

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

**OHIO VALLEY ENVIRONMENTAL  
COALITION, INC.; WEST VIRGINIA  
HIGHLANDS CONSERVANCY, INC.;  
COAL RIVER MOUNTAIN WATCH, INC.  
and SIERRA CLUB**

**Plaintiffs,**

**v.**

**CIVIL ACTION NO. 3:10-cv-0836**

**INDEPENDENCE COAL COMPANY, INC.  
and JACKS BRANCH COAL COMPANY,**

**Defendants.**

**CONSENT DECREE**

**I. RECITALS**

1. On June 17, 2010, Plaintiffs Ohio Valley Environmental Coalition, Inc.; West Virginia Highlands Conservancy, Inc.; Coal River Mountain Watch, Inc. and Sierra Club (collectively “Plaintiffs”) filed a Complaint for Declaratory and Injunctive Relief and for Civil Penalties in this civil action against Defendants Independence Coal Company, Inc. and Jacks Branch Coal Company (“Defendants”).

2. The Complaint alleged that Defendants had discharged concentrations of selenium in excess of the effluent limits for that parameter contained in West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit Nos. WV1016890, WV1017152, and WV0093912 issued to Defendants by the West Virginia Department of Environmental Protection (“WVDEP”) pursuant to Section 402 of the federal Clean Water Act (“CWA”) and the West Virginia Water Pollution Control Act. The Complaint further alleged that Defendants’ discharges of selenium in concentrations exceeding those permitted by its

WV/NPDES permits constituted a violation of the performance standards under the federal Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), and that Defendants had violated certain compliance orders issued to them by WVDEP regarding selenium. Specifically, Plaintiffs alleged that Defendants had violated Amended Order No. 47 related to WV/NPDES Permit No. WV1016890, Amended Order No. 1066 related to WV/NPDES No. Permit WV1017152, and Amended Order No. 18 related to WV/NPDES Permit No. WV0093912.

3. On March 31, 2011, the Court issued a Memorandum Order and Opinion granting Plaintiffs summary judgment on their First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Claims for Relief (except insofar as those claims address Outfall 023 of Independence’s WV/NPDES Permit No. WV1017152, Outfall 014 of Jacks Branch’s WV/NPDES Permit No. WV0093912, and Outfall 004 of Independence’s WV/NPDES Permit No. WV1016890). The Court found that Plaintiffs are entitled to permanent injunctive relief and that a civil penalty may be assessed against Defendants. Doc. # 70 at 48–50. The Court further determined that a hearing would be held to determine the scope of injunctive relief and the amount of any civil penalties to be assessed. *Id.* at 50.

4. The Parties recognize, and the Court by entering this Consent Decree finds, that the Consent Decree has been negotiated by the Parties in good faith and will avoid further litigation among the Parties, and that this Decree is fair, reasonable and in the public interest.

5. The Parties agree to the dismissal of Plaintiffs’ claims regarding Outfall 023 of Independence’s WV/NPDES Permit No. WV1017152, Outfall 014 of Jack’s Branch WV/NPDES Permit No. WV0093912, and WV/NPDES Outfall 004 of Independence’s Permit WV1016890 with prejudice as to any violations through the entry of this Decree.

NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

## **II. JURISDICTION AND VENUE**

6. This Court has jurisdiction over the Parties and over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 33 U.S.C. § 1365 (CWA citizen suit provision) and 30 U.S.C. § 1270 (SMCRA citizen suit provision).

7. Venue is proper in the Southern District of West Virginia pursuant to 28 U.S.C. § 1391(b) and (c), because it is the judicial district in which Defendants are located, reside and/or do business, and/or in which the violations in the Complaint occurred, as well as 33 U.S.C. § 1365(c)(1), because the sources of the CWA violations are located in this judicial district, and 30 U.S.C. § 1270(c), because the coal mining operations complained of are located in this judicial district.

8. For purposes of this Consent Decree, or any action to enforce this Consent Decree, Defendants consent to this Court's jurisdiction over this Consent Decree and consent to venue in this judicial district.

## **III. APPLICABILITY**

9. The provisions of this Consent Decree apply to and are binding upon Plaintiffs and those with authority to act on their behalf, including, but not limited to, their officers, directors, and staff; upon Defendants and any of their respective successors and/or assigns; and upon other persons or entities otherwise bound by the law.

10. No transfer of ownership or operation of any Facility shall relieve Defendants of their obligation to ensure that the terms of this Consent Decree are implemented, provided, however, that prior to any transfer, any Defendants desiring to transfer ownership or

operation of any facility shall provide a copy of this Consent Decree to the proposed transferee and require the transferee to provide written confirmation acknowledging the terms of the Consent Decree and that the transferee will be bound by those terms. In such event, said Defendants shall no longer be subject to this Decree.

11. Defendants shall provide a copy of this Consent Decree to all officers, employees and agents whose duties include compliance with any provision of this Consent Decree, as well as to any contractor retained to perform work required under this Consent Decree.

