

3-5-01  
**ENTERED**

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION

CLERK'S OFFICE U.S. DIST. COURT  
AT BIG STONE GAP, VA  
FILED

MAR 05 2001

MORGAN E. SCOTT, JR., CLERK  
BY: *[Signature]*  
DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

LONE MOUNTAIN PROCESSING, INC.

Defendant.

Civil Action No. 2:00CV00200

**CONSENT DECREE**

**I. Introduction**

1. This Consent Decree ("Decree") is entered into by plaintiff, the United States of America ("the United States"), on behalf of the Department of the Interior ("DOI") as trustee for Natural Resources, and by Defendant Lone Mountain Processing, Inc.

2. The United States has filed a complaint against Lone Mountain alleging that Defendant is liable to the United States under Section 107 of the Comprehensive Environmental Response Compensation, Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9607, for damages for injury to, destruction of, or loss of natural resources resulting from the release or threat of release of hazardous substances from the Site, which is defined in Section II below.

3. Pursuant to Section 122(d)(1)(B) of CERCLA, 42 U.S.C. § 9622(d)(1)(B), entry of this Consent Decree shall not be construed as an acknowledgment by Defendant that any release or threatened release of a hazardous substance constituting an imminent and substantial

endangerment to the public health or welfare or the environment has occurred or exists at the Site. By participating in the process and entering into this Consent Decree, Defendant does not admit to liability for or injury or damage to natural resources arising out of the transactions or occurrences alleged in the Complaint, or for any other purpose. Further, except as otherwise provided herein, this Consent Decree and Defendant's participation in the process leading to the Consent Decree, shall not be admissible in evidence or usable in any way, directly or indirectly, against Defendant in any judicial or administrative proceeding.

4. The Parties hereto recognize, and the Court, by approving and entering this Decree finds, that this Decree has been negotiated by the Parties in good faith, and that implementation of this Consent Decree will avoid lengthy and protracted litigation, is fair, reasonable, and consistent with the purposes of the statute pursuant to which these actions were brought, and is in the public interest.

NOW, THEREFORE, the Parties agree and it is hereby ORDERED, ADJUDGED and DECREED as follows:

## **II. Definitions**

5. Unless otherwise expressly provided for herein, the terms used in this Decree shall have the meaning provided for them in CERCLA and in regulations promulgated under CERCLA. Wherever terms listed below are used in this Decree, the following definitions shall apply:

A) "CERCLA" shall mean the Comprehensive Environmental Response Compensation, Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

B) "Consent Decree" or "Decree" shall mean this Decree and all exhibits or appendices attached hereto. In the event of conflict between the terms of this Decree and any appendix or exhibit, this Decree shall control.

C) "Defendant" shall mean Lone Mountain Processing, Inc.

D) "DOI" shall mean the United States Department of Interior, and any successor departments, agencies or instrumentalities of the United States.

E) "Lone Mountain Processing, Inc." (LMPI) shall include LMPI, its current and past officers, directors, employees, attorneys, and successors.

F) "Natural Resource Damages" shall mean all compensatory damages owing to the United States, as trustee on behalf of the public, caused by a release or a threatened release of a hazardous substance, for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release. The term "natural resources" shall have the meaning set forth in Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

G) "Parties" shall mean the United States and Defendant.

H) "Site" shall mean the property owned or operated by Lone Mountain Processing, Inc. in Lee County, Virginia, and all areas contaminated by releases from the coal slurry impoundment at the property on or about August 9, 1996 and October 24, 1996. The "Site" as used herein shall include the mine works lying between the Lone Mountain Processing Inc. impoundment and the Gin Creek portal as well as all stream beds and their contiguous banks extending from the portal next to Gin Creek (NPDES monitoring point 024) downstream along Gin Creek to its confluence with Straight Creek,

then along Straight Creek to its confluence with the North Fork of the Powell River (North Fork), then along the North Fork to its confluence with the main stem of the Powell River (Powell River), then along the Powell River and into Norris Lake, located in the State of Tennessee.

l) "United States" shall mean the United States of America, in all its capacities, including all its departments, agencies, natural resource trustees and instrumentalities.

### **III. Jurisdiction and Venue**

6. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613 (b), has personal jurisdiction over Defendant, and venue is proper in this District. Defendant consents to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

### **IV. Parties Bound**

7. This Decree shall be binding on all Parties and their successors and assigns. Any change in ownership or corporate status of Defendant, including but not limited to transfer of assets or real or personal property, insolvency, or dissolution, shall in no way alter Defendant's responsibilities under this Decree.

