

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE MANAGEMENT,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,**

Plaintiff,

V.

**Civil Action No. 10-C-49(P)
Judge Richardson**

**POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT,**

Defendant.

CONSENT DECREE

I. INTRODUCTION

1. Plaintiff, the West Virginia Department of Environmental Protection (“WVDEP”)¹, and Defendant, Pocahontas County Public Service District (“District”), hereby seek of this Court entry of this Consent Decree resolving the above styled action, which was filed by the Plaintiff on August 29, 2010.

II. BACKGROUND

2. On May 29, 2003, West Virginia Department of Environmental Protection filed a Complaint (“2003 Complaint”) in the Circuit Court of Pocahontas County, West Virginia. The 2003 Complaint was filed against Snowshoe Mountain, Inc. (“SMI”) and Snowshoe Water and Sewer, Inc. (“SWI”) in response to violations of the terms and conditions of the WV/NPDES permits for wastewater treatment facilities located at Snowshoe Village, the Inn at Snowshoe, and Silver Creek. The matter was designated Civil Action No. 03-C-29.

¹ At the time of this filing, Jeremy Bandy is the current Director of the Division of Water and Waste Management.

3. On May 15, 2008, a Consent Decree (“2008 Consent Decree”) that resolved all issues raised in WVDEP’s aforementioned 2003 Complaint was entered by the Circuit Court of Pocahontas County. The 2008 Consent Decree was binding upon SMI, SWI, and all successors and assigns. The 2008 Consent Decree placed certain interim effluent limits on the relevant permits operated by SMI and SWI. Further, the 2008 Consent Decree required that SMI and SWI transfer the relevant permits to the Defendant and to “continue to support the . . . District . . . to locate and construct a new regional wastewater treatment plant.” Prior Consent Decree, p. 3.

4. The 2008 Consent Decree required, in part, a Supplemental Environmental Project (“SEP”) wherein SWI would transfer \$2.8 million of SWI’s assets to the Defendant in order for the Defendant to operate the permits.

5. Section III of the Consent Decree enjoined SMI, SWI, and all successors and assigns from discharging pollutants from the wastewater treatment facilities in a manner that would result in further violations of the WV/NPDES permit effluent limits. Section IX of the Consent Decree required SMI, SWI, and all successors and assigns to submit quarterly compliance reports to WVDEP.

6. On November 26, 2008, Defendant requested that the aforementioned WV/NPDES permits be transferred, due to Defendant’s purchase of the wastewater facilities.

- a. Snowshoe Village - WV/NPDES Water Pollution Control Permit No. WV0023311 was transferred to Pocahontas County PSD on December 30, 2008. The WV/NPDES permit was reissued on June 28, 2012; April 4, 2018; and May 25, 2022.
- b. Silver Creek - WV/NPDES Water Pollution Control Permit No. WV0082937 was transferred to Pocahontas County PSD on December 30, 2008. The WV/NPDES permit was reissued on February 28, 2011, and it was terminated on July 5, 2016.
- c. Inn at Snowshoe - WV/NPDES Water Pollution Control Permit No. WV0103110, Registration No. WVG550692, was transferred to Pocahontas PSD on December 30, 2008. The WV/NPDES permit was reissued on February 21, 2011 and May 27, 2016. The WV/NPDES permit was terminated on August 11, 2017.

7. On August 29, 2010, WVDEP filed a Complaint in the Circuit Court of Pocahontas County, West Virginia. The Complaint was filed against Defendant in response to violations of the terms and conditions of the WV/NPDES permits for wastewater treatment facilities located at Snowshoe Village, the Inn at Snowshoe, and Silver Creek, as well as violations of the 2008 Consent Decree. The matter was designated Civil Action No. 10-C-49.

8. On December 6, 2016, this Court entered an Agreed Order outlining an agreement that the parties had reached following mediation whereby the Defendant would submit and complete a Supplemental Environmental Project (“SEP”) in order to offset penalties associated with violations having occurred prior to the date of entry of the Agreed Order. With the cost of the potential SEP being unknown at the time of entry of the Agreed Order, this Court stated that the issue of penalty amounts remained an open issue.

9. WVDEP personnel conducted a review of Defendant’s facility records from the time period of January 1, 2009 through November 30, 2022. During this review, numerous exceedances of Defendant’s WV/NPDES permit effluent limits were observed at the Snowshoe Village, Silver Creek, and Inn at Snowshoe wastewater treatment facilities. The exceedances constitute violations of Section A of the respective WV/NPDES permits and Section III of the Consent Decree. In addition, Defendant failed to submit quarterly reports, which is a violation of Section IX of the Consent Decree.

10. Defendant submitted a proposed two-phased Supplemental Environmental Project (SEP) with plans and respective project schedules which will be undertaken to offset a portion of the penalty assessed in this Consent Decree. The proposed projects included the Frank-Bartow Sewer Extension and the Thornwood Waterline Extension. The Frank-Bartow Sewer Extension has since been completed.