#### **IV. DEFINITIONS**

12. Terms used in this Consent Decree that are defined in the CWA, SMCRA or in regulations issued pursuant thereto shall have the meanings assigned to them therein, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Complaint" shall mean the Complaint for Declaratory and Injunctive Relief and for Civil Penalties filed by Plaintiffs in this action on June 17, 2011;

b. "Consent Decree" or "Decree" shall mean this Consent Decree and the appendices attached hereto;

c. "Daily maximum violation" shall mean an exceedance of the effective daily maximum effluent limit of the applicable WV/NPDES Permit.

d. "Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of business of the

next business day except for purposes of calculating periods of compliance under Section VII of this Decree;

e. “DMR” means a Discharge Monitoring Report for one of the WV/NPDES permits identified herein;

f. “Effective Date” shall have the definition provided in Section XIV;

g. “Facility” or “Facilities” shall mean Defendants’ discharge outlets at mining operations subject to WV/NPDES Permit Nos. WV1016890, WV1017152, and WV0093912;

h. “Maximum daily effluent limit” shall mean maximum daily discharge limitation as defined in 40 C.F.R. § 122.2;

i. “Monthly average effluent limit” shall mean average monthly discharge limitation as defined in 40 C.F.R. § 122.2;

j. “Monthly average violation” shall mean an exceedance of the effective monthly average effluent limit of the applicable WV/NPDES Permit;

k. “Outlet” or “Outfall” shall mean the following WV/NPDES-permitted discharge points: WV1016890 Outlets 008 and 015; WV1017152 Outlets 029, 031, 037, 042 and 046; and WV0093912 Outlet 004, 005, 007, 012, 022, 033, and 034;

l. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral;

m. “Parties” shall mean Plaintiffs and Defendants;

n. “Section” shall mean a portion of this Consent Decree identified by a Roman numeral;

o. “State” shall mean the State of West Virginia;

p. “USEPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

q. “WVDEP” shall mean the West Virginia Department of Environmental Protection;

r. “WV/NPDES permit” shall mean a West Virginia/National Pollutant Discharge Elimination System permit issued by WVDEP pursuant to Section 402 of the CWA.

#### V. CIVIL PENALTY

13. Defendants shall pay a civil penalty in the amount of \$ 450,000.00 to the United States as set forth in Paragraph 14, below. Together with the Supplemental Environmental Project to be funded as set forth in Section VI, the payment of this civil penalty is made in settlement of all of Plaintiffs’ claims in this action under the CWA and SMCRA for effluent limit violations occurring prior to the effective date of this Consent Decree.

14. Defendants shall pay the civil penalty due to the United States Treasury within thirty (30) days of the entry of this Decree. 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: Debt Collection Specialist, Environment and Natural Resources Division, Executive Office, PO Box 7754, Ben Franklin Station, Washington D.C. 20044-7754. The check or money order shall reference *Ohio Valley Environmental Coalition, Inc., et al. v. Independence Coal Co., Inc., et al.*, Civil Action No. 3:11-cv-00836, and payment shall be considered paid upon mailing, or direct delivery to the specified address. A copy of the check and cover letter shall be sent to Plaintiffs at the time payment is made and shall state that payment is being made pursuant to this Decree.

15. The sum set forth in Paragraph 13, *supra*, resolves Plaintiffs' demands for civil penalties under 33 U.S.C. § 1365 arising from any selenium violations alleged in Plaintiffs' complaint of WV/NPDES Permit Nos. WV1016890, WV1017152, and WV0093912 that have occurred or may occur up to the effective date of this Decree.

16. Defendants shall not deduct any penalties paid under this Consent Decree pursuant to this Section in calculating its federal, state or local income tax.

#### **VI. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

17. In addition to the civil penalty set forth in Section V, *supra*, Defendants shall pay a total of \$ 4,050,000.00 to the West Virginia Land Trust in order to fund a Supplemental Environmental Project ("SEP").

- a. Appendix A to this Decree describes how the SEP will support and expand the Land Trust.
- b. Defendants shall remit the fund identified in Paragraph 17 by certified check, bank check, or money order to the West Virginia Land Trust within thirty (30) days of the entry of this Decree and shall send the funds to the following address:

West Virginia Land Trust  
PO Box 11823  
Charleston, WV 25339-1823.

The check or money order shall reference Ohio Valley Environmental Coalition, et al. v. Independence Coal Co. et al., Civil Action No. 3:10-cv-836, and payment shall be considered paid upon mailing, or direct delivery to the specified address. A copy of the check and cover letter shall be sent to Plaintiffs at the

time payment is made, and shall state that payment is being made pursuant to this Decree.

18. Defendants shall not deduct its contribution to the SEP or any payments made pursuant to Section VIII (“Stipulated Payments”) in calculating its federal, state or local income tax.

## **VII. COMPLIANCE REQUIREMENTS**

19. This Consent Decree in no way affects or relieves Defendants of their responsibility to comply with applicable federal, state and local laws, regulations and permits, but Plaintiffs shall not seek any remedies or penalties under the CWA or SMCRA for violations of selenium effluent limits at the affected outlets so long as this Decree is in effect other than those remedies and penalties set forth herein.

