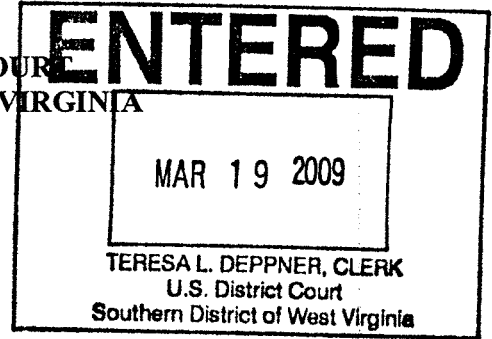


IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON



OHIO VALLEY ENVIRONMENTAL  
COALITION, INC., and WEST  
VIRGINIA HIGHLANDS  
CONSERVANCY, INC.,

Plaintiffs,

v.

CIVIL ACTION NO. 3:08-cv-00088

HOBET MINING, LLC,

Defendant.

**CONSENT DECREE**

**I. RECITALS**

1. On June 29, 2007, after notice to the United States Environmental Protection Agency (“EPA”), the West Virginia Department of Environmental Protection (“WVDEP”), and Defendants Apogee Coal Company, LLC, and Hobet Mining, LLC, Plaintiffs Ohio Valley Environmental Coalition (“OVEC”) and West Virginia Highlands Conservancy (“WVHC”) commenced Civil Action Number 3:07-cv-00413 (Doc. # 1, Civ. No. 3:07-cv-00413) alleging that Defendants have violated the Federal Water Pollution Control Act (the “Clean Water Act” or “CWA”), as amended, 33 U.S.C. § 1251 *et seq.*, and the Surface Mining Control and Reclamation Act (“SMCRA”), as amended, 30 U.S.C. § 1231 *et seq.*, and seeking a declaratory judgment, injunctive relief, the imposition of civil penalties, and the award of costs, including attorney and expert witness fees.

2. On July 18, 2007, Plaintiffs filed an Amended Complaint (Doc. # 12, Civ. No. 3:07-cv-00413) by which they effected a partial dismissal of their action against Hobet Mining, LLC, by narrowing their action to claims against Hobet Mining, LLC, to those arising under West Virginia National Pollution Discharge Elimination System (“WV/NPDES”) Permit WV1017225, but otherwise leaving their claims against Apogee Coal Company, LLC, unaffected.

3. On February 7, 2008, after notice to EPA, WVDEP, and Defendant Hobet Mining, LLC, Plaintiffs OVEC and WVHC commenced Civil Action Number 3:08-cv-00088 (Doc. # 1, Civ. No. 3:08-cv-00088) alleging that Defendant Hobet Mining, LLC, has violated the CWA and SMCRA, and seeking a declaratory judgment, injunctive relief, the imposition of civil penalties, and the award of costs, including attorney and expert witness fees.

4. On March 10, 2008, on the joint motion of the Parties, the Court dismissed Count 3 of the First Amended Complaint for Declaratory and Injunctive Relief and for Civil Penalties in Civil Action Number 3:07-cv-00413 (Doc. # 62, Civ. No. 3:07-cv-00413), which alleged that Hobet Mining, LLC, was in violation of the CWA because of violations of the selenium effluent limitations in WV/NPDES Permit WV1017225 for lack of subject matter jurisdiction.

5. On May 27, 2008, the Court granted in part and denied in part Plaintiffs’ Cross Motion for Partial Summary Judgment and for Declaratory and Injunctive Relief in Civil Action Number 3:07-cv-00413, and granted in part and denied in part Defendants’ Motion for Summary Judgment in Civil Action Number 3:07-cv-00413 (Doc. # 70, Civ. No. 3:07-cv-00413).

6. On August 13, 2008, the Court issued an injunction in Civil Action Number 3:07-cv-00413, (Doc. # 103, Civ. No. 3:07-cv-00413) requiring Defendant Apogee Coal Company, LLC, to install a selenium treatment system at Outfalls 001, 002, and 003 of WV/NPDES Permit WV1013599 no later than May 31, 2009, and to comply with the selenium effluent limitations on those outfalls by June 30, 2009.

7. On September 5, 2008, the Boone County Circuit Court approved a Consent Order between WVDEP and Defendant Hobet Mining, LLC, that resolved violations substantially similar to those that Plaintiffs alleged in Civil Action Number 3:08-cv-00088.

8. On December 18, 2008, the Court granted in part Defendant's Motion to Dismiss in Civil Action Number 3:08-cv-00088 and denied in part as moot and held in abeyance Plaintiffs' Motion for Partial Summary Judgment and Declaratory and Injunctive Relief in Civil Action Number 3:08-cv-00088 (Doc. # 46, Civ. No. 3:08-cv-00088).

9. On February 13, 2009, WVDEP issued a draft administrative order to assess civil penalties against Defendant Hobet Mining, LLC, for violations of the selenium limits in WV/NPDES Permits WV0099392, WV1016776, WV1020889, and WV1021028 for the period of April 1, 2008, through June 30, 2008.

10. Defendant Apogee Coal Company, LLC, discharges wastewater from its Northwest Ruffner Surface Mine (Surface Mining Permit No. S500593), West Ruffner Surface Mine (Surface Mining Permit No. S500190), and Slab Fork Deep Mine (Surface Mining Permit No. U500598) into Rum Creek of the Guyandotte River and its tributaries, pursuant to its WV/NPDES Permit WV1013599.

11. Defendant Hobet Mining, LLC, discharges wastewater from its H-21 Surface Mining Operation (Surface Mining Permits S003285, S508088, S502689, S502992, and S501692) and Ancillary Facility (Surface Mining Permit O501097) into Mud River and its tributaries pursuant to its WV/NPDES Permit WV0099392.

12. Defendant Hobet Mining, LLC, discharges wastewater from its West Ridge Surface Mine (Surface Mining Permit S500396) into the Mud River and its tributaries pursuant to WV/NPDES Permit WV1016776.

