

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

PENNSYLVANIA FEDERATION OF	:	Civil No. 1:99-CV-1791
SPORTSMEN’S CLUBS, INC., <i>et al.</i>,	:	
	:	JUDGE SYLVIA H. RAMBO
Plaintiffs,	:	
	:	
v.	:	
	:	
JOHN QUIGLEY, Secretary	:	
Pennsylvania Department of	:	
Environmental Protection, <i>et al.</i>,	:	
	:	
Defendants.	:	

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between the Plaintiffs (Pennsylvania Federation of Sportsmen’s Clubs, Inc.; Sierra Club, Pennsylvania Chapter; Pennsylvania Trout, Inc.; Center for Coalfield Justice; and Mountain Watershed Association), and the State Defendant (the Acting Secretary of the Pennsylvania Department of Environmental Protection). The Plaintiffs also are entering into a separate settlement agreement with the Federal Defendants (the Secretary of the United States Department of the Interior, and the Director of the Office of Surface Mining Reclamation and Enforcement). Throughout this Settlement Agreement, the Plaintiffs, the State Defendant, and the Federal Defendants will be referred to collectively as the “Settling Parties.”

I. BACKGROUND

A. On October 13, 1999, Plaintiffs Pennsylvania Federation of Sportsmen's Clubs, Inc., *et al.*, commenced this action by filing a Complaint in the United States District Court for the Middle District of Pennsylvania (District Court) against the Secretary of the Pennsylvania Department of Environmental Protection (the State Defendant), and the Federal Defendants – the Secretary of the United States Department of the Interior, and the Director of the Office of Surface Mining Reclamation and Enforcement.

B. The Complaint alleged that the State Defendant and the Federal Defendants had failed to fulfill nondiscretionary duties under the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328, concerning Pennsylvania's "bonding program" under SMCRA, which must provide financial assurance that the approved reclamation plan for each coal mine regulated under SMCRA's permanent regulatory program will be completed.

C. By a Memorandum and Order dated July 6, 2000, the District Court granted in part and denied in part the State Defendant's Motion to Dismiss, and granted the motions to intervene of three Intervenor-Defendants, the Pennsylvania Coal Association,¹ the Pennsylvania Anthracite Council, and ARIPPA.

¹ In 2012, the Pennsylvania Coal Association merged with Families Organized to Represent the Coal Economy to form the Pennsylvania Coal Alliance.

D. Pursuant to the collateral order doctrine, the State Defendant appealed to the United States Court of Appeals for the Third Circuit (Court of Appeals) the portion of the District Court's July 6, 2000 Order partially denying the State Defendant's assertion of immunity from suit under the Eleventh Amendment to the United States Constitution.

E. By a Memorandum and Order dated November 13, 2000, the District Court granted in part and denied in part the Plaintiffs' Motion for Reconsideration, and granted the Plaintiffs' Motion for Certification of Order for Interlocutory Appeal.

F. By an Order dated March 7, 2001, the Court of Appeals granted the Plaintiffs' Petition for Permission to Appeal the District Court's partial granting of the State Defendant's Motion to Dismiss asserting immunity from suit under the Eleventh Amendment.

G. After consolidating the two appeals and hearing argument, the Court of Appeals issued an Opinion and Order on July 24, 2002 holding that the Eleventh Amendment barred the assertion of Counts 1 through 6 of the Complaint against the State Defendant's in federal court, but that the claims against the State Defendant in Counts 7 and 8 of the Complaint were not barred by the Eleventh Amendment and could be adjudicated by the District Court. *Pennsylvania Federation of Sportsmen's Clubs v. Hess*, 297 F.3d 310 (3d Cir. 2002).

H. The Court of Appeals denied the Plaintiffs' Petition for Rehearing En Banc by an Order dated October 1, 2002.

I. In 2003, the federal Office of Surface Mining Reclamation and Enforcement (OSM) took two administrative actions related to the matters at issue in this case:

i. By a letter dated June 12, 2003, OSM terminated an October 1, 1991 "Part 732" letter that had notified Pennsylvania, pursuant to 30 C.F.R. § 732.17(c)-(e), (f)(1), that it was required to amend its regulatory program under SMCRA in order to correct deficiencies in its bonding program.

ii. A final rule published on October 7, 2003, 68 Fed. Reg. 57805 (Oct. 7, 2003), that deleted the regulatory program amendment requirement codified in 1991 at 30 C.F.R. § 938.16(h).

