

IN THE CIRCUIT COURT OF WYOMING 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-97

PAYNTER BRANCH MINING, INC.,

Defendant.

CONSENT DECREE

Upon agreement to the terms herein, 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 Paynter Branch Mining, Inc. (hereinafter "Paynter Branch"), agree that it is their intent to resolve the alleged violations of the West Virginia Water Pollution Control Act, West Virginia Code §§ 22-11-1, *et seq.* ("WPCA"), alleged violations of the West Virginia Surface Coal Mining and Reclamation Act, West Virginia Code §§ 22-3-1, *et seq.* ("SCMRA") (collectively, the "Acts"), and alleged 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.
2. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 and 22-3-17 because Paynter Branch 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 Paynter Branch and its successors, as both the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter "WV/NPDES") Permit Nos. WV1016440, WV1018680, and WV1018906 (the "NPDES Permits") and the permittee of Surface Mining Permit Nos. S-4008-96, S-4012-98, and S-4003-00 (the "SCMRA Permits").

### **III. FINDINGS OF FACT**

4. The Directors filed a Complaint, and later an Amended Complaint (hereinafter "Complaint") in the Circuit Court of Wyoming County, West Virginia, against Paynter Branch as set forth above in the caption of this Consent Decree. The Complaint alleges that Paynter Branch violated the WPCA and the SCMRA through discharges of pollutants from its mining facilities in Wyoming County, West Virginia, which are covered by WV/NPDES Permit Nos. WV1016440, WV1018906 and WV1018680, and SCMRA Permit Nos. S-4008-96, S-4003-00, and S-4012-98.

### **Statutory and Regulatory Background**

5. 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.
6. The NPDES Permits contain limits on the concentrations of certain pollutants that can be discharged in the effluent from the mines.
7. Paynter Branch has reported the quality of its discharges and other information to the WVDEP through submittal of Discharge Monitoring Reports (hereinafter “DMRs”).
8. Paynter Branch’s mining operations are also covered by the SCMRA Permits which WVDEP issued on September 10, 1996 for Permit No. S-4008-96, issued on July 30, 1999 for Permit No. S-4012-98, and issued on December 27, 2000 for Permit No. S-4003-00 (hereinafter, the "Subject Mines").
9. The WVDEP issued the SCMRA Permits pursuant to its authority under the SCMRA 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 approval of the state’s regulatory program in January 1981. WVDEP obtained its regulatory primacy by passing a law, SCMRA, 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. § 948.10.

10. The rules promulgated by the WVDEP implementing SCMRA prohibit violations of effluent limitations contained in a WV/NPDES permit and prohibit violations of water quality standards caused by discharges from a mine site. *See* W. Va. Code. St. R. § 38-2-14.5.b.

**Violations of Effluent Limits**

11. Prior to the lodging of this Consent Decree, the WVDEP’s review of DMRs submitted by Paynter Branch for the period from June 1, 2007 through March 31, 2011 identified results reported in excess of stated effluent limits in the NPDES Permits for the following parameters at the following Outlets:

<b>WV/NPDES Permit No.</b>	<b>Outlet</b>	<b>Parameter(s)</b>
WV1016440	019	Selenium
WV1016440	020	Selenium
WV1018906	001	Selenium, Total suspended solids
WV1018906	002	Selenium, Total suspended solids, Settleable solids
WV1018680	001	Settleable solids, Iron  Aluminum

WVDEP and Paynter Branch have previously entered into Consent Order No. M-08-038 covering exceedances of effluent limits set forth in WV/NPDES Permit No. WV1018906 prior to December, 2008. Consent Order No. M-08-038 is incorporated by reference into this Consent Decree, and the

WVDEP hereby confirms that the penalty assessed by it, and paid by Paynter Branch, pursuant to Consent Order No. M-08-038 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 under the NPDES Permits, including the DMRs from the period covered by Consent Order No. M-08-038, and the parties agree that specific corrective action and/or compliance steps are appropriate for the Outlets and parameters listed in Paragraph 28, below. Of the exceedances identified above, exceedances of parameters other than selenium have not been of a chronic nature, and the parties agree that, as of the effective date of this Consent Decree, no compliance plan for these parameters is warranted.