20. Where any compliance obligation under this Section requires Defendants to obtain a federal, state or local permit or approval, Defendants shall submit timely and substantially complete applications and take all other actions necessary to obtain all such permits or approvals. Defendants may seek relief under the provisions of Section IX of this Consent Decree (“Force Majeure”) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation if Defendants have submitted timely and substantially complete applications and have taken all other actions necessary to obtain all such permits or approvals.

### **Requirements Applicable to All Permits and Outfalls**

21. Defendants shall conduct daily flow monitoring, either through a continuous flow monitor or other comparable method at least until CH2M Hill or

comparable engineering firm determines that sufficient data is available to engineer a particular treatment system.

22. Defendants shall prepare interim progress reports and submit them to the Plaintiffs and Special Masters at a frequency to be determined by the Special Masters, but not less frequently than quarterly [March 31, June 30, September 30, and December 31] commencing after appointment of the Special Masters.

23. All reports shall be submitted to the persons designated in Section XIII of this Consent Decree (“Notices”).

24. The reporting requirements of this Consent Decree do not relieve Defendants of any reporting obligation required by the CWA, SMCRA or their implementing regulations, or by any other federal, state or local law, regulation, permit or other requirement.

25. Any information provided pursuant to this Consent Decree may be used by Plaintiffs in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law, except that if information is submitted under a claim of confidentiality, then the scope of its use shall be determined by the Court.

26. Defendants will treat or manage flow sufficient to comply with its permit requirements and other provisions of this Decree. If the Parties are unable to agree on that flow, the Engineering Special Master shall resolve the dispute.

27. CH2M Hill is designing the treatment systems for Outfalls 008 and 015 of Independence Permit WV1016890. Defendants will also consult with CH2M Hill as to the construction and start-up of this treatment system. Further, Defendants will consult with CH2M Hill or other comparable engineering firm as to the design, construction and startup of the

treatment and/or abatement systems planned for the remaining Outfalls listed in Paragraph IV.12(k) of this Decree.

28. The Parties acknowledge that the first six months after a treatment or abatement system has been completed and begins discharging will be a start-up period. Therefore, sampling data acquired during months one (1) through six (6) after a treatment or abatement system has been completed and starts discharging shall not be used to determine whether Defendants will be required to implement an Alternative Abatement Plan, though Defendants may still use that data to seek termination of the Decree as contemplated in Paragraph 36.

**Requirements Applicable Outfall 037 of WV/NPDES Permit WV1017152  
and Outfall 007 of WV/NPDES Permit WV0093912**

29. Defendants shall install bio-chemical reactors, sometimes referred to as upflow wetlands, in order to reduce the selenium concentrations discharged from Outfall 037 of WV/NPDES Permit No. WV1017152 and Outfall 007 of WV/NPDES Permit No. WV0093912 to compliant levels.

30. Independence shall comply with its selenium effluent limitations on Outfall 037 of WV/NPDES Permit No. WV1017152 by May 1, 2014.

31. Jacks Branch shall comply with its selenium effluent limitations on Outfall 007 of WV/NPDES Permit No. WV0093912 by July 1, 2014.

32. Within three (3) months of entry of this Decree, Defendants will identify one or more Alternative Abatement Plans for Outfall 037 of WV/NPDES Permit No. WV1017152 and Outfall 007 of WV/NPDES Permit No. WV0093012 to Plaintiffs and the Engineering Special Master. Those Alternative Abatement Plans may include, at a minimum, fluidized bed reactors (“FBR”), GE Water and Process Technologies’ ABMet system, and

reverse osmosis. Defendants may also identify a different technology(ies) at any time, including after the three-month period and, if Plaintiffs or the Engineering Special Master agree, Defendants may implement the different technology(ies). Implementation shall only be required as set forth below in Paragraph(s) 33–37 of this Decree. Plaintiffs’ failure to object to a particular technology identified pursuant to this paragraph at the time it is identified is not a waiver of their right to object to that technology if identified as Defendants’ choice of treatment technology for purposes of Paragraph 33.

33. If at any time six (6) months after the completion date of a treatment or abatement system at an outlet listed in Paragraph 29, Defendants violate the daily maximum selenium effluent limitations at that outlet more than two (2) times or violate the average monthly selenium effluent limitations at that outlet in two (2) consecutive months, then within 30 days of those violations, Defendants will choose a technology for that outlet from the list submitted to the Plaintiffs and the Engineering Special Master pursuant to Paragraph 32. If Plaintiffs do not object to that technology, then within 90 days of the violations described above, Defendants shall submit to Plaintiffs and the Engineering Special Master the following information for the Alternative Abatement Plan for that outlet:

A process design narrative describing the effluent limits which will be met;

A listing of treatment objectives applicable to the design;

The characteristics of the water to be treated;

An engineering evaluation of applicable technologies capable of successfully treating the water;

Selection of the best technology;

A narrative description of the design in sufficient detail to be reviewed by persons competent in water/wastewater treatment technologies;

Process design summary tables containing selected design parameters;

Preliminary size of major unit processes and ancillary equipment required;

Preliminary estimates of chemical requirements;

A process flow diagram containing primary flow lines;

Major unit processes;

Preliminary flow and material balances;

A Class 5 Capital cost estimate and operating cost estimate;

A preliminary equipment list; and

An estimated schedule for engineering, procurement, construction, and commissioning of the Alternative Treatment.

