



June 14, 2024

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FCD, LLC Registered Agent
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RE: Notice of Intent (NOI) to Sue for Violations of the Clean Water Act

Dear FCD and Registered Agent:

On behalf of Kentucky Resources Council, Kentucky Waterways Alliance, and Sierra Club (jointly, Citizens), I am writing to provide you with notice that we intend to file a civil lawsuit against FCD, LLC for violating the Clean Water Act (CWA) by discharging pollution from point sources to federal waters without a National Pollutant Discharge Elimination System (NPDES) or Kentucky Pollutant Discharge Elimination System (KD PES) permit. We will specifically allege that FCD's unpermitted discharge of 4.5 million gallons of sediment pond waste from the Sebree Dock coal-loading property in Webster County, Kentucky to the Green River violates the CWA.

We will bring this action under the CWA's citizen-suit provision, Section 505(a). 33 U.S.C. § 1365(a). Section 505 permits citizen suits in federal court against persons "alleged to be in violation of ... an effluent standard or limitation..." 33 U.S.C. § 1365(a)(1). An effluent standard or limitation is defined, in part, as "an unlawful act under subsection (a) of section 1311 of this title." 33 U.S.C. § 1365(f). Section 1311 in turn states that "the discharge of any pollutant by any person shall be unlawful," unless it falls within certain exceptions, including as authorized pursuant to an NPDES or state NPDES permit. 33 U.S.C. §§ 1311(a), 1342.

Pursuant to 33 U.S.C. § 1365(b)(1)(A), this NOI serves to notify FCD that Citizens intend to file suit against FCD for these CWA violations in the U.S. District Court for the Western District of Kentucky at any time beginning 60 days after the postmarked date of this NOI. 40 C.F.R. § 135.2(c). This NOI includes sufficient information to allow FCD to identify the specific activities alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. 40 C.F.R. § 135.3(a). Additionally, Citizens notify FCD of their intention to sue for ongoing violations of the same

type that occur after the violations outlined in this NOI.

I. Specific Clean Water Act Requirements at Issue

The federal CWA provides that “the discharge of any pollutant by any person shall be unlawful,” unless the discharge is in compliance with certain other sections of the CWA, including if authorized under a NPDES permit. 33 U.S.C. §§ 1311(a), 1342. The NPDES program in turn “requires permits for the discharge of ‘pollutants’ from any ‘point source’ into ‘waters of the United States,’” unless the discharge falls into a few narrow categories. 40 C.F.R. §§ 122.1(b), 122.3. “The Act restructures federal regulation by insisting that a person wishing to discharge any pollution into navigable waters first obtain EPA’s permission to do so.” *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S.Ct. 1462, 1468 (2020).

EPA delegated the authority to implement the CWA’s NPDES program in Kentucky to the Commonwealth in 1983 through a Memorandum of Agreement. *See* 48 Fed. Reg. 45,597 (Oct. 6, 1983) (approving Kentucky’s NPDES permitting program). As part of its delegated CWA authority, Kentucky has its own broad law against discharging pollutants to waters of the Commonwealth:

No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth, or cause, permit or suffer to be thrown, drained, run or otherwise discharged into such waters any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth in contravention of the standards adopted by the cabinet or in contravention of any of the rules, regulations, permits, or orders of the cabinet or in contravention of any of the provisions of this chapter.

KRS 224.70–110. Kentucky has established the KPDES permitting program to implement this statute and the CWA. 401 KAR 5:055. The KPDES regulations specifically require that “[a] KPDES permit shall be required to discharge pollutants from a point source into waters of the Commonwealth,” using the same definitions of discharge and point source as the CWA. 401 KAR 5:055, §2(1); 401 KAR 10:001.

