

IN THE CIRCUIT COURT OF FAYETTE 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-149-H  
Judge Hatcher

MAPLE COAL COMPANY,

Defendant.

CONSENT DECREE

Upon agreement to the terms herein, 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 Maple Coal Company (hereinafter "Maple"), agree that it is their intent to resolve the violations of the West Virginia Water Pollution Control Act, West Virginia Code §§ 22-11-1, *et seq.* ("WPCA"), and associated violations of the West Virginia Surface Coal Mining and Reclamation Act, West Virginia Code §§ 22-3-1, *et seq.* ("SCMRA") (collectively, the "Acts"), and violations of the rules and regulations implementing these Acts through this Consent Decree with civil penalties and other duties imposed as expressed herein. After consideration of public comments on this Consent Decree, as proposed, and the parties' responses thereto, the Court enters this 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 Maple 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 Maple and its successors, as the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter "WV/NPDES") Permit Nos. WV1009311 (the "Sycamore NPDES Permit"), WV0090131 (the "Katie Coal NPDES Permit"), and WV1012975 (the "Rhetta No. 7 Permit") (collectively, the "NPDES Permits"), and the permittee of Surface Mining Permit Nos. O-47-85, O-48-85, O-3003-90, U-0570-00, S-3007-95, S-3031-88, S-3041-89, S-3041-91, S-6020-89, and S-3043-87 (the "SCMRA Permits").

## **III. FINDINGS OF FACT**

4. The Directors filed a Complaint, and later an Amended Complaint (hereinafter "Complaint") in the Circuit Court of Fayette County, West Virginia, against Maple as set forth above in the caption of this Consent Decree. The Complaint alleges that Maple violated the WPCA and the SCMRA through discharges of pollutants from its mining facilities in Fayette County, West Virginia, which

are covered by the NPDES Permits. The SCMRA Permits authorize surface mining at these mines and the NPDES Permits authorize discharges from the mines.

### **Statutory and Regulatory Background**

5. WVDEP issued the NPDES Permits pursuant to its authority under the WPCA, pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency ("USEPA") under the federal Clean Water Act, 33 U.S.C. § 1342, and pursuant to a Memorandum of Agreement between the WVDEP and USEPA for the issuance of NPDES permits.

6. The NPDES Permits contain limits on the concentrations of certain pollutants that can be discharged in the effluent from the mine.

7. Maple has reported the quality of its discharges and other information to the WVDEP through submittal of monthly Discharge Monitoring Reports (hereinafter "DMRs").

8. Maple's mining operations are also covered by the SCMRA Permits which WVDEP issued on August 26, 1996 for Permit No. S-3007-95, September 28, 1989 for Permit No. S-3041-89, November 10, 1993 for Permit No. S-3041-91, September 30, 1985 for Permit No. O-47-85, September 30, 1985 for Permit No. O-48-85, May 27, 1980 for UO-570, December 13, 1989 for Permit No. S-6020-89, October 6, 1988 for Permit No. S-3031-88, and September 11, 1987 for Permit No. S-3043-87 (hereinafter, the "Subject Mines").

9. The WVDEP issued the SCMRA Permits pursuant to its authority under the SCMRA and its status as the primary and exclusive regulator of coal mining in West Virginia. The exclusive regulatory jurisdiction under surface mining law is the result of the United States Office of Surface Mining, Reclamation and Enforcement's approval of the state's regulatory program in January

1981. WVDEP obtained its regulatory primacy by passing a law, SCMRA, which met or exceeded the minimum national standards established by Congress and by demonstrating its capacity to enforce its law. *See* 40 C.F.R. § 948.10.

10. The rules promulgated by the WVDEP implementing SCMRA prohibit violations of effluent limitations contained in a WV/NPDES permit and prohibit violations of water quality standards caused by discharges from a mine site. *See* W. Va. Code. St. R. § 38-2-14.5.b.

