

IN THE CIRCUIT COURT OF BARBOUR COUNTY, WEST VIRGINIA

**HAROLD D. WARD, Acting Director,
Division of Water and Waste Management,
West Virginia Department of Environmental
Protection,**

Plaintiff,

v.

Civil Action No. 19-C-2

WOLF RUN MINING, LLC,

Defendant.

CONSENT DECREE

I. RECITALS

1. On January 28, 2019, Plaintiff West Virginia Department of Environmental Protection (“WVDEP”) filed a complaint for injunctive relief and for civil penalties (“Complaint”) in this civil action against Defendant, Wolf Run Mining, LLC (“Defendant”).

2. The Complaint alleged that Defendant holds Water Pollution Control/ NPDES Permit No. WV0043273 issued pursuant to the West Virginia Water Pollution Control Act and Section 402 of the federal Water Pollution Control Act, and also holds Permit No. U-0015-83 issued pursuant to the West Virginia Surface Coal Mining and Reclamation Act. The Complaint alleged that Defendant was discharging pollutants from Outlet No. 001 into Little Hackers Creek that are contributing to adverse effects on the biological component of the aquatic ecosystem in violation of Defendant’s permits.

3. The Parties, desiring to settle and resolve all claims in the Complaint, hereby enter this Consent Decree.

II. JURISDICTION AND VENUE

4. For the purposes of this Consent Decree, the Parties agree that this Court has jurisdiction over the Parties and over the subject matter of this action pursuant the West Virginia Water Pollution Control Act (W.Va. Code §§ 22-11-1 *et seq.*) and the West Virginia Surface Coal Mining and Reclamation Act (W.Va. Code §§ 22-3-1 *et seq.*).

5. Venue is proper in this Circuit pursuant to W.Va. Code § 22-11-22(a) since the waters at issue are located in Barbour County.

6. For the purposes of this Consent Decree, and for any action by Plaintiff to enforce this Consent Decree, the Defendant consents to jurisdiction in this Court. The Parties further consent to the jurisdiction of this Court to enforce or resolve disputes between the Parties.

III. CIVIL PENALTY

7. Defendant shall pay a civil penalty in the amount of \$40,000.00 to the WVDEP within thirty (30) days of the Effective Date of this Decree, which shall be the date of approval by the Circuit Court. Payment of the penalty shall resolve all claims for civil penalties for any violations of Plaintiffs' WV/NPDES Permit No. WV0043273 that have occurred or may occur up to the Effective Date of this Decree. It shall also resolve any claim for penalties for such violations of the Plaintiffs' WV/NPDES permit as may also constitute a violation of Defendant's Surface Mining Permit No. U-0015-83.

IV. COMPLIANCE AND TERMINATION REQUIREMENTS

8. Defendant shall achieve compliance with the prescribed effluent limitations for Outlet 001 by reducing the overall pollutant loading to Little Hackers Creek through implementation of the Remediation Plan attached as Appendix A. The goal of the Remediation Plan is to divert water with elevated levels of dissolved solids that is currently discharged through Outlet 001 and either use it in the coal preparation plant on-site or discharge

it directly to the Tygart Valley River (where its effects will be diluted) so that it does not flow into Little Hackers and Hackers Creeks (where its effects cannot be significantly diluted). There are two primary sources of elevated dissolved solids in water that discharges from Outlet 001: water that is currently pumped from underground mines into Defendant's refuse impoundment and water that otherwise discharges from the refuse impoundment. The Remediation Plan includes steps for diverting both sources of water for use in the preparation plant or for discharge to the Tygart Valley River so that it no longer discharges to Little Hackers Creek. The Parties recognize that this same water is already reaching the Tygart Valley River via Little Hackers and Hackers Creeks but that the aquatic life in the Tygart Valley River is not significantly affected because of the dilution afforded by the volume of that water body. Water volume and water quality in Little Hackers Creek will be preserved in part by the construction of a freshwater diversion to carry surface water around the refuse disposal facility in that watershed. The dates for compliance of the tasks set forth in the Remediation Plan are conditioned on timely review and approval of any necessary permits and licenses from governmental agencies and shall be extended to accommodate reasonable requests based on delays in permit review.

9. A Water Management Plan, attached as Appendix B, contains a flow diagram depicting the final configuration that the Parties contemplate will be achieved upon completion of the Remediation Plan. In addition, a Monitoring Plan, attached as Appendix C, shall be used for measuring compliance with this Decree and for calculating compensation costs in the event compliance cannot reasonably be achieved as described below.

