

IN THE CIRCUIT COURT OF RALEIGH 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-462-H

PIONEER FUEL CORPORATION,

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 Pioneer Fuel Corporation (hereinafter "Pioneer Fuel"), 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 Pioneer Fuel 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 Pioneer Fuel and its successors, as both the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter “WV/NPDES”) Permit Nos. WV1021664, WV1008901, WV1019198, and WV1021699 (the “NPDES Permits”) and the permittee of Surface Mining Permit Nos. S-3018-03, O-4017-96, S-3015-99 and O-3021-03 (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 Raleigh County, West Virginia, against Pioneer Fuel as set forth above in the caption of this Consent Decree. The Complaint alleges that Pioneer Fuel violated the WPCA and the SCMRA through discharges of pollutants from its mining facilities in Raleigh County, West Virginia, which are covered by WV/NPDES Permit Nos. WV1021664, WV1008901, WV1019198, and WV1021699 and SCMRA Permit Nos. S-3018-03, O-4017-96, S-3015-99 and O-3021-03.

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. Pioneer Fuel has reported the quality of its discharges and other information to the WVDEP through submittal of Discharge Monitoring Reports (hereinafter “DMRs”).
8. Pioneer Fuel’s mining operations are also covered by the SCMRA Permits which WVDEP issued on December 20, 2004 for Permit No. S-3018-03; on December 26, 1996 for Permit No. O-4017-96; on November 15, 2001 for Permit No. S-3015-99; and on November 15, 2004 for Permit No. O-3021-03 (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 Pioneer Fuel for the period from June 1, 2007 through March 31, 2011 identified results reported in excess of stated effluent limits in the NPDES Permit for the following parameters at the following

Outlets:

WV/NPDES Permit No.	Outlet	Parameter(s)
WV1021664	001	Total suspended solids, Aluminum
WV1021664	004	Selenium
WV1021664	008	Selenium, Aluminum
WV1021664	009	Selenium, Aluminum
WV1021664	011	Selenium, Aluminum
WV1021664	012	Selenium
WV1021664	013	Selenium
WV1008901	002	Total suspended solids
WV1019198	002	Total suspended solids, Aluminum, Iron
WV1019198	004	Aluminum, Iron
WV1021699	001	Aluminum

WVDEP and Pioneer Fuel have previously entered into Consent Order No. M-08-039 covering exceedances of effluent limits in WV/NPDES Permits WV1021664 and WV1009801 prior to December, 2008. Consent Order No. M-08-039 is incorporated by reference into this Consent Decree, and the WVDEP hereby confirms that the penalty assessed by it, and paid by Pioneer Fuel, pursuant to Consent Order No. M-08-039 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-08-039, and the parties agree that specific corrective action and/or compliance steps are appropriate for the Outlets and parameters referenced 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. 1021664 governs 25 permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, as of April 27, 2009 (Order No. 29003), WV/NPDES Permit No. WV1021664 establishes final effluent limits for that parameter at Outlets 4, 8, 9, 11, 12, 13 and 18-25 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. However, Outlets 19-25 have not been constructed, and, as further described in Paragraphs 18, 19, and 20 below, the other final effluent limits referenced above are the subject of a compliance schedule that

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

13. During the period prior to April 5, 2010, Pioneer Fuel installed an experimental phytoremediation project on the site of the mine covered by WV/NPDES Permit No. WV1021664. After that experiment failed to show satisfactory results, on or about May 28, 2010, Pioneer Fuel initiated demonstration scale testing of a ZVI treatment system at Outlet 008 under WV/NPDES Permit No. WV1021664, and it has continued to monitor and adjust that system since that time.

14. Pioneer Fuel has also continued to evaluate other treatment options for outlets where the ZVI system may not be the best treatment option, including, but not limited to different types of microbial/biological treatment technology. In August, 2010, Pioneer Fuel initiated demonstration-scale testing of a biological treatment system at Outlet 009 under WV/NPDES Permit No. WV1021664. In early 2011, Pioneer Fuel initiated chemical treatment demonstration scale testing at Outlet 011 under WV/NPDES Permit No. WV1021664. It continues to monitor and adjust these systems.

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

16. Pioneer Fuel 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 Pioneer Fuel's efforts to come into full compliance with its selenium effluent limits by April 5, 2010, Pioneer Fuel could not do so.

18. In November, 2009, Pioneer Fuel filed a request to modify WV/NPDES Permit No. WV1021664 to extend the final effective date and monitoring-only requirements for the selenium effluent limits in the permit beyond April 5, 2010.

19. In February 2010, the WVDEP issued a draft permit modification based on Pioneer Fuel's application and commenced a public comment period on the proposed modification. However, prior to the close of the public comment period, the WVDEP issued an order denying Pioneer Fuel's modification request.

