

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 and the STATE OF WEST VIRGINIA by and)
 through the WEST VIRGINIA DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION,)
)
 Plaintiff- Intervenor,)
)
 v.)
)
)
 CONSOL ENERGY INC.; CONSOLIDATION COAL)
 COMPANY; and WINDSOR COAL COMPANY,)
)
 Defendants.)
)

CONSENT DECREE FOR
NATURAL RESOURCES
GAME FISH AND
AQUATIC LIFE CLAIMS

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I. BACKGROUND

A. Concurrent with the lodging of this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims (“Consent Decree”), Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), has filed a Complaint against Defendants CONSOL Energy Inc., Consolidation Coal Company, and Windsor Coal Company; and the State of West Virginia (the “State”), by and through the West Virginia Department of Environmental Protection (“WVDEP”), has moved to intervene in such action.

B. The United States’ Complaint alleges that Defendants are in violation of the Federal Water Pollution Control Act (“CWA”), 33 U.S.C. §§ 1311 and 1342, as amended, for discharging pollutants into waters of the United States in violation of Section 301 of the CWA and for violating the conditions and limitations of National Pollutant Discharge Elimination System (“NPDES”) permits issued pursuant to Section 402 of the CWA.

C. The State of West Virginia’s Motion to Intervene is accompanied by a Complaint alleging that Defendants are in violation of the West Virginia Water Pollution Control Act (“WPCA”), W. Va. Code § 22-11-1, *et seq.*, and the West Virginia Surface Coal Mining and Reclamation Act (“SCMRA”), W. Va. Code § 22-3-1, *et seq.*, for discharging pollutants into State waters in violation of NPDES permits.

D. This Consent Decree for Natural Resources Game Fish and Aquatic Life Claims resolves only the claims alleged by the State for the loss of game fish, aquatic life, and/or other wildlife pursuant to § 22-11-25 of the WPCA.

E. WVDEP has consulted with the West Virginia Division of Natural Resources (“WVDNR”) regarding the terms and conditions of this Consent Decree, and the WVDNR

supports the entry of this Consent Decree

F. All claims other than those made pursuant to W. Va. Code § 22-11-25 that are alleged by the State and the United States in their respective Complaints have been resolved through a separately negotiated instrument that is being lodged concurrently with the Complaints and this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims.

G. Defendants do not admit any liability to the United States or the State arising out of the transactions or occurrences alleged in the respective Complaints, nor do the Defendants admit the factual allegations alleged in the respective Complaints.

H. The Parties recognize, and the Court by entering this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims finds, that this Consent Decree has been negotiated by the State and the Defendants in good faith and will avoid litigation among the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

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

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the Parties and over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b).

2. Venue is proper in the Northern District of West Virginia pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1395(a), as well as Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), because it is the judicial district in which Defendants are located, reside, and/or are doing business, and/or in which the violations alleged in the Complaints occurred.

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

4. For purposes of this Consent Decree, Defendants agree that the United States' Complaint states claims upon which relief may be granted pursuant to Sections 301 and 402 of the Act, 33 U.S.C. §§ 1311 and 1342, and the Complaint filed by the State of West Virginia states claims upon which relief may be granted pursuant to West Virginia Code § 22-11-1, *et seq.*, and West Virginia Code § 22-3-1, *et seq.*

III. APPLICABILITY

5. The provisions of this Consent Decree apply to and are binding upon the State and upon Defendants and any successors, assigns, or other entities, or persons otherwise bound by law.

IV. DEFINITIONS

6. Terms used in this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims that are defined in the WPCA or in regulations promulgated pursuant to the WPCA shall have the meanings assigned to them in the WPCA or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Aquatic Life" shall mean wildlife living in, on, or near waters of the State;
- b. "Complaints" shall mean the complaint filed by the United States and the complaint filed by the State as a Plaintiff-Intervenor in this action;
- c. "Consent Decree" shall mean this Consent Decree for Natural Resources Game

Fish and Aquatic Life Claims;

- d. "Defendants" shall mean the persons or entities named in the Complaints;
- e. "Effective Date" shall have the definition provided in Section VIII;
- f. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;
- g. "Game Fish" shall include all species of fish enumerated in West Virginia Code § 20-1-2;
- h. "Natural Resources Game Fish and Aquatic Life Claims" shall mean the sum of money equal to the cost of replacing any loss of game fish or aquatic life resulting from a person or persons' failure or refusal to discharge any duty imposed upon such person by the WPCA (*see* W. Va. Code § 22-11-25);
- i. "NPDES" shall mean the National Pollutant Discharge Elimination System defined in 40 C.F.R. § 122.2 and any State-issued NPDES permit;
- j. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral;
- k. "Parties" shall mean the State of West Virginia and Defendants;
- l. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral;
- m. "State" shall mean the State of West Virginia, including without limitation the WVDEP and WVDNR;
- n. "United States" shall mean the United States of America, acting on behalf of EPA; and

o. "Wildlife" shall mean wild birds, wild animals, game and fur-bearing animals, fish (including minnows), reptiles, amphibians, mollusks, crustaceans and all forms of aquatic life used as fish bait, whether dead or alive (*see* W. Va. Code § 20-1-2).