13. Defendant Hobet Mining, LLC, discharges wastewater from its Westridge Number 3 Surface Mine (Surface Mining Permit S500203) into Mud River and its tributaries pursuant to its WV/NPDES Permit WV1020889.

14. Defendant Hobet Mining, LLC, discharges wastewater from its Westridge South Number 1 Surface Mine (Surface Mining Permit S500404) into the Mud River and its tributaries pursuant to its WV/NPDES Permit WV1021028.

15. In light of the above pending judicial and administrative proceedings, and after a period of extensive negotiations and other mutual consideration, Plaintiffs and Defendants, by their authorized representatives, and without trial or further adjudication of any outstanding issue of fact or law, consent to the entry of this Consent Decree (“Decree”) to resolve Plaintiffs’ claims in Civil Action Numbers 3:07-cv-00413 and 3:08-cv-00088.

16. Plaintiffs and Defendants believe that settlement of Civil Action Numbers 3:07-cv-00413 and 3:08-cv-00088 is in the best interest of the parties and the public, and that entry of this Decree is the most appropriate means of resolving Civil Action Numbers 3:07-cv-00413 and 3:08-cv-00088.

17. NOW, THEREFORE, without this Decree constituting any evidence or admission by any party with respect to any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ordered, adjudged, and decreed as follows:

## **II. JURISDICTION**

18. For purposes of this Decree, the Parties agree that this Court has jurisdiction over the parties and subject matter of Civil Action Numbers 3:07-cv-00413 and 3:08-cv-00088 pursuant to Section 505(a) of the CWA, 33 U.S.C. § 1365(a), and Section 520(a) of SMCRA, 30 U.S.C. § 1270(a).

## **III. APPLICABILITY**

19. Except as provided in Paragraph 20 below, the provisions of this Decree shall apply to and be binding upon the parties hereto, their officers, directors, agents, servants, employees, successors, assigns, members and attorneys, and upon all those persons, firms and corporations acting under, through or for them, and upon those persons, firms and corporations in active concert or participation with them,.

20. Nothing in this Decree shall be interpreted as a waiver, compromise, or settlement of any cause of action personal to Plaintiffs' members, under either statute or common law, for personal injury or property damage resulting from Defendant's selenium discharges.

## **IV. INJUNCTIVE RELIEF**

21. The terms of the Court's orders in Civil Action Number 3:07-cv-00413 granting Plaintiffs injunctive relief against Defendant Apogee Coal Company, LLC, including, but not limited to, the Court's orders of May 27, 2008, July 7, 2008, August 13, 2008, and December 8, 2008, are hereby modified as follows:

- a. Defendant Apogee Coal Company, LLC, is **ORDERED** to comply with its selenium effluent limitations on Outfalls 001, 002, and 003 of WV/NPDES Permit Number WV1013599 no later than April 5, 2010.
- b. Defendant Apogee Coal Company, LLC, is **ORDERED** to submit status reports to the Court and the Plaintiffs on June 15, 2009, September 15, 2009, December 15, 2009, March 15, 2010, and April 12, 2010. The status reports shall contain all relevant information on Patriot Coal Corporation's installation of pilot treatment projects, its evaluation of various treatment technologies at the facilities at issue in Civil Action Numbers 3:07-cv-00413 and 3:08-cv-00088, and its other efforts to comply with its selenium limits at its coal mining operations, including, but not limited to the following:
  - i. The operational status of treatment equipment using zero-valent iron in either a steel wool or steel foam format, including a description of installed equipment, dates of operation, sampling results, influent selenium concentration, effluent selenium concentration at the point of discharge into receiving waters, selenium removal efficiency, and an analysis of any operational problems with the units and the degree of success in resolving those problems;
  - ii. The operational status of Defendants' ABMet pilot project being performed under the terms of Defendant Hobet Mining, LLC's September 5, 2008 Consent Order with WVDEP,

including a description of installed equipment, dates of operation, sampling results, influent selenium concentration, effluent selenium concentration at the point of discharge into receiving waters, selenium removal efficiency, and an analysis of any operational problems with the units and the degree of success in resolving those problems. Moreover, Defendants shall submit to Plaintiffs and the Court the report on ABMet required under Attachment 4.2 of the Consent Decree between WVDEP and Hobet Mining, LLC, that resolves the Boone County Circuit Court Action 07-C-3 along with the first status report that is due under Paragraph 21.b following the completion of the ABMet report or within one week of the completion of the ABMet report if the ABMet report is not available by April 12, 2010;

- iii. The operational status of Defendants' reverse osmosis pilot projects, including a description of installed equipment, dates of operation, sampling results, influent selenium concentration, effluent selenium concentration at the point of discharge into receiving waters, selenium removal efficiency, and an analysis of any operational problems with the units and the degree of success in resolving those problems; and
- iv. The operational status of the Pilot Project described in Section VII, infra, including a description of installed equipment, dates

of operation, sampling results, influent selenium concentration, effluent selenium concentration at the point of discharge into receiving waters, selenium removal efficiency, and an analysis of any operational problems with the units and the degree of success in resolving those problems.

## V. REPORTING

22. For the period beginning January 1, 2009 and ending on the expiration of this Decree, Defendants shall provide Plaintiffs, through their counsel, with copies of the following documents, to the extent that the documents are otherwise submitted to, or received from, EPA and/or WVDEP, regarding WV/NPDES Permits WV/1013599, WV0099392, WV1016776, WV1020889, and WV1021028: (1) all discharge monitoring reports (DMRs), (2) all notices of noncompliance submitted by WVDEP to Defendants' regarding their selenium discharges and any responses thereto, (3) all monitoring records (including laboratory analyses of effluent sampling) used in preparing any DMR, (4) SEP-related documents as described in Section VII, infra, and (5) all other documents submitted to, or received from, EPA and/or WVDEP concerning the above referenced permits and any EPA or WVDEP judicial and administrative enforcement actions related to those permits.

