



west virginia department of environmental protection

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December 29, 2010

Jeanie Moore, Circuit Clerk
Webster County Courthouse
2 Court Square, Room G-4
Webster Springs, West Virginia 26288

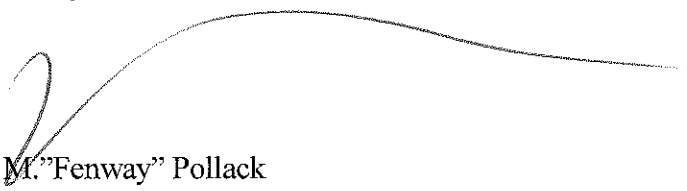
Re: WVDEP v. ICG EASTERN, LLC 10-C-20

Dear Ms. Moore:

Enclosed please find for filing the original **“Notice of Lodging of Consent Decree,”** with regards to the above-referenced case.

Should you have any questions or concerns, please do not hesitate to contact me..

Sincerely,



A. M. "Fenway" Pollack

AMFP/paf

Enclosure

cc: Honorable Jack Alsop
Allyn G. Turner, Esq.
Andrew B. McCallister, Esq.

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, AND THOMAS L. CLARKE,
DIRECTOR, DIVISION OF MINING
AND RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Plaintiffs,

v.

Civil Action No. 10-C-20

ICG EASTERN, LLC,

Defendant.

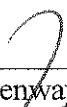
NOTICE OF LODGING OF CONSENT DECREE

Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively the "Directors") of the West Virginia Department of Environmental Protection hereby give notice of lodging of a proposed Consent Decree in the above-captioned action. The attached proposed Consent Decree will resolve all claims alleged by the Directors against ICG Eastern, LLC in Civil Action No. 10-C-20.

The Directors respectfully request that the Court not sign the proposed Consent Decree at this time. Instead, in accordance with the West Virginia Code of State Rules, 47 C.S.R. § 30-15.2.c, the Directors will provide the public with notice that the proposed Consent Decree has been lodged with this Court. The notice will solicit public comment for a period of 30 days. During the comment period, no action is required by the Court. If, after review and evaluation of any

comments received, the Directors continue to believe that the Consent Decree is fair, reasonable, and in the public interest, they will move the Court to enter the Consent Decree.

Respectfully submitted,



A.M. "Fenway" Pollack
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
(304) 926-0499 x. 1702
Counsel for Plaintiffs

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, AND THOMAS L. CLARKE,
DIRECTOR, DIVISION OF MINING
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DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Plaintiffs,

v.

Civil Action No. 10-C-20

ICG EASTERN, LLC,

Defendant.

CONSENT DECREE

Upon agreement to the terms herein by the parties, Scott G. Mandirola, Director of the Division of Water and Waste Management and Thomas L. Clarke, Director of the Division of Mining and Reclamation (hereinafter collectively, the "Directors") of the West Virginia Department of Environmental Protection (hereinafter "WVDEP") and ICG Eastern, LLC (hereinafter "ICG Eastern"), the parties agree that it is their intent to resolve the violations of the West Virginia Water Pollution Control Act ("WPCA"), West Virginia Code §§ 22-11-1, *et seq.*, listed in Attachment 1, and associated violations of the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA"), West Virginia Code §§ 22-3-1, *et seq.* (collectively, the "Acts"), and violations of the rules and regulations implementing these Acts through this Consent Decree with civil penalties and other duties imposed as expressed herein. After consideration of public comments on this Consent Decree, as proposed, and the parties' responses thereto, the Court enters this Consent Decree.

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code §§ 22-11-22 and 22-3-17.
2. Venue is proper in this Circuit Court pursuant to W. Va. Code §§ 22-11-22 and 22-3-17 because ICG Eastern is located and doing business in this judicial circuit and because the violations of the Acts and the rules promulgated pursuant to the Acts that are the subject of this action occurred in this judicial circuit.

II. APPLICATION OF CONSENT DECREE

3. This Consent Decree applies to and is binding upon WVDEP and ICG Eastern and its successors, as both the permittee of West Virginia Water Pollution Control/National Pollutant Discharge Elimination System (hereinafter “WV/NPDES”) Permit No. WV0094889 (the “NPDES Permit”) and the permittee of Surface Mining Permit No. S-2019-88 (the “SCMRA Permit”).