#### **Violations of Effluent Limits**

11. Prior to the lodging of this Consent Decree, the WVDEP's review of DMRs submitted by Maple for the period from June 1, 2007 to June 30, 2011 identified results reported in excess of stated effluent limits in the NPDES Permits, and/or potentially causing an exceedance of in-stream water quality standards, for the following parameters at the following Outlets:

<b>Permit/Outlet</b>	<b>Parameter(s)</b>
WV0090131 - 007	Selenium
WV1009311 - 005	Selenium
WV1009311 - 006	Selenium
WV1009311 - 017	Selenium
WV1009311 - 025	Aluminum
WV1009311 - 043	Selenium
WV1012975 - 001	Iron, pH, Aluminum

WVDEP and Maple have previously entered into Consent Order No. M-09-068 covering exceedances of WV/NPDES permit limits at the NPDES Permits prior to and through November 5, 2009. Consent Order No. M-09-068 is incorporated by reference into this Consent Decree, and the WVDEP hereby confirms that the penalty assessed by it, and paid by Maple, pursuant to Consent Order No. M-09-068 was based upon the factors set forth in Article VI herein, and was adequate and reasonable. WVDEP has reviewed the DMRs for all of the Outlets under the NPDES Permits, including the DMRs from the period covered by Consent Order No. M-09-068, and the parties agree that specific corrective action and/or compliance steps are appropriate for the Outlets and parameters referenced in Paragraph 34, below. Of the exceedances identified above, exceedances of parameters other than selenium have not been of a chronic nature, and the parties agree that, as of the effective date of this Consent Decree, no compliance plan for these parameters is warranted.

#### **Selenium Effluent Limits**

12. The Sycamore NPDES Permit contains 45 permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, the Sycamore NPDES Permit includes final effluent limits for that parameter at Outlets 005, 006, 017, and 043, although, as further described in Paragraphs 18 through 21 below, those final effluent limits are the subject of a compliance schedule that Maple sought to have extended and, in Maple's view, those limits had not yet gone into effect at the time the Complaint was filed. On or about April 5, 2007, WVDEP modified the compliance schedule in the Sycamore NPDES Permit such that Maple was required to report selenium levels in the effluent from those outlets through April 5, 2010, with the final limits of 8.2 ug/L for the daily maximum limit and 4.7 ug/L for the monthly average limit thereafter scheduled to go into effect on or about April 6, 2010.

13. During the period prior to April 5, 2010, Maple installed two different variations of zero-valent iron ("ZVI") treatment technology at the Outlets 006 and 043. These treatment systems showed promise in reducing selenium levels, but were not capable of consistently reducing selenium concentrations in a full-scale implementation by April 6, 2010. Existing water treatment has historically reduced selenium concentrations below water quality-based effluent limits at Outlets 005 and 017, although Outlet 017 has experienced some exceedances in 2011.

14. In addition to water treatment options, Maple has undertaken efforts to identify the sources and flows of selenium discharging from Outlets 006, 017, and 043 and evaluated potential water management options.

15. The parties agree that information available to them, including information related to Maple's treatment efforts as well as those at other mine sites, provides a reasonable basis upon which to conclude that Maple will achieve compliance with its final selenium effluent limits in the Sycamore NPDES Permit by the dates set forth herein.

16. Maple has also identified potential source areas of selenium and is taking steps to isolate or remove areas that are believed to be the main contributors of selenium in the effluent.

17. Despite Maple's diligent efforts to come into full compliance with its selenium effluent limits by April 5, 2010, Maple could not do so.

18. In late 2009, Maple filed a request to modify the Sycamore NPDES Permit to extend the final effective date for the selenium effluent limits for Outlets 006 and 043 beyond April 5, 2010.

19. In February 2010, the WVDEP issued a draft permit modification based on Maple's application and commenced a public comment period on the proposed modification. In late March 2010, USEPA's Region III office orally advised WVDEP that Maple's requested modification could not

be granted solely because Maple's permit had been administratively extended beyond its expiration date while WVDEP processed Maple's application to renew the permit. By letter dated March 25, 2010, WVDEP denied Maple's modification request based on USEPA's oral comments.