23. Patriot Coal Corporation and Defendants hereby release any proprietary interest that they may have in any and all data and information generated as a result of all pilot projects undertaken in its efforts to comply with its selenium limits and agree that all reports and data generated by those pilots may be publicly disseminated.

## VI. CIVIL PENALTIES

24. Not later than sixty (60) days after the entry of this Decree, Defendants shall pay \$50,000 to the United States Treasury. That payment shall be made by certified check, bank check, or money order to the Treasurer of the United States and should be sent to the following address:

Saundra Doyle  
Debt Collection Specialist  
Environment & Natural Resources Division  
Executive Office  
P.O. Box 7754  
Ben Franklin Station  
Washington, D.C. 20044-7754

A copy of the check and cover letter shall be sent to Plaintiffs at the time the payment is made. The cover letter shall state that the payment is being made pursuant to this Decree.

25. The sum set forth in Paragraph 24, supra, shall completely discharge Defendants from any liability under 33 U.S.C. § 1365 arising from any violations of WV/NPDES Permits WV1013599, WV0099392, WV1016776, WV1020889, and WV1021028 that have occurred or may occur up to and including the date of entry of this Decree, and any violations of the selenium effluent limitations in WV/NPDES Permits WV1013599, WV0099392, WV1016776, WV1020889, and WV1021028 that may occur between the date of the entry of this Decree and April 4, 2010.

## VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT

26. Defendants shall complete the following Supplemental Environmental Project ("SEP"), which the Parties agree is intended to secure significant environmental or public health protection and improvements.

27. Prior to January 31, 2010, Defendants shall expend not less than \$350,000 on the SEP, but the Parties recognize that the total expenditure could exceed that amount. The Parties anticipate that Defendants will spend \$160,000 to accomplish the tasks outlined in Appendix B and to provide the electrical power necessary for the SEP. Defendants shall document their expenditures made in connection with the SEP and provide copies of that documentation including invoices to Plaintiffs in the status reports described in Paragraph 21.b.iv above.

28. Defendants' SEP shall be conducted in two phases. In Phase I of the SEP, Defendants shall undertake Pilot Projects using New Logic Research, Inc's Vibratory Shear Enhanced Process (VSEP) membrane technology to demonstrate that technology for the treatment of selenium discharges from coal mining facilities and prepare commentary and reports on the Pilot Projects as described in Paragraphs 43 and 47, below. Phase II of the SEP shall consist of a Concentrate Disposal Study and Report, which will analyze treatment options and their costs for the disposal of concentrate from the VSEP system.

29. The SEP is a Pollution Reduction project, as that term is used in EPA's SEP Policy. Selenium discharges from previous coal mining operations in excess of existing water quality standards have been observed in West Virginia. To date, no technology known to be effective for selenium treatment has been used at coal mining operations to achieve water quality standards for selenium. The SEP is intended to demonstrate VSEP's technical and economic feasibility for use in a coal mining setting. New Logic Research claims that its VSEP technology is superior to traditional reverse osmosis techniques because VSEP can tolerate high levels of suspended solids in the feed

and produces a much lower volume of concentrate than spiral-wound membranes. According to New Logic Research, if VSEP proves effective for selenium reduction in a coal mining setting, its application could result in not only compliance with selenium effluent limitations, but in near-zero discharge of selenium from outfalls to which it is applied. Consequently, the SEP could result in the demonstration of a treatment technology that will virtually eliminate the discharge of selenium into the aquatic environment.

30. Defendants' total payment to New Logic Research, Inc., shall be \$190,000. Of that amount, \$180,000 shall pay for Phase I of the SEP (the Pilot Projects), and \$10,000 shall pay for Phase II of the SEP as provided in Paragraph 44, below.

31. Defendants shall lease the necessary equipment for the Pilot Project from New Logic Research under the terms described in the February 18, 2009 "VSEP Field Pilot Testing Quotation" (hereinafter "VSEP Agreement"). That document is appended to this Decree as Appendix A, and is incorporated herein by reference.

32. In accordance with the VSEP agreement, Defendants shall pay New Logic Research to staff and operate the Pilot Project, including taking the necessary samples of influent and effluent and shipping them to the appropriate analytic laboratory. Defendants shall pay the costs of such shipment and for the analyses of the samples as more fully described in the document appended to this Decree as Appendix B, which is incorporated herein by reference.

33. The Pilot Projects shall be conducted at two outfalls identified by mutual agreement of the Parties, one of which will be Outlet 002 on NPDES permit WV1013599. The other outfall at which the Pilot Project is conducted must be located at

a coal mining operation belonging to Patriot Coal Corporation or its subsidiaries, but need not be located at the mining facilities at issue in Civil Action Numbers 3:07-cv-00413 and 3:08-cv-00088. The project outfalls will be identified based on the dissimilarity of their chemistry, except that both outfalls will be locations at which the selenium concentration regularly exceeds the monthly average of 4.7 µg/l and daily maximum of 8.2 µg/l.

34. Defendants shall prepare the sites at each of the Pilot Project Outfalls for the installation of the VSEP machines in accordance with Appendix A VSEP Agreement.

35. At one of the Pilot Project Outfalls, two VSEP machines will be used in sequence. At the other Pilot Project Outfall, one VSEP machine will be used. New Logic Research may also process the reject from the VSEP machines at one or both Pilot Project Outfalls using a traditional, spiral-wound reverse osmosis membrane in order to evaluate that technology's effectiveness on VSEP concentrate from the treatment of coal-mine runoff. The cost of the use of spiral-wound reverse osmosis membranes is included in the \$180,000 amount that Defendants will pay to New Logic Research under the terms of the Appendix A VSEP Agreement.

36. The Pilot Project at each outfall shall be conducted over four consecutive months, commencing not later than May 1, 2009.

37. Samples of the influent, effluent, permeate, and concentrate will be taken and split by New Logic Research personnel and sent to the appropriate analytical laboratory. Defendants are responsible for the costs of shipping those samples to the laboratory and for the costs of the analysis of the samples.

