/L	Max	9.2	ug/L	12
98	Nov 18	031	Se	4.7	ug/L	Avg	9.85	ug/L	110
99	Nov 18	031	Se	8.2	ug/L	Max	12.7	ug/L	55
100	Nov 18	045	Se	4.7	ug/L	Avg	20.75	ug/L	341
101	Nov 18	045	Se	8.2	ug/L	Max	22.3	ug/L	172
102	Nov 18	045	Se	8.2	ug/L	Max	19.2	ug/L	134
103	Dec 18	005	Se	4.7	ug/L	Avg	6.7	ug/L	43
104	Dec 18	012	Se	4.7	ug/L	Avg	6.05	ug/L	29
105	Dec 18	031	Se	4.7	ug/L	Avg	11.3	ug/L	140
106	Dec 18	031	Se	8.2	ug/L	Max	11.5	ug/L	40
107	Dec 18	031	Se	8.2	ug/L	Max	11.1	ug/L	35
108	Dec 18	045	Se	4.7	ug/L	Avg	15.05	ug/L	220
109	Dec 18	045	Se	8.2	ug/L	Max	16.5	ug/L	101
110	Dec 18	045	Se	8.2	ug/L	Max	13.6	ug/L	66
111	Jan 19	005	Se	4.7	ug/L	Avg	9.3	ug/L	98
112	Jan 19	005	Se	8.2	ug/L	Max	10.2	ug/L	24
113	Jan 19	005	Se	8.2	ug/L	Max	8.4	ug/L	2
114	Jan 19	012	Se	4.7	ug/L	Avg	6.35	ug/L	35
115	Jan 19	031	Se	4.7	ug/L	Avg	11.9	ug/L	153
116	Jan 19	031	Se	8.2	ug/L	Max	12.3	ug/L	50
117	Jan 19	031	Se	8.2	ug/L	Max	11.5	ug/L	40
118	Jan 19	045	Se	4.7	ug/L	Avg	16.85	ug/L	259
119	Jan 19	045	Se	8.2	ug/L	Max	18	ug/L	120
120	Jan 19	045	Se	8.2	ug/L	Max	15.7	ug/L	91
121	Jan 19	047	Se	4.7	ug/L	Avg	13.2	ug/L	181
122	Jan 19	047	Se	8.2	ug/L	Max	13.7	ug/L	67
123	Jan 19	047	Se	8.2	ug/L	Max	12.7	ug/L	55
124	Feb 19	005	Se	4.7	ug/L	Avg	9.3	ug/L	98