11. The Parties recognize and acknowledge that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among the Parties to the extent that the Parties fully abide by the terms and conditions of this Consent Decree, and that this Consent Decree is fair, reasonable, and in the public interest.

12. NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section II of this Consent Decree and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

III. JURISDICTION AND VENUE

13. This Court has jurisdiction over the subject matter of this action pursuant to the Water Pollution Control Act ("WPCA"), W. Va. Code § 22-11-1 *et seq.*

14. Venue is proper in the Circuit Court of Pocahontas County, West Virginia, pursuant to statutory authority referenced in Paragraph 13 of this Consent Decree, because the violations described herein occurred in Pocahontas County, West Virginia.

15. For purposes of this Consent Decree, or any action to enforce this Consent Decree, Defendant consents to the Court's jurisdiction over this Consent Decree and any such action as may arise regarding enforcement thereof.

16. For purposes of this Consent Decree, Defendant agrees that the Complaint states claims upon which relief may be granted pursuant to West Virginia Rule of Civil Procedure 12(b)(6).

IV. APPLICABILITY

17. The obligations of this Consent Decree apply to and are binding upon Plaintiff, Defendant, and any successors, assigns, or other entities or persons otherwise bound by

law.

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

19. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

V. DEFINITIONS

20. Terms used in this Consent Decree that are defined in the WPCA, or regulations promulgated pursuant to such, shall have the meanings assigned to them in the WPCA, or such regulations, unless otherwise provided in this Consent Decree.

21. "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, West Virginia or federal holiday, the period shall run until the close of business of the next business day.

VI. COMPLIANCE REQUIREMENTS

22. Defendant shall immediately take all measures to initiate compliance with the WPCA, any and all relevant regulations promulgated pursuant to the WPCA, and with all terms and conditions of WV/NPDES Permit No. WV0023311.

23. Within sixty (60) days of the effective date of this Consent Decree, Defendant shall submit for approval a proposed plan of corrective action ("POCA") and schedule, outlining action items and completion dates for how and when Defendant will achieve compliance with all

terms and conditions of WV/NPDES Permit No. WV0023311. The POCA shall make reference to this Consent Decree. The POCA shall be submitted to:

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WVDEP
601 57th Street SE
Charleston, WV 25304**

Upon approval, the POCA and schedule shall be incorporated into and become part of this Consent Decree, as if fully set forth herein. Failure to submit an approvable POCA or failure to adhere to the approved schedule is a violation of this Consent Decree.

24. Upon the effective date of this Consent Decree, the SEP plan and schedule (attached) referenced in Paragraph 10 of this Consent Decree shall be incorporated into and become part of this Consent Decree.

25. Within sixty (60) days after completion of each phase of the SEP, Defendant shall submit an SEP Completion Report, with the Completion Reports for those phases and/or projects which have already been completed at the date of entry of this Consent Decree to be provided within sixty (60) days of the entry thereof. The written report shall include, but not be limited to, the following: a detailed description of the projects; a description of any operating problems found and solutions for such problems; a certification of the total costs of the project; an itemization of costs; a description of the public health benefits of the projects; and a certification that the approved SEP has been fully implemented. Failure to complete both phases of the SEP in accordance with the approved plans and schedules is a violation of this Consent Decree, and Defendant shall be required to pay the stipulated penalties found in Section VII of this Consent Decree. Should Defendant be unable to complete either phase of the SEP in accordance with its respective approved schedule due to delays associated with securing funding for the project,

Plaintiff will consider providing an extension of the respective SEP schedule. To request an amendment to the respective approved SEP schedule, Defendant shall submit written correspondence, which includes a detailed description of progress that has been made toward achieving the respective SEP milestones, the specific reason(s) for requesting an extension, and a proposed updated milestone schedule. The request shall be submitted, for approval, to:

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304**

26. Because of Defendant's violations of WV/NPDES permit effluent limits both prior to and since the date of entry of the December 2016 Order, Pocahontas County Public Service District shall be assessed a civil penalty of one million eight hundred fifteen thousand dollars (\$1,815,000) to be paid as follows:

Fifty thousand dollars (\$50,000) shall be paid to the West Virginia Department of Environmental Protection for deposit in the Water Quality Management Fund, in accordance with the following twenty-five (25) month schedule: Two thousand dollars (\$2,000.00) shall be submitted on the first day of the month following the date of execution of this Consent Decree and on the first day of each month thereafter.

The remaining one million seven hundred sixty-five thousand dollars (\$1,765,000) shall be offset by the completion of the approved SEPs. In the event that one or both of the SEPs are not completed as approved, the entire value placed upon the SEP shall become due and payable upon demand by WVDEP.

