

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, AND THOMAS L. CLARKE,
DIRECTOR, DIVISION OF MINING
AND RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Plaintiffs,

v.

Civil Action No. 10-C-20

ICG EASTERN, LLC,

Defendant.

SUPPLEMENTAL CONSENT DECREE

Upon agreement to the terms herein by the parties, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively, the “Directors”) of the West Virginia Department of Environmental Protection (hereinafter “WVDEP”) and ICG Eastern, LLC (hereinafter “ICG Eastern”), the parties agree that it is their intent to enter into this Supplemental Consent Decree to resolve the remaining two categories of alleged violations of the West Virginia Water Pollution Control Act (“WPCA”), West Virginia Code §§ 22-11-1, *et seq.*, and associated alleged violations of the West Virginia Surface Coal Mining and Reclamation Act (“SCMRA”), West Virginia Code §§ 22-3-1, *et seq.* (collectively, the “Acts”), left unresolved by the entry of the initial Consent Decree entered by this Court on April 18, 2011. After consideration of public comments on this Supplemental Consent Decree, as proposed, and the parties’ responses thereto, the Court enters this Supplemental Consent Decree.

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code §§ 22-11-22 and 22-3-17.
2. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 and 22-3-17 because ICG Eastern is located and doing business in this judicial circuit and because the violations of the Acts and the rules promulgated pursuant to the Acts that are the subject of this action occurred in this judicial circuit.

II. APPLICATION OF CONSENT DECREE

3. This Consent Decree applies to and is binding upon WVDEP and upon ICG Eastern and its successors as the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter “WV/NPDES”) Permit No. WV0094889 (the “NPDES Permit”) and the permittee of Surface Mining Permit No. S-2019-88 (the “SCMRA Permit”).

III. FINDINGS OF FACT

4. The Directors filed a Complaint, and then an Amended Complaint (hereinafter “Complaint”), in the Circuit Court of Webster County, West Virginia, against ICG Eastern as set forth above in the caption of this Supplemental Consent Decree. The Complaint alleges that ICG Eastern violated the WPCA and the SCMRA through discharges of pollutants from its surface mining facility near Cowen, Webster County, West Virginia, which is covered by the NPDES Permit. The SCMRA Permit authorizes surface mining at this mine and the NPDES Permit authorizes discharges from the mine.

5. On April 18, 2011, acting upon a joint motion of the parties, this Court entered a Consent Decree in the above-captioned matter. The applicable statutory and regulatory scheme, as well as the complete factual and procedural history of this matter, is set forth under Section III of this Consent Decree. Although this original Consent Decree resolved the majority of claims against ICG Eastern alleged by the WVDEP in its Complaint, Paragraph 23 contained the following reservation of rights by the agency:

[T]his Consent Decree does not cover or assess civil penalties for any violations of selenium effluent limits for Outlets 001 – 026 from April 2010 through the date of this Consent Decree, or selenium effluent [limit] violations at any other outlets from October 1, 2010 through the date of this order. The WVDEP expressly reserves the right to promptly evaluate the assessment of civil penalties for these outlets during these periods . . .

6. Now, through this Supplemental Consent Decree, which is supplemental to and does not supersede or replace any term or condition of the previously entered April 18, 2011 Consent Decree, the WVDEP is imposing additional civil penalties for the two categories of violations identified in Paragraph 7, *infra*.

IV. EFFECT OF SETTLEMENT

7. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which ICG Eastern has asserted multiple defenses, and further agree that the environmental benefit of an expeditious settlement of this civil action is in the best interest of the parties. WVDEP is releasing all of its rights to assert a claim in the future related to any claims asserted in the Complaint for the NPDES Permit and the SCMRA Permit as follows: (1) for any violations of selenium effluent limits for Outlets 001–026 from April 2010 through April 18, 2011, and (2) for any violations of selenium effluent limits at any other outlets from October 1, 2010 through April 18, 2011. The civil penalty

assessed by the Court in this Supplemental Consent Decree reflects the WVDEP's belief that it could prove violations of these effluent limits as well as ICG Eastern's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

8. For the purposes of this Supplemental Consent Decree, ICG Eastern agrees the Complaint states claims upon which relief can be granted.