If, however, Plaintiffs object to Defendants' choice of abatement technology, then the dispute shall be submitted to the Engineering Special Master for resolution.

34. For months seven (7) through twelve (12) following the completion date of any System at a particular outfall listed in Paragraph 29, if more than five (5) of the samples required for implementation of the Decree exceed the daily maximum selenium effluent limitations or if the monthly average selenium concentration exceeds the monthly average selenium effluent limitation for two consecutive months, then Defendants will implement an Alternative Abatement Plan for that outfall as soon as reasonably possible, except that Defendants shall have the right to seek approval to continue using the Initial System. Defendants must seek approval from the Engineering Special Master and will bear the burden of proving that they will be able to attain the required compliance described below without implementing the Alternative Treatment Plan. In any such determination, the Engineering Special Master may consider the extent to which the violations exceeded the permit limits, the flows and other operating conditions.

35. In the event that Defendants achieve compliance with their daily maximum selenium effluent limitations less than 90 percent of the time at an individual outlet

over any six-month period following the twelve-month period after the completion date for that outfall or if Defendants fail to achieve compliance with their monthly average selenium limitation for two consecutive months following that twelve-month period, then Defendants shall have the burden of demonstrating that they should not have to implement the Alternative Abatement Plan and comply with their permit limits as soon as reasonably possible for that outlet. That determination shall be made by the Engineering Special Master and is appealable to the Court. In any such determination the Engineering Special Master may consider the extent by which the violations exceeded the permit limits, the flows and other operating conditions he or she deems appropriate.

36. Following the completion date of each selenium treatment system, the Decree shall remain in effect for an individual outlet until that outlet has achieved 100% compliance with its selenium effluent limitations for six (6) consecutive months, three months of which must include analyses of samples taken in December, January, February or March of a winter with normal temperature and precipitation, in order to ensure that the system will effectively treat selenium during conditions that are expected to pose greater challenges to treatment efficiency for the planned passive treatment systems. After the expiration of any six-month period on which Defendants rely to terminate this decree as to any outlet, Defendants shall notify Plaintiffs in writing that they consider the Decree terminated as to such outlet. After receipt of a notice from Defendants, Plaintiffs shall have thirty (30) days to object to the Engineering Special Master that winter conditions did not meet the required criteria. After providing an opportunity for a response from Defendants and a reply from Plaintiffs, any dispute between the Parties shall be resolved by the Engineering Special Master. In any such dispute, the Plaintiffs shall bear the burden of proof. For the purposes of the termination provisions of

this Decree, compliance with the monthly average limitations shall be calculated as an average over the entire six (6) month period.

37. If Defendants fail to achieve the compliance described in the above paragraph within 24 months of the completion date of the treatment or abatement system designed for an outlet listed in Paragraph 29, then they must implement the Alternative Abatement Plan to achieve compliance as soon as reasonably possible for that outlet. The Engineering Special Master or the Court shall determine the definition of “as soon as reasonably possible.” Provided, however, that Defendants may establish to the Engineering Special Master or the Court that extraordinary circumstances prevented them from achieving 100% compliance over a six-month period and that they will be able to attain compliance with their selenium effluent limitation as soon as reasonably possible without implementing the Alternative Treatment Plan. Defendants will bear the burden of establishing those extraordinary circumstances.

**Requirements Applicable to Outfalls 008 and 015 of  
WV/NPDES Permit No. WV1016890 and Outfall 031 of  
WV/NPDES Permit No. WV1017152**

38. Independence shall install basin-based biological treatment (hereinafter, “B3”) to reduce selenium concentrations in discharges from Outfalls 008 and 015 of WV/NPDES Permit No. WV1016890.

39. Independence shall comply with its selenium effluent limitations on Outfalls 008 and 015 of WV/NPDES Permit No. WV1016890 by June 1, 2014.

40. Independence shall install a B3 system to reduce selenium concentrations in discharges from Outfall 031 of WV/NPDES Permit No. WV1017152.

41. Independence shall comply with its selenium effluent limitations on Outfall 031 of WV/NPDES Permit No. WV1017152 by June 1, 2014.

