IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, and HAROLD D. WARD[1],
ACTING DIRECTOR, DIVISION OF MINING
AND RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Plaintiffs,

v. **CIVIL ACTION NO. 11-C-84**

MINGO LOGAN COAL COMPANY,

Defendant.

PROPOSED SETTLEMENT AND CONSENT ORDER

The parties to this action, the Director of the Division of Water and Waste Management (hereinafter "Director") of the West Virginia Department of Environmental Protection (hereinafter, "WVDEP"), Acting Director of Mining and Reclamation, WVDEP, and Mingo Logan Coal Company (hereinafter "Mingo Logan"), agree herein to fully and finally resolve and settle any and all claims and actions contained in this matter including, without limitation, the alleged exceedances of effluent limitations for WV/NPDES Permit Nos. WV1011120, WV0066737, WV0005690, and WV1004956 regulated by the West Virginia Water Pollution Control Act, ("WPCA") West Virginia Code §§ 22-11-1 through -28, the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA"), West Virginia Code §§ 22-3-1 through – 32a. The terms and conditions of this resolution are contained in this Consent Order, which includes civil penalties and other duties and obligations imposed and as expressed herein. After

[1] Harold D. Ward has replaced Thomas L. Clarke as Acting Director of the West Virginia Department of Environmental Protection's Division of Mining and Reclamation.

consideration of public comments on this Consent Order, as proposed, and the parties' responses thereto, the Court enters this Consent Order.

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code § 22-11-22 and § 22-3-17(j). Venue is proper in this Circuit Court pursuant to W. Va. Code § 22-11-22 and § 22-3-17(j), because Mingo Logan is located and doing business in this judicial circuit, and because the violations of the West Virginia Water Pollution Control Act, ("WPCA") West Virginia Code §§ 22-11-1 through -28, the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA"), West Virginia code §§ 22-3-1 through – 32a, and the rules promulgated pursuant to these laws (collectively the "Acts"), that are the subject of this action occurred in this judicial circuit.

II. APPLICATION OF CONSENT ORDER

2. This Consent Order applies to, and is binding upon, WVDEP and Mingo Logan, as the permittee of WV/NPDES Permit Nos. WV1011120, WV0066737, WV0005690, and WV1004956 (the "Permits"), its parent company, those companies deemed to own and control Mingo Logan by reason of 38 CSR § 2-2.85 and their successors.

III. FINDINGS OF FACT

A. Background

3. Mingo Logan holds NPDES permit Nos. WV1011120, WV0066737, WV0005690, and WV1004956 regulating the discharge of selenium in storm water discharge from its mines located in Mingo and Logan Counties. The selenium at these sites is an artifact of water flowing through already-mined backfill or spoil material. Selenium has only been identified as a problem within the coal industry within the last 10 years or so and was not included in NPDES permits until around 2004.

4. In April of 2007, WVDEP issued compliance schedules industry-wide, which provided three years to bring surface mine discharges into compliance with the water quality limit for selenium. The compliance schedules were set to expire on April 5, 2010.

5. In 2007, Mingo Logan began evaluating various treatment solutions, in accordance with the deadlines included in the compliance schedules. Mingo Logan operates and maintains treatment and disposal systems for the direct discharge of treated water and stormwater from Outlets 001 and 016 into Left Fork of Beech Creek. WVDEP reissued WV/NPDES Permit No. WV1004956 (the Permit) to Mingo Logan on February 1, 2013.

6. Outlet 016 is the emergency spillway for Pond No. 1, which is the initial pond in the selenium treatment system for Outlet 001.

7. In March 2007, Mingo Logan commenced selenium treatment activities for Outlet 001, including the construction of a ZeroValent iron treatment system and a consultation with Suwannee Laboratories for phytoremediation alternatives.

8. Mingo Logan pursued compliance with the final selenium effluent limitations through multiple strategies, including but not limited to the ZeroValent iron treatment system, planting of aquatic plants for phytoremediation, installation of flow curtains to improve retention, development of a special handling plan for potentially selenium toxic material prior to

reactivation of the area, reconstruction of Pond No. 1, installation of a self-charging dewatering syphon, and consultation with multiple environmental firms with experience in selenium treatments systems.