20. On March 26, 2010, Maple filed an administrative appeal with the West Virginia Environmental Quality Board seeking redress for the WVDEP's denial of its modification application. The EQB subsequently granted a stay of the final limits for selenium, which were to go into effect on or about April 5, 2010. On February 24, 2011, the EQB issued a Final Order in that case, denying Maple's appeal. Maple appealed that ruling to the Fayette County Circuit Court, which issued a stay of the underlying selenium effluent limits. That appeal is still pending.

21. Maple also filed an action in the Circuit Court of Kanawha County requesting injunctive relief and specifically asking that Court to enter an order preventing the final limits for selenium from going into effect, thereby preserving its right to pursue the requested modification and to pursue an appeal based on the agency's action on the application. The Court granted this injunction.

22. By a Memorandum Opinion and Order dated September 2, 2011, in *Ohio Valley Environmental Coalition, Inc, et al., v. Maple Coal Company*,--- F. Supp. 2d ---, (S.D. W.Va.), the District Court for the Southern District of West Virginia held that stays issued to Maple by the Environmental Quality Board, the Circuit Court of Kanawha County, and the Circuit Court of Fayette County were invalid. For its part, it is Maple's position that one or more of those stays may be upheld on appeal of the District Court's order. However, for purposes of this consent decree only, the parties agree that beginning on April 6, 2010, any reported result of selenium above the final effluent limits for selenium stated in the Sycamore NPDES Permit shall be considered an exceedance of the final limits subject to penalty assessment.

23. The Katie Coal NPDES Permit governs eight permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, the Katie Coal NPDES Permit does not currently have any final selenium effluent limits. For the permit term running from February 22, 2007 through March 16, 2010, which has been administratively extended through March 1, 2012, Maple was required to report the concentration of selenium present in the discharge from Outlet 007. WVDEP is currently processing Maple's application to reissue the Katie Coal NPDES Permit. Based on sample results reported for Outlet 007, DEP may assign final selenium effluent limits at Outlet 007 when and if the permit is reissued.

24. DEP believes, but Maple denies, that the discharge from Katie Coal NPDES Permit Outlet 007 may have caused or contributed to exceedances of in-stream water quality standards for selenium since October 2007. Without admitting that Maple's discharges caused or contributed to exceedances of in-stream water quality standards for selenium, or that Maple could be subject to enforcement action on that basis, Maple has agreed for purposes of this consent decree only to pay a monetary penalty to address alleged water quality standard violations for selenium potentially caused by discharges from Outlet 007, and to implement a compliance plan as provided in this Consent Decree.

25. Maple has undertaken a number of efforts to identify the potential sources of selenium in the discharge from Outlet 007 and evaluated potential means to abate or reduce the selenium concentrations. These include evaluation of an underground mine pool that may contribute water to the flow and engaging consultants and contractors to identify means to curtail the flow; evaluating means to cap and seal the upland refuse area to reduce the amount of precipitation that contributes

to the discharge; identifying methods to recycle water and otherwise reduce the amount of the discharge; and engaging with consultants to evaluate potential treatment technologies.

26. In addition to the abatement efforts described above, Maple has utilized information generated through its efforts to achieve compliance at the outlets governed by the Sycamore NPDES Permit to assist in determining a treatment method that may be used, as necessary, to treat discharges from the Katie Coal NPDES Permit Outlet 007.

27. The parties agree that information available to them, including information related to Maple's treatment efforts as well as those at other mine sites, provides a reasonable basis upon which to conclude that Maple will achieve compliance with water quality-based effluent limits for selenium, as they are determined and made applicable to Outlet 007 of the Katie Coal NPDES Permit, by the dates set forth herein.

#### **IV. EFFECT OF SETTLEMENT**

28. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which Maple 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. As noted in Paragraph 32 below, 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 Permits and the SCMRA Permits and associated performance standards for the period of June 1, 2007 through June 30, 2011, and claims based on other exceedances and violations of this Consent Decree that occur through the date of termination of this Consent Decree. The civil penalty assessed by the Court in this Consent Decree reflects WVDEP's belief that it could prove violations of effluent limits and other allegations raised in the Complaint and those set forth herein, as well as

Maple's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

Should Maple develop a pattern of non-compliance during the term of this Consent Decree for parameters other than those listed in paragraph 11 above, this Consent Decree shall not preclude DEP from taking further enforcement action against Maple to compel implementation of a compliance plan to address such parameters.