20. On March 10, 2010, Pioneer Fuel filed an administrative appeal with the West Virginia Environmental Quality Board seeking redress for the WVDEP's denial of its modification application. The Board subsequently granted a stay of the final limits for selenium, which were to go into effect in WV/NPDES Permit No. WV1021664 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 Pioneer Fuel pursue resolution of all issues raised in the appeal and this civil action through an omnibus settlement. Pioneer Fuel 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 Pioneer Fuel was not a party to that case, the District Court's decision does not invalidate the stay issued to Pioneer Fuel, and Pioneer Fuel 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 Pioneer Fuel 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 after entry and 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 Pioneer Fuel's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment. Should Pioneer Fuel 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 Pioneer Fuel to compel implementation of a compliance plan to address such parameters.

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

24. The parties agree that the civil penalties to be paid by Pioneer Fuel 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 Pioneer Fuel'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, Pioneer Fuel agrees to promptly withdraw its permit modification request 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, Pioneer Fuel 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 Pioneer Fuel 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. Pioneer Fuel shall continue to implement its demonstration-scale treatment systems as described in and consistent with the time frames set forth in the schedule attached as Exhibit A. (The parties acknowledge that some of the steps set forth in Exhibit A 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. Pioneer Fuel shall conclude the demonstration-scale projects described in subparagraphs (a) and (b) above, and shall evaluate the

effectiveness of the demonstration-scale projects and provide a report on the same to WVDEP by the dates specified in Exhibit A. This report may be combined with the regular quarterly report required under Paragraph 37. Nothing in this paragraph shall prevent Pioneer Fuel from continuing to operate the demonstration-scale treatment systems after the respective deadlines for evaluation of their effectiveness; provided, however, that should Pioneer Fuel 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 Exhibit A (paragraphs 4 and 9) and after consultation with WVDEP, Pioneer Fuel 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. WV1021664 in order to assure compliance with the final effective limits currently set forth in that permit 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 August 1, 2012, Pioneer Fuel shall come into compliance with the final selenium effluent limits established by WV/NPDES Permit No. 1021664 for Outlet 11.

f. By January 1, 2013, Pioneer Fuel shall come into compliance with the final selenium effluent limits established by WV/NPDES Permit No. 1021664 for Outlets 4, 8, 9, 12, and 13

g. Pioneer Fuel 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, Pioneer Fuel, 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 \$379,600.00, 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. Pioneer Fuel shall pay this civil penalty as set forth below.

a. Pioneer Fuel shall pay a total cash penalty of \$379,600 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 57th Street SE
 Charleston, WV 25304

VII. INTERIM LIMITS

30. Pioneer Fuel shall be assigned and comply with the following interim selenium limits leading to compliance with the final effective selenium limits in WV/NPDES Permit No. WV1021664:

Outlets	Phase I Interim Limits	Phase II Interim Limits	Phase III Interim Limits
008	28 ug/l– Daily Maximum from April 1, 2011 until December 31, 2011	21 ug/l – Daily Maximum from January 1, 2012 until July 31, 2012	14 ug/l – Daily Maximum and 9.8 ug/l Average Monthly from August 1, 2012 to December 31, 2012
009	45 ug/l– Daily Maximum from April 1, 2011 until December 31, 2011	37.5 ug/l – Daily Maximum from January 1, 2012 until July 31, 2012	25 ug/l – Daily Maximum and 17.5 ug/l Average Monthly from August 1, 2012 to December 31, 2012
011	29 ug/l– Daily Maximum from April 1, 2011 until November 30, 2011	21.7 ug/l – Daily Maximum from December 1, 2011 until February 28, 2012	14.5 ug/l – Daily Maximum and 10 ug/l Average Monthly from March 1, 2012 to June 30, 2012

012	28 ug/l- Daily Maximum from April 1, 2011 until December 31, 2011	21 ug/l - Daily Maximum from January 1, 2012 until July 31, 2012	14 ug/l - Daily Maximum and 9.8 ug/l Average Monthly from August 1, 2012 to December 31, 2012
013	28 ug/l- Daily Maximum from April 1, 2011 until December 31, 2011	21 ug/l - Daily Maximum from January 1, 2012 until July 15, 2012	14 ug/l - Daily Maximum and 9.8 ug/l Average Monthly from August 1, 2012 to December 31, 2012

The WVDEP shall enforce the interim limits contained in this Paragraph 30 through the stipulated penalties set forth in Paragraph 32 below. The interim limits in this paragraph will terminate and the final effective limits currently listed in NPDES Permit No. WV1021664 will be enforced beginning on July 1, 2012 for Outlet 011 and beginning on January 1, 2013 for Outlets 004, 008, 009, 012, and 013.

31. 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

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

- a. For the violation of a Phase I interim limit, Pioneer Fuel shall pay \$1,000 per violation. For the second consecutive violation of a Phase I interim limit, Pioneer Fuel shall pay \$1,500. For the third consecutive and

- subsequent violations, Pioneer Fuel 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, Pioneer Fuel shall pay \$2,000 per violation. For the second consecutive violation of a Phase II interim limit, Pioneer Fuel shall pay \$2,500. For the third consecutive and subsequent violations, Pioneer Fuel 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, Pioneer Fuel shall pay \$4,000 per violation. For the second consecutive violation of a Phase III interim daily maximum limit, Pioneer Fuel shall pay \$4,500. For the third consecutive and subsequent violations, Pioneer Fuel 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 Pioneer Fuel shall pay \$5,000 per violation. For the second consecutive violation of a Phase III interim average monthly limit, Pioneer Fuel shall pay \$7,500. For

the third consecutive and subsequent violations, Pioneer Fuel shall pay \$10,000. For the purposes of this subparagraph, a violation of a monthly average limit as reported on Pioneer Fuel'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.