J. On December 8, 2003, the Plaintiffs filed a separate action before the District Court, *Pennsylvania Federation of Sportsmen's Clubs, et al. v. Norton, et al.*, Docket No. 1:CV-03-2220 (M.D. Pa.), seeking judicial review of the two agency actions identified in the preceding paragraph.

K. In the instant case, by a Memorandum and Order dated February 13, 2004, the District Court granted the Plaintiffs' "Motion for Stay Pending Resolution of Judicial Review Proceeding at Docket No. 1:CV-03-2220."

L. In the judicial review proceeding at Docket No. 1:CV-03-2220, by a Memorandum and Order issued on February 1, 2006, the District Court granted summary judgment in favor of the defendants in that case (the Secretary of the Interior, and the Director and Regional Director of OSM) and upheld the two challenged actions of OSM. *Pennsylvania Federation of Sportsmen's Clubs v. Norton*, 413 F. Supp. 2d 358 (M.D. Pa. 2006). The Plaintiffs appealed the District Court's judgment to the Court of Appeals, which, on August 2, 2007, reversed the District Court's judgment with respect to the two counts under appeal and directed the District Court to set aside the two agency actions at issue in that case. *Pennsylvania Federation of Sportsmen's Clubs v. Kempthorne*, 497 F.3d 337 (3d Cir. 2007) (*Kempthorne*).

M. At the request of the Settling Parties, since the Court of Appeals issued its decision in *Kempthorne*, the instant case has been stayed pending the commencement and completion of two related administrative proceedings before OSM to amend the Pennsylvania regulatory program under SMCRA.

N. The first of these program amendment proceedings began with Pennsylvania's submission of an extensive program amendment known as the "ABS Program Amendment" in August 2008, *see* 74 Fed. Reg. 2005 (Jan. 14, 2009), and concluded with OSM's publication of a final rule on August 10, 2010 partially approving and partially disapproving the ABS Program Amendment, *see*

75 Fed. Reg. 48526 (Aug. 10, 2010). Among other things, OSM's August 10, 2010 final rule:

- i. Approved, pursuant to 30 U.S.C. § 1259(c), as part of Pennsylvania's approved regulatory program under SMCRA:
 - a. Pennsylvania's Conversion Assistance Program and Land Reclamation Financial Guarantees as alternative financial assurance mechanisms for guaranteeing land reclamation; and
 - b. Pennsylvania's use of trust funds under 52 P.S. § 1396.4b as alternative financial assurance mechanisms for guaranteeing the treatment of post-mining discharges in perpetuity.
- ii. Approved, as part of Pennsylvania's approved regulatory program under SMCRA, regulations adopted by Pennsylvania in 2008 that:
 - a. define the term "ABS Legacy Sites" as set forth in Paragraph 7 of this Settlement Agreement, below;
 - b. create a separate subaccount within Pennsylvania's Surface Mining Conservation and Reclamation Fund called the "Reclamation Fee O&M Trust Account," which may be used solely to pay the construction costs and operation and

maintenance costs associated with treating postmining
pollutional discharges at ABS Legacy Sites, *see* 25 Pa. Code §§
86.17(e)(1) & 86.187(a)(1); and

c. create another separate subaccount within
Pennsylvania's Surface Mining Conservation and Reclamation
Fund called the "ABS Legacy Sites Trust Account," which,
upon being determined to be "actuarially sound," will replace
the Reclamation Fee O&M Trust Account as the source of
funding used by the Department to pay the construction costs
and operation and maintenance costs associated with treating
postmining pollutional discharges at ABS Legacy Sites, *see* 25
Pa. Code §§ 86.17(e)(6), 86.187(a)(2).

O. As required by OSM's August 10, 2010 final rule, Pennsylvania
initiated the second program amendment proceeding by submitting a proposed
program amendment to OSM on October 1, 2010, *see* 76 Fed. Reg. 6587 (Feb. 7,
2011). After twice reopening the comment period in response to supplemental
submissions, *see* 76 Fed. Reg. 64048 (Oct. 17, 2011); 78 Fed. Reg. 11617 (Feb. 19,
2013), OSM published a final rule on September 17, 2015, *see* 80 Fed. Reg. 55746
(Sept. 17, 2015), which approved Pennsylvania's October 1, 2010 program
amendment, as supplemented.

P. Since the filing of the Complaint in this matter, a number of significant changes have been made to the provisions of Pennsylvania's bonding program under SMCRA, and to the implementation of that bonding program.