125	Feb-19	005	Se	8.2	ug/L	Max	13.5	ug/L	65
126	Feb-19	012	Se	4.7	ug/L	Avg	5.6	ug/L	19
127	Feb-19	031	Se	4.7	ug/L	Avg	9.25	ug/L	97
128	Feb-19	031	Se	8.2	ug/L	Max	9.3	ug/L	13
129	Feb-19	031	Se	8.2	ug/L	Max	9.2	ug/L	12
130	Feb-19	045	Se	4.7	ug/L	Avg	21.3	ug/L	353
131	Feb-19	045	Se	8.2	ug/L	Max	25.1	ug/L	206
132	Feb-19	045	Se	8.2	ug/L	Max	17.5	ug/L	113
133	Feb-19	047	Se	4.7	ug/L	Avg	16.85	ug/L	259
134	Feb-19	047	Se	8.2	ug/L	Max	19.1	ug/L	133
135	Feb-19	047	Se	8.2	ug/L	Max	14.6	ug/L	78
136	Mar-19	005	Se	4.7	ug/L	Avg	10.55	ug/L	124
137	Mar-19	005	Se	8.2	ug/L	Max	13.0	ug/L	59
138	Mar 19	012	Se	4.7	ug/L	Avg	7.3	ug/L	55
139	Mar 19	012	Se	8.2	ug/L	Max	8.8	ug/L	7
140	Mar 19	031	Se	4.7	ug/L	Avg	12.267	ug/L	161
141	Mar 19	031	Se	8.2	ug/L	Max	14.2	ug/L	73
142	Mar 19	031	Se	8.2	ug/L	Max	11	ug/L	34
143	Mar 19	045	Se	4.7	ug/L	Avg	19.95	ug/L	324
144	Mar 19	045	Se	8.2	ug/L	Max	24.3	ug/L	196
145	Mar 19	045	Se	8.2	ug/L	Max	15.6	ug/L	90
146	Mar 19	047	Se	4.7	ug/L	Avg	15.6	ug/L	232
147	Mar 19	047	Se	8.2	ug/L	Max	18.8	ug/L	129
148	Mar 19	047	Se	8.2	ug/L	Max	12.4	ug/L	51
149	Apr 19	005	Se	4.7	ug/L	Avg	10.15	ug/L	116
150	Apr 19	005	Se	8.2	ug/L	Max	12	ug/L	46
151	Apr 19	005	Se	8.2	ug/L	Max	8.3	ug/L	1
152	Apr 19	012	Se	4.7	ug/L	Avg	6.4	ug/L	36
153	Apr 19	031	Se	4.7	ug/L	Avg	9.6	ug/L	104
154	Apr 19	031	Se	8.2	ug/L	Max	11.6	ug/L	41
155	Apr 19	045	Se	4.7	ug/L	Avg	22	ug/L	368
156	Apr 19	045	Se	8.2	ug/L	Max	27.4	ug/L	234
157	Apr 19	045	Se	8.2	ug/L	Max	14.7	ug/L	79
158	Apr 19	047	Se	4.7	ug/L	Avg	17.6	ug/L	274
159	Apr 19	047	Se	8.2	ug/L	Max	17.8	ug/L	117
160	Apr 19	047	Se	8.2	ug/L	Max	17.4	ug/L	112
161	May 19	005	Se	4.7	ug/L	Avg	8.55	ug/L	82
162	May 19	005	Se	8.2	ug/L	Max	10	ug/L	22
163	May 19	012	Se	4.7	ug/L	Avg	7.15	ug/L	52
164	May 19	031	Se	4.7	ug/L	Avg	10.2	ug/L	117
165	May 19	031	Se	8.2	ug/L	Max	11.1	ug/L	35
166	May 19	031	Se	8.2	ug/L	Max	9.3	ug/L	13

167	May 19	045	Se	4.7	ug/L	Avg	22.15	ug/L	371
168	May 19	045	Se	8.2	ug/L	Max	23.5	ug/L	187
169	May 19	045	Se	8.2	ug/L	Max	20.8	ug/L	154
170	May 19	047	Se	4.7	ug/L	Avg	14.5	ug/L	209
171	May 19	047	Se	8.2	ug/L	Max	15.6	ug/L	90
172	May 19	047	Se	8.2	ug/L	Max	13.4	ug/L	63
173	Jun 19	005	Se	4.7	ug/L	Avg	10.65	ug/L	127
174	Jun 19	005	Se	8.2	ug/L	Max	12.3	ug/L	50
175	Jun 19	005	Se	8.2	ug/L	Max	9	ug/L	10
176	Jun 19	012	Se	4.7	ug/L	Avg	7.2	ug/L	53
177	Jun 19	031	Se	4.7	ug/L	Avg	9.75	ug/L	107
178	Jun 19	031	Se	8.2	ug/L	Max	10.9	ug/L	33
179	Jun 19	031	Se	8.2	ug/L	Max	8.6	ug/L	5
180	Jun 19	047	Se	4.7	ug/L	Avg	17.1	ug/L	264
181	Jun 19	047	Se	8.2	ug/L	Max	18.3	ug/L	123
182	Jun 19	047	Se	8.2	ug/L	Max	15.9	ug/L	94

69. The excessive selenium discharges at these two mines are contributing to the impairment of the receiving streams. According to WVDEP's 2016 § 303(d) List (List Page 26), Ben Creek is biologically impaired and impaired for selenium along its entire length. Similarly, Pigeon Creek is biologically impaired along its entire length (List Page 25) and impaired for selenium from river mile 31.0 to its headwaters (New List Page 10). The main stem of Tug Fork is also biologically impaired from river mile 27.5 to its headwaters and impaired for selenium from river mile 143.2 to river mile 157.1.

FIRST CLAIM FOR RELIEF
(CWA § 402 Permit Violations)

70. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 69 above.