9. The parties agree that the civil penalties to be paid by ICG Eastern pursuant hereto satisfy all claims that may be asserted for civil penalties under the Acts for the discharge of pollutants regulated by the NPDES Permit as set forth in Paragraph 7, *supra*.

10. This Supplemental Consent Decree shall act as a bar, full accord and satisfaction and have the effect of *res judicata* for any claim or cause of action brought or that may have been brought by the WVDEP, including injunctive relief, for violations of the NPDES Permit and the associated violations of the SCMRA Permit for the categories of violations set forth in Paragraph 7, *supra*, pursuant to 33 U.S.C. § 1365(a)(1)(A) and 30 U.S.C § 1270.

11. Pursuant to Paragraph 28 of the original Consent Decree, upon entry of this Supplemental Consent Decree, ICG Eastern agrees to voluntarily withdraw its permit modification request and related West Virginia Environmental Quality Board appeal and diligently take any other actions reasonably necessary to obtain dismissal of that appeal with prejudice. Further, upon entry of this Supplemental Consent Decree, ICG Eastern likewise will seek to dismiss with prejudice the pending Circuit Court of Kanawha County action, to dissolve the injunction currently in place and to take any other actions reasonably necessary to obtain dismissal of that action.

V. CIVIL PENALTIES

12. In settlement of the claims in the WVDEP's Complaint for those categories of violations identified in Paragraph 7, *supra*, ICG Eastern, without admitting liability for any alleged violations or agreeing to the appropriateness of the civil penalty expressed herein except in the context of this Supplemental Consent Decree, agrees for purposes of the settlement provided herein that it shall pay a total civil penalty in the amount of one hundred thirteen thousand and seven hundred dollars (\$113,700), which includes consideration by the WVDEP of relevant civil penalty assessment factors, including, but not limited to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance related to the violations for which a penalty has been assessed herein. ICG Eastern shall pay this civil penalty as set forth below.

- a. ICG Eastern shall pay a total cash penalty of one hundred thirteen thousand and seven hundred dollars (\$113,700) by certified or cashier's check to the WVDEP for deposit in the WVDEP's Stream Restoration Fund, payable within 60 days of the entry of this Decree.
- b. Payments shall be mailed to the following address:

Jeff McCormick, Assistant Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

13. For failure to make any payment as required herein, ICG Eastern shall be obligated to pay the following stipulated penalties to the WVDEP:

- a. For the 1st through 15th day of noncompliance, ICG Eastern shall pay \$500 per day per violation.

- b. For the 16th through the 30th day of noncompliance, ICG Eastern shall pay \$750 per day per violation; and
- c. For any period of noncompliance after the 30th day, ICG Eastern shall pay \$1,000 per day per violation.

14. Stipulated penalties under Paragraph 13 shall be payable within thirty (30) days of receipt of a written demand from the WVDEP. Such payments shall be made by certified or cashier's check payable to the West Virginia Department of Environmental Protection and delivered to the address specified in Paragraph 12.b for deposit in the Stream Restoration Fund.

VI. FORCE MAJEURE

15. If any event occurs that causes or may cause a violation of any provision of this Supplemental Consent Decree by ICG Eastern, ICG Eastern shall notify the WVDEP in writing within ten (10) days of the date on which it had knowledge or should have had knowledge that the event may or will cause a violation. "Writing" may include the use of electronic mail at an e-mail address provided for the Assistant Director of the Division of Mining and Reclamation – Inspection and Enforcement. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and/or to be taken by ICG Eastern to minimize the violation, and the timetable by which those measures will be implemented. ICG Eastern will adopt all measures to avoid or minimize any such violation. ICG Eastern shall make all efforts to identify events that cause or may cause a violation of this Supplemental Consent Decree.

