

**PUBLIC NOTICE**  
**U. S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4**  
**WATER PROTECTION DIVISION**  
**NPDES Permitting and Enforcement Branch**  
**ATLANTA FEDERAL CENTER**  
**61 FORSYTH STREET, S.W.**  
**ATLANTA, GEORGIA 30303**

**DATE: February 5, 2016**

**PUBLIC NOTICE No. CWA-04-2016-4506(b)**

**Notice of Proposed Issuance of  
Consent Agreement and Final Order**

The U.S. Environmental Protection Agency (EPA), Region 4, proposes to issue a Consent Agreement and Final Order (CAFO), Docket No. CWA-04-2016-4506(b), that assesses an administrative penalty of \$1,500.00 to the Harlan Cumberland Coal Company, LLC (Respondent), P.O. Box 269, Grays Knob, Kentucky, under the authority of Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. §1319(g)(2)(A). This administrative penalty amount has been reduced after EPA concluded that Respondent would suffer undue financial hardship if required to pay the full amount of the proposed civil penalty.

The EPA alleges that the Respondent violated Sections 301 and 402 of the CWA, 33 U.S.C. §1311 and §1342 when it discharged water associated with its coal preparation and mining activities into waters of the United States in a manner that was not in compliance with its Kentucky Pollutant Discharge Elimination System Permit No. KY0043133 (Permit), which included discharging through an unpermitted outfall, failing to maintain and implement an adequate Best Management Practices Plan, and failing to comply with all reporting and effluent limitation requirements of the Permit. The violations occurred at the Totz Preparation Plant, located off of US-Highway 119 in Totz, Harlan County, Kentucky.

Any person wishing to comment on any aspect of the proposed CAFO Docket No. CWA-04-2016-4506(b) may submit such comments in writing to the Regional Hearing Clerk at U.S. EPA, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, Georgia, 30303. Comments must be submitted within 30 days of the date of this notice. Please include the Public Notice Number and the Docket Number with any submitted comments.

Because this matter involves a CWA Section 309(g) proceeding that is proposed to be simultaneously commenced and settled under 40 C.F.R. § 22.13(b), the EPA cannot resolve or settle this CAFO until ten days after the close of the public comment period in accordance with 40 C.F.R. § 22.45 (b) and (c).

**FOR FURTHER INFORMATION:** Persons wishing to receive a copy of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22, which apply to this matter, or comment upon the proposed penalty assessment, should contact the Regional Hearing Clerk identified above. Unless otherwise noted, the public record for this action is located in the EPA Regional Office at 61 Forsyth Street, S.W., Atlanta, Georgia, and the file will be open for public inspection between 9:00 a.m. and 4:00 p.m., Monday through Friday.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4**

**IN THE MATTER OF:** )  
 ) **CONSENT AGREEMENT AND**  
 ) **FINAL ORDER**  
**HARLAN CUMBERLAND** )  
**COAL COMPANY, LLC** )  
**TOTZ PREPARATION PLANT** )  
**TOTZ, HARLAN COUNTY, KENTUCKY,** )  
 )  
**RESPONDENT.** ) **DOCKET NO. CWA-04-2016-4506(b)**  
\_\_\_\_\_ )

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding pursuant to Section 309(g)(2)(A) of the Clean Water Act (“CWA”), 33 U.S.C. § 1319(g)(2)(A), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, published at 64 Fed. Reg. 40176 (July 23, 1999) and codified at 40 Code of Federal Regulations (“C.F.R.”) Part 22.

2. The authority to take action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), is vested in the Administrator of the United States Environmental Protection Agency (“EPA”). The Administrator has delegated this authority to the Regional Administrator, Region 4, who in turn has delegated this authority to the Director of the Water Protection Division, who in turn has delegated this authority to the Chief of the NPDES Permitting and Enforcement Branch of EPA Region 4 (“Complainant”).

**II. Allegations**

3. Harlan Cumberland Coal Company, LLC (“Respondent”) is a limited liability company existing under the laws of the Commonwealth of Kentucky and, therefore, is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

4. At all times relevant to this action, Respondent owned and/or operated a coal preparation plant, called the Totz Preparation Plant, located off of US-HWY 119, Totz, Kentucky.

