

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

FILED**JAN - 3 2000**SAMUEL L. KAY, CLERK
District & Bankruptcy Court

PATRICIA BRAGG, et al.,

Plaintiffs,

v.

Civil Action No. 99-2443(L)
CA-98-636-2

COLONEL DANA ROBERTSON, et al.,

Defendants.

**NOTICE OF FILING OF SECOND
JOINT AND AGREED REVISION TO THE CONSENT DECREE**

Plaintiffs and the Director of the West Virginia Department of Environmental Protection hereby file their Second Joint and Agreed Revision to the Consent Decree.

Respectfully Submitted,

WEST VIRGINIA DIVISION OF
ENVIRONMENTAL PROTECTION

Benjamin L. Bailey, by [Signature] (wv bar # 7762)
Benjamin L. Bailey
Brian A. Glasser
Bailey & Glasser, LLP
Special Assistant Attorneys General
Suite 202, Laidley Tower
500 Lee Street
Charleston, West Virginia 25301
Counsel for Director of the Division of
Environmental Protection

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

PATRICIA BRAGG, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 2:98-636

COLONEL DANA ROBERTSON, et al.,

Defendants.

SECOND JOINT AND AGREED REVISION
TO THE CONSENT DECREE

By Order entered December 22, 1999, the Court directed the parties to revise those portions of the Consent Decree dealing with Counts 2 and 3 of the Second Amended Complaint, in light of the October 20, 1999, Memorandum Opinion and Order regarding the buffer zone issue. In reviewing the Consent Decree, the parties also noted the need for two additional minor modifications to the Decree, relating to the name of the Director and the date for filing the homesteading regulations.

Accordingly, the parties submit the Second Revised Consent Decree (attached as Exhibit A). The original consent decree, in paragraphs 5 and 6, specifically contemplated carving out and further litigating the buffer zone/valley fill issues in Counts 2 and 3 of the Amended Complaint. The parties' work on the remaining paragraphs of the Consent Decree has been unaffected by the continued litigation of Counts 2 and 3. Thus, this revision amends paragraph 5

to specifically reflect the developments on Counts 2 and 3, including the Court's Order, the Stay, and the appeal, and specifically affirms that the parties' duties and obligations under the Consent Decree have not been changed by those developments. Paragraph 6 obligated the Director, among other things, to enforce the buffer zone rule "downstream from the toes of downstream faces of embankments of sediment control structures in intermittent and perennial streams". Because the Director continues to have all the obligations set out in paragraph 6, that paragraph is unchanged.

In addition, the Second Revised Consent Decree changes the name of the Director, in the second paragraph, to reflect Mr. Castle's appointment, and changes the date in paragraph 17 for filing the homesteading regulations to January 5, 2000.

Respectfully submitted,

West Virginia Division of
Environmental Protection,



Benjamin L. Bailey
Brian A. Glasser
Bailey & Glasser, LLP
Special Assistant Attorneys General
Suite 202, Laidley Tower
500 Lee Street
Charleston, West Virginia 25301
*Counsel for Director of the Division
of Environmental Protection*

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

PATRICIA BRAGG, et al.,

Plaintiffs,

v.

Civil Action No. 2:98-0636

COLONEL DANA ROBERTSON, et al.,

Defendants.

REVISED CONSENT DECREE

Background and Purpose

This Consent Decree (Decree) settles partially plaintiffs' claims against the Director of the West Virginia Division of Environmental Protection (the Director).

Although the parties retain some flexibility under the terms of the Decree, it establishes parameters that the parties shall follow in drafting final policies, regulations and legislative proposals.

The parties to this Decree are defendant Michael Castle and plaintiffs Patricia Bragg, James and Sibbey Weekley, Carlos and Linda Gore, Jerry Methena, Cheryl Price and the West Virginia Highlands Conservancy.

This Decree is entered into voluntarily by the parties. This decree is fair, reasonable and in the public interest. The parties agree that this Decree was drafted jointly.



The parties recognize the importance of the ongoing EIS for determining the effects of mountaintop removal mining on the Appalachian region. Determining the effects of such mining is a necessary component of the regulatory process. It is also important for the citizens of West Virginia to understand the long-term effects of this kind of mining on the State. Accordingly, the parties agree that the EIS should be fully funded and encourage federal authorities to assure the EIS is so funded. The parties also agree that the EIS and regulatory processes should be better coordinated so that permit applicants are not subjected to unnecessary delays and duplicative permitting requirements.

