

IN THE CIRCUIT COURT OF LOGAN 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-144
(Roger L. Perry, Judge)**

APOGEE COAL COMPANY, LLC,

Defendant.

SETTLEMENT AND CONSENT ORDER

I. Introduction

The parties have jointly submitted the following Settlement and Consent Order (hereinafter "Order") to resolve the above-captioned civil action currently pending before the Court. In support thereof, they state the following facts. Upon its consideration of the pleadings and the parties' joint motion to enter the following Order to conclude the case, the Court concludes there is good cause to enter the Settlement and Consent Order.

II. Background of the Case

Civil action No. 10-C-144 was filed by the Directors of the Divisions of Water and Waste Management and Mining and Reclamation, West Virginia Department of Environmental Protection ("DEP"), against Apogee Coal Company, LLC, ("Apogee") to enforce NPDES permit WV0099520. Although the civil action alleged violations of the effluent limits for several pollutants regulated by the permit, the chief pollutant that was the focus of the action was selenium. No interim or final order has been entered in this case.

NPDES permit WV0099520 was re-issued by the DEP to Apogee on May 26, 2006. The reissued permit contained a requirement for the company to monitor and report for the presence of selenium. It was subsequently modified by an order of DEP on April 5, 2007 to extend the length of that permit provision until April, 2010. The permit was the subject of an appeal brought by citizens before the West Virginia Environmental Quality Board in November 2007 challenging the permit extension in which the monitor and report provision was sustained.

NPDES permit WV0099520 was also included in a comprehensive consent decree entered on April 30, 2009 in a civil action brought by the United States and the State of West Virginia in the Southern District of West Virginia in *United States, et al v. Patriot Coal Corporation, et al*, at Civil Action No. 2:09-cv-0099 against Apogee, its affiliates and their parent company. This consent decree was brought to enforce the effluent limits of the permit as to all parameters except selenium. In addition to the injunctive relief required by the consent decree, Apogee has paid civil penalties in an amount stipulated for any violations of the effluent limits of the permit except selenium. The civil penalties collected for effluent violations from WV0099520, if any, have been shared by the United States and West Virginia.

On February 18, 2011, a civil action was filed in the United States District Court for the Southern District of West Virginia in *OVEC v. Patriot Coal Corporation* at Civil Action No. 3:11-cv-0115 as a citizens' complaint against Apogee Coal Company, LLC its parent company and two affiliated companies. The allegations of the citizens' suit identify two outlets, No 001 and No. 011, located on NPDES permit WV0099520 which were the subject of the original proceeding brought in this Court by the DEP, plus permits held by the other two affiliated companies, Hobet Mining and Catenary Coal Company. Following the denial of the defendant companies' motion to dismiss the federal action, the parties negotiated and lodged a

consent decree with the federal court. The proposed consent decree obligates Apogee, Hobet and Catenary to install treatment for selenium at the identified outlets in stages beginning with outlets that have lower volume flows and progressing to outlets that have higher flows. Treatment must be completed at all outlets designated within 60 months of the effective date of the entry of the decree. The consent decree was the subject of public comment, was accepted by the U.S. Department of Justice and was entered by the Federal Court on March 15, 2012 (“Federal Consent Decree”).

Patriot Coal, and substantially all of its subsidiaries including Apogee, filed for reorganization under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Southern District of New York on July 9, 2012. Subsequent to that filing, Apogee negotiated an extension to its compliance deadlines in the Federal Consent Decree with the plaintiffs in that case. The Bankruptcy Court approved a global settlement agreement that incorporates the modification of the Federal Consent Decree following a hearing on December 18, 2012. The U.S. District Court for the Southern District of West Virginia then entered the modified Federal Consent Decree on January 9, 2013. Pursuant to this modified decree, Apogee was required to identify and install a treatment system for Outlet 001 and Outlet 011 of WV0099520 by December 15, 2016 and March 15, 2015, respectively. The obligation to identify and install a treatment system for the two outlets on Apogee’s permit WV0099520 is described in Exhibit C to the Federal Consent Decree entered in Civil Action No. 3:11-cv-0115. A copy of Exhibit C is attached to this Order as Exhibit A..