5. To accomplish the objectives of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical and biological integrity of the nation’s waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with a National

Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

6. Section 402 of the CWA, 33 U.S.C. § 1342, establishes an NPDES Permit Program authorizing the EPA or authorized states to administer the NPDES Permit Program, including the issuance of NPDES permits allowing for the discharge of pollutants into navigable waters subject to specific terms and conditions. The EPA has granted the Commonwealth of Kentucky through the Department for Environmental Protection (“KDEP”) authority to issue NPDES permits (referred to as Kentucky Pollutant Discharge Elimination System, or “KPDES” permits) pursuant to Section 402(b) of the CWA. KDEP is responsible for the enforcement of Kentucky Revised Statutes Chapter 224 and Kentucky Administrative Regulations, Title 401, Chapter 5:065, Ky. Rev. Stat. 224 and 401 Ky. Admin. Regs. 5:065.

7. KDEP issued a NPDES Permit No. KY0043133 (“Permit”), in accordance with the provisions of the Kentucky Revised Statutes Chapter 224 and pursuant to 401 KAR 5:055 and the CWA to Respondent on November 20, 2011. The Permit became effective January 1, 2012.

8. The Permit requires compliance with the effluent limits set forth in the Permit and requires that Respondent monitor its discharges and submit Discharge Monitoring Reports (“DMRs”) to the Commonwealth of Kentucky, describing the results of the monitoring. In addition, the Permit contains a requirement that Respondent develop and implement a Best Management Practices Plan (“BMPP”) for the control of acid mine drainage, conductivity, total dissolved solids and sediment released from the operation, and the BMPP shall include erosion prevention measures, sediment control measures, fill minimization and optimization measures, and other site management practices that are protective of the instream water quality and the designated use of the receiving waters affected by the mining operation.

9. On June 5, 2013, EPA performed a Compliance Evaluation Inspection (“CEI”) at the Respondent’s coal preparation plant. The inspections were performed pursuant to Section 308 of the CWA, 33 U.S.C. § 1318.

10. During the CEI and the in-office file review of materials provided by Respondent following the CEI, EPA observed the violations listed below and issued a Notice of Violation to Respondent on August 5, 2013:

- a. The Respondent’s BMPP, dated January 1, 2013, was not adequate for the reasons listed below:
  - i. The site description did not contain the DNR-approved mine plan or any lists of outfalls, representative outfalls or instream monitoring locations, in violation of Section 3.1.1.5.1 of the Permit.
  - ii. The BMPP did not contain any maps, including a Mining and Reclamation Map, and Environmental Resources Information map or a site map identifying the location of hazardous or toxic materials, in violation of Section 3.1.1.5.2 of the Permit.

- iii. The facility's BMPP did not provide the rationale for selection of the BMPs, in violation of Section 3.1.1.5.3 of the Permit.
  - iv. The facility was not complying with the requirements of the BMPP regarding inspections of the facility and maintenance of its records, in violation of Section 3.1.1.5.4 of the Permit. The facility's BMPP stated that routine inspection of the equipment and facilities shall be conducted monthly and reports are to be prepared and stored on site for a minimum of three years. The inspection reports were not maintained on site as stated in the BMPP. Additionally, outfalls inspection reports were only available for the following months: February 2012, June 2012, September 2012, November 2012 and February 2013. Inspection reports for the slurry and refuse impoundments were available approximately on a weekly basis from January-March 2013.
  - v. The facility's BMPP did not describe the protocols, procedures, or schedule for review of the effectiveness of the BMPs, in violation of Section 3.1.1.5.5 of the Permit.
  - vi. The facility's BMPP did not contain any significant updates from the July 19, 2008, BMPP, in violation of Section 3.1.1.5.6 of the Permit.
- b. The Respondent did not submit a QAPP to KDEP Department of Water until May 20, 2013. This was 16 months after issuance of the KPDES Permit. This was in violation of Section 1.1 of the Permit, which required Respondent to submit the QAPP to the Commonwealth within thirty days of the effective date of the Permit.
- c. The Respondent did not perform the quarterly metals testing at all outfalls for approximately six quarters (January 2012-June 2013) since the Permit effective date, in violation of Section 1.2.1 of the Permit.
- d. The Respondent did not perform the discharge duration monitoring at Outfalls 004 and 006 for approximately six quarters (January 2012-June 2013) after the Permit's effective date, in violation of Section 1.2.3 of the Permit.
- e. The facility did not perform the additional monitoring for Outfalls 004 and 006 for approximately six quarters (January 2012-June 2013) after the Permit's effective date, in violation of Section 1.2.3 of the Permit.
- f. The Respondent failed to timely perform Whole Effluent Toxicity testing for Outfalls 004 and 006 for approximately six quarters (January 2012-June 2013) after the Permit's effective date, in violation of Section 1.2.3 of the Permit.