The parties also recognize that the pending programmatic EIS may result in revisions to statutes and regulations governing surface mining. The parties request the Court, when interpreting this Decree, to take account of any rule changes that may result from the EIS. In addition, nothing in this Decree is intended to be inconsistent with the April 7, 1999 Memorandum of Understanding previously filed with this Court.

This Decree requires drafting new policies and proposing new regulations or statutes. WVDEP shall apply these new policies, regulations or statutes as they are adopted consistent with this Decree. This Decree is not intended to preclude issuance of surface mining permits that comply with this Decree and the statutes and regulations as the same may exist between the effective date of the Decree and the finalization of the policies contained herein.

Provisions

The parties agree and the Court orders as follows:

1. For the purposes of this Decree only, this Court has jurisdiction over the parties and subject matter jurisdiction of the action against the Director pursuant to 30 U.S.C. § 1270 and 28 U.S.C. § 1331.

2. The provisions of this Decree shall apply to and be binding upon the parties and their successors.

3. The Court shall retain jurisdiction over this Decree for the purpose of enabling the parties to this Decree to apply to the Court for any further order that may be necessary to interpret, carry out, or enforce the terms of this Decree.

4. If the Court approves this Decree, Plaintiffs shall dismiss, with prejudice, Counts 4, 5, 6, 7, 8, 9, 10, 14 and 15 of the Second Amended Complaint against the Director in regard to surface mining permits or revisions to such permits approved by the Director before July 1, 1999, except as those claims are asserted against the Director's approval of S-5013-97, Hobet's Spruce Mine. Plaintiffs retain the right to assert in any new action any of the claims in the Second Amended Complaint against actions taken by the Director after July 1, 1999.

5. Court approval of this Decree shall not affect Plaintiffs' right to continue to seek relief pursuant to Counts 2 and 3 of the Second Amended Complaint as to the application of the buffer zone rule upstream from toes of downstream faces of embankments of instream sediment control structures (including fills in intermittent and perennial streams), and all other claims asserted in the Second Amended Complaint only as they relate to the issuance of the Spruce Mine permit application. The District Court's October 20 Memorandum Opinion and order granted plaintiffs' summary judgment motion as to Counts 2 and 3. Defendants appealed the order to the Fourth

Circuit Court of Appeals, and sought a stay in this Court. On October 29th, this Court issued another Memorandum Opinion and Order, granting a stay pending appeal. These proceedings as to Counts 2 and 3 do not affect and have not affected the remaining provisions of this Consent Decree.

6. The Director shall enforce the buffer zone rule (38 C.S.R. § 2-5.2) downstream from the toes of downstream faces of embankments of sediment control structures in intermittent and perennial streams. The Director shall require applicants to submit information sufficient to enable the Director to make the findings required by 38 C.S.R. § 2-5.2. The Director shall make site-specific written findings addressing each of the provisions of the rule before granting variances from the rule. The Director shall make these findings within 60 days of the application becoming administratively complete pursuant to W.Va. Code § 22-3-18(a).

7. The Director shall enforce 38 C.S.R. § 2-5.4.b.2 and make site-specific written findings showing that pond placements are as close as practicable to the toes of fills. The Director shall require applicants to submit information sufficient to make these findings. The Director shall make these findings within 60 days of the application becoming administratively complete pursuant to W.Va. Code § 22-3-18(a).

8. The Director shall require a separate hydrologic reclamation plan section in the permit application. The section shall require applicants to specifically address each of the requirements of 38 C.S.R. § 2-3.22.f.

9. The Director shall create policy documents explaining the application of 38 C.S.R. § 2-3.22.f and 2-8.2. The hydrologic reclamation policy document shall explain how to (a) prevent to the extent possible using the best technology currently

available additional contributions of suspended solids to stream flow and (b) include preventive and remedial measures to restore, protect or replace to pre-mining conditions the water supply of present water users. This document shall be adopted by DEP by February 28, 1999. The parties to this Decree shall work together to draft these guidance documents.

10. The Director shall enforce the requirements necessary to authorize variances from AOC. The Director shall make written, site-specific findings addressing each of the relevant requirements of the Act and regulations before authorizing such variances.