42. Within 180 days of the lodging of this decree, Independence shall prepare and submit to the Court, the Plaintiffs, and the Engineering Special Master an Alternative Abatement Plan to deploy in the event that the B3 systems will not achieve compliance with Independence's selenium limits. The Alternative Abatement Plan may include, at a minimum, FBR, GE Water and Process Technologies' ABMet treatment system, and reverse osmosis. Defendants may also identify a different technology, at any time, including after the 180-day period, and, if Plaintiffs agree, Defendants may implement the different technology(ies). If Independence chooses a technology other than an FBR, ABMet or reverse osmosis, and if the Plaintiffs object to Defendants' chosen alternative, then Independence shall bear the burden of persuading the Engineering Special Master that its chosen alternative will achieve compliance. The Alternative Abatement Plan shall include:

A process design narrative describing the effluent limits which will be met;

A listing of treatment objectives applicable to the design;

The characteristics of the water to be treated;

An engineering evaluation of applicable technologies capable of successfully treating the water;

Selection of the best technology;

A narrative description of the design in sufficient detail to be reviewed by persons competent in water/wastewater treatment technologies;

Process design summary tables containing selected design parameters;

Preliminary size of major unit processes and ancillary equipment required;

Preliminary estimates of chemical requirements;

A process flow diagram containing primary flow lines;

Major unit processes;

Preliminary flow and material balances;

A Class 5 Capital cost estimate and operating cost estimate;

A preliminary equipment list; and

An estimated schedule for engineering, procurement, construction, and commissioning of the Alternative Treatment.

43. If at any time it becomes likely that the B3 system(s) will not result in compliance with Independence's selenium limitations, then Independence must implement the Alternative Treatment Plan described in the above paragraph or persuade the Engineering Special Master that alterations to the B3 design will achieve compliance. The burdens of proof and persuasion are on Independence if it intends to comply through alterations through the B3 design.

**Requirements Applicable to Outfalls 029, 042, and 046  
of WV/NPDES Permit No. WV1017152**

44. Independence shall install and commence operation of a mine storage system to achieve compliance with the selenium limits on Outfalls 029, 042, and 046 of WV/NPDES Permit No. WV1017152. The Parties acknowledge that implementation of a mine storage system will require Defendants to apply for and obtain new permits and/or modifications to existing permits. Plaintiffs reserve the right to challenge those permits and/or modifications as necessary to ensure that they comply with the law.

45. Independence shall comply with its selenium effluent limitations on Outfalls 029, 042, and 046 of WV/NPDES Permit No. WV1017152 by April 1, 2014.

46. Independence must establish within 90 days of the entry of this Decree that there is sufficient space in the mine void to accommodate the injection of discharges from Outfalls 029, 042, and 046 and that there is sufficient dilution to ensure compliance with the

selenium water quality standards at seeps and other discharges to surface water from the existing mine pool.

**Requirements Applicable to Outfalls 004, 005, 012, 022, 033,  
and 034 of WV/NPDES Permit No. WV0093912**

47. Jacks Branch shall implement a water management plan, which may include elements of pumping effluent to the Kanawha River or mine storage, or both, for Outfalls 004, 005, 012, 022, 033, and 034 of WV/NPDES Permit No. WV0093912 to bring its discharges from those Outfalls into compliance with the selenium effluent limitations. The Parties acknowledge that implementation of the water management plan will require Defendants to apply for and obtain new permits and/or modifications to existing permits. Plaintiffs reserve the right to challenge those permits and/or modifications as necessary to ensure that they comply with the law.

48. Jacks Branch shall comply with the selenium effluent limitations on Outfalls 004, 005, 012, 022, 033, and 034 by April 1, 2014.

49. Jacks Branch shall augment the flow in the streams that currently receive discharge from Outfalls 004, 005, 012, 022, 033, and 034 as necessary to prevent significant adverse effects to aquatic life in those streams.

50. Jacks Branch shall establish no later than one year after the lodging of this Decree that its preferred water management treatment plan will not cause significant adverse effects to the biological integrity of the streams receiving discharge from Outfalls 004, 005, 012, 022, 033, and 034. Jacks Branch shall bear the burden of proof and persuasion to establish to the satisfaction of the Special Master with expertise in Biology/Aquatic Ecology that its plan will not cause significant adverse effects to the biological integrity of the receiving streams. The Special Master will make the determination based on, among other things:

- Water quality;
- Water quantity;
- Water temperature;
- Stream condition indices as approved by the Biology/Aquatic Ecology Special Master; and
- Morphological conditions of stream beds and banks (e.g., potential for erosion/scouring, etc.).

51. The baseline for comparison of the effects of Jacks Branch's water management plan will be the current receiving stream conditions, excluding the selenium loading from Jacks Branch's current discharges from Outfalls 004, 005, 012, 022, 033 and 034.

52. It is the intent of the Parties to ensure that the receiving streams, after implementation of the water management plan, will provide a habitat for aquatic life comparable to the current habitat. The Parties recognize that the water quality and quantity resulting from the water management plan will not be precisely the same as the current conditions.

