

**IN THE CIRCUIT COURT OF MCDOWELL 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-109-S**

**RIVERSIDE ENERGY COMPANY, LLC,**

**Defendant.**

**CONSENT DECREE**

Upon agreement to the terms herein by the parties, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively, the "Directors") of the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and Riverside Energy Company, LLC (hereinafter "Riverside"), the parties agree that it is their intent to resolve the violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§ 22-11-1 *et seq.*, and associated violations of the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA"), West Virginia Code §§ 22-3-1 *et seq.* (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. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 and 22-3-17 because Riverside 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**

2. This Consent Decree applies to and is binding upon WVDEP and Riverside and its successors, as both the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter "WV/NPDES") Permits Nos. WV1018876 and WV1006509 (the "NPDES Permits") and the permittee of Surface Mining Permits No. U-4023-87 and E-0037-00 (the "SCMRA Permits").

## **III. FINDINGS OF FACT**

3. The Directors filed a Complaint in the Circuit Court of McDowell County, West Virginia against Riverside as set forth above in the caption of this Consent Decree. The Complaint alleges that Riverside violated the WPCA and the WVSCMRA through discharges of pollutants from its mining facilities in McDowell County, West Virginia, which are covered by the NPDES Permits. The SCMRA Permits authorize underground mining and the surface effects associated therewith at the mines and the NPDES Permits authorize discharges from the mines.

### **Statutory and Regulatory Background**

4. WVDEP issued the NPDES Permits pursuant to its authority under the WPCA and 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.

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

6. Riverside has reported the quality of its discharges and other information to the WVDEP pursuant to the terms and conditions of the NPDES Permits. This reporting has occurred through submittal of monthly Discharge Monitoring Reports (hereinafter "DMRs") as prescribed by the WVDEP.

7. Riverside's mining operations are also covered by the SCMRA Permits which the WVDEP issued on December 28, 1988 for Permit No. U-4023-87 and October 29, 1980 for Permit No. E-0037-00.

8. The WVDEP issued the SCMRA Permits pursuant to its authority under the 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 ("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* 30 C.F.R. §§ 732.12 and 948.10.

9. The rules promulgated by the WVDEP implementing WVSCMRA prohibit violations of effluent limitations contained in the NPDES Permits and prohibit violations of water quality standards. *See* W. Va. Code St. R. § 38-2-14.5.b. The monitoring frequency and effluent limitations are governed by standards set forth in the NPDES Permits.

### **Violations of Effluent Limits**

10. The WVDEP's review of DMRs submitted by Riverside for the period from June 1, 2007 through March 31, 2011 identified results reported in excess of stated effluent limits for selenium in WV/NPDES Permit No. WV1018876 at Outlets 001 and 007. WVDEP also identified results reported in excess of the stated effluent limits for total aluminum at Outlet 001 of WV/NPDES Permit No. WV1006509. These results occurred during a two-month period during which this permit had been extended pending reissuance. The WVDEP has determined that the "monitor only" requirement for total aluminum should have been in place until WV/NPDES Permit No. WV1006509 was reissued with effluent limits based on the new warm water aquatic life water quality criteria for aluminum.

11. As part of its review of Riverside's DMRs, the WVDEP also identified results for iron and manganese in the review period that were in excess of the effluent limits in the NPDES Permits; however, these exceedances were previously the subject of a civil administrative penalty imposed pursuant to Consent Order No. M-08-009 between WVDEP and Riverside. Consent Order No. M-08-009 covered exceedances of WV/NPDES permit limits at the NPDES Permits prior to April 2008. Consent Order No. M-08-009 is incorporated by reference into this Consent Decree, and the WVDEP hereby confirms that the penalty assessed by the agency, and paid by Riverside, pursuant to Consent Order No. M-08-009 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 at the NPDES Permits, including those DMRs from the period covered by Consent Order No. M-08-009, and the parties agree that specific corrective action and/or compliance steps are appropriate for the Outlets and parameters listed in Paragraph 34(ii), below.