9. On December 29, 2009, Mingo Logan applied for modification of the Permit to extend the interim effluent limitations in the Permit based on the ongoing treatment activities for Outlet 001. WVDEP denied the modification request on August 24, 2010.

10. On May 25, 2010, Mingo Logan submitted Modification No. 24 for the installation of a supplemental treatment system. Under the modification, existing Outlet 001 was relocated from Pond No. 1 to the down-gradient discharge from an anaerobic reactor for the treatment of selenium. A new Outlet 016 was added at the emergency spillway of Pond No. 1 to ensure that discharge from the emergency spillway during high flow conditions is also monitored and verified. The addition of Outlet 016 did not create additional loading to Left Fork. WVDEP approved Modification No. 24 on September 15, 2010.

11. On August 27, 2012, Mingo Logan applied for Modification No. 27 to install a supplemental treatment system along Left Fork of Beech Creek and to relocate existing Outlet 001 from its designated location at Bioreactor No. 1 to the proposed spillway of Pond 1A, which was proposed for additional water retention following treatment in the bioreactor. WVDEP approved Modification No. 27 on March 15, 2013.

12. The treatment systems for Outlet 001 have been successful in reducing the selenium concentrations from sources to Pond No. 1 during typical flow conditions. The treatment system at outlet 016 was designed and constructed under approved Modification No. 24. Mingo Logan designed the system to treat flow rates up to 3100 gpm based upon the installation of the following systems: 150Hp Vertical Turbine Pump with a capacity of 650 gpm, a 450Hp Vertical

turbine pump with a design capacity of 1,050 gpm, passive treatment system with self-charging siphon with a flow capacity of 1,400 gpm.

13. Outlet 016 is only utilized when the treatment system for Outlet 001 is incapable of treating the entire flow from Pond No. 1. Typically, this occurs during periods of high precipitation which could damage the passive treatment system. Because Outlet 016 discharges infrequently, it is often difficult for Mingo Logan to collect additional samples for compliance with the average monthly effluent limitation.

14. Mingo Logan has also pursued site-specific criteria for the Left Fork of Beech Creek. In addition, the WVDEP has recently announced its intentions to proceed with revisions to the statewide selenium water quality criteria. Mingo Logan and its parent company have participated in the collection of data for a revised statewide criterion as ordered by the West Virginia Legislature pursuant to HB 2579.

15. For discharges from Permit 1004956, Outlet 002, Mingo Logan has already submitted a permit modification to WVDEP that seeks to add retention structures to the Permit. Mingo Logan's compliance plan involves construction of the additional retention structure and revision of the Selenium Material Handling Plan ("MHP") for the watershed contributing to Outlet 002 to incorporate segregation of additional overburden horizons with selenium concentration greater than 1mg/kg. Mingo Logan has already completed construction of the expanded retention volume structure.

16. Mingo Logan has also constructed a bioreactor within the drainage area contributing to Outlet 012 of Permit WV1011120. The bioreactor consists of a series of cells incorporating various wetland plants and organic matter. The organic matter consists of a variety of sources, such as mushroom compost hay, and/or sawdust. These cells create an anaerobic environment,

which is conducive to the digestion of selenium by naturally occurring microbes. Outlet 012 of Permit WV1011120 currently receives discharge from the bioreactor, an existing pilot scale system. Operational changes and enhancements were made to the existing system during the summer of 2012. This bioreactor was constructed as a pilot scale system in order to calibrate the effectiveness of the system and to develop baseline modeling data for use in future system design at other outlets.

17. Mingo Logan has introduced and is maintaining in-situ microbial treatment within the watershed contributing to Permit WV1004956, Outlet 016. Additionally, a recirculating pump has been installed to manage the volume of potential discharge from this outlet and regulate the inflow into a constructed bioreactor at outlet 001 for this facility. Outlet 016 currently discharges only during periods of intense or prolonged precipitation events.