71. Since at least April 2018, Lexington has discharged and continues to discharge pollutants from point sources, i.e., Outlets 002, 019 and 024 at its Low Gap Surface Mine No. 2 and Outlets 005, 012, 031, 045 and 047 at its No. 10 Mine, into tributaries of Ben Creek and Pigeon Creek, pursuant to WV/NPDES Permit Nos. WV1016288 and WV1020579, respectively.

72. Ben Creek and its tributaries (Low Gap Branch, Right Fork Ben Creek, Left Fork Ben Creek, and Toler Creek), Pigeon Creek and its tributaries (Slate Branch, Curry Branch, Rockhouse Fork, Big Pigeonroost Branch, and Evans Ferrell Branch), and the Tug Fork River are waters of the United States within the meaning of 33 U.S.C. § 1362(7).

73. Since at least April 2018, Lexington has discharged and continues to discharge total recoverable selenium from Outlets 002, 019 and 024 at its Low Gap Surface Mine No. 2 and Outlets 005, 012, 031, 045 and 047 at its No. 10 Mine in violation of the limits for that parameter in its WV/NPDES Permit Nos. WV1016288 and WV1020579.

74. Since at least April 2018, Lexington has discharged and continues to discharge pollutants which cause ionic stress and biological impairment in Ben Creek and its tributaries (Low Gap Branch, Right Fork Ben Creek, Left Fork Ben Creek, and Toler Creek), and Pigeon Creek and its tributaries (Slate Branch, Curry Branch, Rockhouse Fork, Big Pigeonroost Branch, and Evans Ferrell Branch), in violation of the narrative water quality standards for biological integrity and aquatic life protection. 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

75. The narrative water quality standards for biological integrity and aquatic life protection incorporated by reference into Part C of Lexington's WV/NPDES Permit Nos. WV1016288 and WV1020579 are "effluent standards or limitations" for purposes of Section 505(a)(1) and 505(f)(6) of the Clean Water Act because they are a condition of a permit issued under Section 402 of the Act. 33 U.S.C. §§ 1342, 1365(a)(1), 1365(f)(6).

76. Based on the WVSCI scores and measured concentrations of ionic pollutants and specific conductivity in Lexington's discharges, and Lexington's failures to take corrective actions to address those conditions, Plaintiffs believe and allege that Lexington is in continuing violation of WV/NPDES Permit Nos. WV1016288 and WV1020579 and the CWA.

77. Lexington is subject to an injunction under the CWA ordering it to cease its permit violations.

SECOND CLAIM FOR RELIEF
(CWA § 401 Certification Violations)

78. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 77 above.

79. The narrative water quality standards for biological integrity and aquatic life protection in 47 C.S.R. §§ 2-3.2.e & 2-3.2.i are "effluent standards or limitations" for purposes of Section 505(a)(1) and 505(f)(5) of the Clean Water Act because compliance with water quality standards is a condition of two individual water quality certifications issued by WVDEP on July 16, 2003 and March 15, 2007 for Lexington's No. 10 Mine under Section 401 of the Act. 33 U.S.C. §§ 1341, 1365(a)(1), 1365(f)(5). Compliance with those standards is also required by Standard Condition 13 in WVDEP's general water quality certification under Section 401 for the 2002 NWPs.

80. Since at least April 2018, Lexington has discharged and continues to discharge pollutants from the No. 10 Mine which cause ionic stress and biological impairment in Pigeon Creek and its tributaries (Slate Branch, Curry Branch, Rockhouse Fork, Big Pigeonroost Branch, and Evans Ferrell Branch), in violation of the narrative water quality standards for biological integrity and aquatic life protection. 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

81. Those violations of water quality standards are also violations of the two individual Section 401 certifications for the No. 10 Mine and Standard Condition 13 in the general Section 401 certification for the No. 10 Mine under the 2002 NWPs.

82. Lexington is violating Standard Condition 3 in WVDEP's certification for the 2002 NWPs because the spoil materials from the No. 10 Mine that were placed in Valley Fills 1,

2, 3, 4, 6A, and 6B and that fill portions of Slate Branch, Curry Branch, Big Pigeonroost Branch and Evans Ferrell Branch are adversely affecting those surface waters and downstream waters by causing violations of water quality standards in those waters.