### **Selenium Effluent Limits**

12. WV/NPDES Permit No. WV1018876 contains ten permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, WV/NPDES Permit No. WV1018876 includes final effluent limits for that parameter at each outlet, although, as further described in Paragraphs 25 and 26 below, those limits are the subject of stays issued by the West Virginia Environmental Quality Board and Circuit Court of Kanawha County. On or about April 5, 2007, WVDEP modified the compliance schedule in WV/NPDES Permit No. WV1018876 such that Riverside was required to report selenium levels in the effluent from the outlets until 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 5, 2010.

13. For both NPDES Permits, the only outlet that has consistently had flows with selenium levels greater than the not-yet-effective final limits during the period from April 2007 through April 2010 is Outlet 007 on WV/NPDES Permit No. WV1018876. With the exception of Outlet 001 on WV/NPDES Permit No. WV1018876, the other Outlets covered by the NPDES Permits either have not had flows or have had levels of selenium less than the final limits from April 2007 to the present.

14. During the period prior to April 5, 2010, Riverside installed a zero-valent iron-based ("ZVI") pilot treatment system at Outlet 007 on WV/NPDES Permit No. WV1018876. It currently treats a portion of the inflow into the treatment pond at Outlet 007. The amount of inflow being treated has ranged from five to forty percent of the total inflow, depending on the amount of inflow. This ZVI treatment system has shown promise in reducing selenium levels, but the system is not

ready for full-scale implementation. Riverside is continuing to refine and improve the system in coordination with its consultants.

15. Riverside has refined and improved the ZVI treatment system by increasing the number of ZVI-filled totes that are used to treat the discharge and thereby increasing the amount of inflow into the treatment pond which is treated, by installing a sand filter to improve the effectiveness of the ZVI treatment systems, and by evaluating and installing a pH modifying device to improve the treatment conditions in the totes. These efforts to refine the treatment process and increase the amount of inflow being treated are ongoing.

16. Riverside has also continued to evaluate other outlets' selenium levels over time to understand and address problem areas, and continues to evaluate other treatment options for outlets where the ZVI system may not be the best treatment option, including, but not limited to, several different types of microbial/biological treatment technology.

17. In 2010, Outlet 001 on WV/NPDES Permit No. WV1018876 began to have more regular flows after a period of approximately 18 months with no discharges.

18. Riverside has installed a start-up scale microbial/biological treatment system at Outlet 001 on WV/NPDES Permit No. WV1018876. Preliminary results from the start-up scale microbial/biological treatment system have shown success in reducing the amount of selenium in the effluent from Outlet 001.

19. The outlets on WV/NPDES Permit No. WV1006509 have not discharged above the final effluent limit for selenium during the period from April 2007 through the present.

20. On October 30, 2009, WVDEP approved Riverside's contingency treatment plan which allowed Riverside to concentrate its treatment development efforts on WV/NPDES Permit No. WV1018876 and apply the lessons learned at this site to other outlets if they began to discharge.
21. The parties agree that information available to them, including information related to Riverside's treatment efforts as well as those at other mine sites, provides a reasonable basis upon which to conclude that Riverside will achieve compliance with its final selenium effluent limits by the dates set forth in Paragraph 34(ii) herein.
22. Despite Riverside's efforts to come into full compliance with its selenium effluent limits by April 5, 2010, Riverside could not do so.
23. On February 16, 2010, Riverside filed a request to modify the NPDES Permits, as well as WV/NPDES Permit Nos. WV0031607 and WV1005677, to extend the final effective date for its effluent limits for selenium beyond April 5, 2010.
24. On February 23, 2010, the WVDEP issued a draft permit modification based on Riverside's application and commenced a public comment period on the proposed modification. On March 4, 2010, prior to the close of the public comment period, Director Clarke issued an order denying the modification request and stating that the draft permit modification had been issued prematurely.
25. On March 10, 2010, Riverside filed an administrative appeal with the West Virginia Environmental Quality Board seeking redress for the WVDEP's denial of its modification application. The Board subsequently granted a stay of the final limits for selenium which were to go into effect on or about April 5, 2010. This appeal is still pending. The Environmental Quality Board has placed this appeal on the inactive docket while the WVDEP and Riverside pursued resolution of all issues raised in the appeal and this civil action through an omnibus settlement.

