

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

SCOTT MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Plaintiff,

v.

Civil Action No. 07-C-3
Civil Action No. 10-C-96

HOBET MINING, LLC, and
CATENARY COAL COMPANY, LLC

Defendants.

[PROPOSED] MODIFIED SETTLEMENT AND CONSENT ORDER

I. Introduction

The parties have jointly submitted the following Modified Settlement and Consent Order to replace in part the existing order previously entered by the Court. In support thereof, they state the following facts. Upon its consideration of the pleadings, the parties' joint motion to consolidate Civil Action No. 07-C-3 and Civil Action No. 10-C-96, and the parties' joint motion to enter the following Order to conclude the case, the Court concludes there is good cause to amend the Consent Order.

II. Background of the Case

Civil action No. 07-C-3 was filed by the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP"), against Hobet Mining, LLC, to enforce four NPDES permits, Nos. WV0099392, WV1016776, WV1020889 and WV1021028. The parties reached an agreement and presented to the Court a Settlement and Consent Order ("Consent Order") that was entered on September 5, 2008. Hobet

filed a petition to amend the Consent Order to include two additional NPDES permits, WV1022890 and WV1022911. The parties conferred on the issues raised in Hobet's petition to amend the Consent Order and presented an agreed order to the Court at a hearing on October 8, 2009. It was entered as a modification to the original Consent Order ("Modified Consent Order") on December 10, 2009. On February 18, 2011, a civil action was filed in the United States District Court for the Southern District of West Virginia at No. 3:11-cv-0115 by citizens against Hobet and Catenary, their parent company and one affiliated company, Apogee Coal Company, LLC. A Consent Decree was presented by the parties in that case, 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"). The parties now move to amend the Modified Consent Order in this case to insure the obligations imposed upon Hobet and Catenary by the Federal Consent Decree and this consent order ("New Consent Order") are consistent.

III. Findings of Fact and Conclusions of Law

1. The Court finds Hobet has made good faith efforts to comply with the Settlement and Consent Order as originally adopted and subsequently amended.
2. The projects undertaken as Supplemental Environmental Projects (SEPs) by Hobet have demonstrated promise in treating selenium. To date none of the SEPs accomplishes economically efficient, effective, and routine treatment under all variable conditions encountered at the Defendants' mine sites to satisfy the West Virginia Water Pollution Control Act or the federal Clean Water Act. The schedule for compliance established by Exhibit A attached hereto is predicated on the application of treatment systems identified by the SEPs and other demonstration projects 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 Defendants can comply with the effluent limits of the permits 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. Hobet, Catenary and DEP concur that their respective interests and statutory obligations are achieved by the companies' selection and installation of treatment technology at the Outlets identified and within the schedule set in Exhibit A to this Modified Settlement and Consent Order.

5. DEP has the authority to issue and enforce NPDES permits pursuant to W.Va. Code §§22-11-4 and 11, to 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 Federal Consent Decree entered in a civil action filed in the United States District Court for the Southern District of West Virginia at No. 3:11-cv-0115 in a citizens' suit brought pursuant to the federal Clean Water Act has set a compliance schedule that authorizes the two companies to comply with the effluent limits for selenium established by their permits over a period that will not extend beyond 2017 depending upon the classification of each outlet on each permit identified in the suit. For the purpose of establishing the compliance deadline under this New Consent Order for each category of outlets identified in Exhibit A, the

date of the entry of the Federal Consent Decree - March 15, 2012 - shall be deemed to establish the time from which compliance will be measured.

7. In support of this New Consent Order, notwithstanding the presence of elevated selenium concentrations reported by the DEP, the research supported by Hobet concludes that fish populations within the Mud River Reservoir have not been impaired in their reproduction despite evidence of the accumulation of selenium in sediment and algae.

8. The timeframe established hereinafter requires Hobet and Catenary to comply with its effluent limitations for selenium as soon as possible under the circumstances.