III. Findings of Fact and Conclusions of Law

1. The Federal Consent Decree entered by the United States District Court for the Southern District of West Virginia at Civil Action No. 3:11-cv-0115 has set a compliance

schedule that authorizes Apogee to comply with the effluent limits for selenium established by permit NPDES permit WV0099520 over a period that will not extend beyond 2016 depending upon the classification of each outlet on the permit identified in the suit.

2. The schedule for compliance established by the Federal Consent Decree Exhibit A attached hereto is predicated on the utilization of treatment systems best suited to the characteristics of each designated outlet. The development of treatment technologies and the schedule for compliance combine to provide a reasonable expectation that Apogee can comply with the effluent limits set for permit WV0099520 by the specified compliance date.

3. To be considered effective, a treatment system must demonstrate the ability to remove a consistent percentage of the selenium found in the waste stream, meet the effluent limits set in the NPDES permits for the purpose of achieving the water quality standard established for the receiving stream, and accommodate the natural variability in selenium content and fluctuation in flow volume that requires treatment.

4. Apogee and DEP concur that their respective interests are best promoted by the company's selection and installation of treatment technology at Outlets 001 and 011, including meeting deadlines that are consistent with those established by the Federal Consent Decree.

5. DEP has the authority to issue and enforce NPDES permits pursuant to W.Va. Code §§22-11-4 and 11, address final effective limits for selenium pursuant to W.Va. Code §22-11-6, and possesses the inherent authority to exercise its discretion to modify previously issued NPDES permits.

6. The timeframe established hereinafter requires Apogee to comply with its effluent limitations for selenium as soon as reasonably practicable under the circumstances.

IV. Order of Compliance

7. Apogee shall propose a strategy for controlling selenium discharged from two outlets on permit WV0099520, identify treatment systems for those outlets and establish a timetable for installation of those systems. Identification and installation of those systems shall follow the timetable established by Exhibit C to the Federal Consent Decree entered in *OVEC v. Patriot Coal Corporation*, and attached hereto.

8. An interim daily maximum effluent limit of 20 ppb for selenium at each outlet is established by this Order until the compliance deadline established for each Category of Outlet per Exhibit C of the Federal Consent Decree attached hereto as Exhibit A and in no instance any later than December 15, 2016.

9. DEP will enforce the permitted effluent limit of 4.7 and 8.2 ppb at each outlet on the date of the compliance deadline established for each Category of Outlet per the attached exhibit.

10. Apogee will install treatment at each outlet by the compliance deadline established for Outlet 011 by March 15, 2015 and for Outlet 001 by December 15, 2016 per Exhibit A.

11. Any selection of a treatment system made by Apogee pursuant to the Federal Consent Decree shall be deemed to be a system that satisfies the provisions of this Order. Nevertheless, any selection shall not relieve Apogee from any requirement to secure any permit needed to install the system selected, nor shall restrict DEP's legal obligation and judgment to review each such application and to determine if a permit may lawfully be issued.

IV. Stipulated Penalties

12. A stipulated penalty in the amount of \$1000.00 shall apply to all violations of the provisions of ¶9 above, arising and hereafter identified for NPDES permit WV0099520 under this Order.

13. Defendants shall be liable for stipulated penalties to the DEP for failure to comply with the administrative provisions of this Order, including the reporting requirements described in the attachments. Stipulated penalties shall accrue as follows:

<u>Period of Noncompliance</u>	<u>Penalty</u>
· 1 st through 15 th day	\$500.00 per day per violation
· 16 th through 30 th day	\$750.00 per day per violation
· After 30 th day	\$1000.00 per day per violation

14. All civil penalties assessed pursuant to this provision shall be presented for payment upon written demand during the time this Order is in effect. Apogee shall pay any sum demanded within 30 days.

15. The stipulated penalties provided herein pertain only to the requirements of this Order and are in addition to other remedies and sanctions available to the DEP by reason of Apogee's failure to comply with the requirements of the Order, the Acts, or its Permits. Any other provision of the Permits not described or set forth in this Order or its attachments shall be sanctioned as provided by the Water Pollution Control Act or the regulations governing coal industry NPDES permits.

