IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

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

Plaintiffs,

v. **CIVIL ACTION NO. 11-C-293**

**COAL-MAC, INC. D/B/A PHOENIX
COAL-MAC MINING, INC.,**

PROPOSED SETTLEMENT AND CONSENT ORDER

1. Upon the agreement to the terms hereof by the parties, the Director of the Division of Water and Waste Management (hereinafter "Director") of the West Virginia Department of Environmental Protection (hereinafter, WVDEP) and Coal-Mac, Inc., d/b/a Phoenix Coal-Mac Mining, Inc (hereinafter "Coal-Mac"), the parties agree that it is their intent to resolve the alleged exceedances of effluent limitations for WV/NPDES Permit No. WV0068764, 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, into a Consent Order with civil penalties and other duties imposed and as expressed herein. After 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

2. 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 Coal-Mac 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

3. This Consent Order applies to, and is binding upon, WVDEP and Coal-Mac, as the permittee of WV/NPDES Permit No. WV0068764 (the "Permit"), its parent company, those companies deemed to own and control Coal-Mac by reason of 38 CSR § 2-2.85 and their successors.

III. FINDINGS OF FACT

A. Background

4. Coal-Mac holds NPDES permit WV0068764 regulating the discharge of selenium in storm water discharge from its Hobet No. 7 Surface Mine located in Mingo and Logan Counties. The selenium at this site 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 8 to 10 years or so and was not included in NPDES permits until around 2004.

5. 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 in these permits were set to expire on April 5, 2010, at which point Coal-Mac would have been required to meet final effluent limits for selenium of 4.7 ppb.

6. 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 their infancy. In October 2010, Judge Chambers, who has presided over the 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 here at full-scale operation. *See OVEC v. Apogee*, 2010 WL 3955828, *5 (S.D.W.Va. Oct. 8, 2010). Recognizing that no coal mining operation had yet been capable to meeting final effluent limit of 4.7 ppb, Coal-Mac submitted modification applications to WVDEP prior to the April 5, 2010 deadline seeking to extend the schedule for achieving compliance with final effluent limits until the July 1, 2012 deadline established by the West Virginia Legislature in W.Va. Code § 22-11-6 (2009). WVDEP proposed to grant the modification request for permit WV0068764. Accordingly, WVDEP sent a draft permit modification out for public comment and to EPA for review. EPA objected to the modification application. Pursuant to a memorandum of agreement between West Virginia and EPA, WVDEP may not issue a permit or modification where EPA has objected.

7. Without a ruling from WVDEP prior to the effective date of final selenium limits, the CWA's anti-backsliding provisions (33 U.S.C. § 1342(o)) could have subsequently prevented the

Agency from granting Appellants' extension requests. Thus, as the April 5th deadline approached without a final decision from WVDEP, Coal-Mac was forced to treat the Agency's failure to rule on the extension requests as a constructive denial and compelled to file appeals with the West Virginia Environmental Quality Board ("EQB"). Along with the appeal, Coal-Mac requested a stay of the effective limits in order to avoid triggering the CWA's anti-backsliding provision. The EQB granted the stay request.

8. To the best of the parties' knowledge, outlets 001, 003, and 014 of Permit WV0068764 are the only outlets that have historically discharged selenium at levels above the monthly average limit typically imposed in West Virginia. Coal-Mac engaged the industry leader in selenium treatment solutions, engineering firm CH2M Hill, in order to evaluate the feasibility of natural treatment systems for Outlets 001 and 014. As opposed to active systems, natural treatment systems are not enhanced or accelerated through the addition of forced air, physical mixing, chemicals, or other artificial enhancements commonly used in conventional wastewater treatment. Accordingly, natural systems are significantly less expensive than their active counterparts, but cannot necessarily be used at all locations because they require substantial amounts of space and relatively constant temperatures. Two such systems are already constructed at Outlets 001 and 014. The natural treatment systems installed at Outlets 001 and 014 have been successful in bringing those outlets into compliance with the effluents limits for selenium contained in Permit WV0068764.

9. On May 17, 2011, the Director filed a Complaint in the Circuit Court of Mingo County, West Virginia, as set forth above in the caption of this Consent Order, which alleges that Coal-Mac violated the Acts, through discharges from NPDES Permit WV0068764 for its mining operations in Mingo County.

B. Statutory and Regulatory Background

10. WVDEP issued Permit WV0068764 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, 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.

11. Coal-Mac's NPDES Permit WV0068764 contains limits on the concentrations of certain pollutants that can be discharged in the effluent from the mine. Coal-Mac 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.

12. WVDEP issued Coal-Mac's operative WVSCMRA permits for its Hobet No. 7 Mine (S006983, S007280, S501494, S504592, and U503595) 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

13. In its review of Coal-Mac's DMRs, the WVDEP has identified sample results for selenium at Outlets 001, 003, and 014 higher than the final effluent limits that were set to take effect on April 5, 2010. In WVDEP's view, those results would have been violations of the NPDES Permit but for an order by the EQB staying the implementation of the NPDES Permit's final effluent limits for selenium. By Memorandum Opinion and Order dated March 31, 2011, however, the District Court for the Southern District of West Virginia ruled that the EQB stays were legally ineffective because the EQB had exceeded its authority under W.Va. Code § 22B-1-7 in issuing them. *Ohio Valley Environmental Coalition, Inc. v. Coal-Mac, Inc.*, --F. Supp. 2d--, 2011 WL 1237643 (S.D. W.Va. 2011)(referred to hereinafter as *OVEC*). Outlets 001 and 014 from Permit WV0068764 were part of the *OVEC* suit, but Outlet 003 was not. Accordingly, it is Coal-Mac's position that the EQB stay was not invalidated as to Outlet 003.