38. Appendix B to this Decree, submitted by Defendants' consultant, sets out the sampling protocols, enumerates the constituents to be monitored, and identifies the sampling points and frequency of sampling.

39. The samples shall be analyzed to determine the concentrations of the constituents, as recommended by New Logic Research and Defendant's consultant and as described in Appendix A and Appendix B, attached hereto. The minimum detection level used to analyze the concentrations of selenium and its species shall be the lowest achievable by Applied Speciation and Consulting, LLC, in Tuckwila, WA. Nothing in this Consent Decree shall be construed to prohibit either party through their consultants and agents to engage in testing and evaluation of the VSEP Pilot Projects by means of any tests or analysis in addition to those specified in Appendices A and B so long as all test results are shared with the other party. If, after the Pilot Project is commenced, the Parties determine that additional or different water analysis is appropriate, then the Parties may modify Appendix B as appropriate.

40. For any Pilot Project Outfall not associated with WV/NPDES Permit WV1013599, Defendants will conduct a wastewater characterization analysis on the discharge from those outfalls similar to that performed by Defendant's consultant on the outfalls associated with WV/NPDES Permit WV1013599 in October 2008.

41. At the end of the Pilot Projects, but no later than September 30, 2009, New Logic Research will submit to the Parties a Draft report presenting the results of the Pilot Projects, including estimates of the capital cost as well as the operating and maintenance costs. The cost of the Draft and Final reports is included in the proposal described in Appendix A. Defendant's consultant shall analyze the Draft Pilot Projects

Report and submit thorough comments on that report to New Logic Research and the Parties by October 14, 2009.

42. New Logic Research shall submit a detailed substantive response to the Defendant's consultant comments on Draft Pilot Projects Report to Defendant's consultants and the Parties by October 23, 2009. Defendant's consultant shall provide a reply to New Logic Research's response to New Logic Research and the Parties by November 2, 2009.

43. If it finds it appropriate in its discretion to respond to Defendant's consultant November 2, 2009 reply, New Logic Research may do so. Not later than November 10, 2009, the Parties shall lodge the Pilot Projects Report and commentary with the Court. The Parties, their parent companies, and their consultants hereby release any proprietary interest that they may have in any and all data and information generated as a result of the Pilot Projects, including the laboratory analysis described in Paragraphs 37, 38, 39 and 40, and agree that the Final Pilot Project Report, commentary, and supporting data may be publicly disseminated following submission of the Report to Court.

44. Phase II of the SEP shall commence on October 1, 2009, and shall consist of a Concentrate Disposal Study and Report based upon the data collected on the concentrate waste stream collected during the operation of the Pilot Projects. To complete Phase II, Defendant shall obtain from Defendant's Consultant a paper report analyzing four potential treatment options and the cost thereof for the concentrate generated by treatment of coal mine runoff by the VSEP technology, from the following list of treatment technologies: iron cementation, ferri-hydrate co-precipitation, barium

addition and ion exchange, biological treatment through the use of ABMet and a fluidized bed reactor, evaporation, crystallization, deep well injection, and off-site disposal in RCRA-regulated facilities. New Logic Research and Defendant's consultant shall jointly select and agree to the four technologies to be evaluated based upon the most economic and environmentally benign methods of disposal of the concentrate given the characteristics and volume of the of the waste that would be generated by the full scale implementation of the Pilot Projects .

45. Draft 1 of the Concentrate Disposal Study and Report shall be due to Plaintiffs and New Logic Research not later than October 23, 2009. New Logic Research shall provide detailed substantive comments to Defendant's consultant on Draft 1 by October 30, 2009.

46. Draft 2 of the Concentrate Disposal Study and Report shall be due to New Logic Research by November 24, 2009, and shall incorporate thorough and complete responses and supporting data to New Logic Research's comments. New Logic Research shall provide detailed substantive comments to Defendant's consultant on Draft 2 by December 11, 2009.

47. Defendants shall provide the Final Concentrate Disposal Study and Report, which shall incorporate thorough and complete responses and supporting data to New Logic Research's comments on Draft 2, to Plaintiffs and the Court by December 30, 2009. The Parties, their parent companies, and their consultants hereby release any proprietary interest that they may have in any and all data and information generated in Phase II of the SEP and agree that the Final Concentrate Disposal Study and Report and supporting data may be publicly disseminated.

48. Defendants shall pay New Logic Research \$10,000 for its participation in Phase II of the SEP, including commenting on the draft reports. That payment is due and payable on December 11, 2009.

49. Defendants hereby certify that, as of the date of this Decree, Defendants are not required to perform or develop the SEP by any other agreement, grant, or as injunctive relief in these or any other cases. Defendants further certify that they have not received, and are not presently negotiating to receive, credit in any other enforcement action for the SEP. The SEP is not otherwise required by law because Defendants are under no obligation to use any particular treatment technology to achieve compliance with their selenium limits. Without the pilot study required in the SEP, VSEP is unlikely to be piloted in Appalachian coal mines in the near future.

50. On or before January 31, 2010, Defendants will submit documentation to Plaintiffs indicating the amount that Defendants have spent on the SEP. If that amount is less than the \$350,000 required by Paragraph 27, Defendants shall pay a stipulated penalty to the U.S. Treasury on or before March 1, 2010, in the amount of the difference between \$350,000 and the amount expended by Defendants.

51. The Parties intend for this SEP to demonstrate the technical and economic feasibility of using VSEP membrane technology to treat selenium discharges from coal mining operations, an environmental benefit that is directly related to the allegations alleged in Plaintiffs' complaint.

52. The SEP protects and reduces risk to public health and the environment by demonstrating a technology to treat an industry-wide problem in Appalachian coal mining.