10. Wolf Run shall submit a Status Report to WVDEP within fifteen (15) days after the end of each quarter, beginning with the quarter immediately following entry of the Consent Decree, identifying its progress to date and planned activities for the following quarter.

Wolf Run will identify all impediments, if encountered, that may have an adverse effect on the completion of tasks set forth in the Remediation Plan.

11. Outlet 001 discharges into Little Hackers Creek, which flows to Hackers Creek and then to the Tygart River. The Parties recognize that both the Hackers Creek and Little Hackers Creek watersheds upstream of Defendant's mining operations have been disturbed by historic mining and other activities unrelated to Defendant's mining, which affect the habitat, water quality, and biological communities in those watersheds. In addition, the habitat and water quality for aquatic life in both Little Hackers and Hackers Creeks downstream of Defendant's Outlet No. 001 has been and is currently adversely affected by agricultural and residential activities that have removed riparian vegetation, contributed to streambank erosion, and increased loading of animal and human wastes to the streams. Accordingly, because each of these factors is unrelated to Defendant's discharges at Outlet 001 but can adversely affect the aquatic community used to derive West Virginia Stream Condition Index ("WVSCI") scores in the areas downstream of Outlet 001, Defendant cannot reasonably be expected to achieve a WVSCI score supporting a finding of compliance with the narrative water quality criteria in these streams notwithstanding successful completion of its Remediation Plan and reductions in pollutant loadings. Further, the Parties recognize that WVDEP has previously determined that the habitat and prior data collection in Little Hackers Creek is not suitable for application of the WVSCI used for assessing watershed impairment. *See* WVDEP's 2003 Ecological Assessment of the Tygart River Valley Watershed, pp. 71-72, *available at* https://dep.wv.gov/WWE/watershed/wqmonitoring/Documents/EcologicalAssessments/EcoAsses_Tyg_2003.pdf (last accessed May 23, 2019). Accordingly, the Parties have agreed that compliance with this Decree and evaluation of the effectiveness of Defendant's pollution

reduction efforts will rely on a comparison of WVSCI scores in Hackers Creek upstream and downstream of the confluence with Little Hackers Creek in recognition of the fact that water quality in Hackers Creek upstream of the confluence is unaffected by Defendant's discharges into Little Hackers Creek.

12. Using the WVSCI, the Defendant shall compare WVSCI scores in Hackers Creek taken upstream and downstream of its confluence with Little Hackers Creek at locations agreed to by WVDEP. To terminate this Decree, Defendant shall within six years of completing the last phase of the Remediation Plan described above or of any extension of that time period as set out below ("the Termination Period"), achieve the following endpoints;

a. Within any 36-month period, demonstrate three WVSCI scores in Hackers Creek below the confluence of Little Hackers Creek that are, in the judgment of WVDEP, equivalent to the scores in Hackers Creek above the confluence with Little Hackers Creek. Upon that demonstration, Defendant may request that WVDEP join it in the submission of a joint notice of compliance and termination to the Court. If Defendant has made the necessary demonstration, then WVDEP shall join Defendant in such a joint notice to the Court, and the Decree shall be considered terminated upon submission of that notice.

b. If Defendant has not made the demonstration in subparagraph "a" within six years of the last phase of the Remediation Plan but has demonstrated at least one equivalent score in any twelve-month period, then the deadline for achieving criteria in subparagraph "a," above, will be extended for another 12 months, and WVDEP may allow a further extension not to exceed 24 additional months if it determines that Defendant has a reasonable chance of meeting the termination criteria in subparagraph "a."