#### **Selenium Effluent Limits**

12. WV/NPDES Permit No. WV1016440 governs 24 permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, this NPDES Permit includes final effluent limits for that parameter at Outlets 3, 4, 14, 15, 16, 17, 18, 19, 20, and 24, although, as further described in Paragraphs 18, 19, and 20 below, those final effluent limits are the subject of a compliance schedule that Paynter Branch sought to have extended and according to prior state circuit court and administrative board rulings have been stayed from going into effect.

13. WV/NPDES Permit No. WV1018906 governs 2 permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, as of April 6, 2009 (Modification No. 4), WV/NPDES Permit No. WV1018906 established final effluent limits for that parameter at Outlets 1 and 2, with the final limits of 8.2 ug/L for the daily maximum limit and 4.7 ug/L for the monthly average limit scheduled to go into effect on or about April 6, 2010, although, as further described in Paragraphs 18, 19, and 20 below, those final effluent limits are the subject of a compliance schedule

that Paynter Branch sought to have extended and according to prior state circuit court and administrative board rulings have been stayed from going into effect.

14. During the period prior to April 5, 2010, Paynter Branch installed a zero-valent iron-based pilot treatment system at Outlet 19 on WV/NPDES Permit No. WV1016440. This ZVI treatment system showed promise in reducing selenium levels, but the system is not ready for full-scale implementation. Further, because of the remote locations of the outlets that have been assigned selenium limits, it is difficult to properly evaluate demonstration-scale tests at these sites. Therefore, Paynter Branch conducted additional selenium demonstration projects at an active mine located near Pax, W.Va. that is operated by an affiliate, Pioneer Fuel Corporation ("Pioneer Fuel"), under WV/NPDES Permit No. WV1021664 ("the Pax Location"). The proximity of the Pax Location to Pioneer Fuel's active mining operations facilitates system installation and modification, allows for closer and more frequent monitoring, and discourages vandalism. In addition, Paynter Branch believes the discharges are similar enough that any technical approaches that are successful at the Pax Location may be applied as necessary at the Subject Mines. However, to supplement ongoing testing at the Pax Location, Paynter Branch has installed demonstration-scale scale systems for treating selenium discharges from Outlets 002 and 020 governed by Permit No. WV1016440 that will facilitate development of a selenium treatment approach for this type of discharge.

15. The parties agree that information available to them, including information related to Paynter Branch's and Pioneer Fuel's treatment efforts as well as those at other mine sites, provides a reasonable basis upon which to conclude that Paynter Branch will achieve compliance with its final selenium effluent limits by the dates set forth herein.

16. Paynter Branch has also identified potential source areas of selenium and is taking steps to isolate or remove areas that are believed to be the main contributors of selenium in the effluent.

17. Despite Paynter Branch's efforts to come into full compliance with its selenium effluent limits by April 5, 2010, Paynter Branch could not do so.

18. In November, 2009, Paynter Branch filed separate requests to modify WV/NPDES Permit Nos. WV1016440 and WV1018906 to extend the final effective date and monitoring-only requirements for the selenium effluent limits in each permit beyond April 5, 2010.

19. In February 2010, the WVDEP issued draft permit modifications based on Paynter Branch's applications and commenced a public comment period on the proposed modifications. However, prior to the close of the public comment period, the WVDEP issued orders denying each of Paynter Branch's modification requests.

20. On March 10, 2010, Paynter Branch filed an administrative appeal with the West Virginia Environmental Quality Board seeking redress for the WVDEP's denial of its modification applications. The Board subsequently granted a stay of the final limits for selenium, which were to go into effect in WV/NPDES Permit Nos. WV1016440 and WV1018906 on or about April 6, 2010. This appeal is still pending. The Environmental Quality Board has placed this appeal on the inactive docket while WVDEP and Paynter Branch pursue resolution of all issues raised in the appeal and this civil action through an omnibus settlement. Paynter Branch concurrently 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 (as amended).