29. For the purposes of this Consent Decree, Maple agrees the Complaint states claims upon which relief can be granted.

30. The parties agree that the civil penalties to be paid by Maple pursuant hereto satisfy all claims that may be asserted for civil penalties under the Acts for the discharge of any pollutant regulated by the NPDES Permits and any other violations of the NPDES Permits (including but not limited to any violations of prior compliance orders) from June 1, 2007 through June 30, 2011.

31. The WVDEP has evaluated the DMRs for all permitted outlets, agency records regarding the NPDES Permits, and other related information and has completed an evaluation of Maple's compliance record. In completing this evaluation, the WVDEP has considered whether other reported results (including, without limitation, for any other parameter which may have had a "report only" requirement) were in fact violations of the NPDES Permits or any applicable statutory or regulatory requirement. WVDEP exercised its enforcement discretion in determining that no other such exceedances or violations that rise to the level of an enforcement action have occurred here.

32. This 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, or

by any person seeking to protect the public interest, including injunctive relief, for violations of the NPDES Permits and the associated violations of the SCMRA Permits, or violations of water quality standards, during the period from June 1, 2007 through June 30, 2011 pursuant to 33 U.S.C. § 1365(a)(1)(A), 30 U.S.C § 1270, and W. Va. Code. St. R. § 38-2-14.5.b.

33. Upon entry of this Decree, Maple agrees to promptly take action to voluntarily withdraw its Sycamore NPDES Permit modification request and related administrative appeal pending in the Fayette County Circuit Court and diligently take any other actions reasonably necessary to obtain dismissal of that appeal with prejudice. Upon entry of this Decree, Maple will also promptly seek to dismiss, with prejudice, the 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. ORDER FOR COMPLIANCE

34. Now, therefore, in accordance with Chapter 22, Article 11, Section 1, *et seq.*, and Chapter 22, Article 3, Section 1, *et seq.*, of the West Virginia Code, it is hereby agreed between the parties and ORDERED by the Court that Maple shall (i) immediately take additional measures to comply with all effluent limits in the NPDES Permits, and (ii) engage in a Corrective Action Plan to address selenium-related compliance at the operations governed by the Sycamore NPDES Permit and Katie Coal NPDES Permit as follows:

- a. Maple shall implement its water management and/or demonstration scale treatment systems for selenium as described in and consistent with the time frames set forth in the

schedule attached as Exhibit A. (The parties acknowledge that some of the steps set forth in Exhibit A have already been completed, in accord with the proposed deadlines that are set forth therein.)

b. The demonstration scale treatment systems are intended to determine the effectiveness of these treatment systems and evaluate the potential for full scale versions of these systems to be installed at relevant outlets. The demonstration scale treatment systems will be designed in such a manner as to provide meaningful data related to the effectiveness of the treatment method in treating the total design flow of water that would have to be treated by a full scale selenium treatment system designed to accommodate a 1-year, 24-hour storm event. The flow capacity of any full scale selenium treatment system and size of such a storm event will be determined by reference to empirical flow data gathered from the relevant area.

c. Unless the water management compliance method is successful, Maple shall conclude the demonstration scale projects described in subparagraphs (a) and (b) above, and shall evaluate the effectiveness of the demonstration scale projects and provide a report on the same to WVDEP by the dates specified in Exhibit A. This report may be combined with the regular quarterly report required under Paragraph 45. Nothing in this paragraph shall prevent Maple from continuing to operate the demonstration scale treatment systems after the respective deadlines for evaluation of their effectiveness. If Maple does so, it shall continue to report information concerning the effectiveness of those systems to WVDEP.

d. Concurrent with its efforts to identify a viable treatment system, Maple will evaluate various water management activities that could potentially reduce selenium concentrations

in the discharges from the relevant outlets either with or without additional treatment facilities.

e. By the dates shown in Exhibit A, and after consultation with WVDEP, Maple shall design and designate the full scale treatment systems, if any, it will install to treat the discharges from relevant outlets in order to assure compliance with specific water quality-based effluent limits for selenium by the dates set forth in subparagraphs (f) and (g) below.

f. Maple shall come into compliance with any applicable water quality-based effluent limits for selenium by December 15, 2012 if it is able to do so via a water management compliance method; by October 15, 2013 if Maple installs a passive treatment system; or by September 15, 2014 if Maple installs an active treatment system.

g. Maple shall come into compliance with the final effective limits in its NPDES Permits for any parameter and/or outlet not listed in Paragraph 36 upon entry of this Order.

