

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No. _____

MINGO LOGAN COAL COMPANY,

Defendant.

CONSENT DECREE

WHEREAS, Plaintiffs, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director, Division of Mining and Reclamation, West Virginia Department of Environmental Protection, ("DEP"), by counsel, has filed a complaint alleging that Defendant, Mingo Logan Coal Company ("Mingo Logan"), has violated the Water Pollution Control Act, West Virginia Code §§ 22-11-1 to -28 (2011) ("WPCA") by causing unpermitted discharges of pollutants into waters of the state, specifically Proctor Hollow and Buffalo Creek, from its permitted facilities in Logan County, West Virginia.

WHEREAS, DEP and Mingo Logan (collectively referred to as "the Parties") have consented to the entry of this Consent Decree ("Decree") without trial of any issues, agree that settlement of this matter is in the public interest and that entry of this Decree is the most appropriate means of resolving this matter; and

WHEREAS Mingo Logan's consent to this Decree is not an admission or adjudication of fact, liability or violation of law;

NOW, THEREFORE, it is **HEREBY ORDERED, ADJUDGED and DECREED** as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to W. Va. Code § 22-11-22.
2. Venue is proper in this Court pursuant to W. Va. Code § 22-11-22 because Mingo Logan's operations are located in Logan County and because the violations referenced herein occurred in Logan County.

II. BINDING EFFECT

3. The provisions of this Decree shall be binding upon DEP and Mingo Logan, its affiliates, officers, directors, agents, assigns, successors in interest and all persons, firms and corporations acting under their control or direction. The provisions of this Decree shall apply to and be binding upon all persons, firms and corporations having notice of this Decree that are, or will be, acting in concert or privity with Mingo Logan or its agents, assigns and any successors in interest. Mingo Logan shall give written notice of this Decree to all successors in interest thirty (30) days prior to transfer of ownership and shall simultaneously verify, in writing, to DEP that such notice has been given. Mingo Logan must obtain the written agreement of any transferee prior to transfer of the facility that the transferee will be bound by this Decree and will submit to the jurisdiction of this Court for its enforcement.

III. DEFINITIONS

4. Unless otherwise defined herein, terms used in this Decree shall have the meaning given to those terms in the WPCA and the rules promulgated thereunder.

IV. OBJECTIVES

5. It is the express purpose of the Parties in entering into this Decree to further the goals of the WPCA. All obligations in this Decree shall be interpreted in a manner consistent with causing Mingo Logan to comply fully with all West Virginia National Pollutant Discharge Elimination System (“WVNPDES”) permits and with the requirements of applicable federal and state laws, regulations and rules.

V. ORDER FOR COMPLIANCE

6. In order to determine compliance with this Decree, DEP and its authorized representatives shall have the right to enter without a warrant into and upon the permitted facilities (WVNPDES Permit No. WV0066567) and upon any place where records relating to this Decree are kept. Such person(s) shall inform an on-site Mingo Logan supervisor or employee that he is present at the facilities and, upon request, present identification and explain that the information sought may be used to verify compliance with terms of this Decree. DEP shall have the right to, inter alia:

- A. Monitor the activities required by this Decree;
- B. Verify any data or information submitted to DEP;
- C. Conduct sampling; and
- D. Inspect and review any record required to be kept under the terms of this Decree, applicable WVNPDES permits or applicable laws, regulations or rules.

7. This Section does not limit any right of entry and inspection held by DEP pursuant to applicable federal or state laws, regulations, rules or permits.

8. Mingo Logan shall not install a valve or other flow limiting device or otherwise obstruct the Adkins Fork mine discharge without specific approval from DEP in the form of a permit modification of WV/NPDES Permit No. WV0066567.

VI. CIVIL PENALTIES

9. In settlement of DEP's claims for relief under W. Va. Code §§ 22-11-22 in its Complaint relating to any and all violations of the WPCA, Mingo Logan, without admitting liability for any alleged violations, shall pay a total of three hundred fifty thousand dollars (\$350,000.00). This payment reflects consideration by DEP of relevant assessment factors, including, but not limited to, deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, willfulness and history of compliance.

10. Within thirty (30) days after entry of this Decree, Mingo Logan shall pay three hundred thousand dollars (\$300,000.00) to DEP, by certified or cashier's check payable to "West Virginia Department of Environmental Protection" for deposit in the Stream Restoration Fund. Such check will be mailed to:

**Harold Ward, Deputy Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304**

The \$300,000.00 will be dedicated by DEP to stream restoration and enhancement projects providing lasting improvements in the Buffalo Creek Watershed, Logan County, West Virginia, provided however, that if within five (5) years from the effective date of this Decree, the entire \$300,000.00 has not been expended for projects in the Buffalo Creek Watershed, Logan County, West Virginia, the remaining funds shall be available for stream restoration and enhancement projects in other watersheds. The DEP may consult with the Buffalo Creek Watershed

