

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION**

**SIERRA CLUB and WEST VIRGINIA  
HIGHLANDS CONSERVANCY,**

**Plaintiffs,**

**v.**

**Civil Action No. 2:10-cv-1199**

**FOLA COAL COMPANY, LLC,**

**Defendant.**

**CONSENT DECREE**

**I. Recitals**

1. On October 11, 2010, Plaintiffs Sierra Club and West Virginia Highlands Conservancy (“Plaintiffs”) filed their Complaint for declaratory and injunctive relief and civil penalties against Defendant Fola Coal Company, LLC (“Fola”) for violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. (hereinafter “the Clean Water Act” or “the CWA”), and the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. (“SMCRA”), at its Surface Mine No. 3 in Clay and Nicholas Counties, West Virginia (“the Mine”).

2. Plaintiffs allege that, by discharging pollutants from the Mine’s Outfall 029 which cause acute and chronic toxicity, ionic stress, and biological impairment in Boardtree Branch, Fola has violated the narrative water quality standards for biological integrity and aquatic life protection incorporated into its West Virginia/National Pollution Discharge Elimination System (“WV/NPDES”) Permit WV1014005 under the CWA, and the performance standards requiring

compliance with water quality standards and protection of the hydrologic balance in its West Virginia SCMRA Permit S200995.

3. Defendant denies and does not admit liability for the violations alleged in Plaintiffs' complaint.

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

5. The Parties agree to the dismissal of Plaintiffs' claims regarding WV/NPDES Permit WV1014005 and WVSMCRA Permit S200995 with prejudice as to violations occurring through the Effective Date of this Consent Decree.

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

## **II. JURISDICTION AND VENUE**

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

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

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

### **III. APPLICABILITY**

9. The provisions of this Consent Decree apply to and are binding upon Plaintiffs and Fola and any of their respective successors and/or assigns, and upon other persons or entities otherwise bound by the law.

10. No transfer of ownership or operation of any Facility shall relieve Fola or its successors of its obligation to ensure that the terms of this Consent Decree are implemented; provided, however that, prior to any transfer, if Fola desires to transfer ownership or operation of any facility to another party, it shall provide a copy of this Consent Decree to the proposed transferee and require the transferee to provide written confirmation to Fola and Plaintiffs acknowledging the terms of the Consent Decree and that the transferee will be bound by those terms. In such event, Fola shall no longer be subject to this Decree for obligations arising after the date of the transfer.

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

### **IV. CIVIL PENALTY**

12. Fola shall pay a civil penalty in the amount of \$25,000.00 to the United States as set forth in Paragraph 13, below. Together with the Supplemental Environmental Project to be funded as set forth in Section V, the payment of this civil penalty is made in settlement of all of

Plaintiffs' claims in this action under the CWA and SMCRA for violations occurring through the Effective Date of this Consent Decree.

13. Fola shall pay the civil penalty due to the United States Treasury within thirty (30) days of the entry of this Decree. That payment shall be made by certified check, bank check, or money order to the Treasurer of the United States and should be sent to the following address: Debt Collection Specialist, Environment and Natural Resources Division, Executive Office, PO Box 7754, Ben Franklin Station, Washington D.C. 20044-7754. The check or money order shall reference Sierra Club, et al. v. Fola Coal Co., LLC, Civil Action No. 2:10-cv-1199, and payment shall be considered paid upon mailing, or direct delivery to the specified address. A copy of the check and cover letter shall be sent to Plaintiffs at the time payment is made, and shall state that payment is being made pursuant to this Decree.

14. The sum set forth in Paragraph 12 above resolves Plaintiffs' demands for civil penalties under 33 U.S.C. § 1365 arising from any violations alleged in Plaintiffs' complaint of WV/NPDES Permit Nos. WV1014005 and WVSMCRA Permit S200995 that have occurred or may occur up to the 24-month compliance date in Paragraph 37 of this Decree.

#### **V. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

15. In addition to the civil penalty set forth in Section IV above, Fola shall pay \$200,000.00 to the West Virginia Land Trust in order to fund a Supplemental Environmental Project ("SEP").

16. If the Special Master makes a negative compliance determination under Paragraph 37 below, Fola shall pay an additional \$500,000.00 to the West Virginia Land Trust in order to fund the SEP.

17. Appendix A to this Decree describes how the SEP will support and expand the Land Trust as described in Paragraphs 15 and 16.