26. Riverside 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 and it remains in effect.

27. By a Memorandum Opinion and Order dated March 31, 2011 in *Ohio Valley Environmental Coalition, Inc. v. Coal-Mac, Inc.*, --- F. Supp. 2d ----, 2011 WL 1237643 (S.D. W. Va.), the District Court for the Southern District of West Virginia held that stays issued to similarly situated permittees by the Environmental Quality Board and the Circuit Court of Kanawha County were invalid. Because Riverside was not a party to this case, the District Court's decision does not invalidate the stays issued to Riverside, and Riverside believes that the Environmental Quality Board and the Circuit Court of Kanawha County stays were properly issued. Notwithstanding the existence of the stays, however, and for the purposes of this consent decree only, the parties agree that any reported result of selenium above the final effluent limits for selenium stated in the NPDES Permits shall be considered an exceedance of the final effluent limits subject to penalty assessment.

#### **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 Riverside 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, now and in the future, related to any claims asserted in the Complaint for the NPDES Permit and the SCMRA Permit and associated performance standards from June 1,

2007 through March 31, 2011. The civil penalty assessed by the Court in this Consent Decree reflects the WVDEP's belief that it could prove violations of effluent limits and other allegations raised in the Complaint as well as Riverside's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

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

30. The parties agree that the civil penalties to be paid by Riverside 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 from June 1, 2007 through March 31, 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 Riverside's compliance record. In completing this evaluation, the WVDEP has considered whether reported results for any parameter other than selenium that may have been subject to a "report only" requirement were in fact violations of the NPDES Permit or any applicable statutory or regulatory requirement. WVDEP exercised its enforcement discretion in determining that no 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, including injunctive relief, for known violations of the NPDES Permits and the associated violations of the SCMRA Permits and associated performance standards, or violations of water quality standards, during the period from June 1, 2007 through March 31, 2011 pursuant to 33 U.S.C. § 1365(a)(1)(A)

and 30 U.S.C § 1270. SCMRA Permit violations, if any, that are not violations associated with the NPDES Permit violations resolved herein are not settled or resolved by this Consent Decree.

33. Upon entry of this Decree, Riverside agrees to voluntarily withdraw its permit modification request and related administrative appeal and to diligently take any other actions reasonably necessary to obtain the dismissal of that appeal with prejudice. Riverside further agrees that upon entry of this Decree, it will seek to dismiss, with prejudice, of the Kanawha County Circuit Court action to dissolve the injunction currently in place and to take any other actions reasonably necessary to obtain the dismissal of that action. Riverside further agrees that it will accept the implementation of the final effluent limits for selenium at WV/NPDES Permit Nos. WV1006509, WV1005677 and WV0031607, which will be immediately effective upon withdrawal of any administrative appeal and dismissal of the injunction.

#### **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 Riverside shall (i) immediately take measures to initiate compliance with all effluent limits in the NPDES Permits, and (ii) engage in a corrective action plan for selenium treatment at Outlets 001 and 007 on WV/NPDES Permit No. WV1018876 as follows:

- a. Riverside shall continue implementation of its ZVI treatment systems for Outlet 007 consistent with the timeframes set forth in the schedule attached as Exhibit 1. The amount of inflow to Outlet 007 that shall be treated by the ZVI treatment systems is anticipated to be five to forty percent and Riverside shall evaluate the potential to increase treatment capacity to ten to fifty percent.