21. By a Memorandum Opinion and Order dated March 31, 2011, in *Ohio Valley Environmental Coalition, Inc, et al., v. Coal Mac, Inc. et al.*,--- 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 Paynter Branch was not a party to that case, the District Court's decision does not invalidate the stays issued to Paynter Branch, and Paynter Branch 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 purposes of this consent decree only, the parties agree that any reported concentration of selenium above the final effluent limits for selenium stated in the NPDES Permits shall be considered an exceedance of the final limits subject to penalty assessment.

#### **IV. EFFECT OF SETTLEMENT**

22. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which Paynter Branch 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 26 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 NPDES Permits and the SCMRA Permits for the period of June 1, 2007 through March 31, 2011 and claims based on other exceedances that may occur through termination 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 Paynter Branch's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment. Should Paynter Branch fail to comply with parameters other than those listed in paragraph 11 above during the term of this Consent Decree, this Consent Decree shall not preclude WVDEP from taking further enforcement action against Paynter Branch to compel implementation of a compliance plan to address such parameters.

23. For the purposes of this Consent Decree, Paynter Branch agrees the Complaint states claims upon which relief can be granted.

24. The parties agree that the civil penalties to be paid by Paynter Branch 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.

25. 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 Paynter Branch's compliance record. In completing this evaluation, the WVDEP has considered whether other reported results for any other parameter which may have had a "report only" requirement were in fact violations of the NPDES 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.

26. 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 violations of the NPDES Permits and the associated violations of the

SCMRA Permits, 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, and based upon W.Va. CSR § 38-2-3.33 and/or W.Va. CSR § 38-2-14.5.

27. Upon entry of this Decree, Paynter Branch agrees to promptly withdraw its permit modification requests and related administrative appeal and diligently take any other actions reasonably necessary to obtain dismissal of that appeal with prejudice. Upon entry of this Decree, Paynter Branch will also promptly seek to dismiss, with prejudice, the Circuit Court of Kanawha County action, to dissolve the injunction currently in place, and to take any other actions reasonably necessary to obtain dismissal of that action.

#### V. ORDER FOR COMPLIANCE

28. 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 Paynter Branch shall (i) immediately take measures to comply with all effluent limits in the NPDES Permits, and (ii) engage in a corrective action plan as follows:

- a. Paynter Branch shall continue to implement its demonstration scale treatment systems as described in and consistent with the time frames set forth in the schedules attached as Exhibits A (for Permit No. WV1016440) and B (for Permit No. WV1018906). (The parties acknowledge that some of the steps set forth in Exhibits A and B have already been completed, in accord with the proposed deadlines that are set forth therein.)
- b. These demonstration scale projects are intended to determine the effectiveness of these treatment systems and evaluate the potential for full scale

versions of these systems to be installed at relevant outlets at the Subject Mines. They will be designed in such a manner as to provide meaningful data related to the effectiveness of the treatment method in treating the total design flow of water that would have to be treated by a full-scale selenium treatment system.

c. Paynter Branch shall conclude the demonstration scale projects described in subparagraphs (a) and (b) above, and shall evaluate the effectiveness of those projects and provide a report on the same to WVDEP by the dates specified in Exhibits A and B, respectively. This report may be combined with the regular quarterly report required under Paragraph 39. Nothing in this paragraph shall prevent Paynter Branch from continuing to operate the demonstration scale treatment systems after the respective deadlines for evaluation of their effectiveness; provided, however, that should Paynter Branch continue to operate those systems it will also continue to submit reports to the WVDEP on same on a regular basis.

d. By the dates shown in Exhibits A (paragraph B.8) and B (paragraph B.5), respectively, and after consultation with WVDEP, Paynter Branch shall design and designate the full-scale treatment systems, if any, it will install to treat the discharges from outlets identified in WV/NPDES Permit Nos. WV1016440 and WV1018906 in order to assure compliance with the final effective limits currently set forth in those permits by the dates set forth in subparagraphs (e) and (f) below. The flow capacity of a full-scale selenium treatment system will be determined by reference to empirical flow data gathered from the relevant area,

and the adequacy of such flow capacity will be demonstrated in the application to modify Permit No. WV1021664 for installation of a full-scale treatment system.