III. FINDINGS OF FACT

4. The Directors filed a Complaint, and then an Amended Complaint (hereinafter “Complaint”) in the Circuit Court of Webster County, West Virginia, against ICG Eastern as set forth above in the caption of this Consent Decree. The Complaint alleges that ICG Eastern violated the WPCA and the SCMRA through discharges of pollutants from its surface mining facility near Cowen, Webster County, West Virginia, which is covered by the NPDES Permit. The SCMRA Permit authorizes surface mining at this mine and the NPDES Permit authorizes discharges from the mine.

Statutory and Regulatory Background

5. WVDEP issued the NPDES Permit pursuant to its authority under the WPCA and pursuant to authority delegated to the WVDEP by the United States Environmental Protection Agency

("USEPA") under the federal Clean Water Act, 33 U.S.C. § 1342, and pursuant to a Memorandum of Agreement between the WVDEP and USEPA for the issuance of NPDES permits.

6. The NPDES Permit contains limits on the concentrations of certain pollutants that can be discharged in the effluent from the mine.

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

8. ICG Eastern's surface mining operation is also covered by the SCMRA Permit which WVDEP issued on September 2, 1988. The SCMRA Permit was transferred to ICG Eastern on September 30, 2005.

9. The WVDEP issued the SCMRA Permit pursuant to its authority under the SCMRA and its status as the primary and exclusive regulator of coal mining in West Virginia. The exclusive regulatory jurisdiction under surface mining law is the result of the United States Office of Surface Mining, Reclamation and Enforcement's approval of the state's regulatory program in January 1981. WVDEP obtained its regulatory primacy by passing a law, SCMRA, which met or exceeded the minimum national standards established by Congress and by demonstrating its capacity to enforce its law. *See* 40 C.F.R. § 948.10.

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

Violations of Effluent Limits

11. The WVDEP's review of DMRs submitted by ICG Eastern for period from June 1, 2007 to September 30, 2010 identified results reported in excess of effluent limits in the NPDES Permit for the following parameters at the following Outlets:

Outlet	Parameter(s)
001	Manganese
006	Aluminum
007	Aluminum
014	Manganese
028	Selenium
030	Selenium and Manganese
031	Selenium and Manganese
034	Selenium, pH, Iron, Manganese, and Aluminum
036	Selenium

WVDEP has reviewed the discharge monitoring reports for these Outlets and the parties agree that specific corrective action and/or compliance steps are appropriate for the Outlets and parameters listed in Paragraph 29, below.

Selenium Effluent Limits

12. The NPDES Permit contains 36 permitted outlets. Each outlet has effluent limits for multiple parameters. With respect to selenium, the NPDES Permit includes final effluent limits for that parameter at each outlet, although, as further described in Paragraphs 20 and 21 below, those final effluent limits are the subject of a compliance schedule for Outlets 001 through 026 and have not yet gone into effect. On or about April 5, 2007, WVDEP modified the compliance schedule in the NPDES Permit such that ICG Eastern was required to report selenium levels in the effluent from Outlets 001 through 026 through April 5, 2010, with the final limits of 8.2 ug/L for the daily

maximum limit and 4.7 ug/L for the monthly average limit thereafter scheduled to go into effect on or about April 5, 2010. WVDEP further modified the compliance schedule on or about July 22, 2008, relating to site-specific steps to be required toward achieving compliance, although the final compliance date for the selenium limits remained April 5, 2010. The final selenium effluent limits of 8.2 ug/L for the daily maximum limit and 4.7 ug/L for the monthly average limit are currently in effect for Outlets 027 through 036.

13. During the period prior to April 5, 2010, ICG Eastern installed wetland treatment systems at Outlets 001, 002, 005, 014 and 021. These wetland treatment systems have shown promise in reducing selenium levels, but have not had time to fully mature and are not yet functioning as designed.

14. ICG Eastern has also continued to evaluate various outlets' selenium levels over time to understand and address problem areas, and continues to evaluate other treatment options for outlets where there is not sufficient area to construct a wetland treatment system, including, but not limited to, several different types of zero valent iron treatment technology and microbial/biological treatment technology.

15. There are technologies under development by ICG Eastern and others, implemented on pilot scale, for the treatment of selenium in discharges. The parties agree that there is currently no technology that has been proven on a full scale basis to consistently reduce selenium levels, but recognize that information available to the parties, including information related to ICG Eastern's treatment efforts, provides a reasonable basis upon which to conclude that ICG Eastern will achieve compliance with its final selenium effluent limits by the dates set forth herein.