IV. Order of Compliance

9. Section IV of the existing Modified Consent Order is modified by replacing it in its entirety with the following provisions.

a. Hobet and Catenary shall propose a strategy for controlling selenium discharged from all outlets on each permit at their respective operations, 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 by the parties in *OVEC v. Patriot Coal Corporation* in Civil Action No. 3:11-cv-0115, and attached hereto as Exhibit A. Installation of treatment systems shall be completed at all outlets as established by the schedule in Exhibit A and as soon as reasonably possible, but no later than December 31, 2017.

b. Section IV.A.1 originally provided:

The Permits currently have effluent limitations for selenium of 4.7 µg/l (micrograms per liter) or parts per billion (ppb) as a monthly average and 8.2 µg/l as a daily maximum. Because the parties to this Consent Order recognize that immediate compliance with these effluent limitations cannot be achieved completely and reliably as to all water that will flow through all outlets, interim standards are appropriate. An interim effluent limit of 35 ppb as a daily maximum value shall be in effect for the period between July 1, 2008

until September 30, 2008; an interim effluent limit of 30 ppb as a daily maximum value shall be in effect for the period between October 1, 2008 until December 31, 2008; an interim effluent limit of 25 ppb as a daily maximum value shall be in effect for the period between January 1, 2009 until March 31, 2009; and an interim effluent limit of 20 ppb as a daily maximum value shall be in effect for the period between April 1, 2009 until April 4, 2010, when the permitted effluent limitations thereafter become effective. As an interim monthly average effluent limitation, Hobet shall report only monthly average values of selenium through April 4, 2010, when the permitted effluent limitations thereafter become effective. All remaining terms and conditions of the Permits remain in full force and effect.

This provision is replaced in its entirety to extend the interim daily maximum effluent limit of 20 ppb for selenium at each outlet until the compliance deadline established for each Category of Outlet per Exhibit A and in no instance any later than December 31, 2017.

c. Section IV.A.2 originally provided:

Hobet shall immediately take all measures to initiate compliance with all terms and conditions of the Permits, excepting the selenium effluent limitations that have been replaced by the interim effluent limitations as specified in Article IV.A., above. WVDEP agrees that it will not seek enforcement of the permitted selenium effluent limitation of 4.7 parts per billion (ppb) as a monthly average and 8.2 ppb as a daily maximum, until April 5, 2010.

This provision is replaced in its entirety to extend the date on which DEP will enforce the permitted effluent limit of 4.7 and 8.2 ppb at each outlet until the compliance deadline established for each Category of Outlet per Exhibit A and in no instance any later than December 31, 2017.

d. Section IV.B.2 originally provided:

Hobet shall have some form of treatment project for the control of selenium concentrations in place and in operation for all applicable outlets no later than December 31, 2009. The installation and operation of the treatment projects shall be phased in at these outlets throughout 2009, according to a schedule to be provided by Hobet. As part of the Quarterly Report specified in Article VIII, Hobet shall provide to the WVDEP a schedule of activities that it will follow in the succeeding calendar quarter to purchase material and equipment, identify new sites for system installation, and perform other necessary activities to complete its installation of treatment systems at all applicable

outlets in 2009. For purposes of this paragraph, a treatment project for an outlet shall include treatment according to Hobet's corrective action plan as set forth in pages 3.1 through 3.18 of Attachment 3, unless directed by DEP to abandon the use of such treatment as provided by Article IV. B. 3, below.

This provision is replaced in its entirety to extend the date by which Hobet and Catenary will install treatment of each outlet by the compliance deadline established for each Category of Outlet per Exhibit A and in no instance any later than December 31, 2017.

e. Section IV.B.3 originally provided:

After June 30, 2009, the DEP may evaluate the effectiveness of the treatment method(s) Hobet has employed. Based on its evaluations, the DEP may order Hobet to: (1) modify an existing treatment system to improve its effectiveness; (2) cease to use any treatment method which has not been shown to be effective in achieving compliance with Hobet's effluent limitations for selenium; or (3) use another treatment method which has been shown to be effective in meeting effluent limitations for selenium. For all outlets where a treatment method which had not been shown to be effective had been in use, Hobet shall have any new treatment method mandated by the WVDEP pursuant hereto in place and in operation within 90 days after being ordered to do so by DEP. Hobet shall achieve compliance with all applicable effluent limitations by April 5, 2010.

This provision is replaced in its entirety. Any selection of a treatment system made by Hobet or Catenary pursuant to the Federal Consent Decree, the schedule for which is attached hereto as Exhibit A, shall be deemed to be a system that satisfies the provisions of this New Consent Order. Nevertheless, any selection shall not relieve Hobet or Catenary 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.

V. Civil Penalty

10. All civil penalties imposed under Section V of the Settlement and Consent Order has been satisfied. All provisions of the section are deleted in their entirety.