### **V. Payments and Transfers**

8. Within 30 days of entry of this Consent Decree, Defendant shall pay to the United States Two Million Four Hundred Fifty Thousand Dollars (\$2,450,000) in full and final satisfaction of DOI's claims for Natural Resource Damages. The foregoing sum is not attributable in any way to any claim for punitive damages or civil penalties. Defendant is

obligated to pay this amount, as well as any Stipulated Penalties or Interest required pursuant to Paragraphs 10 and 11 below. Payment shall be by FedWire Electronics Funds Transfer to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing Account No. 14X5198 (NRDAR), DOJ Number 90-5-1-1-06615, the USAO number to be provided by the United States, and the Lone Mountain Coal Fines Spill. Any payments received after 4:00 p.m. Eastern Time shall be credited on the next business day. Defendant shall send the notice of payment to Bruce Nesslage, DOI Restoration Fund, National Business Center/Division of Financial Management Services, Branch of Accounting Operations, Mail Stop 1313, 1849 C Street, N.W., Washington, D.C. 20240, with a copy to: Mark Barash, Office of the Regional Solicitor, U.S. Department of Interior, One Gateway Center, Suite 612, Newton Corner, MA 02158-2868, referencing Account Number 14X5198, and stating that the payment is for Natural Resource Damages in connection with the Lone Mountain Coal Fines Spill.

9. Funds paid pursuant to paragraph 8 for Natural Resource Damages shall be available and utilized for reimbursement of past natural resource damage assessment costs, and restoration, replacement or acquisition of endangered and threatened fishes and mussels located in the Powell River and its watershed, or restoration, replacement or acquisition of their habitats or ecosystems which support them, or for restoration planning, implementation, oversight, and monitoring.

## **VI. Stipulated Penalties and Interest**

10. If Defendant fails to pay the amount required by Paragraph 8 within the time required, they shall be required to pay as a Stipulated Penalty \$2,500 per day. Stipulated penalties are payable in the same manner as set forth in Paragraph 8.

11. If Defendant fails to pay the amount required by Paragraph 8 within the time required, it shall pay, in addition to stipulated penalties pursuant to Paragraph 10, interest on the unpaid balance of the amount required under Paragraph 8, which shall accrue at the rate calculated pursuant to 28 U.S.C. § 1961.

## **VII. United States' Release, Covenant Not To Sue and Reservation of Rights**

12. This Decree resolves the allegations made by the United States against Defendant in its Complaint initiating the Civil Action which is being filed with the Court contemporaneously herewith. In consideration of the payments to be made pursuant to Paragraph 8, and except as set forth in paragraphs 13 and 14 below, the United States does hereby covenant not to sue or take administrative action against, and forever release and discharge, Defendant for, of and from any and all present or future claims, lawsuits, demands or causes of action for Natural Resource Damages under CERCLA or under any other federal, state or common law, resulting from the release or threat of release of any hazardous substances from the Site on August 9, 1996 and October 24, 1996. This release and covenant not to sue applies only to releases from Lone Mountain's coal slurry impoundment on August 9, 1996 and October 24, 1996, and does not apply to any other release on those dates or any other date.

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13. The release and covenant not to sue set forth in Paragraph 12 above does not pertain to any matter other than those expressly specified in Paragraph 12. The United States reserves, and this Consent Decree is without prejudice to, all rights the United States may have against Defendant Lone Mountain with respect to all other matters, including but not limited to the following:

- A) Claims against Defendant based on a failure by Defendant to meet a requirement of this Consent Decree;
- B) Criminal liability; and
- C) Any activities or releases of hazardous substances other than those related to the release from the Site on August 9, 1996 and October 24, 1996.

14. Moreover, the foregoing release and covenant not to sue, to the extent it concerns future liability to the United States, shall not pertain to any cause of action against Defendant for Natural Resource Damages under CERCLA where such future liability arises out of (i) conditions with respect to the Site, unknown to the United States at the date of lodging of this Consent Decree, that result in releases of hazardous substances that cause injury to, destruction of, or loss of natural resources, or (ii) factual information received by the United States after the date of entry of this Decree which indicates that there is injury to, destruction of, or loss of natural resources of a type that was unknown, or of a magnitude substantially greater than was known to the United States at the date of entry of this Decree. In the event the United States initiates any action pursuant to this Section, Defendant may avail itself of any and all procedural and substantive defenses, including but not limited to, defenses bearing on the subject matter jurisdiction of this Court. For purposes of this paragraph, the United States agrees that it has

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conducted an extensive factual and scientific investigation into the conditions with respect to the Site caused by the releases which are the subject of the release and covenant not to sue. Without in any way limiting the foregoing, conditions and information known to the United States include, but are not limited to, those items set forth in the Appendix filed with the Court contemporaneously herewith.

15. This release and covenant not to sue shall take effect upon receipt by the United States of the payment required by Paragraph 8 of this Consent Decree.