33. 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, Pioneer Fuel 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, Pioneer Fuel shall pay \$1,000 per violation.
- b. For violations of daily maximum limits from September 1, 2011 through April 30, 2012, Pioneer Fuel shall pay \$2,000 per violation.
- c. For violations of daily maximum limits from May 1, 2012 through the termination of this Consent Decree, Pioneer Fuel shall pay \$3,000 per violation.
- d. For violations of average monthly limits from April 1, 2011 through August 31, 2011, Pioneer Fuel 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, Pioneer Fuel 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 the termination of this Consent Decree, Pioneer Fuel 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,.

34. For failure to take or complete any step outlined in the corrective action plan set forth in Paragraph 28 herein, including Exhibit A, or to submit any report as required by Paragraph 37 herein, Pioneer Fuel shall be obligated to pay the following stipulated penalties to WVDEP:

a. For the 1st through 15th day of noncompliance, Pioneer Fuel shall pay \$500 per day per violation;

b. For the 16th through 30th day of noncompliance, Pioneer Fuel shall pay \$750 per day per violation;

c. For any period of noncompliance after the 30th day, Pioneer Fuel shall pay \$1,000 per day per violation.

35. 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.

36. The schedule of stipulated penalties provided in Paragraphs 32, 33, and 34 are effective from April 1, 2011 through the termination of this Consent Decree.

IX. REPORTS

37. Pioneer Fuel shall provide WVDEP with quarterly reports on the status 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 Pioneer Fuel is on the schedule required by this Consent Decree or, if not on schedule, include an explanation of why Pioneer Fuel 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 44.

X. FORCE MAJEURE

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

39. If the WVDEP agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of Pioneer Fuel, Pioneer Fuel shall be excused as to that violation for the period of time the violation continues due to such circumstances. Pioneer Fuel'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 Pioneer Fuel 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 Pioneer Fuel and the length of such delay shall rest with Pioneer Fuel. Failure by Pioneer Fuel to comply with the notice requirements in Paragraph 38 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of Pioneer Fuel's rights under this provision to obtain an extension of its obligations based on that incident. Compliance with any requirement of this Consent Decree, by itself, shall not constitute compliance with any other requirement. Pioneer Fuel 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

40. 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

41. 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 Pioneer Fuel 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 Pioneer Fuel 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 temporary pilot 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

42. 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. Pioneer Fuel 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, Pioneer Fuel 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, Pioneer Fuel 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

43. 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

44. 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) Pioneer Fuel has achieved complete compliance with all requirements of this Consent Decree; (2) Pioneer Fuel 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 Pioneer Fuel 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 _____, 2012.

John A. Hutchison
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

Jonathan C. Frame, Esq. (WVSB #10182)
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
(304) 926-0499 x. 1702
Counsel for Plaintiff

Date

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Date

**EXHIBIT A - Compliance Schedule: WV/NPDES Permit No. 1021664
(Pioneer Fuel Ewing Fork No. 2 Surface Mine, S-3018-03)**

<p>1. Continue demonstration-scale treatment system development through ongoing testing and adjustments:</p> <p>a. On-site status meetings with Liberty Hydrologic and others regarding ongoing demonstration-scale treatment system pilots (ZVI (Outlet 008), biological (Outlet 009), others)</p>	<p>April 15, 2011</p>
<p>b. Complete evaluation of pre-treatment and post-treatment additions /winter performance issues; options for improving 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 systems by adding additional 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 projects and data evaluation; provide information regarding anticipated success of treatment system and need for alternative technology</p>	<p>July 15, 2011</p>
<p>4. Design and designate scaled-up treatment system for 100% of design capacity – OUTLETS 008, 009, 011 012 AND 013</p>	<p>March 1, 2012</p>
<p>5. Submit all necessary permit modification applications to WVDEP (**this will address alternative technologies if determined to be necessary**) – OUTLETS 008, 009, 011, 012 AND 013</p>	<p>May 15, 2012</p>
<p>6. Begin site preparation and initiate construction of treatment system – OUTLETS 008, 009, 011, 012 AND 013</p>	<p>August 30, 2012</p>
<p>7. Begin testing of installed treatment system components and making any necessary adjustments to achieve final compliance – OUTLETS 008, 009, 011, 012 AND 013</p>	<p>October 31, 2012</p>
<p>8. Achieve compliance with final selenium effluent limits – OUTLETS 008, 009, 011, 012 AND 013</p>	<p>March 1, 2013</p>
<p>** 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.</p>	