Those changes include, but are not limited to:

- i. beginning in 2001, the implementation of a "conventional" or "full cost" bonding system for all Pennsylvania coal mining operations regulated under SMCRA, and the related discontinuation of the "alternative bonding system" (ABS) formerly applicable to three categories of coal mining operations;
- ii. the establishment, initially using an appropriation of \$7 million by Pennsylvania in 2001, *see* Act of June 22, 2001, P.L. 979, No. 6A, § 213, of a program to assist mine operators satisfy full cost bonding requirements by allowing them to obtain sum-certain Land Reclamation Financial Guarantees in exchange for annual fees;
- iii. the amendment of Pennsylvania's bond adjustment regulation, 25 Pa. Code § 86.152(a), to make adjustment of the reclamation bond amount mandatory (rather than, as previously, discretionary) where the costs of completing the reclamation plan have changed;

- iv. beginning in 2001, annually updating and publishing the bond rate guidelines used in calculating the required amount of reclamation bonds, *see, e.g.*, 46 Pa. Bull. 1280-83 (March 5, 2016);
- v. replacing a definite period (e.g., 50 years) with an infinite (perpetual) duration in calculating the dollar amount of financial guarantees for the treatment of pollutional post-mining discharges from mines regulated under SMCRA;
- vi. reaching more than one hundred (100) agreements with mine operators requiring the posting of a bond or establishment of a trust fund intended to guarantee the perpetual treatment of post-mining discharges;
- vii. as recounted in Paragraph N, above, the adoption and approval of the ABS Program Amendment,
- viii. as recounted in Paragraph O, above, the adoption and approval of the October 1, 2010 Program Amendment;
- ix. since 2008, the completion of land reclamation on more than forty (40) ABS bond forfeiture sites, funded in part by an appropriation of \$5.5 million by Pennsylvania in 2001;
- x. since 2008, the construction or installation of at least sixteen (16) mine drainage treatment systems on ABS Legacy Sites;
- xi. satisfying both:

a. Pennsylvania's OSM's October 1, 1991 Part 732 notification letter to the Department; and

b. 30 C.F.R. § 938.16(h), which was originally codified in 1991, 56 Fed. Reg. 24687, 24719 (May 31, 1991), amended in 2010, 75 Fed. Reg. 48526, 48547 (Aug. 10, 2010), and removed and reserved in 2015, 80 Fed. Reg. 55746, 55751 (Sept. 17, 2015).

Q. Many of the developments in Pennsylvania's bonding program under SMCRA set forth in the preceding paragraph, along with additional developments not recounted above, occurred during, and were facilitated by, stays of the instant case granted by the District Court.

R. The Federal Defendants are:

i. S. M. R. "Sally" Jewell, the Secretary of the United States Department of the Interior (Interior), which is the agency that has the responsibility to administer SMCRA and to approve and oversee the implementation of state regulatory programs adopted pursuant to SMCRA; and;

ii. Joseph G. Pizarchik, the Director of OSM, which is the bureau through which Interior administers SMCRA.

S. The Plaintiffs and the State Defendant (collectively, the Signatory Parties) agree that this Settlement Agreement has been negotiated in good faith,

that settlement of this matter will avoid further litigation, and that this Settlement Agreement is fair, reasonable, and in the public interest.

NOW, THEREFORE, for good and valuable consideration, the receipt of which is acknowledged, it is hereby agreed as follows:

II. PARTIES BOUND

1. This Settlement Agreement is binding on the Signatory Parties – the Plaintiffs and the State Defendant.

2. The Plaintiffs are:

a. Pennsylvania Federation of Sportsmen’s Clubs, Inc., a statewide organization formed in 1932 that currently represents approximately 200 clubs and 70,000 members and has, as its mission, “[t]o provide a statewide, unified voice for the concerns of all sportsmen and conservationists, to insure their rights and interests are protected, and to protect and enhance the environment and our natural resources.”

b. Sierra Club, Pennsylvania Chapter, a chapter of the Sierra Club, which is a nonprofit corporation organized and existing under the laws of the State of California that has, as its mission, “to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environments; and to use all

lawful means to carry out these objectives.” The Pennsylvania Chapter has approximately 25,000 members organized into ten area groups that cover the entire state.

c. Pennsylvania Trout, Inc., also known as the Pennsylvania Council of Trout Unlimited, Inc. (PATU), a non-profit organization with more than 12,000 members in 48 local chapters in Pennsylvania that is the Pennsylvania council of the national organization Trout Unlimited. PATU’s mission is “[t]o conserve, protect, restore and sustain Pennsylvania’s coldwater fisheries and their watersheds, especially our wild trout resources.”