18. Despite Mingo Logan's diligent efforts to come into full compliance with its selenium, it requires additional time to do so. Given its relatively recent discovery as a parameter of concern, treatment technologies capable of addressing the unique challenges presented by treating selenium at surface mine sites are in a developing state. As explained above, Mingo Logan has been at the forefront of efforts to develop effective treatment solutions for selenium. Indeed, Judge Robert Chambers of the United States District Court for the Southern District of West Virginia, who has presided over numerous CWA citizen suits seeking to enforce selenium limits in federal court, recognized that no treatment technology has yet been demonstrated to treat selenium to the levels needed at full-scale operation. *See OVEC v. Apogee*, 2010 WL 3955828, *5 (S.D.W.Va. Oct. 8, 2010).

19. To the best of the parties' knowledge and belief, the following nine outlets are the only outlets that have historically discharged selenium at levels above the monthly average limit

typically imposed in West Virginia: WV1011120, Outlets 010, 012 & 013; WV1004956, Outlets 001, 015, & 016; WV0005690, Outlets 002 & 003; and WV0066737, Outlet 001. Of these nine outlets, two were addressed in a consent decree entered in a CWA citizen suit in the Southern District of West Virginia: WV1004956, Outlets 001 & 015. *See Ohio Valley Environmental Coalition v. Coal-Mac, Inc., and Mingo Logan Coal Company*, ("*OVEC*") 3:10-cv-00833, Doc. 136. The parties to the *OVEC* suit entered into a Consent Decree whereby Mingo Logan agreed to pay a civil penalty for violations associated with WV1004956, Outlets 001 & 015.

20. The parties agree that the civil penalty paid in connection with the *OVEC* Consent Decree precludes WVDEP from collecting a civil penalty for overlapping alleged violations associated with those three outlets.

21. Additionally, on March 1, 2011, the United States Environmental Protection Agency ("EPA"), along with WVDEP and the Kentucky Cabinet of Energy and Environment, filed suit in the United States District Court for the Southern District of West Virginia against Arch Coal, Inc. and certain of its subsidiaries, including Mingo Logan. *See U.S. EPA, et al. v. Arch Coal, Inc., et al.*, 2:11-cv-00133. The complaint alleged that Mingo Logan violated the CWA by discharging pollutants into waters of the U.S. in excess of the effluent limitations contained in its NPDES permits.

22. On November 7, 2011, the parties entered into a Consent Decree resolving the CWA claims. The Consent Decree applied to all of Arch and Mingo Logan's facilities located in West Virginia, Virginia, and Kentucky, including the outlets at issue in this suit. The Consent Decree did not address selenium (except for one specified outlet that is not part of this suit), but it assessed civil penalties and provided for stipulated penalties for all other applicable NPDES parameters.

23. The parties agree that the civil penalty paid in connection with the *EPA* Consent Decree precludes WVDEP from collecting a civil penalty for overlapping alleged violations associated with those outlets. Additionally, the parties agree that the compliance and reporting requirements of the Consent Decree are sufficient to ensure compliance at those outlets. Accordingly, the parties agree that it is unnecessary for this Consent Decree to address pollutants that were a part of the *EPA* Consent Decree.

B. Statutory and Regulatory Background

24. WVDEP issued Permit Nos. WV1011120, WV0066737, WV0005690, WV1004956, pursuant to its authority under the WPCA and pursuant to its authority delegated to it by the United States Environmental Protection Agency ("USEPA") under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1342, and pursuant to a 1982 Memorandum of Agreement between the WVDEP and the USEPA for the issuance of NPDES permits.

25. Mingo Logan's NPDES Permits generally contain limits on the concentration of selenium that can be discharged in the effluent from the mine. Mingo Logan has reported the quality of its discharges and other information to WVDEP pursuant to the terms and condition of its NPDES permit. This reporting has occurred through submittal of monthly Discharge Monitoring Reports ("DMRs") as prescribed by WVDEP.

26. WVDEP issued Mingo Logan's operative WVSCMRA permits for its mining operations in Logan County pursuant to its authority under WVSCMRA 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 ("OSM") approval of the state's regulatory program in January 1981. WVDEP

obtained its regulatory primacy by passing a law, WVSCMRA, 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. §§ 732.12 and 948.10.