18. Fola shall remit the funds identified in Paragraph 15 by certified check, bank check, or money order to the West Virginia Land Trust within thirty (30) days of the entry of this Decree.

19. If a negative determination is made by the Special Master, Fola shall remit the funds identified in Paragraph 16 by certified check, bank check, or money order to the West Virginia Land Trust within thirty (30) days after the date of the Special Master's negative compliance determination in paragraph 37 below.

20. A copy of the check and cover letter shall be sent to Plaintiffs at the time payment is made, and shall state that payment is being made pursuant to this Decree.

## **VI. COMPLIANCE REQUIREMENTS**

21. This Consent Decree in no way affects or relieves Fola of its responsibility to comply with applicable federal, state and local laws, regulations and permits, but Plaintiffs shall not seek any remedies under the CWA or SMCRA for violations of narrative water quality standards at Outlet 029 when this Decree is in effect other than those remedies set forth herein.

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

submitted timely and substantially complete applications and has taken all other actions necessary to obtain all such permits or approvals.

### **Monitoring and Reporting Requirements**

23. Fola shall conduct monthly monitoring of its discharges from Outlet 029 for the following parameters: sulfate, total dissolved solids, specific conductance, pH, temperature, dissolved oxygen, total suspended solids, total alkalinity, bicarbonate alkalinity, chloride, calcium, potassium, total and dissolved aluminum, total and dissolved iron, total magnesium, and total manganese. Water samples shall be collected and analyzed using U.S. EPA methods.

24. Fola shall conduct acute and chronic whole effluent toxicity (WET) tests and West Virginia Stream Condition Index (WVSCI) sampling at least twice per year between April 15 and October 15 or such other period as allowed by WVDEP. WET tests shall be performed and analyzed using U.S. EPA methods referenced in 40 C.F.R. Part 136, Table 1A. Stream Condition Index (SCI) tests shall be performed and analyzed using WVDEP benthic macroinvertebrate sampling protocols and the results shall identify both the family and genus of each collected organism. If WVDEP adopts a different SCI method than WVSCI during the term of this Decree, such as U.S. EPA's Genus Level Most Probable Stream Status (GLIMPSS) method, Fola shall instead use that method.

25. Within six months after the date of entry of this Decree, Fola shall complete a Toxicity Identification Evaluation (TIE) to identify the specific chemicals responsible for the toxicity of its effluent from Outfall 029. Within three months thereafter, Fola shall complete a Toxicity Reduction Evaluation (TRE) to identify the causes and necessary corrective action to

reduce the toxicity of its discharges from Outfall 029. The TIE and TRE shall be performed using U.S. EPA methods.

26. Fola shall report the results of its monitoring and sampling activities in paragraphs 23-25 above to Plaintiffs and the Special Master of Biology/Aquatic Ecology within 10 business days after receipt of those results.

27. Fola shall prepare interim progress reports and submit them to the Court, Plaintiffs, and Special Masters at a frequency to be determined by the Special Masters, but not less frequently than on a quarterly basis after entry of this Decree.

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

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

#### **Stream Restoration Project**

30. Fola shall seek regulatory approvals as necessary to restore approximately 3,000 feet of Boardtree Branch from the toe of the Boardtree valley fill to the permit boundary, including creation of floodplain and sulfate reducing wetlands, and to restore the mouth of Boardtree Branch, as provided in the Michael Baker Engineering, Inc. Conceptual Restoration Plan attached as Appendix B and as supplemented by plans by CH2M Hill for sulfate reducing systems (the “Stream Restoration Project”). Plaintiffs agree to advise the regulatory authorities that they do not object to the Stream Restoration Project or the permits necessary to conduct the Stream Restoration Project.

31. Fola shall commence the Stream Restoration Project during the first low flow season after obtaining all regulatory approvals and will complete the construction phase in approximately three months. The construction completion date shall be the day final vegetation has been planted at the site.

#### **Source Reduction**

32. Fola shall remove the coal stockpile that is in the drainage area of the Boardtree fill by December 31, 2011.

#### **Boardtree Branch Precipitate Removal**

33. Fola shall seek regulatory approvals and landowner consents as necessary to remove the precipitate in the streambed below the existing discharge point. This work must be approved by the Special Master of Biology as not causing long term harm to aquatic life in the affected streams. This work shall be performed during the same time period as the Stream Restoration Project.

#### **Design and Construction of Treatment or Abatement System**

34. Within one month after entry of this Decree, Fola shall select an engineering consulting firm that will be responsible for supervising and carrying out the design and, if needed, the construction of a treatment or abatement system for discharges from Outfall 029 that will achieve compliance with its WV/NPDES permit WV1014005 and WVSMCRA Permit S200995 (the "Treatment System").