d. Center for Coalfield Justice (CCJ), a non-profit Pennsylvania corporation that is the successor to the original Plaintiff, Tri-State Citizens Mining Network, Inc. (Tri-State). Tri-State was founded in 1994 as an unincorporated association and was incorporated as a non-profit Pennsylvania corporation in 1999. By amendment of its articles of incorporation, Tri-State became CCJ in March 2007. CCJ is a member-based organization with more than one thousand members residing or in or based in Pennsylvania. The mission of CCJ is “to improve policy and regulations for the oversight of fossil fuel extraction and use; to educate,

empower and organize coalfield citizens; and to protect public and environmental health.”

e. Mountain Watershed Association, Inc. (MWA), a non-profit, community-based Pennsylvania corporation with more than 1,200 members that is “dedicated to protecting, preserving and restoring the Indian Creek and greater Youghiogeny River watersheds” by “pursu[ing] on-the-ground restoration of past damage while also advocating on local issues (primarily coal and shale gas extraction) as well as regional and national issues that have a local impact.”

3. The members of the Plaintiff organizations derive recreational, aesthetic, and economic benefits from the lands and waters of Pennsylvania, and the Plaintiff organizations and their members have participated in and contributed resources to projects designed to protect, restore, or improve those lands and waters. The efforts of the Plaintiff organizations to promote protection of Pennsylvania’s environment and natural resources also have included advocacy of legislative, administrative, and judicial actions to require adequate reclamation of coal mines and prevention of mine-related water pollution.

4. The State Defendant is Patrick McDonnell, the Acting Secretary of the Pennsylvania Department of Environmental Protection (Department), which is

the agency with the duty and authority to administer and enforce the coal mining regulatory program for Pennsylvania approved under SMCRA.

III. SUBSTANTIVE PROVISIONS

5. Within ten (10) days after this Settlement Agreement is fully executed, the State Defendant shall submit to OSM, pursuant to 30 C.F.R. § 732.17, a proposed amendment to the approved Pennsylvania regulatory program under SMCRA that is identical in substance, and substantially identical in form, to the document attached to this Settlement Agreement as **“Exhibit A.”**

IV. COSTS OF LITIGATION

6. As part of the settlement of this matter, in the interests of judicial economy, and in order to minimize the amount of attorney time devoted to preparing and responding to a formal motion for costs of litigation under Section 520(d) of SMCRA, 30 U.S.C. § 1270(d), and associated legal argument, the Settling Parties entered into negotiations over the issue of costs of litigation without the filing of a formal motion by the Plaintiffs. The Settling Parties believe that it is in the interests of judicial economy to avoid litigating a motion for costs of litigation, which also avoids diverting agency resources to such litigation.

7. In the interests of the public, the Settling Parties, and judicial economy, the Settling Parties have agreed that the State Defendant and the Federal

Defendants shall pay to Plaintiffs the total amount of Five Hundred and Eighty Five Thousand Six Hundred and One Dollars and Six Cents (\$585,601.06).

8. The State Defendant shall contribute the amount of Three Hundred and Eighty Thousand Five Hundred and Fifty Three Dollars and Three Cents (\$380,553.03) toward the lump sum total of Five Hundred and Eighty Five Thousand Six Hundred and One Dollars and Six Cents (\$585,601.06) in full and complete satisfaction of any and all claims, demands, rights, and causes of action against him pursuant to Section 520(d) of SMCRA, 30 U.S.C. § 1270(d), and/or any other statute and/or common law theory, for all attorneys' fees and costs incurred by Plaintiffs, individually and/or severally, in this action.

a. As early as possible, and in no event later than sixty (60) days after this Settlement Agreement is fully executed, the State Defendant shall make its payment of \$380,553.03 required by this Paragraph.

b. The payment of \$380,553.03 required by this Paragraph shall be made by electronic funds transfer. Counsel for the Plaintiffs will provide the necessary information to counsel for the State Defendant to effectuate the transfer.

c. Receipt of this payment from the State Defendant shall operate as a release of any and all claims for attorneys' fees and costs that Plaintiffs

may seek to pursue against the State Defendant with respect to any aspect of this action through the date on which this Settlement Agreement is executed.