## **VI. CIVIL PENALTIES**

35. In settlement of the WVDEP's claims in its Complaint relating to reported violations of the WPCA and the NPDES Permits and for relief under W. Va. Code §§ 22-11-22 and 22-3-17 and SCMRA and the SCMRA Permits, Maple, without admitting liability for any alleged violations or agreeing to the appropriateness of the civil penalty expressed herein except in the context of this Consent Decree, agrees for purposes of the settlement provided herein that it shall pay a total civil penalty in the amount of Two Hundred and Twenty-Nine Thousand, Three Hundred and Fifty Dollars (\$229,350.00), which includes consideration by 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 as set forth below. Maple shall pay this civil penalty as set forth below.

a. Maple shall pay a total cash penalty of \$114,675.00 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. Maple may propose to the WVDEP a Supplemental Environmental Project ("SEP") to be undertaken for purposes of satisfying up to \$114,675.00 of the civil penalty amount stated above. A complete description and request for approval of any such SEP shall be submitted to the WVDEP within 60 days of the entry of this Decree, and if no such request is submitted within that time, then the remaining unpaid amount of the civil penalty shall be paid within that time by certified or cashier's check as provided in subparagraphs (a) and (c) of this paragraph. Should the WVDEP, in its discretion, deny any request to satisfy any portion of the civil penalty through a SEP, then Maple shall pay the remaining unpaid amount of the civil penalty by certified or cashier's check as provided in subparagraphs (a) and (c) of this paragraph within 30 days from receipt of the WVDEP's decision disapproving such a request.

c. Payments shall be mailed to the following address:

Harold Ward, Deputy Director  
Division of Mining and Reclamation  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304

**VII. INTERIM LIMITS**

36. Maple shall be assigned and comply with the following interim limits leading to compliance with applicable water quality-based effluent limits for selenium, in lieu of any such limits set forth in the NPDES Permits (or reissued permits):

<b>Permit/Outlets</b>	<b>Phase I Interim Limits – July 1, 2011 to December 31, 2011</b>	<b>Phase II Interim Limits – Jan. 1, 2012 to July 31, 2012</b>	<b>Phase III Interim Limits – August 1, 2012 to Dec. 15, 2012 (water management method); Oct. 15, 2013 (passive treatment system); or Sept. 15, 2014 (active treatment system)</b>
WV0090131 - 007	29 µg/l Daily Maximum	19 µg/l Daily Maximum	15 µg/l Daily Maximum 12 µg/l Monthly Average
WV1009311 - 017	19 µg/l Daily Maximum	14 µg/l Daily Maximum	11 µg/l Daily Maximum 9 µg/l Monthly Average
WV1009311 - 006	19 µg/l Daily Maximum	14 µg/l Daily Maximum	11 µg/l Daily Maximum 9 µg/l Monthly Average
WV1009311 - 043	19 µg/l Daily Maximum	14 µg/l Daily Maximum	11 µg/l Daily Maximum 9 µg/l Monthly Average

The WVDEP

shall enforce the interim limits contained in this Paragraph 36 through the stipulated penalties set forth in Paragraph 39 below. The interim limits in this paragraph will terminate and appropriate

water quality-based effluent limits for selenium will be enforced beginning on December 16, 2012 if Maple is able to utilize a water management compliance method; by October 16, 2013 if Maple installs a passive treatment system; or by September 16, 2014 if Maple installs an active treatment system.

37. The parties acknowledge that Maple is currently seeking the reissuance of the Sycamore NPDES Permit and Katie Coal NPDES Permit. Should the Sycamore NPDES Permit or Katie Coal NPDES Permit be reissued after this Consent Decree is entered by the Court, the parties agree that, for purposes of the WPCA and SCMRA, the provisions of this Consent Decree shall be considered an enforcement action for any violations of the selenium effluent limits set forth in the reissued permits during the term of this Consent Decree.