#### **VIII. Effect of Settlement; Contribution Protection**

16. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Each Party expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

17. The Parties agree, and by entering into this Consent Decree the Court finds, Defendant is entitled to such protection from contribution as is provided by CERCLA Sections 113(f) (2), 42 U.S.C. § 9613 (f) (2), for all matters addressed in this Consent Decree. The matters addressed in this Consent Decree are those related to alleged releases of hazardous substances from the Site on August 9, 1996 and October 24, 1996. The matters addressed cover only releases from Lone Mountain's coal slurry impoundment on August 9, 1996 and October 24, 1996, and do not apply to any other release on those dates or any other date.



18. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, 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-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph shall affect the enforceability of the Release and Covenant Not to Sue by the United States set forth in Section VII.

#### **IX. Notice and Submittals**

19. Except as otherwise provided herein, whenever written notice regarding or relating to this Decree is required to be given by one Party to another for any reason, it shall be directed to the individuals and addresses specified below, unless the individuals specified or their successors give notice, in writing, to the other Party that notice should be directed to a different individual or address. All notices shall reference the consolidated actions and civil action numbers.

##### **Notice to the United States:**

Mark Barash, Esq.  
Office of the Solicitor  
Suite 612  
One Gateway Center  
Newton Corner, MA 02158

Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

01/20/01 10:07 FAX 202 610 0383 0111

Notice to Lone Mountain:

Clifton L. Frye, President  
Lone Mountain Processing, Inc.  
P.O. Box 40  
Pennington Gap, Virginia 24277

With Copy To:

Blair M. Gardner, Esq.  
Assistant General Counsel  
Arch Coal, Inc.  
CityPlace One  
Suite 300  
St. Louis, MO 63141

**X. Modifications**

20. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

**XI. Effect of Settlement and Limitations**

21. The provisions of this Decree, including specifically those provisions providing releases, covenants not to sue and contribution protection, shall be binding upon and inure to the benefit of all parties, their respective predecessors, successors, affiliates, officers, directors, employees, agents, assigns and designees.

22. Except as expressly provided in Section VII of this Decree (Release, Covenant Not to Sue and Reservation of Rights), Plaintiff retains all authority it may have under federal law, including, but not limited to, emergency response authority.

## **XII. Signatories and Service**

23. The Assistant Attorney General for the United States and the undersigned representative of the Defendant 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 such party to the terms of this Decree.

## **XIII. Retention of Jurisdiction**

24. The Court shall retain jurisdiction of this matter for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of entering such further orders, decrees, direction, or relief as may be necessary or appropriate for the construction, implementation, modification or enforcement of this Decree.

## **XIV. Public Comment**

25. The Parties agree that this Consent Decree shall be lodged with the Court and be subject to a 30-day public comment period. The United States reserves the right to withdraw its consent to this Decree if comments received during the comment period disclose facts or considerations that show that this Decree is inappropriate, improper, inadequate or not in the public interest. Lone Mountain consents to the entry of this Decree by the Court without further notice, provided, however, that the United States does not withdraw its consent to entry of this Decree.

26. If for any reason this Court should decline to approve this Consent Decree in the form presented, the settlement outlined herein is voidable at the sole discretion of any Party, and the terms of the agreement may not be used as evidence in any administrative or judicial proceeding involving Defendant.

27. In any event, neither the settlement agreement between the parties nor any of the terms hereof may be offered into evidence or referred to in any subsequent administrative or judicial proceeding against Defendant, other than a suit to enforce or interpret the provisions contained herein.

#### **XV. Effective Date**

28. The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

#### **XVI. Costs/Attorneys' Fees**


29. Except as otherwise provided herein, each party to this Consent Decree shall bear his, her or its own costs, attorneys' fees and disbursements. This provision shall not apply to actions pursued under paragraphs 13, 14 and 18.

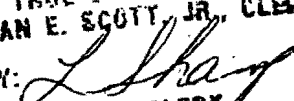
#### **XVII. Entire Agreement**

30. This Decree constitutes the entire agreement of the Parties with respect to the subject matter hereof and may not be modified or amended except in a writing signed by all parties hereto, or as the Court otherwise so orders. All prior negotiations, discussions and communications in connection with the negotiation and execution of this Consent Decree shall be deemed superseded and otherwise merged, integrated and made a part hereof.

The Clerk shall furnish a certified copy of this Consent Decree to all counsel of record.

ENTERED this 5<sup>th</sup> day of March, 2000.

  
United States District Judge

A TRUE COPY, TESTED:  
MORGAN E. SCOTT, JR., CLERK  
BY:   
CLERK

FOR THE UNITED STATES OF AMERICA

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SEEN AND AGREED:

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