C. Violations of Effluent Limits

27. In its review of Mingo Logan's DMRs, the WVDEP has identified sample results for selenium higher than the effluent limits contained in the applicable NPDES permit at the following Outlets:

Permit	Outlet
WV0066737	001
WV0005690	002
WV0005690	003
WV1004956	001*
WV1004956	015*
WV1004956	016
WV1011120	010
WV1011120	012
WV1011120	013

* denotes Outlets which are subject to the Consent Decree entered in *OVEC v. Coal-Mac, et al.*, 3:10-cv-00833.

IV. ORDER FOR COMPLIANCE

28. Now, therefore, in accordance with Chapter 22, Article 11, Section 1 *et seq.* of the West Virginia Code, it is hereby agreed between the parties, and ORDERED by the Director that Mingo Logan shall immediately take measures to initiate compliance with selenium limits at the following outlets expected by the parties to have future potential to discharge selenium in concentrations above the water quality standards: WV1011120, 012; WV1004956, 001, 002,015, and 016. Mingo Logan shall take all measures to initiate compliance with all terms and conditions of the Permits. The parties recognize the possibility that Mingo Logan's corrective action plan may bring an outlet into compliance—as defined in this Consent Decree—prior to the final compliance deadline for a particular outlet, thereby potentially negating subsequent deadlines for that particular outlet. Mingo Logan shall adhere to the compliance schedule as detailed in Paragraphs 29 through 35. For the remaining four outlets, Mingo Logan shall comply with the compliance schedule outlined in Paragraph 36.

29. Mingo Logan shall come into compliance with the final permit effluent limitations for selenium at Outlet 016 as soon as possible but no later than April 30, 2017. Mingo Logan shall adhere to the compliance schedule milestones prescribed in Attachment A to this Consent Decree in order to achieve the final effluent limitations.

30. Mingo Logan shall submit a Plan of Action on or before December 15, 2015 outlining the measures that Mingo Logan will take to come into compliance with the selenium at Outlet 016. Once submitted and approved by agency, the Plan of Action shall be enforceable under this Consent Decree.

31. Mingo Logan shall submit quarterly progress reports thereafter summarizing excursions, response measures implemented, results of response measures, rainfall data, supporting data including sampling results, and any additional actions to be taken in the future to ensure

compliance with the final permit limitations for selenium at Outlet 016. Quarterly reports shall be submitted within 20 days of the end of each calendar quarter via mail or electronic notification.

32. Mingo Logan shall have an interim daily maximum limitation for selenium at Outlet 016 of 9.5 mg/l. The interim effluent limitation shall apply until April 30, 2017. Mingo Logan shall comply with the final effluent limitations as soon as possible but no later than April 30, 2017. Until that time, Mingo Logan shall comply with the interim effluent limitation at Outlet 016 for selenium.

33. Outlet 016 shall only discharge under the following circumstances: (1) when necessary or prudent for diversion of water from the passive treatment system for routine maintenance, investigation, or repair activities, (2) as necessary related to the maintenance or repair of the pumps at Pond No. 1, or (3) in response to precipitation events that exceed the treatment design capacity of 3,100 gpm or freezing conditions that necessitate a discharge at Outlet 016. Mingo Logan must keep records identifying whether the duration of the discharge exceeds four consecutive days or exceeds more than four calendar days within a rolling thirty-day period.

34. Outlet 016 and instream station DBC shall be sampled concurrently at least once per month when Outlet 016 discharges. For the purposes of this Consent Decree only, "concurrently" shall be defined as sampling within six hours of outlet sampling. The data required by this paragraph shall be provided in quarterly eDMRs for the facility and in the quarterly reports pursuant to this Consent Decree.

35. If the total selenium concentration at the in-stream site exceeds 5 ug/l at instream station DBC, written notification will be provided within 24 hours and shall describe the suspected

cause of failure to meet the instream criteria at DBC, along with remedial measures to prevent future failures to meet thresholds.