38. For all other parameters and outlets not subject to interim limits as set forth herein, the WVDEP shall enforce the effluent limits currently in effect as set forth in the NPDES Permits.

#### **VIII. STIPULATED PENALTIES**

39. In the event Maple violates any interim limit for selenium as described in Paragraph 36, Maple shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the violation of a Phase I interim limit, Maple shall pay \$1,000 per violation. For the second consecutive violation of a Phase I interim limit Maple shall pay \$1,500. For the third consecutive and subsequent violations Maple shall pay \$2,000. For the purposes of this subparagraph, a violation following an observed and reported "no flow" condition shall not be

consecutive with any violation that occurred before the observed and reported "no flow" condition.

- b. For the violation of a Phase II interim limit, Maple shall pay \$2,000 per violation. For the second consecutive violation of a Phase II interim limit Maple shall pay \$2,500. For the third consecutive and subsequent violations Maple shall pay \$3,000. For the purposes of this subparagraph, a violation following an observed and reported "no flow" condition shall not be consecutive with any violation that occurred before the observed and reported "no flow" condition.
- c. For the violation of a Phase III interim daily maximum limit, Maple shall pay \$4,000 per violation. For the second consecutive violation of a Phase III interim daily maximum Maple shall pay \$4,500. For the third consecutive and subsequent violations Maple shall pay \$5,000. For the purposes of this subparagraph, a violation following an observed and reported "no flow" condition shall not be consecutive with any violation that occurred before the observed and reported "no flow" condition.
- d. For the violation of a Phase III interim average monthly limit Maple shall pay \$5,000 per violation. For the second consecutive violation of a Phase III interim average monthly limit Maple shall pay \$7,500. For the third consecutive and subsequent violations Maple shall pay \$10,000. For the purposes of this subparagraph, a violation of a monthly average limit as reported on Maple's DMRs shall constitute one (1) violation, and a violation

following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.

40. For violation of any final effective effluent limit in the NPDES Permits other than interim effluent limits for selenium, Maple shall be obligated to pay the following stipulated penalties to WVDEP:

a. For violations of daily maximum limits from July 1, 2011 through December 31, 2012, Maple shall pay \$1,000 per violation.

b. For violations of daily maximum limits from January 1, 2013 through December 31, 2013, Maple shall pay \$2,000 per violation.

c. For violations of daily maximum limits from January 1, 2014 through termination of this Consent Decree, Maple shall pay \$3,000 per violation.

d. For violations of average monthly limits from July 1, 2011 through December 31, 2012, Maple shall pay \$3,000 per violation; provided, however, that a violation of a monthly average limit as reported on a DMR shall constitute one (1) violation.

e. For violations of average monthly limits from January 1, 2013 through December 31, 2013, Maple shall pay \$4,000 per violation; provided, however, that a violation of a monthly average limit as reported on a DMR shall constitute one (1) violation.

f. For violations of average monthly limits from January 1, 2014 through termination of this Consent Decree, Maple shall pay \$5,000 per violation; provided, however, that a violation of a monthly average limit as reported on a DMR shall constitute one (1) violation.

41. For failure to take or complete any step outlined in the Corrective Action Plan set forth in Paragraph 34(ii) herein, including Exhibit A, or to submit any report as required by Paragraph 34(ii), including Exhibit A, or Paragraph 45, herein, Maple shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the 1<sup>st</sup> through 15<sup>th</sup> day of noncompliance, Maple shall pay \$500 per day per violation;
- b. For the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance, Maple shall pay \$750 per day per violation;
- c. For any period of noncompliance after the 30<sup>th</sup> day, Maple shall pay \$1,000 per day per violation.

42. Stipulated penalties 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 35.c for deposit in the Stream Restoration Fund.

43. The schedule of stipulated penalties provided in Paragraph 40 shall apply to all violations of final effective limits in the NPDES Permits in accordance with Paragraph 38 above.