16. If the WVDEP agrees that any violation of this Supplemental Consent Decree is caused by circumstances reasonably beyond the control of ICG Eastern, ICG Eastern shall be excused as to that violation for the period of time the violation continues due to such circumstances. ICG

Eastern's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event the WVDEP does not agree, then ICG Eastern may submit the matter to this Court for resolution. The burden of proving that any delay was caused by circumstances reasonably beyond the control of ICG Eastern and the length of such delay shall rest with ICG Eastern. Failure by ICG Eastern to comply with the notice requirements in Paragraph 15 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of ICG Eastern's rights under this provision to obtain an extension of its obligations based on that incident.

17. Compliance with any requirement of this Supplemental Consent Decree, by itself, shall not constitute compliance with any other requirement. ICG Eastern must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

VII. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

18. The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Supplemental Consent Decree until its termination as set forth below. Additionally, should either party believe that the other has failed or is failing to comply with the terms of this Supplemental Consent Decree, it may petition this Court for a resolution of the issue.

XII. PERMITS AND OTHER LAWS AND REGULATIONS

19. This Supplemental Consent Decree is not, and shall not be interpreted to be, a permit or modification of a permit under the WPCA, nor shall it relieve ICG Eastern of any other obligation imposed by the WPCA, the NPDES Permit, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve ICG Eastern of its obligation to comply

with any other federal or state law or any rule or regulation in any way related to the substance of this Supplemental Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

VIII. PUBLIC NOTICE

20. The parties acknowledge and agree that final approval of this Supplemental Consent Decree is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. ICG Eastern shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Supplemental Consent Decree. The public shall have at least thirty (30) days in which to make any comments on this Supplemental Consent Decree and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Supplemental Consent Decree if warranted based on comments received during the period for public comments. If the WVDEP modifies this Supplemental Consent Decree in response to public comments, ICG Eastern may either consent to, or withhold consent to, entry of the modified Supplemental Consent Decree. If the WVDEP makes no changes in response to public comments, ICG Eastern consents to entry of this Supplemental Consent Decree without further notice. If for any reason this Court should decline to approve this Supplemental Consent Decree in the form presented, this agreement is not binding on and is of no effect on the parties.

IX. EFFECTIVE DATE

21. The effective date of this Supplemental Consent Decree shall be the date upon which it is entered by the Court as a final judgment and order.

X. TERMINATION

22. Termination of this Supplemental Consent Decree shall be by order of the Court upon application by either party, provided that all of the following conditions have been met: (1) ICG Eastern has achieved complete compliance with all requirements of this Supplemental Consent Decree; (2) ICG Eastern has paid all civil and stipulated penalties required herein; and (3) all motions and other proceedings concerning this Supplemental Consent Decree have been completed and are no longer subject to further judicial review and all relief resulting from such motions or other proceedings has been fully satisfied.

XI. SIGNATORIES AUTHORIZED

Each of the signatories to this Supplemental Consent Decree certifies that she or he is fully authorized to enter into the terms and conditions of this Supplemental Consent Decree and to bind legally the party to the Supplemental Consent Decree so represented by her or him.

It is so ORDERED this _____ day of _____, 2011.

We hereby consent to the entry of this Decree:

Scott G. Mandirola, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection

Date

Thomas L. Clarke, Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Date

Jonathan C. Frame (WVSB #10182)
Associate Counsel, Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
(304) 926-0499
Counsel for Plaintiff

Date

Allyn G. Turner (WVSB #5561)
James S. Crockett, Jr. (WVSB #9229)
M. Katherine Crockett (WVSB #10799)
Spilman Thomas & Battle, PLLC
Post Office Box 273
Charleston, WV 25321-0273
aturner@spilmanlaw.com
jcrockett@spilmanlaw.com
kcrockett@spilmanlaw.com
Counsel for Defendant

Date