36. Mingo Logan will adhere to the following Corrective Action Plan for the other four outlets subject to this Consent Decree: WV1011120, 012; WV1004956, 001, 002, and 015. This plan may be subject to design modifications to improve performance

MILESTONE	DEADLINE
a. Submit quarterly status/progress reports to DMR Inspector and NPDES Supervisor in the Logan Regional Office.	a. Quarterly – Due within 15 days of the end of each calendar quarter.
b. Complete surveys, mapping, topography/geotech studies.	b. No later than 3 months from entry of Consent Decree.
c. Complete Analyses on the water chemistry to determine, among other things, the predominant form of selenium, pH, dissolved oxygen, TSS, Fe, Al, Mn, nitrates, sulfate, TDS, Ca, and Mg.	c. No later than 6 months from entry of Consent Decree.
d. Collect all flow data and establish minimum, average, and maximum flow rates per outlet; Select appropriate remedial measure.	d. No later than 9 months from entry of Consent Decree.
e. Complete final design and engineering for selected remedial measure and submit all necessary permit revisions.	e. No later than 12 months from entry of Consent Decree.
f. Begin construction of selected remedial measure.	f. No later than 15 months from entry of Consent Decree.
g. Complete construction of selected remedial measure.	g. No later than 21 months from entry of Consent Decree.
h. Achieve compliance with applicable selenium limits.	h. No later than 24 months from entry of Consent Decree.

V. COMPLIANCE REQUIREMENTS

37 Where any compliance obligation under this Section requires Mingo Logan to obtain a federal, state or local permit or approval, Mingo Logan shall submit timely and substantially complete applications and take all other actions necessary to obtain all such permits or approvals. Mingo Logan may seek relief under the provisions of Section IX of this Consent Decree ("Force

Majeure") for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Mingo Logan has submitted timely and substantially complete applications and has taken all other actions necessary to obtain all such permits or approvals.

38. Mingo Logan shall measure the flow from the Outlets and sample the effluent for selenium from the Outlets identified in Paragraph 28 at least twice per month during the term of this Decree as it applies to the individual Outlet. For purposes of this Decree, a sample result of "no flow" cannot be used to calculate the monthly average concentration, nor shall it interrupt any sequence of consecutive compliance events required in this Decree. For purposes of this Decree, a sample result of "no Flow" shall count as a sample as per this paragraph.

39. Mingo Logan shall complete construction of its proposed Selenium Treatment Systems at each Outlet as set forth in Paragraphs 29-36.

40. The parties acknowledge that the first six months after a Selenium Treatment System has been completed and begins discharging will be a start-up period, as biological materials become more active and Mingo Logan adjusts the treatment system. Therefore, sampling data acquired during months one (1) through six (6) after a Selenium Treatment System has been completed and started discharging shall not be used to determine whether the passive bioreactor treatment systems are functioning as designed, though Mingo Logan may still use those data to seek termination of the Decree as contemplated in Paragraph 52.

41. Following the completion date of each Selenium Treatment System, the Decree shall remain in effect for the individual Outlet(s) until such time as the Selenium Treatment System(s) are constructed and until that Outlet has achieved 90% compliance with its selenium effluent limitations for six (6) consecutive months. For the purposes of the termination provisions of the

Decree, compliance with the monthly average limitations shall be calculated as an average over the entire six (6) month period. Once Mingo Logan believes it has achieved compliance with the remedial measures of the Consent Decree, it shall notify WVDEP in writing. If the parties are in agreement that Mingo Logan has satisfied its obligations, they shall notify the Court and jointly request termination of jurisdiction. If the parties are in disagreement as to Mingo Logan's compliance, the parties shall request a determination from the Court.

42. Mingo Logan will treat flow sufficient to comply with its permit requirements.

VI. CIVIL PENALTY

43. In settlement of the WVDEP's claims in the Complaint relating to reported violations of the WPCA and Permits and for relief under W.Va. Code § 22-3-17(j), and Mingo Logan without admitting liability for any alleged violation or agreeing to the appropriateness of the civil penalty expressed herein except in the context of this Consent Order, agrees for purposes of the settlement provided for herein that it shall pay a total civil penalty of $ 27,500. The civil penalty calculation does not include penalties for WV1004956, Outlets 001 & 015 because Mingo Logan has already paid a civil penalty for violations during the relevant time period as part of the settlement entered in *OVEC v. Coal-Mac, et al.*, 3:10-cv-00833, nor does it include violations of non-selenium parameters, which were assessed as part of the settlement entered in *USEPA, et al. v. Arch Coal, Inc., et al.,* 2:11-cv-00133.