KPDES permits must meet a number of federal requirements in order to be lawful CWA permits. For instance, KPDES permits must include pollution discharge limits, including federal technology-based effluent limits and water quality based effluent limits. 40 C.F.R. Part 122, Subpart C; 40 C.F.R. §§ 122.43, 123.25(a)(15), 122.44(a)(1). KPDES permits must also include compliance conditions of NPDES permits, such as opening the premises for an inspection and providing records when needed. 40 C.F.R. § 122.41. And KPDES permits must be publicly noticed with a comment period. 40 C.F.R. § 124.10.

State law cannot create exceptions to the CWA’s permitting requirements. *See N. Plains Res. Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1165 (9th Cir. 2003) (Montana has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process); *see also West Virginia Highlands Conservancy, Inc. v. Huffman*, 588 F.Supp.2d 678, 688 (N.D.W.Va. 2009) (citing same).

II. Specific Activities Alleged to Constitute a CWA Violation

Citizens allege that FCD's discharges of pollutants from the Sebree Dock sediment pond (and the other waters on the Sebree Dock property) into the Green River is a violation of Section 1311 of the CWA, 33 U.S.C. § 1311(a), because FCD's discharges constitute unpermitted discharges of pollution from point sources to federal waters.

A. FCD Has Obtained State "Off-Permit" Authorization to Discharge 4.5 Million Gallons of Coal-Contaminated Wastewater into the Green River Beginning on June 17, 2024

On May 20, 2024, FCD, LLC, a holding company associated with Kentucky Utilities and Louisville Gas and Electric, submitted an application to the Kentucky Division of Water for a One-Time/Temporary Discharge Request for Off-Permit Authorization. Exh. 1, *FCD OTD Application*. The application requests "off-permit" authorization to discharge 4.5 million gallons of waste into the Green River from a 50-year old sediment pond and other waters at the Sebree Dock property. *Id.* Specifically, FCD stated that it plans to "[r]eclaim the inactive Sebree Dock property and rid the area of any standing water associated with the sediment basin to prohibit the impounding of any water on property." *Id.* FCD further stated that it planned to discharge, "4.5 million gallons, 1000 GPM, intermittent over 2 months," from two specific locations:

- Outfall 1 Latitude: 37°36'39" N; Longitude: 87°29'27" W
- Outfall 2 Latitude: 37°36'33" N; Longitude: 87°29'20" W

Id. FCD stated that it anticipates beginning the discharge to the Green River on June 17, 2024. *Id.* FCD also included a satellite photo of the discharge locations. Exh. 2, *FCD Proposed Discharge Locations*. On May 24, 2024, the Kentucky Division of Water issued FCD a "One Time Discharge Authorization." Ex. 3, *FCD OTD Authorization*. This letter purports to authorize the discharges described in FCD's May 20, 2024 FCD OTD Application.

FCD's Sebree Dock property has been used as a coal-loading site since at least 1972. Its large, U-shaped sediment pond, which FCD now plans to drain to the Green River, was designed not to discharge. FCD described the property, its operations, and the sediment pond as follows in its 2016 application for a no-discharge permit:

The operation includes transloading trucked coal into two (2) incised hoppers. Coal may be stockpiled at the site prior to loading. The coal will be transported by conveyor to barge(s) located along the Green River at Mile Point 43 .9. The dock site encompasses approximately 11.5 acres. Surface water drainage from adjacent areas is diverted around the dock site. Runoff within the site will flow to Sediment Basin No. SB#1. The basin is designed not to discharge. The holding capacity of the basin is 14 acre-feet. Periods of non-precipitation will allow water to evaporate from the basin. The basin is an existing structure that was built in 1972.

Exh. 4, *FCD 2016 No-Discharge Permit Application*. A current [Google Map satellite photo](#) of the site shows a large quantity of what appears to be coal refuse on the ground around the siltation pond.