Association in identifying stream restoration and enhancement projects on which these funds may be expended. In addition, should the Buffalo Creek Watershed Association present DEP with one or more proposals which: (1) will accomplish stream restoration and enhancement providing lasting improvements to the Buffalo Creek Watershed at a specified, reasonable cost; (2) identify the work to be performed in sufficient detail; and, (3) identify a responsible contractor willing to perform proposed work of the project for the specified cost and on terms acceptable to DEP, then the DEP is hereby **AUTHORIZED** and **ORDERED** to expend such funds from the Stream Restoration Fund for the project(s) (total project funding not to exceed \$300,000.00 in the aggregate). The determinations as to whether a proposed project will accomplish stream restoration and enhancement providing lasting improvements to the Buffalo Creek Watershed, the specified cost is reasonable, the work to be performed is identified in sufficient detail, the proposed contractor is responsible and the terms for performance of the work are reasonable are to be made by the DEP, in its sole discretion.

11. The remaining \$50,000.00 of Mingo Logan's civil penalties shall be satisfied by providing the Buffalo Creek Watershed Association an annual charitable contribution of \$10,000.00 for five years for its use in watershed and community improvements in the Buffalo Creek Community, Logan County, West Virginia. The first payment shall be made by January 1, 2012 and each subsequent payment shall be made by January 1st of each following year, with the last payment being made by January 1, 2016 Mingo Logan shall submit its contribution by cashier's check made payable to the "Buffalo Creek Watershed Association" and shall be tendered to:

Buffalo Creek Watershed Association
Post Office Box 177
Accoville, West Virginia 25606

12. Mingo Logan shall simultaneously verify, in writing, to DEP that such annual contribution has been made.

VII. STIPULATED PENALTIES

13. For failure to comply with Article V Order for Compliance herein, or to submit any payment as required by Article VI Civil Penalties herein, Mingo Logan shall be obligated to pay the following stipulated penalties to WVDEP:

- A. For the 1st through 15th day of noncompliance, Mingo Logan shall pay \$500 per day per violation;
- B. For the 16th through 30th day of noncompliance, Mingo Logan shall pay \$750 per day per violation; and
- C. For any period of noncompliance after the 30th day, Mingo Logan shall pay \$1,000 per day per violation.

Stipulated penalties shall be payable within thirty (30) days of receipt of a written demand from the DEP. Such payments shall be made by certified or cashier's check payable to "West Virginia Department of Environmental Protection" and delivered to the address specified in Paragraph 10 for deposit in the Stream Restoration Fund.

VIII. FAILURE OF COMPLIANCE

14. DEP does not, by consent to the entry of this Decree, warrant or aver in any manner that Mingo Logan's complete compliance with this Decree will result in compliance with the WPCA or its WVNPDES permits. Mingo Logan shall remain solely responsible for its compliance with the terms of the WPCA, this Decree, its WVNPDES permits and all applicable provisions of federal and state law, regulations and rules.

15. The obligations herein shall be in addition to any other remedies or sanctions that may be available to DEP by reason of Mingo Logan's failure to comply with the requirements of the Decree, its other WVNDPES permits or any provision of federal or state law, regulations or rule. DEP may, inter alia, file separate actions for statutory penalties or injunctive relief against Mingo Logan for violations of any provision of federal or state law, regulations or rules that occur after the filing of the complaint in this matter.

IX. FORCE MAJEURE

16. If any event occurs that causes or may cause a violation of any provision of this Decree by Mingo Logan, Mingo Logan shall notify DEP 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 Deputy 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 Mingo Logan to minimize the violation, and the timetable by which those measures will be implemented. Mingo Logan will take 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 Decree.

17. If DEP agrees that any violation of this Decree 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. Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Mingo Logan's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event DEP 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 Mingo Logan. Failure by Mingo Logan to comply with the notice requirements in Paragraph 21 shall render this paragraph 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.

18. An extension of one compliance date based on a particular incident shall not result in an extension of subsequent compliance date or dates, unless specifically authorized by DEP. Mingo Logan must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

19. Compliance with any requirement of this Decree, by itself, shall not constitute compliance with any other requirement. Mingo Logan shall bear the burden of proving that any delay or violation of any requirement was caused entirely by circumstances beyond the control of Mingo Logan or any entity controlled by Mingo Logan, including Mingo Logan's agents, consultants or contractors. Mingo Logan shall also bear the burden of proving the duration and extent of any delay or violation attributable to such circumstances.

X. DISPUTE RESOLUTION

20. In the event that a dispute arises regarding the implementation of this Decree, any party may submit the dispute to the Court for resolution. Unless Mingo Logan petitions the Court to resolve a dispute, Mingo Logan shall follow the position of DEP. In any petition to the Court concerning the dispute, Mingo Logan shall set forth the nature of the dispute and a proposal for resolution. DEP shall have thirty (30) days to file their response and may advocate one or more

alternative proposals for resolution. Said dispute shall be resolved in accordance with the objectives of this Decree and the WPCA.