### **VIII. COSTS AND ATTORNEY FEES**

53. Defendants agree to pay Plaintiffs' reasonable costs and attorney fees, including expert witness fees and costs, in the amount of \$325,000. Of that sum, \$39,504 is for expert witness fees and costs, \$40,500 is for attorney fees and costs to Public Justice, and \$244,996 is for attorney fees and costs to the Appalachian Center for the Economy and the Environment, Inc. Not later than five (5) business days from the entry of this Decree, Defendants shall deliver to Plaintiffs' counsel a check for \$325,000 made payable to the Appalachian Center for the Economy and the Environmental, Inc. The Appalachian Center for the Economy and the Environment, Inc., shall be wholly responsible for the proper distribution of any portions of the delivered sum to any and all other attorneys, experts or other entities who may be entitled thereto. The sum delivered under this paragraph shall be a complete settlement of Plaintiffs' claims for costs and fees incurred up to the date of entry of this Decree and thereafter for responding to possible comments on this Decree by the Department of Justice and for monitoring Defendants' compliance with the Decree, but does not include (1) costs and fees, if any, incurred thereafter if it becomes necessary for the Court to issue an order interpreting or enforcing the terms of this Decree or (2) costs and fees, if any, incurred after April 19, 2010.

### **IX. GENERAL PROVISIONS**

54. The undersigned representative(s) for each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into the terms and conditions of this Decree and to bind them legally to it.

55. Plaintiffs' consent to the entry of this Decree shall not be construed to be an endorsement of the passive selenium treatment technologies that Defendants are pursuing.

56. Whenever this Decree requires notice to, or service of documents on, either party, the communication to Plaintiffs shall be directed to Derek O. Teaney, Appalachian Center for the Economy and the Environment, P.O. Box 507, Lewisburg, WV, 24901, and the communication to Defendant shall be directed to Blair M. Gardner, Jackson Kelly PLLC, 500 Lee Street East, Suite 1600, P.O. Box 553, Charleston, WV 25322.

57. Defendants shall give written notice of this Decree to any successor in interest prior to transfer of ownership of the facilities at issue in this Decree, and shall simultaneously verify to Plaintiffs that such notice has been given.

58. The Court shall retain jurisdiction of this matter for the purpose of enabling the parties to this Decree to apply to the Court for any further order that may be necessary to interpret or enforce the terms of this Decree.

59. This Decree shall terminate on April 19, 2010, except to the extent that the parties may be involved in proceedings to enforce the terms of this Decree, in which case the Decree shall terminate when a final order in those proceedings is issued. The pendency of such proceedings shall not limit the right of Plaintiffs to commence an action for any violations of Defendants' WV/NPDES permits that occur after April 19, 2010.

60. The terms of this Decree shall not be changed, revised, or modified except by a written instrument signed by the parties to this Decree, or by further orders of the Court, and shall not take effect until approved by the Court.

61. Plaintiffs and Defendants reserve all legal and equitable rights and defenses available to them to enforce or defend the provisions of this Decree. Before a party invokes the Court's jurisdiction to interpret, enforce, or modify this Decree, the party shall send a written notice to the other party outlining the nature and requesting informal negotiations among the principals and counsel to resolve the matter. If the parties are unable to resolve the matter within 10 business days from the date of the notice (or within an additional period of time agreed to by the parties), any party may request the Court to resolve the matter.

ENTER: March 19, 2009



ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE

For the Plaintiffs Ohio Valley Environmental Coalition and West Virginia Highlands Conservancy

Dated: March 11, 2009

/s/ Derek O. Teaney  
DEREK O. TEANEY (WV Bar No. 10223)  
Appalachian Center for the Economy and  
the Environment  
P.O. Box 507  
Lewisburg, WV 24901  
304-793-9007

For the Defendants Apogee Coal Company, LLC, and Hobet Mining, LLC

Dated: March 11, 2009

/s/ Blair M. Gardner  
BLAIR M. GARDNER (WV Bar No. 8807)  
JACKSON KELLY PLLC  
500 Lee Street, East, Suite 1600  
Charleston, WV 25322  
304-340-1146



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

23 MAR 2009

Colonel Dana R. Hurst  
District Engineer  
Huntington District  
U.S. Army Corps of Engineers  
Huntington, West Virginia 25701-2070

Re: PN 2007-000099-GUY; Highland Mining Company, Reylas Surface Mine

Dear Colonel Hurst:

Thank you for discussing with us the proposed surface mining project by the Highland Mining Company on Wednesday, March 18. The Environmental Protection Agency (EPA) has expressed significant concerns regarding this project. The Highland Mining Company is proposing to place fill material into approximately 13,174 linear feet of stream channel in conjunction with the construction of Valley Fill No. 1, the installation of the embankment for Sediment Pond S-9, installation of a temporary Erosion Protection Zone, and implementation of one mine-through area near the town of Ethel, Logan County, West Virginia. EPA believes that this proposal is likely to cause or contribute to an excursion from the State's water quality standards downstream resulting in an impairment of the aquatic life use, and that the direct and cumulative impacts from this and future mines will be persistent and permanent and can not be sufficiently or effectively compensated through the proposed mitigation. Accordingly, EPA must recommend denial of the permit as proposed.

Construction of Valley Fill No. 1 would include the permanent impacts to 1,600 linear feet of perennial stream channel, 7,426 linear feet of intermittent stream channel, and 3,448 linear feet of ephemeral stream channel. Temporary impacts include 600 linear feet of perennial channels and 100 linear feet of intermittent stream channel. Impacts are proposed in Reylas Fork of Bandmill Hollow and unnamed tributaries of Bandmill Hollow which is a tributary to Dingess Run, which flows into the Guyandotte River. The applicant has proposed to mitigate for the impacts by creating on-site stream channels.

EPA has expressed its significant concern regarding the impact to the human environment through a lack of avoidance and minimization efforts undertaken for this project, the cumulative impacts on the watershed, forest and habitat destruction and fragmentation within a globally significant and biologically diverse forest system, and the impairment of downstream water quality. In addition, EPA has concerns regarding the success of the proposed mitigation and that it will not adequately offset the persistent and permanent impacts to the aquatic ecosystem communities and functions. Accordingly, EPA believes that this project will result in significant impacts to the human environment requiring an environmental impact statement pursuant to Section 102 of the National Environmental Policy Act (NEPA).