The Sebree Dock site does not appear to ever have had an industrial stormwater permit,

which would normally be required for a coal-loading site, because all of the site’s (contaminated) stormwater went into the no-discharge sediment pond. *See Exh. 5, FCD 2016 No-Discharge Permit KNDOP 03001016; see also 40 C.F.R. §§ 122.26(a)(2), 122.26(b)(14)* (federal stormwater regulations requiring permit). If FCD had discharged this stormwater directly to the Green River pursuant to an industrial stormwater permit, the discharge would have been required to, at a minimum, meet the Kentucky General Permit’s total suspended solids, oil and grease, and pH limits. *Ex. 6, KYR000000 Industrial Stormwater Permit § 2.1.*

Given the use of the site to load and stockpile coal, it is likely that the sediment basin and other waters on the Sebree Dock property contain high levels of coal particles, which can contain high levels of heavy metals and other harmful pollutants. The initial lab data FCD included in its OTD application showed levels of a number of toxics above human health and aquatic life criteria.

Pollutant	Water Quality Criteria				FCD Sebree Dock Average of 5/20 Samples	Units
	Human Health:		Warm Water Aquatic Habitat:			
	Domestic Water Supply Source	Fish	Acute	Chronic		
Antimony	5.6	640	-	-	72.3	µg/L
Arsenic	10	-	340	150	65.7	µg/L
Beryllium	4	-	-	-	62.3	µg/L
Cadmium	5	-			63	µg/L
Iron	300	-	4,000	1,000	6,476.7	µg/L
Lead	15	-			66.7	µg/L
Thallium	0.24	0.47	-	-	67.1	µg/L
Total Dissolved Solids	250,000				1,958,000	µg/L

Ex. 7, FCD Lab Data. This data indicates that FCD’s discharge may be “at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard,” which triggers the need for water-quality based permit limits. 40 CFR § 122.44(d)(1)(i). If coal was washed at the site, FCD’s discharge may also require federal technology-based effluent limit guidelines (ELGs) for iron and manganese. 40 C.F.R. § 434.23.

Based on records received in response to a June 10, 2024 Kentucky Open Records Request, FCD has not applied for or obtained a KPDES permit to discharge these 4.5 million gallons of contaminated sediment pond pollution into the Green River. FCD’s existing December 14, 2023 Stream Construction Permit, which authorizes the “demolition and removal of existing two dolphin-type mooring structures and work barge between them,” on the Green River does not authorize the discharge of 4.5 million gallons of sediment pond and other waste into the Green River. *See Ex. 8, FCD Stream Construction Permit.* Neither does FCD’s existing “no-discharge” permit for the site authorize any surface water discharge. *Ex. 5, 2016 No-Discharge Permit KNDOP 03001016.*

B. A Kentucky “Off-Permit Discharge Authorization” is Not a NPDES or KPDES Permit and Does Not Meet the Requirements of the CWA for Discharging Pollution into Federal Waters

Since 2017, Kentucky has issued at least 280 “Off-Permit Authorizations,” or OTDs, which purport to allow pipeline projects, natural gas distribution facilities, rubber and chemical manufacturing plants, landfills, aluminum smelters, gas stations, and power plants to discharge pollutants into Kentucky waters without obtaining a KPDES permit. Exh. 9, *All OTDs*.

Kentucky’s Off-Permit Authorizations are not NPDES or KPDES permits. The Off-Permit Authorizations themselves are minimal, one-page letters typically requiring notification 48 hours before the discharge occurs, some after-the-fact monitoring data, and some basic best management practices without any legal enforceability. Ex. 3, *FCD OTD Authorization*. They do not include any of the many federal requirements for permits. *See* 40 C.F.R. Parts 122, 124. The OTD Application also does not conform with federal requirements for NPDES and KPDES permit applications. *Compare* Exh. 1 *with* 40 C.F.R. § 122.21.

Nor do Kentucky’s Off-Permit Authorization approvals meet federal permitting public notice and process requirements. Here, for instance, only four days elapsed between FCD’s submission of the OTD application and Kentucky’s OTD approval, and no public notice was conducted. *See* 40 C.F.R. § 124.10 (requiring public notice and public comment). Nor does Kentucky appear to have evaluated whether FCD’s coal-contaminated discharge complies with water quality standards and antidegradation designations for the receiving waterbodies, as required by 40 C.F.R. § 122.4.