9. Plaintiffs reserve the right to seek additional costs of litigation, including attorneys' fees, incurred subsequent to the execution of this Settlement Agreement arising from Plaintiffs' need to enforce the terms of this Settlement Agreement. The State Defendant reserves the right to oppose any such request.

V. EFFECT OF SETTLEMENT AGREEMENT

10. It is agreed and understood by the Signatory Parties that this Settlement Agreement is not a consent decree, nor is it intended to be construed as such under the provisions of the Pennsylvania Commonwealth Attorneys Act pursuant to Sections 204(e) of the Pennsylvania Commonwealth Attorneys Act, the Act of October 15, 1980 (P.L. 950, No. 164), codified at 71 P.S. §§ 732-204(e). It is further agreed and understood by the Signatory Parties that no party may seek contempt relief pursuant to this Settlement Agreement, as such relief is neither available nor contemplated hereunder.

11. Nothing in this Settlement Agreement relieves the State Defendant of any obligation or right to act in a manner consistent with applicable federal, state or local law.

12. Except as set forth in this Settlement Agreement, nothing in this Settlement Agreement shall be construed as an admission of any issue of fact or law.

13. Except as set forth in this Settlement Agreement, each Signatory Party retains any and all rights, claims or defenses it otherwise may have.

14. Nothing in this Settlement Agreement shall bind, obligate, or otherwise create any rights of duties applicable to or enforceable by, or impose any conditions or limitations upon, any person or entity that has not signed this Settlement Agreement, nor shall this Settlement Agreement be construed to make any such person or entity a third-party beneficiary of this Settlement Agreement.

VI. SOVEREIGN IMMUNITY

15. The State Defendant will not assert sovereign immunity to prevent enforcement of this Settlement Agreement.

VII. SEVERABILITY

16. If any provision of this Settlement Agreement is declared invalid or unenforceable, the remaining provisions shall continue in effect.

VIII. ENTIRE AGREEMENT

17. This Settlement Agreement constitutes and contains the entire agreement among the Signatory Parties with respect to the subject matter hereof and merges and supersedes prior negotiations, understandings, agreements, representations and warranties among the Signatory Parties.

IX. MODIFICATION

18. This Settlement Agreement may not be amended or modified except in writing by the Signatory Parties.

X. CAPTIONS AND HEADINGS

19. The captions or headings appearing in this Settlement Agreement are for convenience of reference only and in no way define, limit, or affect the scope or substance of any provision of this Settlement Agreement.

XI. NO WAIVER

20. The failure of any party to seek redress for violation of, or to insist upon strict performance of, any provision of this Settlement Agreement, shall not be a waiver of that provision by that party or estop that party from asserting fully any and all of its rights under this Settlement Agreement, or as to any subsequent violation of this Settlement Agreement.

XII. JOINT DRAFTING

21. It is hereby expressly understood and agreed that this Settlement Agreement was jointly drafted by the Plaintiffs and the State Defendant. Accordingly, the Signatory Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

XIII. NOTICES AND CORRESPONDENCE

22. Any notice or correspondence required or provided for by this Settlement Agreement shall be in writing, via electronic mail, overnight delivery, or first-class mail, and sent to each of the following counsel (or to any new or additional address of the Signatory Parties' counsel provided via notice served in accordance with this paragraph):

a. For the Plaintiffs:

Kurt J. Weist, Senior Attorney
Citizens for Pennsylvania's Future
610 North Third Street
Harrisburg, PA 17101-1113
E-mail: weist@pennfuture.org

b. For the State Defendant:

Robert A. Reiley
Assistant Director
Bureau of Regulatory Counsel
Pennsylvania Department of Environmental Protection
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Harrisburg, PA 17105-2063
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Bureau of Regulatory Counsel
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Rachel Carson State Office Building
400 Market Street, P.O. Box 2063
Harrisburg, PA 17105-2063
E-mail: jirole@pa.gov

XIV. NOTICE AND OPPORTUNITY TO CURE

23. In the event any of the Signatory Parties believes another Signatory Party has breached its obligations under this Settlement Agreement, the party alleging breach shall provide the allegedly breaching party written notice outlining the nature of the alleged breach. The party receiving the notice will have thirty (30) days from receipt of the notice to cure the alleged breach.

24. No motion or other proceeding seeking to enforce this Settlement Agreement shall be properly filed unless the moving party has provided the written notice and 30-day opportunity to cure as set forth in the preceding paragraph.