g. On certain dates, Respondent discharged pollutants in violation of the effluent limitations established in its Permit during the period from January 2010 through March 2013, in violation of Section 1.2 of the Permit.

11. On September 5, 2013, the EPA held a show cause meeting with Respondent to discuss the resolution of the violations at the facility.

12. On March 14, 2014, Respondent entered into an Administrative Order on Consent (“AOC”) No. CWA-04-2014-4751 with EPA, wherein Respondent was required to perform specified injunctive relief in order to address the outstanding violations at the facility. To date, the Respondent is in compliance with the AOC.

13. In late summer of 2014, Respondent and EPA held penalty negotiations in order to reach a settlement regarding Respondent’s payment of a civil penalty that would further address the above violations. As a follow-up to these discussions, Respondent stated it would have an inability to pay the proposed penalty and, on September 25, 2014, asked the EPA for paperwork so that it could establish its inability to pay.

14. On January 2, 2015, Respondent submitted to EPA certain financial documents to EPA so that EPA could perform an ability to pay analysis. On January 6, 2015, EPA received these documents, and in early 2015, the Agency completed its analysis. Based upon a review of the financial information submitted to EPA by Respondent, EPA has concluded that Respondent would suffer undue financial hardship if required to pay the full amount of the proposed civil penalty.

15. On July 14, 2015, EPA and Respondent reached an agreement in principal to proceed with resolving this enforcement matter by settling at a reduced penalty amount, the amount of which is based upon EPA’s ability to pay analysis.

16. Respondent violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, by discharging pollutants into waters of the United States without complying with all terms of its Permit by not maintaining an adequate BMPP; not performing monitoring and reporting as required by the Permit; and discharging pollutants into waters of the United States in excess of the effluent limits as specified in the Permit.

### **III. Stipulations and Findings**

17. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without the taking of any evidence or testimony, the making of any argument, or the adjudication of any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Consent Agreement and Final Order (“CA/FO”) will simultaneously commence and conclude this matter.

18. For the purposes of this CA/FO, Respondent admits the jurisdictional allegations set out above and admits the factual allegations set out above.

19. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

20. Respondent consents to the assessment of and agrees to pay the civil penalty as set forth in this CA/FO and consents to the other conditions set forth in this CA/FO.

21. By signing this CA/FO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

22. The EPA reserves the right to assess and collect any and all civil penalties for any violation described herein to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to the EPA.

23. Complainant and Respondent agree to settle this matter by their execution of this CA/FO. The parties agree that the settlement of this matter is in the public interest and that this CA/FO is consistent with the applicable requirements of the CWA.

#### **IV. Payment**

24. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, and considering the nature of the violations, other relevant factors and the Respondent's ability to pay, the EPA has determined that one thousand five hundred dollars (\$1,500.00) is an appropriate civil penalty to settle this action.

25. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CA/FO via a cashier's or certified check, payable to the order of "Treasurer, United States of America". The check shall reference on its face the name of Respondent and the Docket Number of this CA/FO. Such payment shall be tendered to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

26. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CA/FO, to the following persons at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Mary Mattox  
U.S. Environmental Protection Agency, Region 4  
Water Protection Division  
Clean Water Enforcement Branch  
Municipal and Industrial Enforcement Section  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

27. The penalty amount specified above shall represent civil penalties assessed by the EPA and shall not be deductible for purposes of federal taxes.

28. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CA/FO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CA/FO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CA/FO shall not be subject to review.

#### **V. General Provisions**

29. This CA/FO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit. Other than as expressed herein, compliance with this CA/FO shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by the EPA.