Citizens have been warning Kentucky for over a year that its Off-Permit Authorizations program does not replace federally-required NPDES permits. In February 2023, Citizens formally notified Kentucky’s Energy and Environment Cabinet, which includes the Division of Water, that the Off-Permit Program was contrary to the CWA and requested that Kentucky end the program. Ex. 10, *Letter to Commissioner Hatton* (Feb. 2023). Citizens also verbally warned Energy and Environment Cabinet officials that the Off-Permit program was illegal in a June 2023 meeting. When Kentucky had not ended the program by the end of 2023, Citizens in January 2024 wrote to EPA’s Region 4 NPDES Permitting Section, which supervises Kentucky KPDES permitting, and asked EPA to order Kentucky to halt issuing OTD authorizations. Exh. 11, *Letter to Dan Holliman, EPA* (Jan. 2024). Citizens sent a copy of the EPA letter to Kentucky’s Energy and Environment Cabinet.

In its letters to Kentucky and EPA, Citizens highlighted the risk of citizen suits that is created by the illegal Off-Permit Authorization program. For instance, in the 2023 letter to Kentucky’s Energy and Environment Cabinet, Citizens wrote the following:

Any facilities that are discharging pollutants solely under an Off-Permit Authorization to waters of the United States are discharging pollutants without a NPDES permit, a violation of the CWA’s plain language permitting requirement. 33 U.S.C. § 1311(a). ... **These facilities are vulnerable to not only EPA enforcement, but citizen CWA enforcement action.** CWA Section 505(a)(1), 33 U.S.C. § 1365(a)(1). Unless the Commonwealth takes steps to immediately end the Off-Permit Program, even facilities without an ongoing discharge are vulnerable to

citizen suit because “a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.” *Tamaska v. City of Bluff City, Tennessee*, 26 Fed.Appx. 482, 485 (6th Cir. 2002) (citing *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171–72 (4th Cir. 1988)).

Ex. 4, *Letter to Commissioner Hatton* at 6 (emphasis added).

C. FCD Is Required to Apply for and Obtain NPDES Permit Coverage Before Discharging the Sediment Pond into the Green River

Before discharging any wastewater into the Green River, FCD must apply for and obtain a KPDES permit to discharge pollution into the Green River, not an OTD Authorization. 33 U.S.C. § 1311(a); KRS 224.70–110. A KPDES permit will have pollution limits, public notice, enforcement provisions, public reporting, and compliance mechanisms. If FCD goes forward with this unpermitted discharge, FCD will be in violation of Section 301 of the federal Clean Water Act, which provides that “the discharge of any pollutant by any person shall be unlawful,” unless it falls within certain exceptions, including as authorized by a NPDES permit. 33 U.S.C. § 1311(a); *see also* 33 U.S.C. § 1342; 40 C.F.R. § 122.1(b), 122.3.

III. The Location of the Alleged Violations

The alleged CWA violations are located on the Sebree Dock site, which is south of State Highway 56 and the Green River in Sebree, Kentucky and lacks an exact address. FCD’s OTD application includes the coordinates of the planned two outfalls:

Facility Name:	FCD, LLC		
Street Address:	128 Eastwood Ferry RD		
City/State/ZIP Code:	Sebree	KY	42455
County:	Webster	Number of Outfalls:	2
Outfall 1 Latitude:	37°36’39” N	Outfall 1 Longitude:	87°29’27” W
Outfall 2 Latitude:	37°36’33” N	Outfall 2 Longitude:	87°29’20” W
Outfall 3 Latitude:		Outfall 3 Longitude:	-
Receiving Stream:	Green River		

Exh. 1, *FCD OTD Application*. FCD also included a satellite photo of the two specific discharge locations. Ex. 2, *FCD Proposed Discharge Locations*.