XV. TERMINATION OF THIS ACTION

25. The Signatory Parties agree that, within five (5) days of the later of:
a) the State Defendant fulfilling his obligations under Paragraphs 5 and 8 of this Settlement Agreement; or b) the separate settlement agreement between the Plaintiffs and the Federal Defendants being fully executed, they, together with the Federal Defendants, will sign and submit to the District Court a joint stipulation of settlement and dismissal of this action with prejudice pursuant to Fed. R. Civ. P. 41(a)(2), which shall be conditioned on the incorporation of the numbered paragraphs of the separate settlement agreement between the Plaintiffs and the Federal Defendants into the order of the District Court dismissing this action.

XVI. COUNTERPARTS

26. This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument. Delivery of an executed counterpart of this Settlement Agreement by facsimile, or by electronically scanning and emailing an executed counterpart signature page, while not specifically required, will be acknowledged as being equally as effective as delivery of a manually executed counterpart of this Settlement Agreement. The use of a signature page received by facsimile, or through an electronic scan and email, shall not affect the validity, enforceability, or binding effect of this Settlement Agreement.

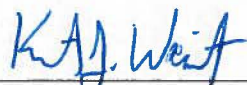
XVII. CERTIFICATION

27. The undersigned representatives of each Signatory Party certify that they are fully authorized by the party (or parties) they represent to consent to this Settlement Agreement.

THE UNDERSIGNED PARTIES enter into this Settlement Agreement in the matter of *Pennsylvania Federation of Sportsmen's Clubs, Inc., et al. v. John Quigley, et al.*, Civil No. 1:99-cv-1791 (M.D. Pa).

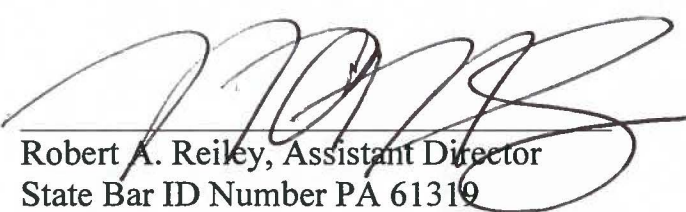
FOR THE PLAINTIFFS:

Dated: 11/2/2016


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FOR THE STATE
DEFENDANT:

Dated: 11-2-16


Robert A. Reiley, Assistant Director
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APPROVED AS TO LEGALITY AND FORM:

Amy Quarantini
Chief/Assistant Counsel
Department of Environmental Protection

11-2-16
Date

Elizabeth J. Roth
Office of General Counsel

11/2/16
Date

Funding Commitment No.: 4000020632

I hereby approve this agreement and certify that funds in the amount of \$380,553.03 are available under

BP 2016	2010200000	3555609000	V00537000000	6342100	\$190,276.52
BP 2016	7024300000	3555609000	V00537000000	6342100	\$190,276.51

Christina E. Lyons
Comptroller

11-10-16
Date

EXHIBIT A

INTRODUCTION

On August 1, 2008, the Pennsylvania Department of Environmental Protection (“Pennsylvania” or “Department”) sent the Office of Surface Mining Reclamation and Enforcement (“OSM”) a proposed program amendment entitled “ABS Program Amendment.” *See* 74 Fed. Reg. 2005 (Jan. 14, 2009). This proposed amendment was intended to satisfy a required amendment imposed by OSM in a final rule published in the *Federal Register* on May 31, 1991, 56 Fed. Reg. 24687, and codified at 30 CFR 938.16(h).

On August 10, 2010, OSM published a final rule partially approving and partially disapproving the Alternative Bonding System (“ABS”) Program Amendment, *see* 75 Fed. Reg. 48526 (Aug. 10, 2010). Among other things, OSM’s August 10, 2010 final rule:

Approved, pursuant to 30 U.S.C. § 1259(c), as part of Pennsylvania’s approved regulatory program under SMCRA: Pennsylvania’s Conversion Assistance Program and Land Reclamation Financial Guarantees as alternative financial assurance mechanisms for guaranteeing land reclamation; and Pennsylvania’s use of trust funds under 52 P.S. § 1396.4b as alternative financial assurance mechanisms for guaranteeing the treatment of post-mining discharges in perpetuity.