e. By October 1, 2012, Paynter Branch shall come into compliance with the final selenium effluent limits established by WV/NPDES Permit No. 1016440 for Outlets 3, 4, 14, 15, 16, 17, 18, 19, 20, and 24 .

f. By January 1, 2013, Paynter Branch shall come into compliance with the final selenium effluent limits established by WV/NPDES Permit No. 1018906 for Outlets 1 and 2.

g. Paynter Branch shall come into compliance with the final effective limits in its NPDES Permits for any parameter and/or outlet not listed in subparagraphs (e) and (f) upon entry of this Order.

## **VI. CIVIL PENALTIES**

29. In settlement of the WVDEP's claims in its Complaint relating to reported violations of the WPCA and the NPDES Permits and for relief under W. Va. Code §§ 22-11-22 and 22-3-17, Paynter Branch, 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 in the amount of \$169,500.00, 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, good faith efforts to comply, and history of compliance related to

the violations for which a penalty has been assessed herein. Paynter Branch shall pay this civil penalty as set forth below.

a. Paynter Branch shall pay a total cash penalty of \$169,500.00 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  
 Division of Mining and Reclamation  
 West Virginia Department of Environmental Protection  
 601 57<sup>th</sup> Street SE  
 Charleston, WV 25304

**VII. INTERIM LIMITS**

30. Paynter Branch shall be assigned and comply with the following interim selenium limits leading to compliance with the final effective selenium limits in WV/NPDES Permit Nos. WV1016440 and WV1018906 (or any such reissued permit):

<b>WV/NPDES Permit</b>	<b>Outlets</b>	<b>Phase I Interim Limits</b>	<b>Phase II Interim Limits</b>	<b>Phase III Interim Limits</b>
WV1016440	019 and 020	21 ug/l – Daily Maximum from April 1, 2011 until December 31, 2011	15.7 ug/l – Daily Maximum from January 1, 2012 until May 31, 2012	11 ug/l – Daily Maximum and 7.5 ug/l Average Monthly from June 1, 2012 until September 30, 2012

WV1018906	001	24 ug/l – Daily Maximum from April 1, 2011 until December 31, 2011	19 ug/l – Daily Maximum from January 1, 2012 until August 31, 2012	15 ug/l – Daily Maximum and 10.5 ug/l Average Monthly from September 1, 2012 to December 31, 2012
WV1018906	002	17.5 ug/l – Daily Maximum from April 1, 2011 until December 31, 2011	12.7 ug/l – Daily Maximum from January 1, 2012 until August 31, 2012	8 ug/l – Daily Maximum and 5.5 ug/l Average Monthly from September 1, 2012 to December 31, 2012

31. The WVDEP shall enforce the interim limits contained in Paragraph 30 through the stipulated penalties set forth in Paragraph 34 below. The interim limits in this paragraph will terminate and the final effective limits currently listed in NPDES Permit No. WV1016440 will be enforced beginning on October 1, 2012 and the final effective limits currently listed in NPDES Permit No. WV1018906 will be enforced beginning on January 1, 2013.

32. The parties acknowledge that Paynter Branch is currently seeking the reissuance of WV/NPDES Permit No. WV1016440 and WV/NPDES Permit No. WV1018906. Should either or both of these NPDES permits be reissued after this Consent Decree is entered by the Court, the parties agree that, for purposes of the WPCA and SCMRA, the provisions of this Consent Decree shall be considered an enforcement action of any selenium effluent limits set forth in those reissued permits.

33. For all other parameters and outlets not subject to interim limits as set forth herein, the WVDEP shall enforce the effluent limits currently in effect as set forth in the NPDES Permits.