30. Nothing in this CA/FO shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CA/FO or of the statutes and regulations upon which this CA/FO is based, or for Respondent's violation of any federal or state statute, regulation or permit.

31. Except as otherwise set forth herein, this CA/FO constitutes a settlement by Complainant and Respondent of all claims for civil penalties pursuant to the CWA with respect to only those violations alleged in this CA/FO. Except as otherwise set forth herein, compliance with this CA/FO shall resolve the allegations of violations contained herein. Nothing in this CA/FO is intended to nor shall be construed to operate in any way to resolve criminal liability, if any, of Respondent, or other liability resulting from violations that were not alleged in this

CA/FO. Other than as expressed herein, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment or to pursue criminal enforcement.

32. Each undersigned representative of the parties to this CA/FO certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind that party to it.

33. This CA/FO applies to and is binding upon Respondent and its officers, directors, employees, agents, successors and assigns.

34. Any change in the legal status of Respondent, including but not limited to any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CA/FO.

35. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this CA/FO.

36. In accordance with 40 C.F.R. § 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Kavita K. Nagrani  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
(404) 562-9697

For Respondent:

W. Blaine Early, III  
Stites & Harbinson, PLLC  
250 West Main Street, Suite 2300  
Lexington, Kentucky 40507-1758  
859-226-2284

and

Harlan Cumberland Coal Company, LLC  
P.O. Box 269  
Grays Knob, Kentucky 40829

37. The parties acknowledge and agree that this CA/FO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

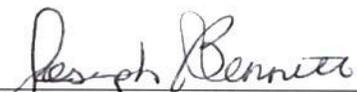
38. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

39. Effective upon signature of this CA/FO by Respondent, Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from Respondent the payment EPA receives from Respondent the payment(s) required by this CA/FO shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States related to the matters addressed in this CA/FO and that, in any action brought by the United States related to the matters addressed, Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Respondent that it will not make this CA/FO effective, the statute of limitations shall begin to run again commencing ninety days after the date such notice is sent by EPA.

**VI. Effective Date**

40. The effective date of this CA/FO shall be the date on which the CA/FO is filed with the Regional Hearing Clerk.

**For RESPONDENT, HARLAN CUMBERLAND COAL COMPANY, LLC:**

  
\_\_\_\_\_  
Joseph Bennett, Manager  
Harlan Cumberland Coal Company, LLC

Date: 12/30/2015

**AGREED AND CONSENTED TO:**

**For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:**

\_\_\_\_\_  
Denisse D. Diaz, Chief  
NPDES Permitting and Enforcement Branch  
Water Protection Division  
U.S. EPA, Region

Date: \_\_\_\_\_

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4**

<b>IN THE MATTER OF:</b>	)	
	)	<b>CONSENT AGREEMENT AND</b>
	)	<b>FINAL ORDER</b>
<b>HARLAN CUMBERLAND</b>	)	
<b>COAL COMPANY, LLC</b>	)	
<b>TOTZ PREPARATION PLANT</b>	)	
<b>TOTZ, HARLAN COUNTY, KENTUCKY,</b>	)	
	)	
<b>RESPONDENT.</b>	)	<b>DOCKET NO. CWA-04-2016-4506(b)</b>
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**FINAL ORDER**

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, including Subpart I, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: \_\_\_\_\_

\_\_\_\_\_  
Tanya Floyd  
Regional Judicial Officer

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL ORDER** in the matter of **Harlan Cumberland Coal Company, LLC, Docket No. CWA-04-2016-4506(b)** (filed with the Regional Hearing Clerk on \_\_\_\_\_, 2016), was served on \_\_\_\_\_, 2016, in the manner specified to each of the persons listed below.

By hand-delivery: Kavita K. Nagrani  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
(404) 562-9697

By certified mail,  
return receipt requested: W. Blaine Early, III  
Stites & Harbinson, PLLC  
250 West Main Street, Suite 2300  
Lexington, Kentucky 40507-1758  
(859) 226-2284

and

Harlan Cumberland Coal Company, LLC  
P.O. Box 269  
Grays Knob, Kentucky 40829

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

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Ms. Patricia A. Bullock  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
Sam Nunn Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960  
(404) 562-9511