11. The Director shall, by October 15, 1999, propose and submit to the Legislature for approval as regulation or statute the AOC variance provision found at 30 U.S.C. § 1265(c)(3)(B)(ii), requiring that the postmining land use be shown to be obtainable according to data regarding expected need and market.

12. The Director shall propose and submit to the Legislature regulations or *proposed statutory provisions making commercial forestry and homesteading postmining land uses for operations receiving AOC variances.* Once these rules are adopted and OSM approves them or enters into an agreement with the Director approving the rules, *grassland uses (e.g. pastureland, hayland or rangeland) or undeveloped recreational uses shall not be approvable as post-mining land uses for operations that receive AOC variances.* The parties to this Decree shall work together to draft the regulations or proposed statutory language.

13. The Director shall enforce the statutory and regulatory provisions concerning variances from contemporaneous reclamation. The Director shall require all

of the information required by the contemporaneous reclamation regulations to be included in permit applications and shall, before approving variances, make site-specific written findings explaining the reasons for granting such variances.

14. The parties agree to develop a plan to meet AOC and to optimize spoil placement for surface mining valley fills. (See Working Papers). As of now, however, that plan does not cover contour mines. The plan shall optimize spoil placement. Once the plan is implemented, it shall establish the amount of spoil that operators must place on mining benches and valley fill crests. The plan shall only be implemented pursuant to an MOU or agreement among the affected federal and State agencies.

15. As explained in Paragraph 12, the Director shall, by October 15, 1999, propose and submit to the Legislature a regulation or statute implementing commercial forestry as an approved post-mining land use for an AOC variance. The reclamation plan for this use shall assure commercial tree growth. The parties to the Decree shall work together with experts acceptable to the parties to draft detailed language for the rule. James Burger and Steven Handel are experts acceptable to the parties. The Director shall pay the experts reasonable hourly rates and expenses based on prevailing rates for experts with similar education and experience.

16. As explained in Paragraph 12, the Director shall propose and submit, to the Legislature by December 22, 1999, regulations or proposed statutory provisions making homesteading an approved post-mining land use for an AOC variance. Before obtaining the variance, the permit applicant/permittee, landowner and/or other responsible parties (hereinafter "responsible parties") must, in addition to satisfying the other requirements for an AOC variance, enter into a contract with the State requiring

the responsible parties to install roads, electricity and a permanent water supply (public water, wells, or an approved reservoir) as soon as practicable after completion of mining. Before the variance may be granted, the responsible parties shall submit a detailed and site specific reclamation plan to the Director showing how each of the requirements of the homesteading regulations will be accomplished. The parties to this Decree shall work together to draft this language.

The contract between the responsible parties and the State shall, at minimum, require the responsible parties to follow the reclamation plan. Before receiving the variance the responsible parties must demonstrate that they have the financial capability to achieve the use and to carry out the reclamation plan. As with commercial forestry, the parties to this Decree shall work together with experts, acceptable to both parties, to draft detailed language to assure that the postmining land and soil support the residential homesteading use, appropriate septic systems and appropriate flora after mining. The surface rights shall be placed in escrow before mining begins. After the Director certifies that the required infrastructure is in place, the escrow agent shall transfer the deeds to the entity (to be designated by agreement of the parties) managing the homestead. That entity shall, as described in the new regulations, issue the deed to the homesteader free of charge.

17. The parties to this Decree shall work together to draft language, to be submitted to the Legislature as regulation or statute by January 5, 2000, to assure that the homestead sites will be made available to the public expeditiously, will be distributed on a fair and equitable basis, and will support residential homesteading uses. Grantors may reserve their mineral rights. The plots shall be between one and

forty acres in size (depending on the proposed use), and shall be distributed to West Virginia residents who are at least eighteen years old. Homesteaders shall not receive title to the land until they have lived on the plat for at least five consecutive years. Each household may receive only one plot.

18. Before approving future AOC variances, the Director shall coordinate the review of approved postmining land uses with any State or local economic development authority that may be interested in participating in the variance process.

19. The Director shall propose and submit to the Legislature, on or before December 15, 1999, regulations or statutory provisions addressing bonding for surface mining operations that receive an AOC variance (not contour mines). The revised AOC variance bonding requirements shall be as follows: phase I bond release of 50% after regrading; phase II bond release of 10% when revegetation is accomplished; phase III bond release of 40% when the necessary post mining infrastructure is established and any necessary financing is completed. Phase III bond release for commercial forestry shall be established by the commercial forestry regulations and shall be based on tree survival and productivity rates developed by those regulations. The parties to this Decree shall work together to draft the regulations or proposed statutory language. These provisions are subject to OSM approval.