14. The parties to the *OVEC* suit entered into a Consent Decree whereby Coal-Mac agreed to pay a civil penalty for violations associated with Outlets 001 and 014 and agreed to implement selenium treatment for those outlets. Specifically, the Decree resolved claims for violations of selenium limits for these outlets from April 6, 2010 up until entry of the Decree on December 2, 2011. *See Ohio Valley Environmental Coalition, Inc. v. Coal-Mac, Inc.*, 3:10-cv-00833, Doc. 136 (S.D. W.Va.). The parties agree that WVDEP's civil penalty calculation in this suit shall not include penalties for violations addressed in the *OVEC* suit.

15. Notwithstanding the existence of the EQB stays, 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 Permit shall be considered an exceedance of the final effluent limits subject to penalty assessment.

IV. CORRECTIVE ACTION PLAN

16. On March 12, 2012, Coal-Mac requested approval from WVDEP to remove Pond No. 2 from Permit WV0068764 through a "Removal of Drainage Control Structure" form. Pond No. 2 was designated as NPDES Outlet 003 on Permit WV0068764. The "Removal of Drainage Control Structure" form submitted by Coal-Mac certified that Pond No. 2 met the revegetation requirements established in the approved reclamation plan and regulations for Phase II standards. Coal-Mac also certified that the outlet met applicable effluent limits for the preceding year to establish that the hydrologic balance is being preserved. WVDEP signed the approval on August 29, 2012. Pond No. 2 was subsequently removed. Accordingly, Outlet 003 is no longer discharging, as it is no longer in existence.

V. ORDER FOR COMPLIANCE

17. 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 Court that Coal-Mac shall immediately take all measures to initiate compliance with all terms and conditions of the Permits Coal-Mac is hereby obligated to eliminate the discharge of selenium in amounts in excess of the proposed limits. Upon entry of this Decree, the WVDEP may evaluate the effectiveness of compliance solutions Coal-Mac has employed. Based on its evaluation, the WVDEP may order Coal-Mac to take additional action(s) in order to improve upon or supplement the proposed corrective action plan.

VI. CIVIL PENALTY

18. 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 Coal-Mac 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 $ 17,030.00. This amount covers penalties for any alleged violations of selenium occurring between April 6, 2010, and the present for Outlet 003. Any violations occurring after the entry of this Decree shall be assessed at the rates agreed to in Section VII.

19. Coal-Mac shall pay $17,030.00 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.

20. Coal-Mac 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

21. In the event that data reviewed by WVDEP reveals any daily maximum violations of selenium during the period between June 4, 2013, and the entry of this Consent Decree, Coal-Mac shall be obligated to pay $1,000.00 per violation. Violations of monthly average limits of selenium during this time period shall be assessed at $1,000.00 per violation; provided, however, that violation of a monthly average limit as reported on a DMR shall constitute one (1) violation.

22. Coal-Mac shall be liable for stipulated penalties to the WVDEP for failure to comply with the administrative provisions of this Consent Orders. Stipulated penalties shall accrue as follows:

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

23. Coal-Mac 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 Stream Restoration Fund.

24. 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 Coal-Mac'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 shall be sanctioned as provided by the WPCA or the regulations governing coal industry NPDES permits.

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

VIII. REPORTS

26. Coal-Mac shall provide WVDEP with a final report detailing the removal of Pond No. 2, Outlet 003. This report shall be submitted to WVDEP beginning thirty days after entry of this Consent Decree.

IX. FORCE MAJEURE

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

28. If the WVDEP agrees that any violation of this Consent Order is caused by circumstances reasonably beyond the control of Coal-Mac, Coal-Mac shall be excused as to that violation for the period of time the violation continues due to such circumstances. Coal-Mac'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 Coal-Mac 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 Coal-Mac and the length of such delay shall rest with the Coal-Mac. Failure by Coal-Mac 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 Coal-Mac's rights under this provision to obtain an extension of its obligations based on that incident.

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

X. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

30. 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

31. Should any person seek to intervene in the proceeding before the Circuit Court of Mingo 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 Coal-Mac 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 Coal-Mac shall not be entitled to a stay or other relief from: (1) the stipulated penalties for which Article VI hereof provides; or (2) liability for the civil penalties for which Article V hereof provides.

XII. PERMITS AND OTHER LAWS AND REGULATIONS

32. 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 Coal-Mac 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 Coal-Mac 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

33. 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, Coal-Mac 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

34. 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

35. 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) Coal-Mac has achieved complete compliance with all requirements of this Consent Order; (2) Coal-Mac 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.

XVI. EFFECT OF SETTLEMENT

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

38. For the purposes of this Consent Decree, Coal-Mac agrees that the Complaint states claims upon which relief can be granted.

39. 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 Coal-Mac's compliance record.

40. 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.

XVII. SIGNATORIES AUTHORIZED

41. 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
Director, Division of Water
and Waste Management West Virginia
Department of Environmental Protection

Date

_____ _____

Harold Ward
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

Date

_____ _____

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

Date

_____ _____

COAL-MAC, INC.
By

Date

_____ _____

Christopher M. Hunter (WVBN 9726)
JACKSON KELLY PLLC
1600 Laidley Tower
P. O. Box 553
Charleston, WV 25322
(304) 340-1000
Counsel for Defendant

Date