**VIII. STIPULATED PENALTIES**

34. In the event Paynter Branch violates any interim limit for selenium as described in Paragraph 30, Paynter Branch shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the violation of a Phase I interim limit, Paynter Branch shall pay \$1,000 per violation. For the second consecutive violation of a Phase I interim limit Paynter Branch shall pay \$1,500. For the third consecutive and subsequent violations, Paynter Branch shall pay \$2,000. For the purposes of this subparagraph, a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.
- b. For the violation of a Phase II interim limit, Paynter Branch shall pay \$2,000 per violation. For the second consecutive violation of a Phase II interim limit, Paynter Branch shall pay \$2,500. For the third consecutive and subsequent violations, Paynter Branch shall pay \$3,000. For the purposes of this subparagraph, a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.
- c. For the violation of a Phase III interim daily maximum limit, Paynter Branch shall pay \$4,000 per violation. For the second consecutive violation of a Phase III interim daily maximum limit, Paynter Branch shall pay \$4,500. For the third consecutive and subsequent violations, Paynter Branch shall pay \$5,000. For the purposes of this subparagraph, a violation following an observed and reported

“no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.

- d. For the violation of a Phase III interim average monthly limit Paynter Branch shall pay \$5,000 per violation. For the second consecutive violation of a Phase III interim average monthly limit, Paynter Branch shall pay \$7,500. For the third consecutive and subsequent violations, Paynter Branch shall pay \$10,000. For the purposes of this subparagraph, a violation of a monthly average limit as reported on Paynter Branch’s DMRs shall constitute one (1) violation, and a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.

35. For violation of any final effective effluent limit in the NPDES Permits other than the effluent limits for selenium for the NPDES Permits and outlets referenced in Paragraph 30 that are subject to the interim limits as set forth herein, Paynter Branch shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For violations of daily maximum limits from April 1, 2011 through August 31, 2011, Paynter Branch shall pay \$1,000 per violation.
- b. For violations of daily maximum limits from September 1, 2011 through April 30, 2012, Paynter Branch shall pay \$2,000 per violation.
- c. For violations of daily maximum limits from May 1, 2012 through termination of this Consent Decree, Paynter Branch shall pay \$3,000 per violation.

d. For violations of average monthly limits from April 1, 2011 through August 31, 2011, Paynter Branch shall pay \$3,000 per violation; provided, however, that a violation of a monthly average limit as reported on a DMR shall constitute one (1) violation.

e. For violations of average monthly limits from September 1, 2011 through April 30, 2012, Paynter Branch shall pay \$4,000 per violation; provided, however, that a violation of a monthly average limit as reported on a DMR shall constitute one (1) violation,.

f. For violations of average monthly limits from May 1, 2012 through termination of this Consent Decree, Paynter Branch shall pay \$5,000 per violation; provided, however, that a violation of a monthly average limit as reported on a DMR shall constitute one (1) violation,.

36. For failure to take or complete any step outlined in the corrective action plan set forth in Paragraph 28 herein, including Exhibits A or B, or to submit any report as required by Paragraph 39 herein, Paynter Branch 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, Paynter Branch shall pay \$500 per day per violation;

b. For the 16<sup>th</sup> through 30<sup>th</sup> day of noncompliance, Paynter Branch shall pay \$750 per day per violation;

c. For any period of noncompliance after the 30<sup>th</sup> day, Paynter Branch shall pay \$1,000 per day per violation.

37. 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 29.b for deposit in the Stream Restoration Fund.

38. The schedule of stipulated penalties provided in Paragraphs 34, 35, and 36 are effective from April 1, 2011 through termination of this Consent Decree.

### **IX. REPORTS**

39. Paynter Branch shall provide WVDEP with quarterly reports on the status of efforts to achieve compliance with applicable water quality-based selenium effluent limits and/or water quality standards. These quarterly reports shall include a summary of the sampling results for selenium at each Outlet in the NPDES Permits referenced in Paragraph 30. The quarterly reports shall indicate what has been accomplished since the submittal of the prior quarterly report, whether Paynter Branch is on the schedule required by this Consent Decree or, if not on schedule, include an explanation of why Paynter Branch 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 Section V ("Order for Compliance") of this Consent Decree until all remedial measures described therein are completed. Each quarterly report shall be submitted to WVDEP at the address shown in paragraph 29 (with a copy sent to Wayne Wilson, at the same WVDEP address) within fifteen (15) days following the end of the calendar quarter, beginning January 15, 2012, and every three months thereafter until this Consent Decree is terminated in accordance with Paragraph 47.