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

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

18. In October 2009, ICG Eastern filed a request to modify the NPDES Permit to extend the final effective date for the selenium effluent limits for Outlets 001 through 026 in the NPDES Permit.

19. In February 2010, the WVDEP issued a draft permit modification based on ICG Eastern's application and commenced a public comment period on the proposed modification. Prior to the close of the public comment period, the USEPA filed a general objection to the WVDEP's proposed granting of the permit modification. On May 27, 2010, USEPA filed a specific objection to the requested permit modification. The effect of USEPA's objections was to halt further activity on the requested permit modification pending agency dialogue to resolve the objection. No agreement was reached regarding the USEPA objection, and subsequently the WVDEP denied the modification request.

20. On April 2, 2010, ICG Eastern filed an administrative appeal with the West Virginia Environmental Quality Board seeking redress for the WVDEP's failure to timely process its modification application. The Board subsequently granted a stay of the final limits for selenium, which were to go into effect on or about April 5, 2010. This appeal is still pending and is anticipated to be scheduled for an evidentiary during the first quarter of 2011.

21. ICG Eastern concurrently filed an action in the Circuit Court of Kanawha County requesting injunctive relief and specifically asking that Court to enter an order preventing the final limits for selenium from going into effect, thereby preserving its right to pursue the requested modification

and to pursue an appeal based on the agency's action on the application. The Court granted this injunction and it remains in effect.

22. Outlets 027 through 036 have selenium effluent limits of 8.2 ug/L for the daily maximum limit and 4.7 ug/L for the monthly average limit that are currently in effect. The permit modification request did not request any modification to the limits at these outlets.

IV. EFFECT OF SETTLEMENT

23. The parties recognize the time, resources, expense and complexity associated with litigating the multiple claims asserted by the WVDEP, and as to which ICG Eastern has asserted multiple defenses, and further agree that the environmental benefit of an expeditious settlement of this civil action is in the best interest of the parties. As noted in Paragraph 27 below, WVDEP is releasing all of its rights to assert a claim in the future related to any claims asserted in the Complaint for the period of June 1, 2007 through September 30, 2010. The civil penalty assessed by the Court in this Consent Decree reflects WVDEP's belief that it could prove violations of effluent limits and other allegations raised in the Complaint as well as ICG Eastern's belief that the defenses raised in response to those allegations would have eliminated or mitigated any penalty assessment.

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

25. The parties agree that the civil penalties to be paid by ICG Eastern pursuant hereto satisfy all claims that may be asserted for civil penalties under the Acts for the discharge of any pollutant regulated by the NPDES Permit from June 1, 2007 through September 30, 2010.

26. The WVDEP has evaluated the DMRs for all permitted outlets, agency records regarding the NPDES Permit, and other related information and has completed an evaluation of ICG Eastern's compliance record.

27. This Consent Decree shall act as a bar, full accord and satisfaction and have the effect of *res judicata* for any claim or cause of action brought or that may have been brought by the WVDEP or by any person, including those seeking injunctive relief, for violations of the NPDES Permit and the associated violations of the SCMRA Permit, or violations of water quality standards, during the period from June 1, 2007 through September 30, 2010 pursuant to 33 U.S.C. § 1365(a)(1)(A) and 30 U.S.C § 1270.

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

V. ORDER FOR COMPLIANCE

29. Now, therefore, in accordance with Chapter 22, Article 11, Section 1, *et seq.*, and Chapter 22, Article 3, Section 1, *et seq.*, of the West Virginia Code, it is hereby agreed between the parties and ORDERED by the Court that ICG Eastern shall (i) immediately take measures to initiate compliance with all effluent limits for all Outlets 001 – 036, and (ii) engage in a corrective action plan at Outlets 001, 002, 005, 006, 007, 014, 021, 031, 034 and 036 as follows:

a. ICG Eastern shall continue implementation of its wetland treatment systems for Outlets 001, 002, 005, and 014 consistent with the time frames set forth in the schedule attached as Exhibit 1.

