

**IN THE CIRCUIT COURT OF RALEIGH COUNTY
BECKLEY, WEST VIRGINIA**

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

Plaintiff,

v.

**Civil Action No. 10-C-545-H
The Honorable John A. Hutchinson**

ICG BECKLEY, 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 Harold Ward, Director of the Division of Mining and Reclamation (hereinafter collectively, the "Directors") of the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and ICG Beckley, LLC (hereinafter "ICG"), the parties agree that it is their intent to resolve the alleged violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§ 22-11-1 *et seq.*, (the "Act"), and violations of the rules and regulations implementing the Act 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.
2. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 because ICG 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

3. This Consent Decree applies to and is binding upon WVDEP and ICG and its successors, as both the permittee of West Virginia Underground Injection Control (hereinafter "UIC") Permit No. 1074-07-081 (the "UIC Permit 1074") and UIC Permit No. 0734-04-081 (the "UIC Permit 0734").

III. FINDINGS OF FACT

4. The Directors filed a Complaint (hereinafter "Complaint") in the Circuit Court of Raleigh County, West Virginia, against ICG as set forth above in the caption of this Consent Decree. The Complaint alleges that ICG violated the WPCA through underground injection discharges of pollutants from its surface mining facility in Raleigh County, West Virginia, which is covered by UIC Permit Nos. 1074-07-081 and 0734-04-081.

Statutory and Regulatory Background

5. WVDEP issued the UIC 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 Section 300h-1 of the federal Safe Drinking Water Act, 42 U.S.C. § 300f et seq., and pursuant to a letter dated January 11, 1984 from the Administrator of the USEPA approving West Virginia's UIC program.

6. The UIC Permits contain limits on the concentrations of certain pollutants that can be injected underground.

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

8. On UIC Permit No. 1074, some DMR submittals for Total Petroleum Hydrocarbons – Oil Range Organics ("TPH-ORO"), and Total Petroleum Hydrocarbons – Diesel Range Organics ("TPH-DRO") showed readings that appeared to be above UIC permit limits. However, ICG submitted independent laboratory analysis that has established that the TPH-ORO, TPH-DRO and Total Petroleum Hydrocarbons – Hydrocarbons ("TPHH") readings do not fit the analytic profile of any known refined petroleum product. ICG maintains, and WVDEP concurs, that any and all TPH-ORO, TPH-DRO and TPHH readings on UIC Permit No. 1074 between 2007 and the effective date of this Consent Decree constitute false positive readings, are therefore not violations, and are excluded from the penalty assessment.

Violations of Effluent Limits

9. WVDEP's review of DMRs submitted by ICG during 2007 to the effective date of this Consent Decree identified results reported in excess of effluent limits in the UIC Permits for the following parameters at the following injection sites:

UIC Permit No.	Parameter(s)
1074	Total Chromium, Dissolved Arsenic
0734	Dissolved Beryllium, Dissolved Nickel, and Dissolved Cadmium

The specific alleged violations which will be assessed penalties under UIC Permit No. 1074-07-081 are as follows:

UIC Permit No. 1074-07-081, Injection Point 209				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
7/08	Total Chromium	mg/l	0.10	0.762
5/10	Dissolved Arsenic	mg/l	0.01	0.015

The specific alleged violations which will be assessed penalties under UIC Permit No. 0734-04-081 are as follows:

UIC Permit No. 0734-04-081, Injection Point 201				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
6/07	Dissolved Beryllium	mg/l	0.004	0.007
6/07	Dissolved Nickel	mg/l	0.100	0.347
1/08	Dissolved Beryllium	mg/l	0.004	0.005
1/08	Dissolved Nickel	mg/l	0.100	0.331
2/08	Dissolved Beryllium	mg/l	0.004	0.005
2/08	Dissolved Nickel	mg/l	0.100	0.300
3/08	Dissolved Beryllium	mg/l	0.004	0.006

3/08	Dissolved Nickel	mg/l	0.100	0.371
4/08	Dissolved Beryllium	mg/l	0.004	0.010
4/08	Dissolved Nickel	mg/l	0.100	0.460
5/08	Dissolved Beryllium	mg/l	0.004	0.012
5/08	Dissolved Nickel	mg/l	0.100	0.586
6/08	Dissolved Beryllium	mg/l	0.004	0.010
6/08	Dissolved Nickel	mg/l	0.100	0.485
7/08	Dissolved Beryllium	mg/l	0.004	0.009
7/08	Dissolved Cadmium	mg/l	0.005	0.007
7/08	Dissolved Nickel	mg/l	0.100	0.504
8/08	Dissolved Beryllium	mg/l	0.004	0.009
8/08	Dissolved Cadmium	mg/l	0.005	0.008
8/08	Dissolved Nickel	mg/l	0.100	0.483
9/08	Dissolved Beryllium	mg/l	0.004	0.007
9/08	Dissolved Cadmium	mg/l	0.005	0.017