53. In the event that the Biology/Aquatic Ecology Special Master determines that the preferred water management plan will cause significant adverse effects on the biological integrity of the receiving streams, Jacks Branch shall install an Alternate Treatment System such as a B3, FBR, ABMet, or reverse osmosis, unless Jacks Branch persuades the Biology/Aquatic Ecology Special Master either

- (1) that the preferred water management plan can be altered to prevent significant adverse effects on the biological integrity of the receiving streams; or
- (2) that all available Alternative Treatment Systems would cause significantly greater adverse effects.

Jacks Branch will bear the burden of proving one of those conditions. The Alternative Treatment System design and construction schedule shall be decided by the Engineering Special Master in the event the Parties are unable to agree on a schedule.

### VIII. STIPULATED PAYMENTS

54. Defendants shall be liable for stipulated payments for violations as specified below, unless excused under Section IX (“Force Majeure”).

55. Stipulated payments shall be paid to the West Virginia Land Trust identified in the SEP described in Section VI.

56. Accrued stipulated payments shall be satisfied in full through payment as set forth in Paragraph 17.b.

57. A daily maximum violation or monthly average violation as reported on Defendants’ DMRs shall constitute one (1) violation for purposes of this Section.

58. Plaintiffs may, in the unreviewable exercise of their discretion, reduce or waive stipulated payments otherwise due under this Consent Decree.

59. Regarding Outfall 037 of WV/NPDES Permit WV1017152, Independence shall comply with the following schedule and be liable for stipulated payments as follows:

- a. Complete “front-end” engineering: March 31, 2012
- b. Complete detailed design work: June 30, 2012
- c. Complete construction: May 1, 2014

For each week that Independence is late in completing any of the tasks enumerated herein, it shall become liable for the following stipulated penalties:

- a. For Day 1 through and including Day 30, Independence shall pay the sum of \$750 per day;
- b. For Day 31 through and including Day 60, Independence shall pay the sum of \$1,500 per day;
- c. For Day 61 through and including the Day of Completion, Independence shall pay the sum of \$2,500 per day.

In the event deadlines for stipulated payments overlap, Defendants shall be liable only for payments for missing one deadline, whichever provides the highest penalty.

60. Regarding Outfall 007 of WV/NPDES Permit WV0093912, Jacks Branch shall comply with the following schedule and be liable for stipulated payments as follows:

- a. Complete “front-end” engineering: March 31, 2012
- b. Complete detailed design work: June 30, 2012
- c. Complete construction: July 1, 2014

For each week that Jacks Branch is late in completing any of the tasks enumerated herein, it shall become liable for the following stipulated penalties:

- a. For Day 1 through and including Day 30, Jacks Branch shall pay the sum of \$750 per day;
- b. For Day 31 through and including Day 60, Jacks Branch shall pay the sum of \$1,500 per day;
- c. For Day 61 through and including the Day of Completion, Jacks Branch shall pay the sum of \$2,500 per day.

In the event deadlines for stipulated payments overlap, Defendants shall be liable only for payments for missing one deadline, whichever provides the highest penalty.

61. Regarding Outfalls 008 and 015 of WV/NPDES Permit WV1016890 and Outfall 031 of WV/NPDES Permit WV1017152, Independence shall comply with the following schedule:

- a. Complete “front-end” engineering: March 31, 2012
- b. Complete detailed design work: October 5, 2012
- c. Complete construction: June 1, 2014

For each week that Independence is late in completing any of the tasks enumerated herein, it shall become liable for the following stipulated penalties:

- a. For Day 1 through and including Day 30, Independence shall pay the sum of \$750 per day;
- b. For Day 31 through and including Day 60, Independence shall pay the sum of \$1,500 per day;
- c. For Day 61 through and including the Day of Completion, Independence shall pay the sum of \$2,500 per day.

In the event deadlines for stipulated payments overlap, Defendants shall be liable only for payments for missing one deadline, whichever provides the highest penalty.

62. Regarding Outfalls 029, 042, and 046 of WV/NPDES Permit WV1017152, Independence shall comply with the following schedule:

- a. Complete “front-end” engineering: January 31, 2012
- b. Complete detailed design work: April 30, 2012
- c. Complete construction: April 1, 2014

For each week that Independence is late in completing any of the tasks enumerated herein, it shall become liable for the following stipulated penalties:

- a. For Day 1 through and including Day 30, Independence shall pay the sum of \$750 per day;
- b. For Day 31 through and including Day 60, Independence shall pay the sum of \$1,500 per day;
- c. For Day 61 through and including the Day of Completion, Independence shall pay the sum of \$2,500 per day.

In the event deadlines for stipulated payments overlap, Defendants shall be liable only for payments for missing one deadline, whichever provides the highest penalty.

63. Regarding Outfalls 004, 005, 012, 022, 033, and 034 of WV/NPDES Permit WV0093912, Jacks Branch shall comply with the following schedule:

- a. Complete “front-end” engineering: April 13, 2012

- b. Complete detailed design work: September 13, 2012
- c. Complete construction: April 1, 2014

For each week that Jacks Branch is late in completing any of the tasks enumerated herein, it shall become liable for the following stipulated penalties:

- a. For Day 1 through and including Day 30, Jacks Branch shall pay the sum of \$750 per day;
- b. For Day 31 through and including Day 60, Jacks Branch shall pay the sum of \$1,500 per day;
- c. For Day 61 through and including the Day of Completion, Jacks Branch shall pay the sum of \$2,500 per day.