44. The schedule of stipulated penalties provided in Paragraphs 39, 40, and 41 are effective from the entry date of this Consent Decree through termination of this Consent Decree.

## **IX. REPORTS**

45. Maple shall provide WVDEP with quarterly reports on the status of Maple's efforts to achieve compliance with applicable water quality-based selenium effluent limits and/or water quality standards. These quarterly reports shall include a summary of the sampling results for selenium at each Outlet referenced in Exhibit A. The quarterly reports shall indicate what has been accomplished since the submittal of the prior quarterly report, whether Maple is on the schedule required by this Consent Decree or, if not on schedule, include an explanation of why Maple is behind schedule, how far it is behind schedule, and what measures are being taken to get back on schedule. The quarterly reports shall also describe activities undertaken pursuant to Section V ("Order for Compliance") of this Consent Decree until all remedial measures described therein are completed. Each quarterly report shall be submitted to WVDEP at the address listed in paragraph 36.c (with an additional copy sent to Wayne Wilson, at the same address) within fifteen (15) days following the end of the calendar quarter, beginning October 15, 2011, and every three months thereafter until the termination of this Consent Decree pursuant to Paragraph 53.

## **X. FORCE MAJEURE**

46. If any event occurs that causes or may cause a violation of any provision of this Consent Decree by Maple, Maple 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 Maple to minimize the violation, and the timetable by which those measures will be implemented. Maple will adopt all measures to avoid or minimize any such violation. Maple shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

47. If the WVDEP agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of Maple, Maple shall be excused as to that violation for the period of time the violation continues due to such circumstances. Maple'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 Maple 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 Maple and the length of such delay shall rest with Maple. Failure by Maple to comply with the notice requirements in Paragraph 46 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of Maple's rights under this provision to obtain an extension of its obligations based on that incident.

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

#### **XI. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION**

49. The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree until the Decree is terminated as set forth below. Additionally,

should either party believe that the other has failed or is failing to comply with the terms of this Decree, it may petition this Court for a resolution of the issue.

## **XII. PERMITS AND OTHER LAWS AND REGULATIONS**

50. This 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 Maple 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 Maple 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 Consent Decree; provided, however, that no permit or permit modification shall be required to implement the demonstration scale treatment systems at the Subject Mine that is subject to this Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

## **XIII. PUBLIC NOTICE**

51. The parties acknowledge and agree that final approval of this Consent Decree is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. Maple shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Consent Decree. The public shall have at least thirty (30) days in which to make any comments on this Consent Decree and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Consent Decree if warranted based on comments received during the period for public comments. If the WVDEP modifies this Consent Decree in response to public comments, Maple may either consent to, or withhold consent to, entry of the modified Consent Decree. If the WVDEP makes no changes in response to public comments, Maple consents to entry of this Consent Decree without further notice. If for any reason this Court should decline to approve

this Consent Decree in the form presented, this agreement is not binding on and is of no effect on the parties.

#### XIV. EFFECTIVE DATE

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

#### XV. TERMINATION

53. Termination of this 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) Maple has achieved complete compliance with all requirements of this Consent Decree; (2) Maple has paid all civil and stipulated penalties required herein; and (3) all motions and other proceedings concerning this 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; Provided, however, that should Maple show that it is in consistent compliance with applicable selenium effluent limits at the outlets addressed in paragraph 36 above, and conditions (2) and (3) of this paragraph have been satisfied, then the parties shall jointly move the Court for an order terminating this Consent Decree. For purposes of this paragraph, "consistent compliance" shall mean: (a) at least six consecutive DMR samples during a single calendar quarter that do not exceed the applicable daily maximum selenium limit stated in the permit; and (b) at least three consecutive months during a single calendar quarter, including the six-week period in described in the preceding sentence, where the average of the DMR sample results does not exceed the applicable monthly average selenium limit stated in the permit.