35. Within three months after completion of the TRE, Fola shall complete the preliminary engineering for the design of the Treatment System.

36. Within one month after the completion of preliminary engineering, Fola shall solicit bids for final engineering and construction of the Treatment System.

37. On the date that is twenty four months after completion of construction of the Stream Restoration Project, Fola shall submit its analysis of the chemical, biological, and toxicological monitoring data collected pursuant to Paragraphs 23-25 above to the Special Master of Biology/Aquatic Ecology. Plaintiffs may also submit their comments on that analysis within 14 days after Fola's submission. Within 30 days after submission of that analysis, the Special Master shall determine based on (a) that data, and (b) the WVDEP-approved SCI method in effect at that time (e.g., WVSCI, GLIMPSS, or another method), whether Fola is in compliance, or is reasonably likely to attain compliance in a short period of time (not to exceed six months), with the narrative water quality standards for biological integrity and aquatic life protection in its WV/NPDES Permit. The burden of demonstrating compliance to the Special Master is on Fola.

38. For the purpose of determining compliance under Paragraphs 34 and 37 above, compliance means, at a minimum, that Fola has achieved, and is likely to continue to achieve, a passing score for biological integrity using the WVDEP-approved SCI method in effect at the time of determining compliance, an acute WET score that does not exceed 0.3 Toxic Unit, and a chronic WET score that does not exceed 1.0 Toxic Unit.

39. If the Special Master determines that Fola has met the requirements of paragraph 38, or determines that Fola is reasonably likely to achieve such compliance within a short amount of time (not to exceed six months), Fola will not need to select a winning bid, sign a contract, or construct the Treatment or Abatement System.

40. If the Special Master makes a negative determination, or does not have sufficient information to make a positive determination, then within two months after the Special Master's determination, Fola shall select the winning bid and sign the contract for construction of the Treatment System.

41. If the Special Master makes a negative determination, or does not have sufficient information to make a positive determination, then within one month after the Special Master's determination, Fola shall submit a schedule for completion of that system and for compliance as soon as is reasonably possible. The Special Master for Engineering shall determine whether the milestones in Fola's schedule are established in a manner to assure that compliance is achieved as soon as reasonably possible. If the Special Master makes a negative determination on that issue, Fola shall revise its schedule until it obtains a positive determination from the Special Master. Fola shall comply with the schedule and the compliance deadline approved by the Special Master.

## **VII. SPECIAL MASTERS**

42. The Parties consent to the appointment of a Special Master of Engineering and a Special Master of Biology/Aquatic Ecology agreed to by the Parties to oversee the implementation of this Decree and to make certain determinations described in this Decree during the course of the Decree's implementation.

43. If Plaintiffs and Fola fail to agree on the two Special Masters within two weeks after entry of this Decree, each side shall present to the other the names of three candidates. The opposing side will then select one candidate to be presented to the Court, resulting in two names presented to the Court without indication to the Court of which Party prefers which candidate.

The Court will then pick from the remaining two candidates or require the Parties to submit additional names.

44. Fola will bear the costs and fees associated with the Special Masters.

#### **VIII. FORCE MAJEURE**

45. “Force Majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the reasonable control of Fola, of any entity controlled by Fola, or of Fola’s contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Fola’s best efforts to fulfill the obligation. The requirement that Fola exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential Force Majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. “Force Majeure” does not include Fola’s financial inability to perform any obligation under this Consent Decree.

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

47. If Plaintiffs agree that the delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Consent Decree that are

affected by the Force Majeure event will be extended by Plaintiffs for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation. Plaintiffs will notify Fola in writing within 5 business days of the length of the extension, if any, for performance of the obligations affected by the Force Majeure event.

48. If Plaintiffs do not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, Plaintiffs will notify Fola in writing of its decision with five (5) days of its receipt of the Force Majeure claim by Fola. Any dispute between the Parties over a Force Majeure claim may be resolved by the appropriate Special Master.

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

49. This Consent Decree resolves the civil claims of Plaintiffs for the violations alleged in the Complaint through the termination of this Consent Decree.

50. Fola'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. Plaintiffs do not, by their consent to the entry of this Consent Decree, warrant or aver in any manner that Fola's compliance with any aspect of this Consent Decree shall result in compliance with provisions of the Act, 33 U.S.C. § 1311, et seq., or with any other provisions of federal, state or local laws, regulations or permits.