c. If Defendant is unable to terminate the Decree within the Termination Period specified above, then it shall pay a fee for use in a stream enhancement or mine reclamation project to be approved by WVDEP (“Enhancement Fee”) within 90 days of the expiration of the Termination Period. The Enhancement Fee shall be calculated as follows for that segment of Little Hackers Creek located between its approved NPDES outlet (as of the end of the Termination Period) and the downstream site currently identified as BASDLHC in Permit No. U-0015-83. Utilizing the U.S. Army Corps of Engineers’ Hydrogeomorphic Guidebook for the Functional Assessment of High Gradient Streams and Low Gradient Perennial Streams ERDC/EL TR-17-1 (Jan. 2017), Defendant shall calculate the Stream and Wetland Valuation Metric “SWVM” units for that portion of Little Hackers Creek identified above in its current condition, using a conductivity of 2,227 $\mu\text{S}/\text{cm}$ and a WVSCI score of 54.87 (“the Current Conditions”). It shall then calculate the SWVM units for the same stream segment assuming a conductivity of 500 $\mu\text{S}/\text{cm}$ and a WVSCI score of 72 (the “Target Conditions”). If, at the end of the period allowed for terminating this Decree, Defendant has been unable to terminate the Decree, then it shall calculate SWVM units with the then-existing stream conditions (the “Final Conditions”). If the calculated SWVM units for the Final Conditions fall below those calculated for the Target Conditions, then Defendant shall compute and pay an Enhancement Fee for the difference in the SWVM values between the Target and Final Condition by using the Handbook’s calculator for permanent impacts. Upon the payment of the Enhancement Fee the Defendant shall be considered to have complied with its NPDES Permit and this Decree, and the Parties shall submit a notice to that effect to the Court and the Decree shall be considered terminated.

V. STIPULATED PENALTIES AND EXTENSIONS

13. In the event Defendant does not meet the deadlines for completion of any step in the Remediation Plan it shall pay, upon request by WVDEP, a stipulated penalty of \$2,000 for each week that it is late unless it demonstrates to WVDEP a reasonable basis for the delay or that the delay is not likely to affect the final date for completing the Remediation Plan. If there is a reasonable basis for the delay, then the time for performance of the affected obligations under this Decree shall be extended by Plaintiff for such time as is reasonably necessary to complete the relevant obligations. Any dispute between the Parties as to what constitutes a reasonable delay may be resolved by the Court. In order to claim a reasonable delay, Defendant shall, to the extent practicable, provide WVDEP with at least five (5) days advance written notice.

VI. EFFECT OF SETTLEMENT

14. This Consent Decree resolves the civil claims of WVDEP for such violations as were or could have been alleged in the Complaint through the Effective Date of this Decree, including, but not limited to, violations of any provision of the WPCA and/or SCMRA that were or could have been alleged by WVDEP.

15. This Decree and agreement does not represent an admission of wrongdoing or liability by Defendant nor a concession that the legal theories advanced by WVDEP are either correct or applicable at other sites.

16. This Consent Decree shall not be construed to create any rights in, or grant any cause of action to, any party other than the Plaintiff and Defendant.

VII. COSTS AND FEES

17. The Parties shall bear their own costs and fees, except WVDEP reserves the right to seek such fees and costs as may otherwise be recoverable in the event it takes later action to enforce the provisions of this Decree.

VIII. NOTICES

18. Unless otherwise specified herein, notices required by this Consent Decree shall be in writing and addressed as follows or to such designees as the Parties may later identify:

To Plaintiff: Director, Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57 Street SE
Charleston, WV 25304

To Defendant: Wolf Run Mining, LLC
Attn: President
One CityPlace Drive, Ste. 300
St. Louis, MO 63141

Arch Coal, Inc.
Attn: General Counsel
One CityPlace Drive, Ste. 300
St. Louis, MO 63141

IX. EFFECTIVE DATE

19. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

X. RETENTION OF JURISDICTION

20. The Court shall retain jurisdiction over the compliance with the Decree until the Decree is terminated as set forth above.

XI. MODIFICATION

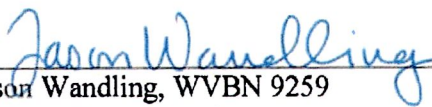
21. The provisions of this Decree may be modified, subject to judicial approval, upon joint application of the Parties. Changes to the Remediation Plan, Water

Management Plan, and Monitoring Plan (attached as Appendices A through C) may be made upon joint agreement of the Parties and shall not require Court approval except to the extent they seek to change the termination endpoints or the time for termination set forth herein.

ENTERED _____, 2019


HONORABLE SHAWN D. NINES, JUDGE

For the Plaintiff, Harold D. Ward, Acting Director, Division of Water and Waste Management,
West Virginia Department of Environmental Protection



Jason Wandling, WVBN 9259
Office of Legal Services
WV Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

For the Defendant, Wolf Run Mining, LLC



Robert G. McLusky, WVBN 2489
Jennifer L. Hughes, WVBN 9676
Christopher M. Hunter, WVBN 9768
Jackson Kelly, PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, West Virginia 25322