- b. Riverside shall continue to install and refine the microbial/biological start-up scale treatment system at Outlet 001 consistent with the timeframes set forth in the schedule attached as Exhibit 2. Due to the intermittent nature of the discharge from Outlet 001, Riverside shall assure during periods of no flow from that outlet that sufficient inflow from Outlet 007 is directed to the microbial/biological treatment systems to assure that the effectiveness of the treatment system can be evaluated.
- c. The treatment systems installed and operated at Outlets 001 and 007 will be designed and implemented to determine the effectiveness of these treatment systems and evaluate the potential for these systems to be installed at other Riverside outlets, should that become necessary. These treatment systems will be designed and installed in a manner to provide meaningful data, including evaluation of selenium removal efficiencies, related to the effectiveness of the treatment method for conditions comparable to those anticipated at outlets for which treatment may be installed and with consideration of Riverside's ability to scale up the treatment system or systems selected to achieve compliance with final limits.
- d. Riverside shall conclude the evaluation phase of the start-up scale projects described in subparagraphs a. and b. and shall evaluate the effectiveness of the pilot projects and provide a report on the same to WVDEP by the dates specified in Exhibits 1 and 2, respectively.
- e. By July 15, 2011, Riverside shall designate the treatment systems it will install at Outlets 001 and 007 on WV/NPDES Permit No. WV1018876 to ensure compliance with the final limits currently set forth in the NPDES Permit by the dates set forth in

- subparagraph f. below, or explain in writing any determination that no further treatment system is required at any specific outlet(s) in order to comply with final permit limits. Upon designating any treatment system it will install at Outlets 001 and 007, Riverside shall immediately initiate any additional engineering designs and other work necessary to ensure the designated treatment systems will be operational on or before the dates set forth in subparagraph f. below. The selected treatment system will be designed to withstand expected periodic fluctuations in flows from the underground mine voids that produce the discharges at Outlets 007 and 001 and still achieve compliance with final selenium limits. Riverside shall complete construction of any designated treatment systems for Outlet 007 by June 15, 2012 as specified in Exhibit 1 and shall complete construction of any designated treatment systems for Outlet 001 by June 15, 2012 as specified in Exhibit 2; provided that Riverside may install additional treatment capacity or make other changes or revisions to the constructed treatment systems after the dates set forth above to improve the treatment capacity or efficiency of the treatment systems.
- f. Riverside shall come into compliance with the final effective limits for selenium in WV/NPDES Permit No. WV1018876 for Outlets 001 and 007 by September 1, 2012.
  - g. Riverside shall come into compliance with the final effective limits for selenium in its NPDES Permits for any outlet not listed in subparagraph f. upon entry by this Court of this Consent Decree.

## VI. CIVIL PENALTIES

35. In settlement of the WVDEP's claims in its Complaint relating to any and all reported violations of the WPCA and NPDES Permits and WVSCMRA and the SCMRA Permits for relief

under W. Va. Code §§ 22-11-22 and 22-3-17, Riverside, 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 of one hundred nine thousand and six hundred eighty two dollars (\$109,682). This civil penalty reflects consideration by the WVDEP of relevant civil penalty assessment factors, including but not limited to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance as set forth below.

- a. Riverside shall pay a total cash penalty of one hundred nine thousand and six hundred eighty two dollars (\$109,682) by certified or cashier's check to the WVDEP for deposit in the WVDEP's Stream Restoration Fund, payable within 60 days of the entry of this Decree.
- b. Payments shall be mailed to the following address:

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

#### **VIII. INTERIM LIMITS**

36. Riverside shall be assigned and comply with the following interim limits leading to compliance with the final selenium limits at Outlets 001 and 007 on WV/NPDES Permit No. WV1018876:

Outlet	Phase I Interim Limits Entry date of Decree to January 31, 2012	Phase II Interim Limits February 1, 2012 to August 31, 2012
WV1018876 – 001	12.5 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly
WV1018876 – 007	12 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly

37. The WVDEP shall enforce the interim limits contained in Paragraph 36 through the stipulated penalties set forth in Paragraph 39 below. The interim limits in Paragraph 36 will terminate on September 1, 2012.

38. For all other parameters and outlets, the WVDEP shall enforce the final effective limits currently listed in the NPDES Permits.