44. Mingo Logan shall pay $27,500 by certified or cashier's check to the WVDEP for deposit in the WVDEP's Mining and Reclamation Operations Fund within thirty (30) days after entry of this Consent Order.

45. Mingo Logan shall pay by certified or cashier's check to the WVDEP. Payments shall be mailed to:

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

VII. STIPULATED PENALTIES

46. Any exceedance of an interim daily maximum limit shall obligate Mingo Logan to pay $1,000.00 per violation. For the second consecutive violation of an interim daily maximum limit for the same parameter at the same outlet that does not show a reduction in concentration from the first violation, Mingo Logan shall pay $2,000. For the third consecutive and subsequent violations that do not show a reduction in concentration from the previous violation of the interim limit, Mingo Logan shall pay $3,000. Consecutive violations that evidence reductions in concentration from the previous violation shall be assessed a stipulated penalty of $1,000.

47. Mingo Logan shall be liable for stipulated penalties to the WVDEP for failure to comply with the administrative provisions of this Consent Order, including the reporting requirements described in the attachments. Stipulated penalties shall accrue as follows:

Period of Noncompliance	Penalty
1st through 15th day	$500.00 per violation
16th through 30th day	$750.00 per violation
After 30th day	$1,000.00 per violation

48. Mingo Logan shall pay the stipulated penalty established by this Article for any violation of the provisions of this Consent Order as provided by this Article within 15 days of receipt of written demand by WVDEP. Such payments may be made to the WVDEP for deposit in the Mining and Reclamation Operations Fund.

49. The stipulated penalties provided herein pertain only to the requirements of this Consent Order and are in addition to other remedies and sanctions available to the WVDEP by reason of Mingo Logan's failure to comply with the requirements of the Consent Order, the Acts, or its Permits. Any other provision of the Permits not described or set forth in this Consent Order or its attachments shall be sanctioned as provided by the WPCA or the regulations governing coal industry NPDES permits.

50. The schedule of stipulated penalties provided in this Article shall extend through the termination of this Consent Decree.

VIII. REPORTS

51. Mingo Logan shall provide WVDEP with quarterly reports on the status of its development and installation of selenium treatment systems. These quarterly reports shall include a summary of the sampling results for selenium at each Outlet listed in Paragraph 28. The quarterly reports shall indicate what has been accomplished since the submittal of the prior quarterly report, whether Mingo Logan is on the schedule required by this Consent Decree or, if not on schedule, include an explanation of why Mingo Logan 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 IV.B ("Corrective Action Plan") of this Consent Decree until all remedial measures described therein are completed. Each quarterly report shall be submitted to WVDEP with Mingo Logan's quarterly DMR submittal until all of the conditions set forth in 33 are satisfied.

IX. FORCE MAJEURE

52. If any event occurs which causes or may cause a violation of any provision of this Consent Order by Mingo Logan, it 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. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and to be taken by Mingo Logan to minimize the violation, and the timetable by which those measures will be implemented. Mingo Logan will adopt all measures to avoid or minimize any such violation. Mingo Logan shall make all efforts to identify events that cause or may cause a violation of this Consent Order.

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

54. Compliance with any requirement of this Consent Order, by itself, shall not constitute compliance with any other requirement. Mingo Logan must make an individual showing or

proof regarding each delayed incremental step or other requirement for which an extension is sought.

55. This Article VII shall not be applied to extend the aforementioned deadlines by which Mingo Logan shall achieve compliance with all applicable effluent limitations.

X. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

56. The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Order until the Order 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 Order, it may petition this Court for a resolution of the issue.

XI. MODIFICATIONS

57. Should any person seek to intervene in the proceeding before the Circuit Court of Logan County and thereafter challenge this Consent Order upon entry as a final order and judgment, whether the challenge is in the form of an appeal to the Supreme Court of Appeals or a collateral challenge in the federal court of the Southern District of West Virginia, the parties agree that nothing herein prohibits Mingo Logan from seeking relief from the appropriate tribunal to stay its obligations expressed herein until such time that any appeal or challenge is completed and not subject to further review. Provided, however, that Mingo Logan shall not be entitled to a stay or other relief from: (1) the applicable deadlines in this Consent Decree by which Mingo Logan shall achieve compliance with all applicable effluent limitations; (2) the stipulated penalties for which Article VI hereof provides; or (3) liability for the civil penalties for which Article V hereof provides.