51. 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.

#### **X. COSTS**

52. Fola shall pay Plaintiffs' reasonable costs and attorneys' fees, including expert

witness fees and expenses, incurred in conjunction with this civil action through the Effective Date of this Consent Decree, in accordance with the fee-shifting provisions of the CWA and SMCRA. Of that amount, \$106,309.20 is for Plaintiffs' reasonable attorneys' fees, allocated as follows:

- a. \$3,553.20 for Derek Teaney's 15.12 hours at the reasonable rate of \$235/hour.
- b. \$15,265.00 for Joseph Lovett's 43.00 hours at the reasonable rate of \$355/hour.
- c. \$85,500.00 for Jim Hecker's 228.00 hours at the reasonable rate of \$375/hour.
- d. \$1,991.00 for Margaret Janes' 18.10 hours at the reasonable rate of \$110/hour.

In addition to attorney fees, Plaintiffs' costs and expert expenses were \$12,365.70.

53. Not later than twenty (20) days from the entry of this Consent Decree, Fola shall deliver to Plaintiffs' counsel a check for \$118,674.90 made payable to Appalachian Mountain Advocates. Appalachian Mountain Advocates shall be wholly responsible for the proper distribution of any portions of the delivered sum to any and all other attorneys, experts or other entities who may be entitled thereto. The sum delivered under this paragraph shall be a complete settlement of Plaintiffs' claims for costs and fees incurred up to the Effective Date of this Consent Decree, and thereafter for responding to possible comments on this Decree by the Department of Justice.

54. Plaintiffs' reasonable costs, including attorneys' and expert witness fees, for their work related to (a) monitoring Fola's compliance with the Decree, and (b) proceedings to interpret or enforce the terms of the Decree shall be paid by Fola. If there is a dispute about those costs, the parties agree that the Court may determine if the costs are "reasonable."

## **XI. DISPUTE RESOLUTION**

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

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

## **XII. NOTICES**

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

To Plaintiffs:

Derek Teaney  
Appalachian Mountain Advocates  
P.O. Box 507  
Lewisburg, WV 24901

James Hecker  
Public Justice  
1825 K Street N.W., Suite 200  
Washington, DC 20006

To Fola:

General Manager Environmental Services  
Consol Energy Inc.  
1000 Consol Energy Drive  
Canonsburg, PA 15317

Legal Department  
Consol Energy Inc.  
1000 Consol Energy Drive  
Canonsburg, PA 15317

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

59. 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**

60. 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.

### **XIV. RETENTION OF JURISDICTION**

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

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

#### **XV. MODIFICATION**

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

#### **XVI. TERMINATION**

64. If the Special Master makes a positive determination under Paragraph 37 above, this Decree shall terminate two months after the date of that determination, unless that determination is challenged. If the challenge is denied, the Decree shall terminate when the court decision denying that determination becomes final. If the challenge is upheld, or if the Special Master makes a negative determination under Paragraph 37 above, this Decree shall terminate after Fola has completed construction of the Treatment System and demonstrated compliance, as defined in Paragraph 38, for a period of one full year; provided, however, that the pendency of any proceedings to interpret, modify or enforce this Decree shall extend the termination date until the court decision regarding those proceedings is final.

#### **XVII. SIGNATORIES/SERVICE**

65. Each undersigned representative of Plaintiffs and Fola 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.

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

**XVIII. INTEGRATION**

67. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

**XIX. FINAL JUDGMENT**

68. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to Plaintiffs and Fola. 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.

**XX. APPENDICES**

69. The following appendices are attached to and part of this Consent Decree:  
Appendix A: West Virginia Land Trust SEP; and Appendix B: Michael Baker Engineering, Inc. Conceptual Restoration Plan.

ENTER: \_\_\_\_\_, 2011

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JOHN T. COPENHAVER  
UNITED STATES DISTRICT JUDGE

For the Plaintiffs Sierra Club and West Virginia Highlands Conservancy, Inc.

/s/ Joseph M. Lovett \_\_\_\_\_ Dated: 11/30/11 \_\_\_\_\_

JOSEPH M. LOVETT,  
Appalachian Mountain Advocates  
P.O. Box 507  
Lewisburg, WV 24901  
304-793-9007

For Fola Coal Company, LLC

/s/ Robert G. McLusky \_\_\_\_\_ Dated: 11/30/11 \_\_\_\_\_

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