The Clean Water Act Section 404(b)(1) Guidelines state that the “fundamental precept of these Guidelines is that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.” Based on information gathered for our review of the Public Notice EPA believes that this project, as proposed, has not made such a demonstration.

The CWA Section 404(b)(1) Guidelines clearly state that alternatives are presumed to be available for non-water dependent activities that do not involve the use of the aquatic ecosystem, including jurisdictional wetlands [40 CFR 230.10(a)(3)]. Only the least environmentally damaging practicable alternative (LEDPA) can be permitted and in order to identify the LEDPA the applicant’s alternatives analysis must examine a full range of alternatives which would avoid and minimize impacts to the maximum extent practicable. The applicant has indicated that because of the post mining land use, as permitted through the SMCRA process, does not allow for the use of the Approximate Original Contour +/-Excess Overburden Guidelines. Post mining land use is proposed to be FEMA relocation for residents in the stream valley following flooding events. Here, it appears that the evaluation for avoidance and minimization efforts under section 404 have been made relative to the SMCRA permit issued. It is important to remember that the review as authorized by the Clean Water Act is an independent review relative to its own requirements and considerations. We would also note that the SMCRA review is not a substitute for and should not be used in lieu of a rigorous review under the Section 404(b)(1) Guidelines. As the Office of Surface Mining made clear in the recent revision to the Stream Buffer Zone Rule:

“In interpreting this statutory provision with respect to effluent limitations adopted as part of our initial regulatory program, the U.S. Court of Appeals for the D.C. Circuit held that “where the Secretary’s regulation of surface coal mining’s hydrologic impact overlaps EPA’s, the Act expressly directs that the Federal Water Pollution Control Act and its regulatory framework are to control so as to afford consistent effluent standards nationwide.” .... The new rules emphasize that issuance of a SMCRA permit is not a substitute for the reviews, authorizations, and certifications required under the Clean Water Act and does not authorize initiation of surface coal mining operations for which the applicant has not obtained all necessary authorizations, certifications, and permits under the Clean Water Act.” [73 Fed. Reg. 75814, 75819 (Dec. 12, 2008)].

In addition, the Guidelines at 230.10(b) state that “no discharge of dredged or fill material shall be permitted if it (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violation of any applicable State water quality standard...” While we recognize that matters involving compliance with water quality are generally deferred to the state’s certification pursuant to Section 401 of the Clean Water Act, other water quality aspects brought to the Corps’ attention by EPA must be considered. 33 C.F.R. 320.4(d). Thus, water quality impacts must be considered as part of the permit review process. *See* 33 C.F.R. 320.4(d) (“Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity”); 40 C.F.R. 230.10(b)(1) & (c)(3). Moreover, West Virginia’s Section 401 (standard condition # 10) certification in this instance states it is the Corps’ responsibility that the 404 permit “...comply

with water quality standards contained in the West Virginia Code of Regulations, Requirements Governing Water Quality Standards, Title 47, Series 2.” As set forth below, evidence to date shows that valleyfills permitted for this mining-operation will result in downstream impacts that will lead to impairment of the aquatic life use and would therefore result in a violation of West Virginia’s water quality standards.

This proposed project is located in the headwaters of Dingess Run watershed which drains into the Guyandotte River. Approximately 25% of the subwatershed has been mined or is being actively mined. Dingess Run has been identified as an impaired stream and has elevated conductivity levels. The Guyandotte River is a High Quality Stream as defined by the West Virginia Division of Natural Resources for fisheries.

EPA Region 3’s Freshwater Biology Team has extensively investigated the downstream effects of mountaintop mining and the associated valley fills. The results indicate that these types of activities proposed by the applicant are strongly correlated to downstream aquatic life use impairment, as indicated by raw taxonomic data, individual metrics that represent important components of the macroinvertebrate assemblage, or when multi-metric indices are considered (Pond et al 2008). Their results also confirm earlier studies that mountaintop mining impacts to aquatic life are strongly correlated with ionic strength in the Central Appalachians. In U.S. EPA’s dataset, all mined sites with the specific conductance greater than 500  $\mu\text{S}/\text{cm}$  were rated as impaired with a genus-level multi-metric index (GLIMPSS). Undisturbed streams in the Central Appalachians are naturally very dilute, with background conductivities generally less than 75  $\mu\text{S}/\text{cm}$ . Downstream of mine sites, specific conductance and component ions can be elevated twenty to thirty times over the background levels observed at un-mined sites (Bryant et al. 2002). This increase in conductivity impairs aquatic life use and is persistent over time. This impact can not be easily mitigated or removed from stream channels.

The severity of the biological impairment established by our Freshwater Biology Team’s work rises to the level of a violation of water quality standards (WQS). In West Virginia, the narrative WQS reads, “. . . no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed”. EPA has long recognized that biological assessments provide a useful means of ascertaining consistency with water quality standards because they represent a direct measure of attainment of the aquatic life use. In July 1991, EPA transmitted final national policy on the integration of biological, chemical and toxicological data in water quality assessments. According to this policy, referred to as “Independent Application,” indication of impairment of water quality standards by any one of the three types of monitoring data (biological, chemical, or toxicological) should be taken as evidence of impairment regardless of the findings of the other types of data. This policy continues to the present. *See, e.g., Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b), and 314 of the Clean Water Act.* It is also consistent with West Virginia’s use of biological data to support determinations of water quality impairments.

Our Freshwater Biology Team’s work also establishes there is significant degradation of waters of the United States and a violation of the antidegradation policy, which is part of water quality standards and is intended to protect existing uses, including the aquatic life use. 40 C.F.R. 131.12(a)(1). EPA has interpreted the antidegradation policy as not precluding physical modifications otherwise authorized pursuant to Section 404, provided the discharge does not

result in “significant degradation” to the aquatic ecosystem as defined under section 230.10(c) of the Section 404(b)(1) Guidelines. See EPA, *Water Quality Standards Handbook: Second Edition*, Section 4.4.3 (Aug. 1994). The Section 404(b)(1) Guidelines define significant degradation as including, among other things, significant adverse effects “on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes.”