64. Notwithstanding Defendants' liability for stipulated penalties as described in Paragraphs 59 through 63, Plaintiffs (a) reserve the right to seek non-monetary injunctive relief if Defendants miss the deadlines for the completion of "front-end" engineering or detailed design work in Paragraphs 59 through 63 above by more than 45 days; and (b) reserve the right to seek any and all equitable or legal remedies if Defendants miss the deadlines for the completion of construction in Paragraphs 59 through 63 above by more than 60 days.

65. No stipulated payments for effluent limitation violations shall accrue during the first 12-month period following the completion deadline for a Selenium Treatment System for Outfalls 031 and 037 of WV/NPDES Permit WV1017152; Outfall 007 of WV/NPDES Permit WV0093912; and Outfalls 008 and 015 of WV/NPDES Permit WV1016890. Stipulated payments for effluent limitation violations shall begin to accrue immediately after the completion deadlines for Selenium Treatment Systems for Outfalls 004, 005, 012, 022, 033, and 034 of WV/NPDES Permit WV0093912 and Outfalls 029, 042, and 046 of WV/NPDES Permit WV1017152.

66. From month thirteen following the completion deadline of a Selenium Treatment System for Outfalls 031 and 037 of WV/NPDES Permit WV1017152; Outfall 007 of WV/NPDES Permit WV0093912; and Outfalls 008 and 015 of WV/NPDES Permit WV1016890, through termination of this Decree for those Outfalls, stipulated payments shall accrue as follows per violation for each reported daily maximum violation or monthly average violation: \$25,000.00 for each monthly average violation and \$12,500.00 for each daily maximum violation.

67. From the day following the completion of a Selenium Treatment System for Outfalls 004, 005, 012, 022, 033, and 034 of WV/NPDES Permit WV0093912 and Outfalls 029, 042, and 046 of WV/NPDES Permit WV1017152, through termination of this Decree for those Outfalls, stipulated payments shall accrue as follows per violation for each reported daily maximum violation or monthly average violation: \$25,000.00 for each monthly average violation and \$12,500.00 for each daily maximum violation.

68. Defendants shall submit stipulated payments due as a result of noncompliance under Paragraphs 59 through 67 at the end the 30 Day period following the conclusion of each calendar quarter (i.e., by April 30, July 31, October 31 and January 31). Defendants shall make payments to the West Virginia Land Trust following the procedure specified in Section VI herein. Notice of such payment shall be sent to Plaintiffs.

#### **IX. FORCE MAJEURE**

69. “Force Majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the reasonable control of Defendants, of any entity controlled by Defendants, or of Defendants’ contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Defendants’ best efforts to fulfill the obligation.

The requirement that Defendants exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. “Force Majeure” does not include Defendants’ financial inability to perform any obligation under this Consent Decree.

70. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a Force Majeure event, Defendants shall provide notice orally or by electronic or facsimile transmission to Plaintiffs within five business(5) days of when Defendants first knew that the event might cause a delay. Within 14 days thereafter, Defendants shall provide in writing to Plaintiffs an explanation of the reasons for the delay; the anticipated duration of the delay; and actions taken or to be taken to prevent or minimize the delay.

71. If Plaintiffs agree that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are affected by the Force Majeure event will be extended by Plaintiffs for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. Plaintiffs will notify Defendants in writing within 5 business days of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

72. If Plaintiffs do not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, Plaintiffs will notify Defendants in writing of its decision with five (5) days of its receipt of the Force Majeure claim by Defendants. Any dispute

between the Parties over a Force Majeure claim may be resolved by the Engineering Special Master.

#### **X. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

73. This Consent Decree resolves the civil claims of Plaintiffs for the violations alleged in the Complaint and in this action, filed on June 17, 2010, as well as for violations of the WV/NPDES Permits listed herein which were reported on discharge monitoring reports through the effective date of this Consent Decree.

74. Defendants' compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations or permits, except as set forth herein. Plaintiffs do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree shall result in compliance with provisions of the Act, 33 U.S.C. § 1311, *et seq.*, or with any other provisions of federal, state or local laws, regulations or permits.

75. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

#### **XI. COSTS**

76. Defendants shall pay reasonable costs and attorneys' fees, including expert witness fees and costs incurred by Plaintiffs in conjunction with this civil action through the Effective Date of this Consent Decree, in accordance with the fee-shifting provisions of the CWA and SMCRA. Those costs and fees total \$175,122.89. Of that amount, \$ 107,436.12 is for Plaintiffs' reasonable attorneys' fees, allocated as follows:

- a. \$69,166.37 for Derek Teaney's 294.33 hours at the reasonable rate of \$235/hour.