Approved, as part of Pennsylvania’s approved regulatory program under SMCRA, regulations adopted by Pennsylvania in 2008 that: define the term “ABS Legacy Sites;” create a separate subaccount within Pennsylvania’s Surface Mining Conservation and Reclamation Fund called the “Reclamation Fee O&M Trust

Account,” which may be used solely to pay the construction costs and operation and maintenance costs associated with treating postmining polluttional discharges at ABS Legacy Sites, *see* 25 Pa. Code §§ 86.17(e)(1) & 86.187(a)(1); and create another separate subaccount within Pennsylvania’s Surface Mining Conservation and Reclamation Fund called the “ABS Legacy Sites Trust Account,” which, upon being determined to be “actuarially sound,” will replace the Reclamation Fee O&M Trust Account as the source of funding used by the Department to pay the construction costs and operation and maintenance costs associated with treating postmining polluttional discharges at ABS Legacy Sites, *see* 25 Pa. Code §§ 86.17(e)(6), 86.187(a)(2).

As required by OSM’s August 10, 2010 final rule, Pennsylvania initiated the second program amendment proceeding by submitting a proposed program amendment to OSM on October 1, 2010, *see* 76 Fed. Reg. 6587 (Feb. 7, 2011). After twice reopening the comment period in response to supplemental submissions, *see* 76 Fed. Reg. 64048 (Oct. 17, 2011); 78 Fed. Reg. 11617 (Feb. 19, 2013), OSM published a final rule on September 17, 2015, *see* 80 Fed. Reg. 55746 (Sept. 17, 2015), which approved Pennsylvania’s October 1, 2010 program amendment, as supplemented.

This proposed program amendment is being submitted to OSM to further define how the Department will implement its obligations under the approved ABS Program Amendment consistent with OSM oversight.

IMPLEMENTATION PROCESS

Implementation Process for ABS Legacy Sites

The ABS Program Amendment added to Pennsylvania's approved state regulatory program under SMCRA a new category of mines known as "ABS Legacy Sites." As defined in 25 Pa. Code § 86.1, "ABS Legacy Sites" are "[m]ine sites, permitted under the Primacy Alternate Bonding System [ABS], that have a postmining polluttional discharge where the operator has defaulted on its obligation to adequately treat the discharge and, either the bond posted for the site is insufficient to cover the cost of treating the discharge, or a trust to cover the costs of treating the discharge was not fully funded and is insufficient to cover the cost of treating the discharge."

It is important to have an accurate and up-to-date list of the mine sites classified as "ABS Legacy Sites." One reason is that under 25 Pa. Code §§ 86.17(e)(1), (6); 86.187(a)(1)(iv), (2)(ii), the moneys in the Reclamation Fee O&M Trust Account and ABS Legacy Sites Trust Account may only be spent on treating discharges from ABS Legacy Sites. In addition, under 25 Pa. Code §§ 86.17(6)(ii), (iii); 86.187(a)(2)(iii)(B), (C), the ABS Legacy Sites Trust Account cannot be found "actuarially sound" until the construction of the necessary treatment facilities has been completed at all ABS Legacy Sites, and the amount of funds in the ABS Legacy Sites Trust Account (after combination with the Reclamation Fee

O&M Trust Account) is sufficient to generate enough interest to pay the annual costs of treating the discharges from the ABS Legacy Sites.

The current list of ABS Legacy Sites is attached to this proposed program amendment as Attachment #1.

For planning purposes, it is also helpful to identify the mines that may in the future become ABS Legacy Sites. These “Potential ABS Legacy Sites” are currently permitted mines that would, if the mine operator were to default on its obligation to adequately treat the postmining pollutional discharge(s) from the site, satisfy the definition of “ABS Legacy Sites” as defined in 25 Pa. Code § 86.1 – and therefore would be added to the list of “ABS Legacy Sites” on Attachment #1 to this proposed program amendment – because the bond or trust (or combination thereof) currently posted for the site is insufficient to cover the cost of treating the discharge(s). The Department has no current expectation that the operator of any of these “Potential ABS Legacy Sites” will default on its treatment obligations. Moreover, the Department attests that the operator of each of these sites has a long term plan in place to supplement its current bond or trust so that, when the plan is completed, sufficient funds will be available to cover the cost of treating the discharges in perpetuity. The current list of “Potential ABS Legacy Sites” is attached to this proposed program amendment as Attachment #2. Based on what it knows today, the Department expects any future additions to the list of ABS

Legacy Sites (Attachment #1) to come from the list of Potential ABS Legacy Sites (Attachment #2).

There may be additional mines of which the Department currently is unaware, however, that are properly considered “ABS Legacy Sites.” In the unexpected circumstances described in Paragraph 2, below, a mine that does not appear on the list of Potential ABS Legacy Sites may nevertheless be added to the list of ABS Legacy Sites.