#### **IX. STIPULATED PENALTIES**

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

- a. For the violation of a Phase I interim limit, Riverside shall pay \$2,000 per violation. For the second consecutive violation of a Phase I interim limit which does not show a reduction in the level of selenium from the first violation, Riverside shall pay \$2,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation interim limit, Riverside shall pay

\$3,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$2,000.

b. For the violation of a Phase II interim daily maximum limit, Riverside shall pay \$4,000 per violation. For the second consecutive violation of a Phase II interim daily maximum limit which does not show a reduction in the level of selenium from the first violation, Riverside shall pay \$4,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation of the interim daily maximum limit, Riverside shall pay \$5,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$4,000.

c. For the violation of a Phase II interim average monthly limit, Riverside shall pay \$5,000. For the second consecutive violation of a Phase II interim average monthly limit which does not show a reduction in the level of selenium from the first violation, Riverside shall pay \$7,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation of the interim average monthly limit, Riverside shall pay \$10,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$5,000.

40. For violation of any final effective effluent limit in the NPDES Permits other than the effluent limits for selenium at Outlets 001 and 007 on WV/NPDES Permit No. WV1018876, which are subject to the interim limits set forth in Paragraph 36 above, Riverside shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For each exceedance of a daily maximum limit from April 1, 2011 through September 30, 2011, Riverside shall pay \$1,000.
- b. For each exceedance of a daily maximum limit from October 1, 2011 through March 31, 2012, Riverside shall pay \$2,000.
- c. For each exceedance of a daily maximum limit from April 1, 2012 through August 31, 2012, Riverside shall pay \$3,000.
- d. For each exceedance of an average monthly limit from April 1, 2011 through September 30, 2011, Riverside shall pay \$3,000.
- e. For each exceedance of an average monthly limit from October 1, 2011 through March 31, 2012, Riverside shall pay \$4,000.
- f. For each exceedance of an average monthly limit from April 1, 2012 through August 31, 2012, Riverside shall pay \$5,000.

41. For failure to take or complete any step outlined in the corrective action plan set forth in Paragraph 34(ii) herein, to submit any payment as required by Paragraph 35 herein, or to submit any report as required by Paragraph 45 herein, Riverside 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, Riverside shall pay \$500 per day per violation;
- b. For the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance, Riverside shall pay \$750 per day per violation; and
- c. For any period of noncompliance after the 30<sup>th</sup> day, Riverside 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.b for deposit in the Stream Restoration Fund.

43. The Phase I stipulated penalties provided in Paragraph 39 shall apply to any selenium result from Outlets 001 and 007 that exceeds the final effective limits in the NPDES permit for the period from April 1, 2011 to the entry of this Consent Decree.

44. The schedule of stipulated penalties provided in Paragraphs 40 and 41 shall be effective from the entry date of this Consent Decree through August 31, 2012.

#### **X. REPORTS**

45. Riverside shall provide WVDEP with quarterly reports on the status of its evaluation and/or development of, and installation of selenium treatment systems. These quarterly reports shall include a summary of the sampling results above the interim limits for selenium at each Outlet listed in Paragraph 34(ii). The quarterly reports shall indicate what has been accomplished since the submittal of the prior compliance report, whether Riverside is on the schedule required by this Consent Decree or, if not on schedule, an explanation of why Riverside 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 the Order for Compliance section of this Consent Decree until all remedial measures described therein are completed. Each quarterly report shall be submitted to WVDEP beginning December 30, 2011, and every three months thereafter until all the conditions set forth in Paragraph 53 are satisfied.

## XI. FORCE MAJEURE

46. If any event occurs that causes or may cause a violation of any provision of this Consent Decree by Riverside, Riverside 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 Riverside to minimize the violation, and the timetable by which those measures will be implemented. Riverside will take all measures to avoid or minimize any such violation. Riverside 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 Riverside, Riverside shall be excused as to that violation for the period of time the violation continues due to such circumstances. Riverside'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 Riverside 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 Riverside and the length of such delay shall rest with Riverside. Failure by Riverside 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 Riverside'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. Riverside must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

#### **XII. 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.

#### **XIV. 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 Riverside of any other obligation imposed by the WPCA, its NPDES Permits, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve Riverside 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. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

#### **XV. 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. Riverside 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, Riverside 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, Riverside 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.