20. A five member permit quality control panel (with two members appointed by Mountain State Justice or its assigns and two by the West Virginia Coal Association and/or the West Virginia Mining and Reclamation Association and one from WV DEP) shall be established. The purpose of this panel is to evaluate and improve quality control related to permitting. The panel shall hold its first meeting during August, 1999.

The State shall retain or contract with panel members at reasonable hourly rates and expenses based on prevailing rates for those with similar education and experience. This panel shall be composed of technical and/or legal experts. The members of the panel need not remain constant (i.e. the parties may designate different team members for different meetings). The panel may review surface mining permits and visit mine sites, as appropriate, to apprise the Director respecting administrative completeness of permits and to help assure consistent application of policies and procedures. The panel shall meet for three days every four months.

21. By October 1, 1999, the Director shall create and post new positions for a trained and qualified engineer (with at least a B.S. in mining or civil engineering) and a biologist (with at least a masters degree in biology). These new employees will oversee implementation of the new AOC and post-mining land use rules, coordinate quality control panel reviews, attend quality control panel meetings when necessary and follow-up, within DEP, on quality control panel recommendations. These new positions shall be filled as soon as practicable and not later than December 31, 1999.

22. All provisions of this Decree shall apply to all applications and amendments/revisions pending on July 1, 1999 regardless of the valley fill size except as limited by paragraph 23. They shall also apply to any revision to the Spruce Mine.

23. The plan developed pursuant to paragraph 14 (AOC/valley fill optimization) shall apply as follows:

- a. to all permit applications filed after July 1, 1999.
- b. to any revision to the Spruce Mine.

c. to any amendment/revision to an already issued permit that results in a change to the footprint of an excess spoil disposal valley fill or results in the change from AOC to an AOC variance.

d. to all permit applications or revisions appearing on "Monthly Report - West Virginia Permitting Activities" dated May 5, 1999 as submitted by the Office of Surface Mining Reclamation and Enforcement to Congress (attached), that are listed as proposing at least one valley fill greater than 250 acres on that report.

e. to all permit applications and revisions/amendments to already issued permits pending on July 1, 1999 that propose at least one valley fill affecting a watershed of more than 250 acres (measured from the top of the ridgeline to the toe of the fill).

This provision shall not apply to contour mines unless an AOC/optimization plan is agreed to for contour mines. This provision shall not prohibit the Director from applying requirements that are the same as or similar to the requirements of paragraph 14 to any pending permit application or amendment/revision.

24. The Director, in his official capacity, without waiving any right of contribution, shall pay seventy-five percent of Plaintiffs' reasonable attorneys' fees and costs (including expert witnesses' fees and expenses) that they have incurred, up to the effective date of this Decree, in the prosecution of the claims asserted against the Director. This amount shall be determined by subtracting the fees and costs paid to Plaintiffs by the federal defendants from Plaintiffs' total fees and costs (until the effective date of this Decree) and then multiplying the remainder by .75. The Director shall pay the remaining twenty-five percent and reasonable fees and costs incurred

after the effective date attributable to Counts 2 and 3 of the Second Amended Complaint only if Plaintiffs substantially prevail on Counts 2 or 3. The Director shall pay further fees in regard to Plaintiffs' challenge to the issuance of the permit for the Spruce Mine only if Plaintiffs take action against that permit after the effective date and substantially prevail in that action. The Director shall pay the reasonable fees and costs Plaintiffs incur in the post-Decree implementation of this Decree (e.g. assisting in drafting policies, regulations and statutory provisions).

Plaintiffs shall submit their bill by February 28, 2000. The parties shall endeavor in good faith to reach an agreement as to the appropriate amount of fees and costs within thirty days following the Director's receipt of Plaintiffs' documentation. If an agreement is reached, the Director shall send payment for the agreed amount, payable to Mountain State Justice, Inc., within sixty days after an agreement is reached. Mountain State Justice will be responsible for distributing the amount paid. Plaintiffs shall submit documentation of any post-entry fees and costs to the Director on or before February 28, 2000. The parties shall endeavor in good faith to reach an agreement as to the appropriate amount of such fees and costs within thirty days following the Director's receipt of Plaintiffs' documentation. If agreement is reached, the Director shall send payment for the agreed amount, payable to Plaintiffs' counsel, within sixty days after agreement is reached. Plaintiffs' counsel shall be responsible for distributing the amount paid. Any unresolved disputes concerning reasonable fees and costs shall be resolved by the Court.