IV. Receiving Water

FCD is discharging pollution from the Sebree Dock property to approximately Mile 44 of the Green River. This section of the Green River is classified for domestic water supply, fish consumption, primary contact recreation water, secondary contact recreation water and warm water aquatic habitat.¹ This section of the Green River also has a robust mussel population. A recent survey found that this area had a higher than average mussel density of 0.71/m², at least 19 species, a wide range of age classes, and evidence of reproduction. Exh. 12, *Mussel Surveys at Green River Mile 43.6 along the Left and Right Descending Banks near Sebree, KY* (2021).

The Green River is a federal water of the United States. 33 C.F.R. § 328.3(a).

V. The Person or Persons Responsible for the Alleged Violations

The person or persons responsible for the alleged violations is FCD, LLC. Under the CWA, the term ‘person’ “means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5). As an LLC, FCD LLC is a person for purposes of the CWA.

VI. The Full Name and Address and Phone Number of the Persons Giving the Notice

Kentucky Resources Council, Inc. (KRC) is a nonprofit corporation in good standing with the Commonwealth of Kentucky. KRC’s address is P.O. Box 1070, Frankfort, KY 40602 and phone number is (502) 875-2428. The address of its registered agent is W. Henry Graddy IV, 137 North Main Street, Versailles, KY 40383.

KRC is a statewide public-interest environmental law and advocacy organization. Its mission is to protect Kentucky's natural resources, advocate for environmental health and justice, and teach citizens to be effective environmental stewards. KRC program provides free legal assistance to those living "downwind, downstream, and downhill" of environmental problems, who cannot afford or find representation. They also work to assure that those who pollute our land, air, or water are held accountable.

Kentucky Waterways Association (KWA) is a member-supported nonprofit organization working to protect, restore and celebrate Kentucky's waterways since 1993. KWA envisions a Kentucky that sustains and celebrates our vast network of healthy waterways. Kentucky’s lakes, rivers, streams, and wetlands support thriving aquatic ecosystems, healthy fish and wildlife populations, abundant recreation, and dependable, clean water supplies for future generations. KWA’s address is 330 North Hubbards Lane, Louisville, KY 40207 and its phone number is (502) 589-8008.

The Sierra Club is a nationwide non-profit environmental membership organization, which has its purpose to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; to educate and enlist

¹ <https://mywaterway.epa.gov/waterbody-report/21KY/KY-3078/2022>

humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. The Sierra Club is located at 2101 Webster Street, Suite 1300, Oakland, California, 94612 and its phone number is (415) 977-5589.

Members of KRC, KWA, and the Sierra Club are avid fish and wildlife lovers, mussel enthusiasts, and canoers along the Green River, including areas downstream of the Sebree Dock. These members will be injured by FCD's unpermitted pollution, particularly of coal-related metals, as described herein, as this pollution threatens members' use and enjoyment of the Green River and their enjoyment of the fish and wildlife that use the Green River.

VII. Conclusion

According to its OTD Application, FCD is about to or is currently violating section 1311 of the CWA by discharging pollutants from a point source to a federal water without a NPDES or KPDES permit. Accordingly, EIP intends to file suit in the U.S. District Court for the Western District of Kentucky for these unpermitted discharges pursuant to 33 U.S.C. § 1365(a)(1) and 33 U.S.C. § 1365(b)(1)(A) any time after 60 days from the postmarked date of this NOI. This lawsuit will seek to enjoin and abate the violations described above, ensure future compliance with federal and state law, obtain civil penalties, recover attorneys' fees and costs of litigation, and obtain any other appropriate relief.

If you believe any of the facts described above are in error or have any information indicating that you are not violating the CWA, have not violated the CWA, will not violate the CWA, or if you are interested in an early and prompt resolution of this matter, I urge you to contact me immediately.

Respectfully submitted,

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