#### **XVI. 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.

#### **XVII. 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) Riverside has achieved complete compliance with all requirements of this Consent Decree; (2) Riverside 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 have been fully satisfied.

#### **XVIII. SIGNATORIES AUTHORIZED**

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.

We hereby consent to the entry of this Decree:

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

\_\_\_\_\_  
Date

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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Jonathan C. Frame (WVSB #10182)  
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*

\_\_\_\_\_  
Date

\_\_\_\_\_  
Allyn G. Turner (WVSB #5561)  
Spilman Thomas & Battle, PLLC  
Post Office Box 273  
Charleston, WV 25321-0273  
[aturner@spilmanlaw.com](mailto:aturner@spilmanlaw.com)  
*Counsel for Defendant*

\_\_\_\_\_  
Date

## EXHIBIT 1

### OUTLET 007

A. Continue pilot treatment system development through ongoing pilot scale testing and adjustments to the pilot scale technology:

1. Evaluate feasibility of adding additional totes for treatment of increased flows through start-up scale treatment system. June 15, 2011

2. Evaluation of data from start-up scale treatment system in conjunction with completion of #1 above. July 15, 2011

B. Submit quarterly status report on treatment system efforts to the WVDEP. Quarterly, beginning December 30, 2011

C. Submit report to WVDEP on anticipated success of ZVI treatment system and final selection of selenium treatment system for Outlet 007. July 15, 2011

D. Begin design of scaled-up treatment system. July 15, 2011

E. Submit all necessary permit modification applications to WVDEP, and, if necessary a request for a letter of approval to begin preparatory work before the permit modification application is approved.\* (\*\*this will address alternative technologies if determined to be necessary based on C. above\*\*)

October 15, 2011

F. Begin site preparation and initiate construction of treatment system. February 15, 2012

G. Begin testing of installed treatment system and making any necessary adjustments to achieve final compliance. June 15, 2012

H. Achieve compliance with final selenium effluent limits. September 1, 2012

*\* The parties agree that review and approval of a complete application for this modification should be completed within 120 days of submission, and the subsequent deadlines herein are based on this anticipated timeframe.*

*\*\* Alternative ZVI technologies, emerging biological technologies, phytoremediation and/or other technologies are being considered concurrently for use if it is determined based on C. above that an alternate technology will be pursued.*

## EXHIBIT 2

### OUTLET 001

A. Continue pilot treatment system development through ongoing pilot scale testing and adjustments to the pilot scale technology:

1. On-site status meeting with Water's Edge regarding ongoing start-up scale treatment system development. June 15, 2011
2. Complete evaluation of the ability to increase flow through start-up scale treatment system. July 15, 2011
3. Evaluation of data from start-up scale treatment system in conjunction with completion of #1-#2 above. July 15, 2011

B. Submit quarterly status report on treatment system efforts to the WVDEP. Quarterly, beginning December 30, 2011

C. Submit report to WVDEP on anticipated success of Water's Edge biological reactor treatment system and final selection of selenium treatment system for Outlet 001. July 15, 2011

D. Begin design of scaled-up treatment system. July 15, 2011

E. Submit all necessary permit modification applications to WVDEP, and, if necessary a request for a letter of approval to begin preparatory work before the permit modification application is approved.\* (\*\*this will address alternative technologies if determined to be necessary based on C. above\*\*)

October 15, 2011

F. Begin site preparation and initiate construction of treatment system. February 15, 2012

G. Begin testing of installed treatment system and making any necessary adjustments to achieve final compliance. June 15, 2012

H. Achieve compliance with final selenium effluent limits. September 1, 2012

*\* The parties agree that review of a complete application for this modification should be completed within 120 days of submission, and the subsequent deadlines herein are based on this anticipated timeframe.*

*\*\* Alternative MATRIC technologies, emerging biological technologies, phytoremediation and/or other technologies are being considered concurrently for use if it is determined based on C. above that an alternate technology will need to be pursued.*