b. ICG Eastern shall install pilot projects of at least two non-wetland treatment technologies (e.g., zero valent iron, microbial/biological reactor systems, and/or other technologies) at two outlets within 90 days of the entry of this Decree. One or more pilot treatment systems shall be installed at Outlet 007 and one or more pilot treatment systems shall be installed at Outlet 031. These pilot projects will be designed and implemented to determine the effectiveness of these treatment systems and to evaluate the potential for these systems to be installed at other ICG Eastern outlets. These pilot treatment systems will be designed in a manner to provide meaningful data related to the effectiveness of the treatment method for conditions comparable to those anticipated at outlets for which treatment may be installed and with consideration of ICG Eastern's ability to scale up the pilot treatment system or systems selected to achieve compliance with final selenium limits.

c. ICG Eastern shall conclude the pilot project phase described in subparagraph b. above by August 31, 2011 and shall evaluate the effectiveness of the pilot projects and provide a report on the same to WVDEP by October 15, 2011. This report may be combined with the regular quarterly report required under Paragraph 42. Nothing in this paragraph shall prevent ICG Eastern from continuing to operate the pilot treatment systems after August 31, 2011.

d. By November 15, 2011, and after consultation with WVDEP, ICG Eastern shall designate the treatment systems, if any, it will install at each Outlet identified in Paragraph 29(ii) above to ensure compliance with the final effective limits currently set forth in the NPDES Permit by the dates set forth in subparagraphs e. and f. below. ICG Eastern shall hire an independent consultant to review and analyze its current treatment systems and plans for each of the Outlets identified in Paragraph 29(ii) and make recommendations regarding the same. This independent consultant or consultants shall be experienced in the treatment of mine water discharges and shall not have been an employee of or retained by ICG Eastern as of the date of the filing of the complaint in this civil action. The independent consultant or consultants shall prepare a report detailing the results of his or her review and making recommendations regarding any alterations and/or maintenance by July 31, 2011, a copy of which shall be sent to the WVDEP.

e. ICG Eastern shall come into compliance with the final effective limits in its NPDES Permit for Outlets 001, 002, 005, 006 and 014 by August 1, 2012.

f. ICG Eastern shall come into compliance with the final effective limits in its NPDES Permit for Outlets 007, 021, 031, 034 and 036 by December 1, 2012.

VI. CIVIL PENALTIES

30. In settlement of the WVDEP's claims in its Complaint relating to reported violations of the WPCA and the NPDES Permit and for relief under W. Va. Code §§ 22-11-22 and 22-3-17, ICG Eastern, without admitting liability for any alleged violations or agreeing to the appropriateness of

the civil penalty expressed herein except in the context of this Consent Decree, agrees for purposes of the settlement provided herein that it shall pay a total civil penalty in the amount of two hundred and twenty-eight thousand seven hundred and fifty dollars (\$228,750), which includes consideration by WVDEP of relevant civil penalty assessment factors, including, but not limited to deviation from requirements, potential harm to the environment, potential economic benefit from any non-compliance, and history of compliance. ICG Eastern shall pay this civil penalty as set forth below.

a. ICG Eastern shall pay a total cash penalty of two hundred and twenty-eight thousand seven hundred and fifty dollars (\$228,750) by certified or cashier's check to the WVDEP for deposit in the WVDEP's Stream Restoration Fund, payable within 60 days of the entry of this Decree.

b. Payments shall be mailed to the following address:

Jeff McCormick, Assistant Director
 Division of Mining and Reclamation
 West Virginia Department of Environmental Protection
 601 57th Street SE
 Charleston, WV 25304

VII. INTERIM LIMITS

31. ICG Eastern shall be assigned and comply with the following interim limits leading to compliance with the final effective limits in its NPDES Permit for Outlets 001, 002, 005, 006, and 014:

Outlet	Phase I Interim Limits Entry date of Decree	Phase II Interim Limits May 16, 2011 to	Phase III Interim Limits December 16, 2011 to
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	to May 15, 2011	December 15, 2011	July 31, 2012
001	11 ug/l – Daily Maximum	9 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly
002	14 ug/l – Daily Maximum	11 ug/l – Daily Maximum	10 ug/l – Daily Maximum 7 ug/l – Average Monthly
005	16 ug/l – Daily Maximum	13 ug/l – Daily Maximum	11 ug/l – Daily Maximum 7.5 ug/l – Average Monthly
006	11 ug/l – Daily Maximum	9 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly
014	11 ug/l Daily Maximum	9 ug/l – Daily Maximum	9 ug/l – Daily Maximum 6 ug/l – Average Monthly

32. The WVDEP shall enforce the interim limits contained in Paragraph 31 through the stipulated penalties set forth in Paragraph 36 below. The interim limits for Outlets 001, 002, 005, 006 and 014 will terminate and the final effective limits currently listed in the NPDES Permit will be enforced beginning on August 1, 2012.