Should the Defendant fail to adhere to the above outlined payment schedule, any interest on the civil penalty, as well as any stipulated penalties, shall be calculated at the rate specified in W.Va. Code §56-6-31 with interest accruing from one day after the penalty is due.

Payments made pursuant to this paragraph are not tax-deductible for purposes of State or federal law. **Payment shall be mailed to:**

Chief Inspector

Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304

27. If conditions are found to exist at the site not previously documented that require additional remediation or monitoring after the lodging of this Consent Decree with the Court that were not contemplated in this Consent Decree, Plaintiff reserves the right to pursue any claims or remedies available to it by law and those claims and remedies shall exist separate and apart from this Consent Decree unless and until, upon written agreement by both Parties, those claims and remedies are incorporated into an amendment to this Consent Decree and accepted by the Court.

28. Any information provided pursuant to this Consent Decree may be used by Plaintiff in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VII. STIPULATED PENALTIES

29. Defendant shall be liable for stipulated penalties to Plaintiff for violations of this Consent Decree as specified below, unless excused under Section VIII. A violation includes failing to comply with any obligation of this Consent Decree.

30. Upon the effective date of this Consent Decree, Defendant agrees to the following stipulated penalties for each future violation of the effluent limits provided in WV/NPDES Permit No. WV0023311. Stipulated penalties shall be paid within ten (10) days of receipt of WVDEP's demand and shall be deposited into the Water Quality Management Fund. Stipulated penalties shall expire two (2) years after the effective date of this Consent Decree.

Max Daily Stipulated Penalties

Minor (≤100% exceedance)	Moderate (101-600% exceedance)	Major (>600% exceedance)
\$1000	\$1500	\$2000

Avg Monthly Stipulated Penalties

Minor (≤40% exceedance)	Moderate (41-300% exceedance)	Major (>300% exceedance)
\$1000	\$1500	\$2000

31. Upon the effective date of this Consent Decree, Defendant agrees to the following stipulated penalties for each future violation of a deadline associated with any work plan or schedule approved under this Consent Decree or the Plan of Corrective Action. The stipulated penalty for each violation as described herein this Paragraph shall be \$1000 per violation.

32. Stipulated penalties under this Section shall begin to accrue on the day a violation occurs and shall continue to accrue separately each day until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

33. Plaintiff may, in its sole discretion, waive specific stipulated penalties otherwise due without having effect on any future or other non-specified stipulated penalties.

34. Stipulated penalties shall continue to accrue as provided in this Section, during any dispute resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement of the Parties or by a decision by Plaintiff that is not appealed to a Court, Defendants shall pay accrued penalties determined to be owed, together with interest as referenced in Paragraph 26, to Plaintiff within thirty (30) days of the effective date of the agreement or the receipt of Plaintiff's decision or order.
- b. If the dispute is appealed to the Court and Plaintiff prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owed, together with interest as referenced in Paragraph 26, within sixty (60) days of

receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the Court's decision, Defendant shall pay all accrued penalties determined to be owed, together with interest as referenced in Paragraph 26, within fifteen (15) days of receiving the final appellate court decision.

35. In paying stipulated penalties owed to Plaintiff, the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid. In addition, the transmittal letter shall state Defendant's name, street/P.O. Box address, email addresses and telephone numbers; the name of the case, the civil action number, the amount paid, the method of payment, and made payable to: Chief Inspector, Environmental Enforcement - Mail Code #031328, WV-DEP 601 57th Street SE, Charleston, WV 25304.

36. Nothing in this Section shall be construed to limit Plaintiff from seeking any remedy otherwise provided by law for Defendants' failure to pay any stipulated penalties.

37. The payment of penalties, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

38. Stipulated penalties are not Plaintiff's exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section X Plaintiff expressly reserves the right to seek any other relief deemed appropriate for Defendant's violation of this Consent Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid for such violation pursuant to this Consent Decree.

VIII. FORCE MAJEURE

39. If any event occurs which causes or may cause a delay in the achievement of the requirements of this Consent Decree or a violation of any provision of this Consent Decree by Defendant, they shall notify Plaintiff within three (3) business days of the date on which Defendant has knowledge or should have had knowledge that the event may or will cause a delay or violation. Defendant shall provide written notification within ten (10) days. The written notice shall contain a detailed written explanation of the anticipated length and cause of the delay, the measures taken and/or to be taken to prevent or minimize the delay, and a timetable by which Defendant intends to implement these measures. Defendant shall adopt all measures to avoid or minimize any such violation. Defendant shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

40. Force majeure shall not include delays caused or contributed to by the lack of sufficient funding. Force majeure will include, but not be limited to, delays caused solely by state agencies or the State of West Virginia, or other regulatory agency of proper jurisdiction, where Defendant can demonstrate that it made timely submissions or took timely actions in accordance with the deadlines required by this Consent Decree, but that subsequent deadlines cannot be met due to the inaction or untimely action of state agencies or the State of West Virginia or other regulatory agency of proper jurisdiction.