## X. FORCE MAJEURE

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

41. If the WVDEP agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of Paynter Branch, Paynter Branch shall be excused as to that violation for the period of time the violation continues due to such circumstances. Paynter Branch'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 Paynter Branch 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 Paynter Branch and the length of such delay shall rest with Paynter Branch. Failure by Paynter Branch to comply with the notice requirements in Paragraph 40 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of Paynter Branch's rights under this provision to obtain an extension of its obligations based on that incident.

42. Compliance with any requirement of this Consent Decree, by itself, shall not constitute compliance with any other requirement. Paynter Branch must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

**XI. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION**

43. 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.

**XII. PERMITS AND OTHER LAWS AND REGULATIONS**

44. 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 Paynter Branch of any other obligation imposed by the WPCA, the NPDES Permit, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve Paynter Branch 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; provided, however, that no permit or permit modification shall be required to implement the demonstration-scale treatment systems at the Subject Mines. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

**XIII. PUBLIC NOTICE**

45. 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. Paynter Branch 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, Paynter Branch 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, Paynter Branch 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.

#### **XIV. EFFECTIVE DATE**

46. 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.

#### **XV. TERMINATION**

47. 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) Paynter Branch has achieved complete compliance with all requirements of this Consent Decree; (2) Paynter Branch 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 has been fully satisfied; Provided, however, that should Paynter Branch show that it is in consistent compliance with applicable selenium effluent limits at the outlets addressed in paragraph 30 above, and conditions (2) and (3) of this paragraph have been satisfied, then the parties shall jointly move the Court for an order terminating

this Consent Decree. For purposes of this paragraph, "consistent compliance" shall mean: (a) at least six consecutive DMR samples during a single calendar quarter that do not exceed the applicable daily maximum selenium limit stated in the permit; and (b) at least three consecutive months during a single calendar quarter, including the three month period in described in the preceding sentence, where the average of the DMR sample results does not exceed the applicable monthly average selenium limit stated in the permit.

**XVI. 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.

\_\_\_\_\_  
Warren R. McGraw  
Chief Judge

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

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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*

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Date

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304.357.0900  
Telefax: 304.357.0919  
*Counsel for Defendant Paynter Branch Mining, Inc.*

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Date

**EXHIBIT A - Compliance Schedule: WV/NPDES Permit No. 1016440  
(Paynter Branch No. 1 Surface Mine, S-4008-96)**

<p><b>A. Pax Location</b></p> <p>1. Continue demonstration scale treatment system development through ongoing testing and adjustments:</p> <p>a. On-site status meeting with Liberty Hydrologic and others regarding ongoing demonstration scale treatment systems</p>	<p>April 15, 2011</p>
<p>b. Complete evaluation of pre-treatment and post-treatment additions / winter performance issues/ options for improving treatment systems</p>	<p>May 1 – May 15, 2011</p>
<p>c. As warranted based on results, evaluate treatment of increased flows through demonstration scale treatment system by adding additional treatment facilities</p>	<p>May 15 – June 30, 2011</p>
<p>d. Evaluation of data from demonstration scale treatment systems based on completion of a - c above</p>	<p>July 1, 2011</p>
<p>2. Submit quarterly status report on treatment system efforts to the WVDEP</p>	<p>Quarterly, beginning October 15, 2011</p>
<p>3. Meet with WVDEP on status of demonstration scale treatment project and data evaluation; provide information regarding anticipated success of treatment system and whether alternative technology may be needed</p>	<p>July 15, 2011</p>
<p><b>B. <u>Paynter Branch No. 1 Surface Mine (S-4008-96)</u></b></p> <p>1. Evaluation of data from demonstration scale treatment system at Pax Location and design demonstration-scale treatment system (including designation of outlets where treatment will be applied) based on results of earlier testing and site-specific conditions (on-bench discharges)</p>	<p>July 15, 2011</p>
<p>2. Complete installation of initial demonstration treatment system (on-bench; Outlet 20)</p>	<p>August 15, 2011</p>
<p>3. Submit quarterly status report on treatment system efforts to the WVDEP</p>	<p>Quarterly, beginning on October 15, 2011</p>
<p>4. Meet with WVDEP on status of demonstration scale treatment project and data evaluation; provide information regarding anticipated success of treatment system and whether alternative technology may be needed</p>	<p>October 15, 2011</p>