XI. ADDRESS FOR SERVICE

21. Unless otherwise specified, all notices, documents, reports or other submissions required by this Decree shall be mailed first class, certified mail, return receipt requested, to the following addresses:

For DEP:

**Harold Ward, Deputy Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304
harold.d.ward@wv.gov**

For Mingo Logan:

**Director of Engineering and Technical Services
Arch Coal, Inc.
Eastern Operations
c/o John McDaniel
300 Corporate Centre Drive
Scott Depot, West Virginia 25560**

XII. EFFECT

22. This Decree settles the civil claims against Mingo Logan for violations of the WPCA alleged in the complaint filed by DEP. The violations settled by this Decree occurred prior to and until the date of the filing of the complaint by DEP.

XIII. NONWAIVER PROVISIONS

23. This Decree is not and shall not be construed as either a WVNPDES permit or a modification of any existing WVNPDES permit. Any new permit or modification must be obtained in accordance with applicable federal and state laws, regulations and rules.

24. This Decree shall not affect Mingo Logan's obligation to comply with all applicable federal, state and local laws, regulations, rules and permits.

25. DEP expressly reserves, and nothing herein shall be construed to limit, its right to pursue all remedies available for violations of any federal or state laws, regulations or rules not specially pleaded in the complaint filed in this matter.

26. Nothing herein shall be construed to limit the rights of DEP to undertake any criminal enforcement activity against any person.

27. Nothing herein shall be construed to limit the authority of DEP to undertake any actions in response to conditions which may present an imminent and substantial endangerment to the public health, welfare or the environment.

XIV. MODIFICATION

28. This Decree contains the entire agreement of the Parties and shall not be modified by any prior oral or written agreement, representation or understanding.

29. This Decree may be modified with the written consent of all Parties and approval of the Court. Any mutually agreed-upon modification to this Decree shall be filed with the Court.

XV. EFFECTIVE DATE

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

XVI. RETENTION OF JURISDICTION

31. The Court shall retain jurisdiction of this case in order to enforce and implement the Decree and to interpret the rights and obligations of the Parties to the Decree. Such jurisdiction shall not terminate until all requirements of this Decree have been terminated and all disputes arising under this Decree have been resolved.

XVII. TERMINATION

32. This decree shall terminate either upon payment of all sums owed hereunder or by the Court's Order granting a motion of any party to the Court after all of the following have occurred:

A. Mingo Logan has achieved compliance with all provisions contained in this Decree;

B. Mingo Logan has paid all penalties due hereunder and no amounts are outstanding or owed to DEP;

C. Mingo Logan has certified, pursuant to Section IX, compliance with the above requirements to the Court and DEP; and

D. DEP, within thirty (30) days of receiving such certification from Mingo Logan, has not opposed Mingo Logan's claims. If DEP opposes termination, any dispute shall be resolved pursuant to the dispute resolution provisions of this Decree.

XVIII. COSTS OF SUIT

33. DEP and Mingo Logan shall each bear their own costs and attorney's fees.

XIX. PUBLIC NOTICE

34. The parties acknowledge and agree that final approval of this Decree is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. Mingo Logan shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Decree. The public shall have at least thirty (30) days in which to make any comments on this Decree and DEP reserves the right to withhold or withdraw its consent or to propose modifications to this Decree if warranted based on comments received during the period for public comments. If DEP modifies this Decree in response to public comments, Mingo Logan

may either consent to, or withhold consent to, entry of the modified Decree. If DEP makes no changes in response to public comments, Mingo Logan consents to entry of this Decree without further notice. If for any reason this Court should decline to approve this Decree in the form presented, this agreement is not binding on and of no effect to the Parties.

XX. AUTHORITY TO SIGN

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

XXI. APPROVAL AND ENTRY OF CONSENT DECREE

36. The Parties enter into this Decree and submit it to the Court that it may be approved and entered:

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

Honorable Circuit Court Judge

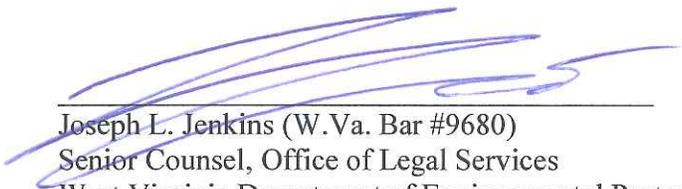
We hereby consent to the entry of this Decree:

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



Joseph L. Jenkins (W.Va. Bar #9680)
Senior Counsel, Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, West Virginia 25304
Phone: (304) 926-0499 x 1444
Counsel for DEP

11/30/11
Date

John McDaniel
Director of Engineering and Technical Services
Arch Coal, Inc., Eastern Operations
300 Corporate Centre Drive
Scott Depot, West Virginia 25560

Date

Robert G. McLusky, Esq. (W.Va. Bar #2489)
Jackson Kelly, PLLC
Post Office Box 553
Charleston, West Virginia 25322
Phone: (304) 340-1381
Counsel for Mingo Logan

Date