33. ICG Eastern shall be assigned and comply with following interim limits leading to compliance with the final effective limits in its NPDES Permit for Outlets 007, 021, 031, 034 and 036:

Outlet	Phase I Interim Limits Entry date of Decree to June 15, 2011	Phase II Interim Limits June 16, 2011 to February 14, 2012	Phase III Interim Limits February 15, 2012 to November 30, 2012
007	15 ug/l – Daily Maximum	12 ug/l – Daily Maximum	10.5 ug/l – Daily Maximum 7.5 ug/l – Average Monthly

021	18 ug/l – Daily Maximum	18 ug/l – Daily Maximum	13 ug/l – Daily Maximum 10 ug/l – Average Monthly
031	18 ug/l – Daily Maximum	14 ug/l – Daily Maximum	11.5 ug/l – Daily Maximum 8.5 ug/l – Average Monthly
034	14 ug/l – Daily Maximum	11 ug/l – Daily Maximum	10 ug/l – Daily Maximum 7 ug/l – Average Monthly
036	16 ug/l – Daily Maximum	13 ug/l – Daily Maximum	11 ug/l – Daily Maximum 7.5 ug/l – Average Monthly

34. The WVDEP shall enforce the interim limits contained in Paragraph 33 through the stipulated penalties set forth in Paragraph 36 below. The interim limits for Outlets 007, 021, 031, 034 and 036 will terminate and the final effective limits currently listed in the NPDES Permit will be enforced beginning on December 1, 2012.

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

VIII. STIPULATED PENALTIES

36. In the event ICG Eastern violates any interim limit for selenium as described in Paragraphs 31 and 33, ICG Eastern shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the violation of a Phase I interim limit, ICG Eastern shall pay \$1,000 per violation. For the second consecutive violation of a Phase I interim limit which does not show a reduction in the level of selenium from the previous sample result, ICG Eastern shall pay \$1,500. For the third consecutive and subsequent

violations which do not show a reduction in the level of selenium from the previous sample result, ICG Eastern shall pay \$2,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$1,000. For the purposes of this subparagraph, a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.

- b. For the violation of a Phase II interim limit, ICG Eastern shall pay \$2,000 per violation. For the second consecutive violation of a Phase II interim limit which does not show a reduction in the level of selenium from the first violation, ICG Eastern shall pay \$2,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation interim limit, ICG Eastern shall pay \$3,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$2,000. For the purposes of this subparagraph, a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.
- c. For the violation of a Phase III interim daily maximum limit, ICG Eastern shall pay \$4,000 per violation. For the second consecutive violation of a Phase III interim daily maximum limit which does not show a reduction in the level of selenium from the first violation, ICG Eastern shall pay \$4,500. For the third

consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation of the interim daily maximum limit, ICG Eastern shall pay \$5,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$4,000. For the purposes of this subparagraph, a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.

- d. For the violation of a Phase III interim average monthly limit ICG Eastern shall pay \$5,000 per violation. For the second consecutive violation of a Phase III interim average monthly limit which does not show a reduction in the level of selenium from the first violation, ICG Eastern shall pay \$7,500. For the third consecutive and subsequent violations which do not show a reduction in the level of selenium from the previous violation of the interim average monthly limit, ICG Eastern shall pay \$10,000. Consecutive violations that evidence reductions in the level of selenium from the previous violation shall be assessed a stipulated penalty of \$5,000. For the purposes of this subparagraph, a violation following an observed and reported “no flow” condition shall not be consecutive with any violation that occurred before the observed and reported “no flow” condition.