V. SETTLEMENT AMOUNT

7. Within 30 Days after the Effective Date of this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims, Defendants shall pay a total of Five Hundred Thousand Dollars (\$500,000.00) in settlement of any and all claims for loss of game fish, aquatic life, and other wildlife asserted in the State's Complaint or arising out of the events described therein, pursuant to W. Va. Code § 22-11-25.

8. Defendants shall make payment to the State by certified or cashier's check payable to the State of West Virginia for deposit in the Natural Resources Game Fish and Aquatic Life Fund. Payments shall be mailed to:

Bret Preston
WV DNR Wildlife Resources Section
324 4th Avenue
South Charleston, WV 25303

9. Defendants shall not deduct any payments made pursuant to this Consent Decree in calculating their federal or state or local income tax.

VI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

10. This Consent Decree for Natural Resources Game Fish and Aquatic Life Claims resolves any and all claims alleged or asserted in the State's Complaint for liability due to the loss of game fish, aquatic life, and any other wildlife pursuant to § 22-11-25 of the WPCA, including any such claims arising out of the events described therein.

11. The State reserves all legal and equitable remedies available to enforce the

provisions of this Consent Decree, except as expressly stated in Paragraph 10. Except as expressly specified in Paragraph 10, this Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the WPCA or implementing regulations, or under other federal or state laws, regulations, or permit conditions.

12. In any subsequent administrative or judicial proceeding initiated by the State for monetary claims for loss of game fish, aquatic life and/or other wildlife relating to the Defendants' alleged violations, Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 10 of this Section.

13. Defendants are responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and 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. The State does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Decree shall result in compliance with provisions of the WPCA, W. Va. Code § 22-11-1, *et seq.*, or with any other provisions of federal, state, or local laws, regulations, or permits.

14. This Consent Decree does not limit or affect the rights of Defendants or of the State against any third parties not party to this Decree, nor does it limit the rights of third parties

not party to this Decree against Defendants, except as otherwise provided by law.

15. 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.

16. By the execution of this Consent Decree, Defendants release and shall hold harmless the State, its instrumentalities, agents, and employees, in their official and personal capacities, of any and all liability or claims arising out of or otherwise related to the negotiations leading to this Consent Decree and all matters contained therein.

VII. COSTS

17. The Parties shall bear their own costs of this action, including attorneys' fees, except that the State shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the settlement amount due but not paid by Defendants.

VIII. EFFECTIVE DATE

18. 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.

IX. MODIFICATION

19. The terms of this Consent Decree may be not be modified for any purpose.

X. TERMINATION

20. After Defendants have completed the requirements of Section V (Settlement Amount), Defendants may serve upon the State a Request for Termination, stating that Defendants have satisfied those requirements, together with all necessary supporting

documentation.

21. Following receipt by the State of Defendants' Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the State agrees that the Consent Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

XI. PUBLIC PARTICIPATION

22. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with W. Va. Code R. § 47-30-15.2.c. The State reserves the right to withdraw or withhold its consent if the comments regarding this Consent Decree disclose facts or considerations indicating that this Consent Decree is inappropriate, improper, or inadequate. Defendants consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the State has notified Defendants in writing that it no longer supports entry of the Consent Decree.

XII. SIGNATORIES/SERVICE

23. Each undersigned representative of the Defendants and of the State 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.

24. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agree to accept service of process by mail with respect to

all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XIII. INTEGRATION

25. This Consent Decree for Natural Resources Game Fish and Aquatic Life Claims constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

XIV. FINAL JUDGMENT

26. Upon approval and entry of this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims by the Court, this Consent Decree shall constitute a final judgment of the Court as to the State and Defendants with regard to any and all claims brought or that could have been brought pursuant to W. Va. Code § 22-11-25 based upon the allegations made and events described in the State's Complaint. 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.

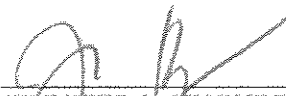
SO ORDERED THIS 6th DAY OF July, 2011.

/s/ Frederick P. Stamp, Jr.
United States District Judge
Northern District of West Virginia

THE UNDERSIGNED PARTIES enter into this Consent Decree for Natural Resources Game Fish and Aquatic Life Claims in the matter of *United States, et al. v. CONSOL Energy Inc., et al.*

FOR THE STATE OF WEST VIRGINIA, by and through the WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Randy C. Huffman, Secretary,

Date: 3/14/11



JENNIFER L. HUGHES
Senior Counsel
Office of Legal Services
WV Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

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FOR DEFENDANTS CONSOL Energy Inc.; Consolidation Coal Company; and Windsor Coal Company;

FOR CONSOL ENERGY INC.

Date: 2-28-11



Robert P. King, Executive Vice President

FOR CONSOLIDATION COAL COMPANY

Date: 2-28-11



Robert P. King, Vice President

FOR WINDSOR COAL COMPANY

Date: 2-28-11



Robert P. King, Vice President