Moreover, the permit, if issued, will eliminate or impact 13,174 linear feet of headwater streams. EPA remains concerned about the conceptual mitigation plan. The conceptual plan is likely inadequate to fully compensate for lost functions of the aquatic ecosystem and will not be able to return aquatic life uses downstream. The use of constructed sediment ditches to comply with SMCRA and NPDES requirements as stream channels post reclamation is a concern. These channels are designed to carry polluted waters during active mining. These constructed channels even after reclamation will not provide clean, freshwater dilution to the watershed, which is so essential to the overall health of those receiving waters. To date it has not been demonstrated that the mitigation of headwater streams at these sites are adequately constructed to provide the functions of natural headwater streams, therefore incurring a loss of aquatic functions which can not be adequately restored or replaced. Headwater streams are vital components of the ecosystem. These ephemeral and intermittent streams collectively provide high levels of water quality and quantity, sediment control, nutrients, and organic matter, and as a result, are largely responsible for maintaining the quality of downstream riverine systems. Even though ephemeral and intermittent streams may go dry during a portion of the year, they continue to provide habitat for macroinvertebrates and amphibians that utilize the interstitial water flows in the substrate below the stream. These streams provide clean, freshwater dilution to downstream receiving waters to maintain the overall health and vitality of the larger watershed. Such aquatic resources have been significantly impacted by mining in Southern West Virginia.

In addition to the importance of headwater streams these large tracts of intact forested areas are also vitally important. The mining region of Appalachia is characterized by the Anderson Level Land Use/Land Cover as approximately 92% forested, providing large interior forested habitats. These habitats are important ecologically because a variety of wildlife species require large forested tracts of continuous forest cover to subsist. Forest fragmentation can adversely impact these species and in some cases, result in their disappearance from the area. Forested areas are therefore important from the standpoint of maintenance of interior forest species.

In light of the information above, this proposed project has the potential to cumulatively add to the miles of impaired streams in this watershed. Cumulative impacts are required to be considered in the 404(b)(1) Guidelines analysis. (40 CFR 230.11(g)) Given the past mining conducted in this watershed, the cumulative and synergistic impacts of past and proposed mining must be evaluated. The Guidelines require an analysis to determine if significant degradation of the aquatic ecosystem will occur, with special emphasis on the persistence and permanence of effects, both individually and cumulatively. The most current science and data provides the evidence of the extent of persistent and permanent degradation to aquatic communities exists.

EPA has provided evidence that these activities are likely to cause or contribute to an excursion of water quality standards. The CWA Section 404 permit evaluation must ensure that



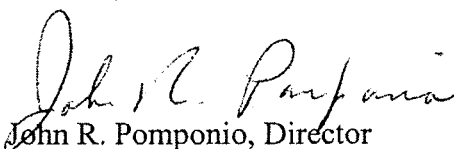
these excursions will not occur, otherwise, the proposed activity may not be authorized. EPA believes that additional avoidance and minimization efforts must be considered to reduce the adverse impacts of this proposal, that the anticipated impacts may cause or contribute to an excursion from the State's water quality standards downstream and that the direct and cumulative impacts from this and future mines will be persistent and permanent and can not be sufficiently or effectively compensated through the proposed mitigation, therefore EPA must recommend denial of the permit as proposed.

EPA's comments reflect a concern that the substantive environmental criteria upon which permit decisions are to be based will not be met. Based on the evidence that avoidance and minimization of the proposal's impacts have not been fully considered, and that this project is likely to cause excursions from water quality standards, specifically, impairment of the aquatic life use, and will impact remaining unmined streams necessary to provide clean freshwater dilution to the watershed, EPA believes that the proposed project will result in substantial and unacceptable impacts to aquatic resources of national importance.

In addition, Section 404(c) of the Clean Water Act gives EPA the authority to prohibit the issuance of a permit to fill waters of the United States if it is determined that such a discharge will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. After careful consideration, we find that the extensive cumulative and other impacts give this proposed project high potential as a candidate for a 404(c) action.

My staff is interested in discussing these issues with the applicant and the Corps as quickly as possible to resolve these concerns. Should you have any questions please feel free to contact Ms. Jessica Martinsen at 215-814-5144 or by email at [martinsen.jessica@epa.gov](mailto:martinsen.jessica@epa.gov).

Sincerely,



John R. Pomponio, Director  
Environmental Assessment and Innovation Division





**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

**MAR 23 2009**

Colonel Dana R. Hurst  
District Engineer  
U.S. Army Corps of Engineers, Huntington District  
502 Eighth Street  
Huntington, WV 25701

Re: DA Permit No. 2004-1400; Central Appalachia Mining, LLC  
Pre-Construction Notification and Compensatory Mitigation Plan  
KYDNR Permit No. 898-0610

Dear Colonel Hurst:

The U.S. Environmental Protection Agency (EPA), Region 4 has reviewed Central Appalachia Mining, LLC's proposal to discharge fill material into approximately 22,233 linear feet of waters of the United States in conjunction with the construction, operation, and reclamation of the Big Branch Surface Mine in Pike County, KY. The proposal includes the direct permanent impacts to 18,833 linear feet of ephemeral and intermittent channels of Big Branch, Swamp Fork, Shannon Branch, Daniels Branch, and Left Fork Malachi Branch. Project water-dependant components include eight valley fills, eight sediment control ponds, and three temporary stream crossings. The project purpose is to construct attendant and associated features to facilitate efficient extraction of 7.3 million tons of coal reserves in the Surface Mining Control and Reclamation Act (SMCRA) permitted area. A compensatory mitigation plan was included with the original and revised permit application; the plan was again revised in October 2008, and subsequently reviewed by EPA to ensure avoidance and minimization of impacts. However, EPA continues to have significant concerns, as described below, regarding the cumulative impacts of this project on the watershed, impairment of downstream water quality, the degradation of perennial stream channels, and that impacts have not been adequately avoided and minimized. Moreover, EPA does not believe the proposed mitigation will adequately offset the persistent and permanent impacts to the aquatic ecosystem communities and functions.