37. For violation of any final effective effluent limit in the NPDES Permit other than the effluent limits for selenium for the Outlets listed in Paragraph 29(ii) that are subject to the interim limits

as set forth herein, ICG Eastern shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For violations of daily maximum limits from October 1, 2010 through March 31, 2011, ICG Eastern shall pay \$1,000 per violation.
- b. For violations of daily maximum limits from April 1, 2011 through December 31, 2011, ICG Eastern shall pay \$2,000 per violation.
- c. For violations of daily maximum limits from January 1, 2012 through November 30, 2012, ICG Eastern shall pay \$3,000 per violation.
- d. For violations of average monthly limits from October 1, 2010 through March 31, 2011, ICG Eastern shall pay \$3,000 per violation.
- e. For violations of average monthly limits from April 1, 2011 through December 31, 2011, ICG Eastern shall pay \$4,000 per violation.
- f. For violations of average monthly limits from January 1, 2012 through November 30, 2012, ICG Eastern shall pay \$5,000 per violation.

38. For failure to take or complete any step outlined in the corrective action plan set forth in Paragraph 29(ii) herein, including Exhibit 1, or to submit any report as required by Paragraph 29(ii), including Exhibit 1, or Paragraph 42, herein, ICG Eastern shall be obligated to pay the following stipulated penalties to WVDEP:

- a. For the 1st through 15th day of noncompliance, ICG Eastern shall pay \$500 per day per violation;
- b. For the 16th through 30th day of noncompliance, ICG Eastern shall pay \$750 per day per violation;

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

39. Stipulated penalties shall be payable within thirty (30) days of receipt of a written demand from the WVDEP. Such payments shall be made by certified or cashier's check payable to the West Virginia Department of Environmental Protection and delivered to the address specified in Paragraph 30.b for deposit in the Stream Restoration Fund.

40. The schedule of stipulated penalties provided in Paragraph 37 shall apply to all violations of final effective limits in the NPDES permit in accordance with Paragraph 35 above.

41. The schedule of stipulated penalties provided in Paragraphs 37 and 38 are effective from the entry date of this Consent Decree through November 30, 2012.

IX. REPORTS

42. ICG Eastern shall provide WVDEP with quarterly reports on the status of its evaluation and/or development of, and installation of selenium treatment systems. These quarterly reports shall include a summary of the sampling results for selenium at each Outlet listed in Paragraph 29(ii). The quarterly reports shall indicate what has been accomplished since the submittal of the prior quarterly report, whether ICG Eastern is on the schedule required by this Consent Decree or, if not on schedule, include an explanation of why ICG Eastern is behind schedule, how far it is behind schedule, and what measures are being taken to get back on schedule. The quarterly reports shall also describe activities undertaken pursuant to Section V ("Order for Compliance") of this Consent Decree until all remedial measures described therein are completed. Each quarterly report shall be submitted to WVDEP beginning March 31, 2011, and every three months thereafter until all of the conditions set forth in Paragraph 50 are satisfied.

X. FORCE MAJEURE

43. If any event occurs that causes or may cause a violation of any provision of this Consent Decree by ICG Eastern, ICG Eastern shall notify the WVDEP in writing within ten (10) days of the date on which it had knowledge or should have had knowledge that the event may or will cause a violation. "Writing" may include the use of electronic mail at an e-mail address provided for the Assistant Director of the Division of Mining and Reclamation – Inspection and Enforcement. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and/or to be taken by ICG Eastern to minimize the violation, and the timetable by which those measures will be implemented. ICG Eastern will adopt all measures to avoid or minimize any such violation. ICG Eastern shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

44. If the WVDEP agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of ICG Eastern, ICG Eastern shall be excused as to that violation for the period of time the violation continues due to such circumstances. ICG Eastern's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event the WVDEP does not agree, then ICG Eastern may submit the matter to this Court for resolution. The burden of proving that any delay was caused by circumstances reasonably beyond the control of ICG Eastern and the length of such delay shall rest with ICG Eastern. Failure by ICG Eastern to comply with the notice requirements in Paragraph 43 shall render this paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of ICG Eastern's rights under this provision to obtain an extension of its obligations based on that incident.

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

XI. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

46. The Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree until the Decree is terminated as set forth below. Additionally, should either party believe that the other has failed or is failing to comply with the terms of this Decree, it may petition this Court for a resolution of the issue.

XII. PERMITS AND OTHER LAWS AND REGULATIONS

47. This Consent Decree is not, and shall not be interpreted to be, a permit or modification of a permit under the WPCA, nor shall it relieve ICG Eastern of any other obligation imposed by the WPCA, the NPDES Permit, or any permit issued under the WPCA, except as expressly provided herein, nor shall it in any way relieve ICG Eastern of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws.