XII. PERMITS AND OTHER LAWS AND REGULATIONS

58. This Consent Order is not, and shall not be interpreted to be, a permit or modification of a permit under the Acts, nor shall it relieve Mingo Logan of any other obligation imposed by the Acts, its Permit, or any permit issued under the Acts, except as expressly provided herein, nor shall it in any way relieve Mingo Logan 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 Order. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

XIII. PUBLIC NOTICE

59. The parties acknowledge and agree that final approval of this Consent Order is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. The public shall have at least thirty (30) days in which to make any comments on this Consent Order and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Consent Order if warranted based on comments received during the period for public comments. If the WVDEP makes no changes in response to public comments, Mingo Logan consents to entry of this Consent Order without further notice. If for any reason, this Court should decline to approve this Consent Order in the form presented, this agreement is voidable at the sole discretion of the WVDEP and the terms of the agreement may not be used as evidence in any litigation between the parties.

XIV. EFFECTIVE DATE

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

XV. TERMINATION

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

XVII. EFFECT OF SETTLEMENT

62. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which Mingo Logan has asserted multiple defense, 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. 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 as well as Mingo Logan's belief that the defense raised in response to those allegations would have eliminated or mitigated any penalty assessment.

63. For the purposes of this Consent Decree, Mingo Logan agrees that the Complaint states claims upon which relief can be granted.

64. The WVDEP has evaluated the DMRs for all permitted outlets, agency records regarding the NPDES Permits referenced in the Complaint, and other related information and has completed an evaluation of Mingo Logan's compliance record.

65. 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, including injunctive relief, for the NPDES Permits referenced in the Complaint, and the associated violations of the SCMRA Permits, or violations of water quality standards.

XVIII. SIGNATORIES AUTHORIZED

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

It is so ORDERED this ____ day of _____, 2015

_____

_____, JUDGE

We hereby consent to the entry of this Order.

_____ _____

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

_____ _____

Harold D. Ward , Date
Acting Director, Division of Mining
and Reclamation West Virginia
Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304
(304) 926.0499, Ext. 1448

_____ _____

Jonathan Frame, Esq. Date
WVDEP/Office of Legal Services
601 57th Street, SE
Charleston, WV 25304
(304) 926.0499, Ext. 1448
Counsel for Plaintiff

_____ _____

MINGO LOGAN MINING, LLC Date
By

_____ _____

Christopher M. Hunter (WVBN 9726) Date
JACKSON KELLY PLLC
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ATTACHEMENT A

Permit WV1004956, Outlet 016

A. Mingo Logan has constructed a functioning bioreactor at outlet 001which receives inflow from Pond 1. This bioreactor has demonstrated effective treatment of selenium of inflow into Pond 1. Mingo Logan also has installed a functioning recirculating pump in Pond 1 to manage excess inflow from precipitation events and snowmelt. This system has shown overall performance success in treatment and management of selenium inflow into Pond 1 with outlet 016 acting as the emergency discharge structure for Pond 1.

B. Management of the pumping system has shown problems in pump volumes during excessive precipitation events and also during extended periods of freezing conditions that have affected the discharge lines from the pumping system.

C. Mingo Logan will submit a Plan of Action to intercept and prevent untreated discharge from outlet 016 due to excessive precipitation/freezing that has been experienced as inflow to Pond 1 by December 15, 2015 from the effective date of the Consent Decree.

D. Mingo Logan will begin construction included in the Plan of Action within three (3) months of approval by West Virginia Department of Environmental Protection. The Plan of Action will include any permitting requirements necessary under the West Virginia Surface Coal Mining and Reclamation Act.

E. All requirements in the approved Plan of Action will be completed within eighteen (18) months of the effective date of the Consent Decree

F. Achieve compliance with selenium effluent limits at outlet 016 and manage all storm flow inflow into Pond 1 by April 30, 2017.