The USEPA Region 3 Freshwater Biology Team has extensively investigated the downstream effects of mountaintop mining (MTM) and the associated valley fills (VFs). The results show that MTM and VF activities are strongly related to downstream biological impairment, as indicated by raw taxonomic data, individual metrics that represent important components of the macroinvertebrate assemblage, or multi-metric

interpret narrative standards. For example, in Kentucky the narrative water quality standard states: "Surface waters shall not be aesthetically or otherwise degraded by substances that: injure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life." Kentucky's Department for Environmental Protection has used biological data to interpret their narrative WQS, and then listed mining-impaired streams on their 303(d) lists. Also, 33 CFR 320.4(d) states "Applications for permits for activities which may adversely affect the quality of waters of the United States will be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity. The evaluation should include the consideration of both point and non-point sources of pollution. It should be noted, however, that the Clean Water Act assigns responsibility for control of non-point sources of pollution to the states. Certification of compliance with applicable effluent limitations and water quality standards required under provisions of section 401 of the Clean Water Act will be considered conclusive with respect to water quality considerations unless the Regional Administrator, Environmental Protection Agency (EPA), advises of other water quality aspects to be taken into consideration." In light of the conclusions reached in the study with respect to the downstream effects of mountaintop mining, the water quality effects demonstrated by the EPA study must be taken into consideration before the Section 404 permit can be issued.

The Clean Water Act Section 404(b)(1) Guidelines state the "fundamental precept of these Guidelines is that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." Based on EPA Region 3's investigations and our review of the application, the activities described in this permit will bury approximately 3.5 miles of stream and are likely to degrade water quality downstream of the permitted facility and cause impairment of the aquatic life uses in downstream waters. Further, the compensatory mitigation projects proposed by the applicant, while addressing physical parameters, do not address degraded downstream water quality and may not fully restore the aquatic life uses or ensure that water quality standards are met.

We believe additional avoidance and minimization must be considered to reduce the overall individual and cumulative effects of the proposal and ensure downstream water quality standards are met. Such measures to be more fully considered include a reduction on the valley fill size and frequency, revisiting the approximate original contour configurations to maximize the spoil returned to the mined area, and consideration of alternative disposal sites that do not impact waters of the United States. While EPA feels the applicant has made significant progress in scaling back the project scope, we believe that additional measures may be available to reduce the impact of this proposal and that all alternatives should be exhausted to ensure that this proposal does not result in an unacceptable adverse impact, either individually or cumulatively, on the aquatic environment. Should additional avoidance and minimization of the project's impact be found feasible, we would ask that the District require the applicant to submit a

aquatic environment. Should additional avoidance and minimization of the project's impact be found feasible, we would ask that the District require the applicant to submit a revised version of the Environmental Information Document and Compensatory Mitigation Plan prior to permit approval.

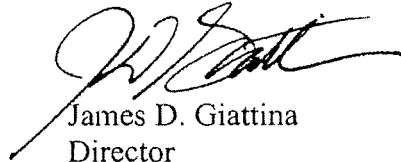
The Guidelines further state that no discharge of dredged or fill shall be permitted if it causes or contributes to violations of any applicable State water quality standard. With the overall size of the proposed project and its impacts, EPA is working with the Commonwealth of Kentucky to ensure a Section 402 Individual Permit is obtained by the applicant rather than the General Permit for Coal Mining Activities currently issued by the Commonwealth. Possibilities remain for further restrictions to this project mainly centered on water quality issues, such as, requiring chronic whole effluent toxicity (WET) testing (IC25) and instream benthic macroinvertebrate studies in CWA Section 402 permits. Since the proposed surface mining moves forward in phases, where one area is mined before moving to another, we suggest that the applicant develop an adaptive management plan that includes best management practices (BMPs) or best available technologies (BATs) to address potential impacts to water quality as each valley fill is constructed. We further recommend that the U.S. Army Corps of Engineers-Huntington District include the development and approval of the adaptive management plan as a condition in the Section 404 permit.

In addition, EPA believes conservation easements or deed restrictions are necessary to cover all waterways in avoided valleys within the permit boundaries as well as all restoration stream reaches to prevent future impacts from coal mining. These waterways include the entire reach of Big Branch, all side channels and tributaries to Big Branch, such as, Little Fork and Swamp Branch, and both left and right forks of Malachi Branch into Knox Creek. Additionally, for those deed restrictions and easements added and already in the compensatory mitigation plan, we recommend that the District require the easement to be recorded by the county (Pike, KY) prior to project initiation to prevent loss of the easement area in perpetuity should property ownership change hands.

We appreciate the District's and the company's willingness to work with EPA in adjusting project parameters and augmenting the extent of mitigation to offset anticipated impacts of the proposed project. We have worked closely with the company's consultant, Summit Engineering, to address our past concerns with the loss of over 20,000 linear feet of jurisdictional waters, and in formulating a revised mitigation plan. We believe that if the recommendations given above are addressed and met, Central Appalachia Mining's proposal is a suitable candidate for receiving an individual permit from the District.

My staff is interested in discussing these issues with the applicant, their consultant, and the District as quickly as possible to resolve these concerns. In addition, we will be contacting other agencies to ensure all facets of environmental quality have been addressed in order to allow this application to move forward. Please do not hesitate to contact Todd Bowers (404-562-9225) or Jennifer Derby (404-562-9401) of my staff if you have questions.

Sincerely,

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James D. Giattina  
Director

Water Protection Division



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MAR 23 2009

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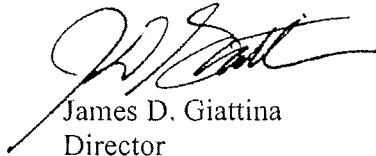
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