XIII. PUBLIC NOTICE

48. The parties acknowledge and agree that final approval of this Consent Decree is subject to public notice and comment as provided in 47 C.S.R. § 30-15.2.c. ICG Eastern shall be responsible for paying any and all fees or charges associated with the publication of a public notice regarding this Consent Decree. The public shall have at least thirty (30) days in which to make any comments

on this Consent Decree and the WVDEP reserves the right to withhold or withdraw its consent or propose modifications to this Consent Decree if warranted based on comments received during the period for public comments. If the WVDEP modifies this Consent Decree in response to public comments, ICG Eastern may either consent to, or withhold consent to, entry of the modified Consent Decree. If the WVDEP makes no changes in response to public comments, ICG Eastern consents to entry of this Consent Decree without further notice. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is not binding on and is of no effect on the parties.

XIV. EFFECTIVE DATE

49. The effective date of this Consent Decree shall be the date upon which it is entered by the Court as a final judgment and order.

XV. TERMINATION

50. Termination of this Consent Decree shall be by order of the Court upon application by either party, provided that all of the following conditions have been met: (1) ICG Eastern has achieved complete compliance with all requirements of this Consent Decree; (2) ICG Eastern has paid all civil and stipulated penalties required herein; and (3) all motions and other proceedings concerning this Consent Decree have been completed and are no longer subject to further judicial review and all relief resulting from such motions or other proceedings has been fully satisfied.

XVI. SIGNATORIES AUTHORIZED

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

It is so ORDERED this _____ day of _____, 2011.

We hereby consent to the entry of this Decree:

Scott G. Mandirola, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection

Date

Thomas L. Clarke, Director
Division of Mining and Reclamation
West Virginia Department of Environmental Protection

Date

A.M. "Fenway" Pollack
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
(304) 926-0499 x. 1702
Counsel for Plaintiff

Date

Allyn G. Turner (WVSB #5561)
Andrew B. McCallister (WVSB #10026)
Spilman Thomas & Battle, PLLC
Post Office Box 273
Charleston, WV 25321-0273

Counsel for Defendant

EXHIBIT 1

Date Due (or Completed)	Task
March 31, 2011	Submission of quarterly report, including summary of 2010 wetland maturation period and trends in selenium levels.
June 30, 2011	Submit quarterly report.
July 31, 2011	Complete evaluation of the need for additional wetland treatment area or plant species to improve wetland effectiveness and schedule installation, planting or construction, if applicable.
September 30, 2011	Submit quarterly report.
October 15, 2011	Submit determination, based on selenium water and plant data, reports, and input of the WVDEP, if any, on the anticipated success of the wetland treatment systems, and need, if any, for an alternate or supplemental treatment plan at any wetland outlet in the event the wetland treatment system will not ensure compliance; and submit plan for supplemental treatment, if applicable
December 1, 2011	Begin installation of supplemental treatment systems, if applicable.
December 31, 2011	Submit quarterly report.
March 31, 2012	Submit quarterly report.
April 30, 2012	During the post-maturation period spring season, document selenium levels flowing into and out of wetland system and plant tissue selenium levels. Document wetland plant growth after spring season.
June 30, 2012	Complete post-maturity seasonal wetland monitoring.
June 30, 2012	Submit quarterly report.
August 1, 2012	Complete installation or construction of all treatment facilities and achieve compliance with final selenium effluent limits.
September 30, 2012	Submit final quarterly report.

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, AND THOMAS L. CLARKE,
DIRECTOR, DIVISION OF MINING
AND RECLAMATION, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Plaintiffs,

v.

Civil Action No. 10-C-20

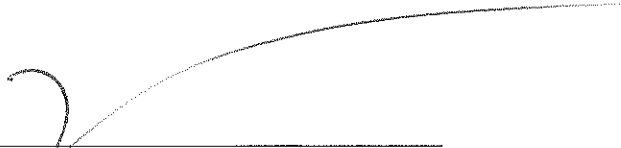
ICG EASTERN, LLC,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2010, I served a true and correct copy of the foregoing Notice of Lodging of Consent decree by U.S. mail to:

Allyn G. Turner, Esq.
Andrew B. McCallister, Esq.
Spilman Thomas & Battle, PLLC
Post Office Box 273
Charleston, WV 25321-0273
aturner@spilmanlaw.com
amccallister@spilmanlaw.com
Counsel for Defendant


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