5. Complete installation of demonstration-scale treatment systems (all other outlets)	November 1, 2011
6. Evaluate pre-treatment needs/options for post-treatment	December 15, 2011
7. Evaluate treatment of increased flows at 25% or more volume capacity	December 15, 2011
8. Design and designate scaled-up treatment systems for 100% of design capacity	March 1, 2012
9. Submit all necessary permit modification applications to WVDEP (**this will address alternative technologies if determined to be necessary**)	May 1, 2012
10. Begin site preparation and initiate construction of full-scale treatment systems	July 1, 2012
11. Begin testing of installed treatment system components and making any necessary adjustments to achieve final compliance	October 1, 2012
12. Achieve compliance with final selenium effluent limits	March 1, 2012
<b>** Alternatives under active consideration and testing include: (a) ZVI technologies and modifications to ZVI installations; (b) emerging biological technologies; and (c) chemical technologies, all of which are being considered concurrently for use if it is determined that an alternate technology will need to be pursued.</b>	

**EXHIBIT B - Compliance Schedule: WV/NPDES Permit No. WV1018906  
(Paynter Branch North Surface Mine, S-4003-00)**

<p><b>A. Pax Location</b></p> <p>1. Continue demonstration-scale treatment system development through ongoing testing and adjustments:</p> <p>a. On-site status meeting with Liberty Hydrologic and others regarding ongoing demonstration-scale treatment systems</p>	<p>April 15, 2011</p>
<p>b. Complete evaluation of pre-treatment and post-treatment additions / winter performance issues/ options for improving treatment systems</p>	<p>May 1 – May 15, 2011</p>
<p>c. As warranted based on results, evaluate treatment of increased flows through demonstration-scale treatment system by adding additional treatment facilities</p>	<p>May 15 – June 30, 2011</p>
<p>d. Evaluation of data from demonstration-scale treatment systems based on completion of a - c above</p>	<p>July 1, 2011</p>
<p>2. Submit quarterly status report on treatment system efforts to the WVDEP</p>	<p>Quarterly, beginning October 15, 2011</p>
<p>3. Meet with WVDEP on status of demonstration-scale treatment project and data evaluation; provide information regarding anticipated success of treatment system and whether alternative technology may be needed</p>	<p>July 15, 2011</p>
<p><b>B. <u>Paynter Branch North Surface Mine (S-4003-00)</u></b></p>	
<p>1. Complete installation of demonstration scale treatment system(s) at Paynter Branch North Surface Mine</p>	<p>March 16, 2011</p>
<p>2. Complete evaluation of data from demonstration scale treatment system(s) at Paynter Branch North Surface Mine</p>	<p>August 16, 2011</p>
<p>3. Submit quarterly status report on treatment system efforts to the WVDEP</p>	<p>Quarterly, beginning on October 15, 2011</p>
<p>4. Complete evaluation of data from demonstration-scale treatment systems at Pax Location</p>	<p>December 15, 2011</p>
<p>5. Design and designate scaled-up treatment system for 100% of design capacity</p>	<p>March 1, 2012</p>
<p>6. Submit all necessary permit modification applications to WVDEP (**this will address alternative technologies if determined to be necessary**)</p>	<p>May 1, 2012</p>

7. Begin site preparation and initiate construction of treatment system	July 1, 2012
8. Begin testing of installed treatment system components and making any necessary adjustments to achieve final compliance	October 1, 2012
9. Achieve compliance with final selenium effluent limits	March 1, 2013
<b>** Alternatives under active consideration and testing include: (a) ZVI technologies and modifications to ZVI installations; (b) emerging biological technologies; and (c) chemical technologies, all of which are being considered concurrently for use if it is determined that an alternate technology will need to be pursued.</b>	