16. The provisions of this section shall remain in effect until December 15, 2016.

V. Bi-Monthly Reports

17. Apogee will submit bi-monthly reports to DEP will be identical to the reports now furnished to the United States District Court for the Southern District of West Virginia in Civil Action No. 3:09-cv-1167 on the 15th day in the month when due.

VI. Miscellaneous Provisions

18. The extensions of time and other modifications provided for in this Order shall be null and void and of no further force and effect in the event this Court determines by final order upon motion and notice to the opposing party that the Defendant (i) is in material default in the performance of any provision of this consent decree, is not taking steps to correct such default, or (ii) has ceased operating or otherwise abandoned its mining sites (including by rejection of coal leases) relating to the permits subject to the original consent decree without complying in full with its obligations hereunder or under federal or state law.

19. On or prior to the date on which the Defendant files a chapter 11 plan of liquidation or a motion to convert such Defendant's chapter 11 case to a case under chapter 7 of the Bankruptcy Code, such Defendant shall provide a plan (the "Step Plan") detailing the steps they intend to take with respect to their obligations hereunder or under federal or state law. In the event the Step Plan does not make adequate provision for compliance in full with the Defendant's obligations hereunder or under federal or state law, the extensions of time and other modifications provided for in this Order shall be null and void upon the effective date of such plan of liquidation or conversion of such case, unless prior to such time the Defendant and DEP reach an agreement on a mutually acceptable plan for addressing the Defendant's obligations hereunder or under federal or state law.

20. The parties acknowledge and agree that final approval of this Settlement and Consent Order is subject to public notice and comment as provided in 47 C.S.R. 10-16.2.c. Following presentment to the Court, the public shall have at least thirty (30) days in which to comment on this modification. DEP reserves the right to withhold or withdraw its consent if the comments indicate that this modification is inappropriate, improper, or inadequate. Apogee consents to entry of this Order without further notice. If for any reason, this Court should decline to approve this Order in the form now or subsequently presented, the DEP may, at its sole discretion, withdraw its concurrence with its terms, and this Order may not be used as evidence in any litigation between the parties.

The circuit clerk is directed to send copies of this Order, once entered, to counsel of record.

Entered this _____ day of June, 2013.

Roger L. Perry,
Circuit Judge

EXHIBIT A

CATEGORY I (0-200 gpm)

Technology Selection Date (if necessary) – September 1, 2013

Category Compliance Date – March 15, 2015

Category I Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Hobet	WV0099392	015, 019, 021 028, 032, 033 034, 035, 036, 045, 046, 077, 078, 079 and 084*
Hobet	WV1016776	002, 003, 004, 006, 007 and 041
Hobet	WV1020889	001, 003 and 005
Hobet	WV1021028	006
Catenary	WV0093751	003
Catenary	WV0096962	042 and 055
Catenary	WV1014684	006

WV0099392, Outlet 084 to be evaluated for compliance by August 1, 2014

CATEGORY II (201-400 gpm)

Technology Selection Date (if necessary) – December 31, 2013

Category Compliance Date – March 15, 2016 –

Category II Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Hobet	WV0099392	014 and 027
Catenary	WV0093751	005 and 026
Catenary	WV0096920	001
Catenary	WV0096962	056
Catenary	WV1014684	001, 002 and 003

CATEGORY III (401-600 gpm)

Technology Selection Date (if necessary) – March 31, 2014 (except for WV1017225, Outlet 004)

Category Compliance Date – December 15, 2016 (except for WV1017225, Outlet 004)

Category III Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Hobet	WV0099392	037 and 038
Hobet	WV1016776	050
Hobet	WV1017225	004*

Compliance date for WV1017225, Outlet 004 – August 1, 2014

CATEGORY IV (601-1000 gpm)

Technology Selection Date (if necessary) – September 1, 2014

Category Compliance Date – May 15, 2017

Category IV Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Hobet	WV0099392	004 and 040
Hobet	WV1016776	001

CATEGORY V (1000+ gpm)

Completion of Water Management and Technology Evaluation – June 30, 2015

Technology Selection Date (if necessary) – September 1, 2015

Category Compliance Date – March 15, 2018

Category V Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Catenary	WV0096962	001 and 044