UIC Permit No. 0734-04-081, Injection Point 202				
Date	Parameter	Units	Permitted max. daily	Reported max. daily
6/07	Dissolved Beryllium	mg/l	0.004	0.010
6/07	Dissolved Nickel	mg/l	0.100	0.511

7/07	Dissolved Beryllium	mg/l	0.004	0.0087
7/07	Dissolved Nickel	mg/l	0.100	0.419
8/07	Dissolved Beryllium	mg/l	0.004	0.0089
8/07	Dissolved Nickel	mg/l	0.100	0.428
9/07	Dissolved Beryllium	mg/l	0.004	0.01
9/07	Dissolved Nickel	mg/l	0.100	0.467
10/07	Dissolved Beryllium	mg/l	0.004	0.008
10/07	Dissolved Nickel	mg/l	0.100	0.420
11/07	Dissolved Beryllium	mg/l	0.004	0.008
11/07	Dissolved Nickel	mg/l	0.100	0.397
12/07	Dissolved Beryllium	mg/l	0.004	0.006
12/07	Dissolved Nickel	mg/l	0.100	0.339
1/08	Dissolved Nickel	mg/l	0.100	0.178
2/08	Dissolved Nickel	mg/l	0.100	0.217
3/08	Dissolved Nickel	mg/l	0.100	0.193
4/08	Dissolved Nickel	mg/l	0.100	0.270
5/08	Dissolved Beryllium	mg/l	0.004	0.007
5/08	Dissolved Nickel	mg/l	0.100	0.359
6/08	Dissolved Nickel	mg/l	0.100	0.194
8/08	Dissolved Beryllium	mg/l	0.004	0.007
8/08	Dissolved Nickel	mg/l	0.100	0.380

9/08	Dissolved Beryllium	mg/l	0.004	0.007
10/08	Dissolved Beryllium	mg/l	0.004	0.008
10/08	Dissolved Cadmium	mg/l	0.005	0.006
11/08	Dissolved Beryllium	mg/l	0.004	0.007

WVDEP has reviewed the DMRs for all of the injections for the UIC Permits to the present and the parties agree that no specific corrective action and/or compliance steps are necessary based on ICG's history of compliance since 2013.

IV. EFFECT OF SETTLEMENT

10. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which ICG 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 14 below, WVDEP is releasing all of its rights to assert a claim in the future related to any claims asserted in the Complaint for the period of January 1, 2007 through the effective date of this Consent Decree. 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 ICG's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

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

12. The parties agree that the terms of this Consent Decree and the civil penalties to be paid by ICG pursuant hereto satisfy all claims that may be asserted under the Acts for the discharge of any pollutant regulated by the UIC Permit Nos. 1074-07-081 and 0734-04-081 from January 1, 2007 through the effective date of this Consent Decree.

13. The WVDEP has evaluated the DMRs for all permitted injection sites, agency records regarding the UIC Permits, and other related information and has completed an evaluation of ICG's compliance record. In completing this evaluation, the WVDEP has considered whether reported results for any other parameter which may have had a "report only" requirement were in fact violations of the UIC Permits 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.

14. 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 any and all violations of the UIC Permits and associated performance standards, or violations of water quality standards, during the period from January 1, 2007 through the effective date of this Consent Decree pursuant to 42 U.S.C. § 300f, et seq.

V. CIVIL PENALTIES

15. In settlement of WVDEP's claims in its Complaint relating to reported violations of the WPCA and the UIC Permits and for relief under W. Va. Code §§ 22-11-22, ICG, without admitting liability for any alleged violations or agreeing to the appropriateness of the civil penalty expressed herein except solely within the context of this Consent Decree, agrees for purposes of the settlement

provided herein that it shall pay a total civil penalty in the amount of ONE HUNDRED EIGHTY ONE THOUSAND TWO HUNDRED FIFTY dollars and NO CENTS (\$181,250.00), payable to the Mining and Reclamation Operations Fund pursuant to 47 C.S.R. § 1-7.4, and which includes consideration by 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.

VII. PERMITS AND OTHER LAWS AND REGULATIONS

16. 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 ICG of any other obligation imposed by the WPCA, the UIC Permits, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve ICG 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.

VIII. PUBLIC NOTICE

17. 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. ICG 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 Order, if warranted, for good cause shown in comments

received during the period for public comments. If the WVDEP modifies this Consent Decree in response to public comments, ICG 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, ICG 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.

VIII. EFFECTIVE DATE

18. 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.

IX. TERMINATION

19. Termination of this Consent Decree shall be effective upon all of the following conditions being met: (1) ICG has paid all civil and stipulated penalties required herein; and (2) 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.

X. SIGNATORIES AUTHORIZED

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

It is so ORDERED this _____ day of _____, 2014.

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

5/19/14
Date



Harold Ward, Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

5/19/14
Date



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Date