83. Lexington is violating Standard Condition 5 in WVDEP's certification for the 2002 NWPs because the fill material used at the No. 10 Mine to create Valley Fills 1, 2, 3, 4, 6A, and 6B is adversely affecting the chemical and biological properties of Slate Branch, Curry Branch, Big Pigeonroost Branch, Evans Ferrell Branch, Pigeon Creek, and the Tug Fork River by causing violations of water quality standards in those waters.

84. Lexington is subject to an injunction under the CWA ordering it to cease its violations of the conditions in the Section 401 certifications.

THIRD CLAIM FOR RELIEF
(SMCRA Violations)

85. Plaintiffs incorporate by reference all allegations contained in paragraphs 1 through 84 above.

86. Lexington's WVSCMRA Permits S401395 and S501501 require it to comply with performance standards of the WVSCMRA. 38 C.S.R. § 2-3.33(c).

87. Those performance standards provide that discharges 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; *see also,* 38 C.S.R. § 2-14.5.b.

88. West Virginia water quality standards prohibit discharges of "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or that cause "significant adverse impacts to the chemical, physical, hydrologic, or biological components of aquatic ecosystems." 47 C.S.R. §§ 2-3.2.e & 2-3.2.i.

89. WVSCMRA performance standards also provide that "[a]ll surface mining and reclamation activities shall be conducted . . . to prevent material damage to the hydrologic balance outside of the permit area." 38 U.S.C. § 2-14.5. "Material damage," at a minimum includes violations of water quality standards.

90. By violating NPDES permit effluent limitations and West Virginia water quality standards for biological integrity and aquatic life protection at its Low Gap Surface Mine No. 2 and No. 10 Mine, Lexington has also violated, and is continuing to violate, the performance standards incorporated as conditions in its WVSCMRA Permits S401395 and S501501.

91. Federal and State performance standards require that, "[i]f drainage control, restabilization and revegetation of disturbed areas, diversion of runoff, mulching, or other reclamation and remedial practices are not adequate to meet the requirements of this section and § 816.42, the operator shall use and maintain the necessary water-treatment facilities or water quality controls." 30 C.F.R. § 816.41(d)(1); *see also,* 38 C.S.R. § 2-14.5.c ("Adequate facilities shall be installed, operated and maintained using the best technology currently available in accordance with the approved preplan to treat any water discharged from the permit area so that it complies with the requirements of subdivision 14.5.b of this subsection.").

92. The violations identified herein show that Lexington's existing treatment methods are insufficient to meet that requirement. Thus, the performance standards require Lexington to construct a system that will effectively treat its effluent to levels that comply with all applicable effluent limitations and water quality standards.

93. Each violation of Lexington's WVSCMRA permits is a violation of SMCRA and is enforceable under the citizen suit provision of SMCRA, 30 U.S.C. § 1270(a).

94. Lexington is subject to an injunction under SMCRA ordering it to cease its permit

violations.

RELIEF REQUESTED

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

1. Declaring that Lexington has violated and is in continuing violation of the CWA and SMCRA;

2. Enjoining Lexington from operating its Low Gap Surface Mine No. 2 and No. 10 Mine in such a manner as will result in further violations of WV/NPDES Permit Nos. WV1016288 and WV1020579, its water quality certifications and the conditions thereunder, and WVSCMRA permits S401395 and S501501;

3. Ordering Lexington to immediately comply with the effluent limitations in WV/NPDES permit WV1016288 and WV1020579;

4. Ordering Lexington to immediately comply with the conditions in its two individual water quality certifications dated July 22, 2003 and March 15, 2007 and with Standard Conditions 3, 5 and 13 in WVDEP's general certification for the 2002 NWPs;

5. Ordering Lexington to immediately comply with the terms and conditions of WVSCMRA permit S401395 and S501501;

6. Ordering Lexington to pay appropriate civil penalties for each day of each violation of its NPDES permits pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d) and 1365(a);

7. Ordering Lexington to conduct monitoring and sampling to determine the environmental effects of its violations, to remedy and repair environmental contamination and/or degradation caused by its violations, and restore the environment to its prior uncontaminated condition;

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

9. Granting other such relief as the Court deems just and proper.

Respectfully submitted,

/s/ J. Michael Becher
J. Michael Becher (WV Bar No. 10588)
Derek Teaney (WV Bar No. 10223)
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901
(304) 382-4798
mbecher@appalmad.org
dteaney@appalmad.org

Counsel for Plaintiffs