**XVI. SIGNATORIES AUTHORIZED**

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

It is so ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

\_\_\_\_\_  
JOHN W. HATCHER, JR., CIRCUIT JUDGE

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

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Jonathan C. Frame (W. Va. Bar No.10182)  
Office of Legal Services  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street SE  
Charleston, WV 25304  
(304) 926-0499 x. 1702  
*Counsel for Plaintiff*

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Date

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Christopher B. Power, Esq. (W. Va. Bar No. 4286)  
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Dinsmore & Shohl LLP  
Post Office Box 11887  
Charleston WV 25339-1887  
304.357.0900  
Telefax: 304.357.0919  
*Counsel for Defendant, Maple Coal Company*

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Date

**EXHIBIT A - Compliance Schedule: WV/NPDES Permit Nos. WV1009311 and WV0090131 (Maple Coal Company)**

Retain additional consultants to continue Alternatives and Engineering Assessment

**January 15, 2011**

Continue Evaluation of existing zero-valent iron demonstration scale systems

**January 15, 2011**

Reinitiate comprehensive evaluation of potential alternatives with new consultant, to include: water management (e.g., source controls, hydraulic controls/rerouting, alternative wastewater disposal alternatives, and flow augmentation), passive water treatment and active water treatment, if required.

**January 15, 2011**

Comply with applicable interim limits

**Entry of Consent Decree**

Complete Evaluation of zero-valent iron demonstration scale systems

**July 15, 2011**

Submit Preliminary Alternatives Assessment Report and Compliance Alternatives Decision Document, including designation of method(s) chosen to attain compliance

**December 15, 2011**

***Maple Coal shall implement water management and/or treatment route alternatives, dependent upon the results of the Alternatives Decision Document. If both water management and treatment alternatives are required for a single outlet, schedules for each, as outlined below, shall apply. If different types of alternatives are required at each outlet, a proposed schedule for concurrent implementation will be submitted in a timely manner for approval by WVDEP.***

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***Water Management Compliance Methods***

Evaluate water management strategies	<b>January 1, 2011</b>
Submit permit modification application, if required	<b>January 15, 2012</b>
Construction complete, water management alternatives	<b>June 15, 2012</b>
Attain compliance with Final Limits ( <i>unless additional treatment is required to meet limits, then treatment schedule shall apply</i> )	<b>December 15, 2012</b>

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***Passive Treatment Route, if necessary***

Commence construction of demonstration scale system	<b>December 15, 2011</b>
Submit report on demonstration scale system	<b>April 15, 2012</b>
Complete design of full scale treatment system	<b>June 15, 2012</b>
Submit permit modification application, if required	<b>March 15, 2012</b>
Commence construction of full scale treatment system (as warranted, based on demonstration scale results and WVDEP approval)	<b>August 15, 2012</b>
Construction complete	<b>March 15, 2013</b>
Startup of passive treatment facilities	<b>May 3, 2013</b>
Comply with Final Limits—passive treatment alternative	<b>October 15, 2013</b>

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***Active Treatment Route, if active treatment is necessary***

Commence construction of demonstration scale system	<b>June 15, 2012</b>
Submit report on demonstration scale system	<b>December 15, 2012</b>
Submit permit modification application, if required	<b>March 15, 2013</b>
Complete design of full scale treatment system	<b>June 15, 2013</b>
Commence Construction of full scale treatment system	<b>May 15, 2013</b>
Construction complete	<b>March 15, 2014</b>
Startup of active treatment facilities	<b>June 15, 2014</b>
Comply with Final Limits—active treatment alternative	<b>September 15, 2014</b>

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***Quarterly Status Reports/Update Meetings with WVDEP:***

Submit Progress Report	October 15, 2011
Submit Progress Report/Meet with WVDEP	January 15, 2012
Submit Progress Report	April 15, 2012
Submit Progress Report/Meet with WVDEP	July 15, 2012
Submit Progress Report	October 15, 2012
Submit Progress Report /Meet with WVDEP	January 15, 2013

If Passive or Active Treatment is Required

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Submit Progress Report	April 15, 2013
Submit Progress Report /Meet with WVDEP	July 15, 2013

Submit Progress Report	October 15, 2013
Submit Progress Report /Meet with WVDEP	January 15, 2014
Submit Progress Report	March 15, 2014

If Active Treatment is Required

Submit Progress Report/Meet with WVDEP	June 15, 2014
Submit Final Report	October 15, 2014