41. If Plaintiff agrees that any violation of this Consent Decree is caused by circumstances reasonably beyond the control of Defendant, they shall be excused as to that violation for the period of time the violation continues due to such circumstances. Defendant's time for performance shall be extended for a period not exceeding the delay actually resulting from the circumstance and any stipulated penalties pursuant to this Consent Decree will be

waived. In the event that Plaintiff does not agree, Defendant may submit the matter to the Circuit Court of Pocahontas County for resolution of whether or not Defendant is entitled to relief pursuant to this Force Majeure provision. The burden of proving that any delay was caused by circumstances reasonably beyond the control of Defendant and the length of such delay shall rest with Defendant. Failure by Defendant to comply with the notice requirements of this Section shall render this Section void and of no force and effect as to the particular incident involved, and shall constitute a waiver of the Defendant's right under this provision to obtain an extension of its obligations based on that incident.

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

IX. INFORMATION COLLECTION AND RETENTION

43. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by Plaintiff pursuant to applicable laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable laws, regulations, or permits.

X. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

44. This Consent Decree resolves the civil claims of Plaintiff for the violations alleged in the Complaint filed in this action, as well as any additional permit violations through the date of lodging so long as Defendant remains compliant with the terms of this Consent Decree.

45. Plaintiff reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of Plaintiff

to obtain penalties or injunctive relief under the WPCA, or any regulations promulgated pursuant to such, or under any other federal or state laws, regulations, or permit conditions, except as expressly specified with regard to those violations described in the Complaint. Plaintiff further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Defendant's facilities, whether related to the violations addressed in this Consent Decree or otherwise.

46. In any subsequent administrative or judicial proceeding initiated by Plaintiff for injunctive relief, civil penalties, other appropriate relief relating to violations of the WPCA, or any regulations pursuant to such, except as expressly specified with regard to those violations described in the Complaint or Paragraph 44 of this Consent Decree, Defendant 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 Plaintiff in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved in this Complaint.

47. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits; and Defendant's 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. Plaintiff does not, by their consent to entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with the relevant provisions of the WPCA, and regulations

promulgated pursuant to such, or with any other provisions of federal, state, or local laws, regulations, or permits.

48. This Consent Decree does not limit or affect the rights of Defendant or Plaintiff against any third parties not party to this Consent Decree, nor does it limit the rights of third parties not a party to this Consent Decree, except as otherwise provided by law.

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

XI. COSTS

50. The Parties shall bear their own costs of this action, including attorneys' fees, except that Plaintiff shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

XII. NOTICES

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

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WV-DEP
601 57th Street SE
Charleston, WV 25304**

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

53. 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.

XIII. EFFECTIVE DATE

54. 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 the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that Defendant hereby agrees that it shall be bound to perform duties scheduled to occur prior to the Effective Date. In the event Plaintiff withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

XIV. RETENTION OF JURISDICTION

55. The Court shall retain jurisdiction over this case until termination of this Consent Decree for the purpose of resolving disputes arising under this Consent Decree or entering orders modifying this Consent Decree, or effectuating or enforcing compliance with the terms of this Consent Decree.

XV. MODIFICATION

56. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all Parties. Said writing may include an electronic transmission between the Parties acknowledging the modification to the Consent Decree.

57. In any disputes concerning modification of this Consent, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with West Virginia Rule of Civil Procedure 60.

XVI. TERMINATION

58. This Consent Decree shall terminate upon Defendant's notification of full compliance with the requirements set forth in Section VI and verification of this notification by WVDEP.

XVII. SIGNATORIES/SERVICE

59. Each undersigned representative of Defendant and Plaintiff 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 Consent Decree.

60. 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 e-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 West Virginia Rules of Civil Procedure and any applicable Local Rules of this Court, including, but not limited to, service of a summons. Defendants need not file an answer to the Complaint in this action unless and until the Court expressly declines to enter this Consent Decree.

XVIII. INTEGRATION

61. This Consent Decree 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, other than deliverables that are subsequently submitted and approved pursuant to this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

62. The provisions of this Consent Decree are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.

XIX. FINAL JUDGMENT

63. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to Plaintiff and Defendant that is binding upon the parties, as well as heirs, successors, and assigns.


It is so **DECREED AND ORDERED** this _____ day of _____, 2024.

Hon. Robert E. Richardson
Circuit Judge

Upon signing, Parties hereby agree to the terms and conditions outlined in the above CONSENT DECREE:

Jeremy Bandy, Director
Division of Water and Waste Management
West Virginia Department of
Environmental Protection

Date



Mark Smith, Chairman
Pocahontas County Public Service District

Date: February 14, 2024