- b. \$25,205.00 for Joseph Lovett's 71.00 hours at the reasonable rate of \$355/hour.
- c. \$4,781.25 for Jim Hecker's 12.50 hours at the reasonable rate of \$ 375/hour.
- d. \$630.00 for Amy Dawson's 3.6 hours at the reasonable rate of \$175/hour.
- e. \$7,298.00 for Isak Howell's 35.6 hours at the reasonable rate of \$205/hour.
- f. \$382.50 for Margaret Janes' 4.5 hours of paralegal work at the reasonable rate of \$85/hour.

In addition to attorney fees, Plaintiffs' costs and expert expenses were \$67,659.77.

77. Not later than twenty (20) days from the entry of this Consent Decree, Defendants shall deliver to Plaintiffs' counsel a check for \$ 175,122.89 made payable to the Appalachian Mountain Advocates. Appalachian Mountain Advocates 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 Effective Date of this Consent Decree, and thereafter for responding to possible comments on this Decree by the Department of Justice.

78. Plaintiffs retain the right to seek costs, including attorneys' and expert witness fees, for their work related to this Consent Decree. Any award of costs and fees shall be at the sole discretion of the District Court.

## **XII. SPECIAL MASTER**

79. The Parties consent to the appointment of a Special Master of Engineering and a Special Master of Biology/Aquatic Ecology agreed to by the Parties to oversee the implementation of this Decree and to make certain determinations, described above, during the

course of the Decree's implementation. In the event of a disagreement among the Parties, the Court may appoint Special Masters recommended by the Parties or of its choosing. The Parties will submit the names of recommended Special Masters to the Court within 30 days of the entry of this Decree.

80. In the event of a disagreement among the Parties as to the Special Masters, each side shall present to the other the names of three candidates. The opposing side would then select one candidate to be presented to the Court, resulting in two names presented to the Court without indication to the Court of which Party prefers which candidate. The Court would then pick from the remaining two candidates or require the parties to submit additional names.

81. Defendants will bear the costs and fees associated with the Special Master.

82. As described above, Defendants must first present any dispute or request for relief from the terms of this Decree to Plaintiffs in writing. Plaintiffs shall have fourteen (14) days to respond. If Plaintiffs do not respond, or if Defendants are not satisfied with Plaintiffs' response, they may invoke the Special Master's dispute resolution authority or otherwise seek relief from the Special Master.

83. If any party is dissatisfied with the Special Master's resolution of a dispute, it may request that the Court resolve the matter.

### **XIII. NOTICES**

84. Unless otherwise specified herein, whenever notifications, submissions, reports or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To Plaintiffs:

Derek Teaney  
Appalachian Mountain Advocates

P.O. Box 507  
Lewisburg, WV 24901

To Defendants:

Thomas Cook  
Alpha Appalachia Services  
Director - Environmental Permitting & Special Projects  
300 Running Right Way  
P O Box 261  
Julian, WV 25529

85. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

86. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

**XIV. EFFECTIVE DATE**

87. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter this Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

**XV. RETENTION OF JURISDICTION**

88. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Section XVI ("Modification") or effectuating or enforcing compliance with the terms of this Decree.

89. Plaintiffs and Defendants reserve all legal and equitable rights and defenses available to them to enforce or defend the provisions of this Consent Decree.

**XVI. MODIFICATION**

90. The terms of this Consent Decree, including the attached appendices, may be modified only by a subsequent written agreement signed by all Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

#### **XVII. TERMINATION**

91. Unless otherwise specified in this Decree, this Consent Decree shall terminate when Defendants have achieved compliance with the selenium effluent limitations at all outfalls at issue in this matter for at least six consecutive months.

92. The term of this Consent Decree may be extended pursuant to Paragraphs 36 and 37 herein.

#### **XVIII. SIGNATORIES/SERVICE**

93. Each undersigned representative of Plaintiffs and Defendants certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

94. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

#### **XIX. INTEGRATION**

95. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation,

inducement, agreement, understanding or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

## XX. FINAL JUDGMENT

96. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to Plaintiffs and Defendants. The Court finds that there is no just reason for delay and, therefore, enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

## XXI. APPENDICES

97. The following appendices are attached to and part of this Consent Decree:  
Appendix A — Supplemental Environmental Project.

ENTER: \_\_\_\_\_, 2012

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ROBERT C. CHAMBERS  
UNITED STATES DISTRICT JUDGE

For the Plaintiffs Ohio Valley Environmental Coalition, Inc., West Virginia Highlands Conservancy, Inc., Coal River Mountain Watch, Inc., and Sierra Club

/s/ Derek O. Teaney  
DEREK O. TEANEY (WV Bar No. 10223)  
Appalachian Mountain Advocates  
P.O. Box 507  
Lewisburg, WV 24901  
304-793-9007

Dated: December 9, 2011

For the Defendants Independence Coal Company, Inc., and Jacks Branch Coal Company

/s/ Robert G. McLusky

Dated: December 9, 2011

ROBERT G. McLUSKY, WVBN 2489  
MATTHEW S. TYREE, WVBN 11160  
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