VI. Supplemental Environmental Projects

11. Hobet has no remaining obligations with respect to the SEPs set forth in Section VI of the Modified Consent Order except the obligation to supply stone for use in the DEP's projects designed to improve aquatic habitat in the Coal River as originally provided in Attachment 4.5 of the original Consent Order. Hobet will continue to supply stone as required through the end of 2017 unless that date is further extended upon the mutual agreement of the parties. All other provisions of the section are deleted in their entirety.

VII. Stipulated Penalties

12. The provision of this section shall remain in effect until July 1, 2017, and additionally shall apply to all violations heretofore arising and hereafter identified for all NPDES permits identified in Exhibit A to this New Consent Order. All civil penalties assessed pursuant to this provision shall be presented for payment upon written demand during the time this New Consent Order is in effect. Hobet and Catenary shall pay any sum demanded within 30 days

VIII. Quarterly Reports

13. The Quarterly Reports provision of the Modified Consent Order shall be amended to provide the submission of bi-monthly reports which will be identical to the reports now furnished pursuant to the Federal Consent Decree on the 15th day in the month when due.

IX. Miscellaneous Provisions

14. All remaining references in the Modified Consent Order to the date July 1, 2012, are hereby replaced by the date December 31, 2017. All terms and conditions of this modification shall apply to: 1) all NPDES permits identified in Exhibit A to the New Consent Decree; 2) all outlets constructed on those permits since the entry of the Consent Order on

September 5, 2008 as identified in Exhibit A; and 3) all final and effective limits imposed for outfalls on those permits since the entry of the order on September 5, 2008.

15. The parties acknowledge and agree that final approval of this modification to the original Modified Consent Order is subject to public notice and comment as provided in 47 C.S.R. 10-16.2.c. 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. Hobet and Catenary consent to entry of this New Consent Order without further notice. If for any reason, this Court should decline to approve this New Consent Order in the form now or subsequently presented, the DEP may, at its sole discretion, withdraw its concurrence with its terms, and this New Consent Order may not be used as evidence in any litigation between the parties.

16. The provisions of I (Jurisdiction and Venue), III (Findings of Fact), IX (Force Majeure), X (Dispute Resolution and Retention of Jurisdiction), XI (Modifications), XII (Permits and Other Laws and Regulations), XV (Termination) and XVI (Application of Amounts Deposited in the Stream Restoration Funds) shall be deemed to survive the modification of the Modified Consent Order. All other provisions of the Consent Order or the Modified Consent Order previously entered by the Court shall be deemed to be superseded and void except as otherwise stated in this Order.

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

Entered this _____ day of _____, 2012.

WILLIAM S. THOMPSON
Circuit Judge

EXHIBIT A

CATEGORY I (0-200 gpm)

Technology Selection Date (if necessary) – September 1, 2012

Category Compliance Date – March 15, 2014 - 24 months from the Effective Date of the Federal Consent Decree

Category I Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Hobet	WV0099392	015, 028, 034, 035, 045, 046, 077, 079 and 084
Hobet	WV1016776	002, 003, 004, 006, 007 and 041
Hobet	WV1020889	001 and 003
Hobet	WV1021028	006
Catenary	WV0093751	003
Catenary	WV0096962	042 and 055
Catenary	WV1014684	006
Apogee	WV0099520	011

CATEGORY II (201-400 gpm)

Technology Selection Date (if necessary) – December 31, 2012

Category Compliance Date – March 15, 2015 - 36 months from the Effective Date of the Federal Consent Decree

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, 2013

Category Compliance Date – December 15, 2015 – 45 months from the Effective Date of the Federal Consent Decree

Category III Covered Outfalls

Company	Covered Permits WV/NPDES Permit No.	Covered Outfalls
Hobet	WV0099392	037 and 038
Hobet	WV1016776	050
Hobet	WV1017225	004
Apogee	WV0099520	001

CATEGORY IV (601-1000 gpm)

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

Category Compliance Date – May 15, 2016 - 50 months from the Effective Date of the Federal Consent Decree

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, 2014

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

Category Compliance Date – March 15, 2017 - 60 months from the Effective Date of the Federal Consent Decree

Category V Covered Outfalls

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

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Civil Action No. 07-C-3
Civil Action No. 10-C-96

HOBET MINING, LLC, and
CATENARY COAL COMPANY, LLC

Defendants.

ORDER TO CONSOLIDATE ACTIONS

Upon the joint motion of the parties to consolidate actions and to enter a settlement and consent order, the above civil actions identified above are consolidated for further disposition by this Court.

ENTERED THIS _____ day of May, 2012.

WILLIAM S. THOMPSON
Circuit Judge