25. The terms of this Decree shall not be changed except by written agreement signed by the parties to this Decree, or by further orders of the Court, and shall take effect when signed by the parties.

26. In the event of a disagreement between the parties concerning the interpretation or performance of any aspect of this Decree, the dissatisfied party shall provide the other party with notice of the dispute and a request for negotiations. Unless the dispute relates to an action or threatened action that constitutes an imminent threat to health, safety or the environment or would immediately affect a legal interest of Plaintiffs, the parties shall meet and confer within 20 days of the notice or such time thereafter as is mutually agreed. If the parties are unable to resolve the dispute within 20 days of such meeting, then the parties' remedy is to move the Court to resolve the dispute. If, however, the dispute relates to an action or threatened action that constitutes an imminent threat to health, safety or the environment or would immediately affect a legal interest of a Plaintiff, then a Plaintiff may seek immediate relief from the Court.

27. This Decree shall apply only to surface mining activities and not to underground mines or associated facilities or refuse facilities.

28. If both parties determine that good faith efforts are being made to meet the deadlines established by this Decree, the parties may extend the deadlines by written agreement. If the parties do not come to an agreement regarding the extension of any deadline, then the party wishing to extend the deadline must move the Court for an extension of the deadline.

29. In the event that this Decree is not entered or does not become effective for any other reason (except that the Court determines that it violates the public interest), it shall serve as a settlement agreement which binds the parties to its terms.

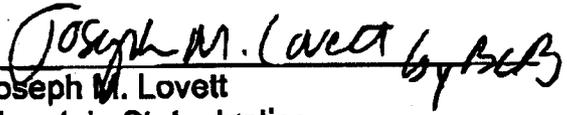
30. No federal agency is a party to this Decree.

31. The effective date of this Decree shall be the date that it is submitted to the Court and from that day forward, the Director shall enforce all provisions of this Decree.

32. The undersigned representatives of each party certifies that she or he is fully authorized by the party or parties whom she or he represents to enter into the terms and conditions of this Consent Decree and to bind them legally to it.



Benjamin L. Bailey
Brian A. Glasser
Bailey & Glasser, LLP
Special Assistant Attorneys General
Suite 202, Laidley Tower
500 Lee Street
Charleston, West Virginia 25301
*Counsel for Director of the Division of
Environmental Protection*



Joseph M. Lovett
Mountain State Justice
922 Quarrier Street, Suite 525
Charleston, West Virginia 25301
On Behalf of Counsel for Plaintiffs

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

PATRICIA BRAGG, et al.,

Plaintiffs,

v.

Civil Action No. 2:98-636

COLONEL DANA ROBERTSON, et al.,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies the foregoing *Notice of Filing of Second Joint And Agreed Revision to the Consent Decree* and the *Second Joint and Agreed Revision To the Consent Decree* were served upon counsel, as set forth below, by depositing a true copy thereof, postage prepaid, in the *United States Mail*, this 3rd day of January, 2000, to:

Patrick C. McGinley, Esquire
737 South Hills Drive
Morgantown, WV 26505

Suzanne M. Weise, Esquire
Post Office Box 343
Morgantown, WV 26507-0343

James M. Hecker, Esquire
Trial Lawyers for Public Justice
1717 Massachusetts Ave., NW, Suite 800
Washington, DC 20036

William E. Adams, Jr., Chief
Mr. Thomas L. Clarke, Deputy Chief
Craig Giffin, Esquire
Office of Legal Services
Division of Environmental Protection
1356 Hansford Street
Charleston, WV 25301

Steven Rusak, Esquire
Department of Justice
Environmental and Natural
Resources Division
Service Operation Center
601 D Street, NW, Room 8515
Washington DC 20004

Terry F. Clarke, Esquire
Office of General Counsel
United States Army Corps of Engineers
502 8th Street
Huntington, WV 25701

W. Warren Upton, Esquire
M. Shane Harvey, Esquire
Jackson & Kelly
1600 Laidley Tower
PO Box 553
Charleston, WV 25332-0553