1. If a mine site on the list of Potential ABS Legacy Sites in Attachment #2 suffers bond forfeiture, the Department will remove it from the list of Potential ABS Legacy Sites in Attachment #2 and add it to the list of ABS Legacy Sites in Attachment #1.

2. A mine site permitted under Pennsylvania’s Primacy ABS also may be added to the list of ABS Legacy Sites in Attachment #1 if:

a. bond release was obtained by the mine operator through fraud, misrepresentation, or concealment at a time when the mine was covered by the Primacy ABS; or

b. the Department’s determination of the required amount, or the funded amount, of the bond or trust fund established to guarantee perpetual treatment of the post-mining discharge(s) was based on:

i. fraud, misrepresentation, or concealment by the mine operator, including, but not limited to, the understatement of any cost figures used in the calculation of the amount of the bond or trust fund, or any material misrepresentation

concerning the value of, or the extent of ownership of, any asset used to fund a trust fund; or

ii. underestimation of the value of an asset(s) lacking an available market value, such as coal reserves.

3. A mine may be removed from the list of ABS Legacy Sites in

Attachment #1 only if:

a. there no longer is any post-mining discharge from the mine that must be treated in order to satisfy the applicable requirements;

b. the amount of bond posted for the mine becomes sufficient to guarantee the adequate treatment of all post-mining discharges from the mine in perpetuity; or

c. a trust fund covering the mine is established and fully funded, or becomes fully funded, in an amount that is sufficient to guarantee the adequate treatment of all post-mining discharges from all mines covered by the trust in perpetuity.

4. Whenever the Department adds any mine to or removes any mine from the list of ABS Legacy Sites in Attachment #1 or the list of Potential ABS Legacy Sites in Attachment #2, the Department will request concurrence from OSM consistent with its oversight authority and publish in the *Pennsylvania Bulletin*, within a reasonable time, a notice identifying the list(s) affected and the mine(s) added or removed, and providing a brief explanation of the basis for the change(s) made.

Implementation Related to ABS Bond Forfeiture Sites: Completion of Land Reclamation and Currently Necessary Treatment System Construction

Completion of Land Reclamation

1. The mining operations listed in Attachment #3 to this proposed program amendment were permitted and bonded under the Primacy ABS, and the mine operator had not completed the reclamation of the land on the mine sites when the Department forfeited the reclamation bond. The Department will take all actions within its authority and control to ensure that, by December 31, 2018, all backfilling, regrading, and initial planting/ seeding has been completed at all of the mining operations mines listed in Attachment #3 to this proposed program amendment.

2. By January 31 of each year, Pennsylvania will provide to OSM, and make publicly available through the Department's web site, a report certifying the progress made during the preceding calendar year toward satisfying the obligation stated in the preceding paragraph. This annual certification will cease when the Department certifies that the obligation stated in the preceding paragraph has been fulfilled.

Currently Necessary Treatment System Construction

1. The mining operations listed in Attachment #4 to this proposed program amendment are ABS Legacy Sites for which the Department is aware of a

currently existing need for a new treatment system(s) to be constructed or installed, or an existing treatment system(s) to be repaired, replaced, or upgraded, in order to provide treatment for a post-mining discharge(s). The initial construction/installation or repair/replacement/upgrading of the relevant treatment system(s) occurring after the filing of this proposed program amendment at the mining operations listed in Attachment #4 to this proposed program amendment will be referred to as the “currently necessary ABS Legacy Site post-mining discharge treatment system installation and rehabilitation.”

2. The Department will take all actions within its authority and control to ensure that, by December 31, 2018, the currently necessary ABS Legacy Site post-mining discharge treatment system installation and rehabilitation has been completed at the mining operations listed in Attachment #4 to this proposed program amendment.

3. By January 31 of each year, Pennsylvania will provide to OSM, and make publicly available through the Department’s web site, a report certifying the progress made during the preceding calendar year toward satisfying the obligation stated in the preceding paragraph. This annual certification will cease when the Department certifies that the obligation stated in the preceding paragraph has been fulfilled.

Implementation of Mixed-Site, Partially-Funded, Department-Directed Trusts

For the purposes of this proposed program amendment:

- a. a “mixed-site trust” is a trust fund established by a mine operator, or with the proceeds from collecting the reclamation bonds posted by a mine operator, to pay for the treatment of post-mining discharges from multiple mines that include both Primacy ABS bond forfeiture sites and mines that were not permitted and bonded under the Primacy ABS (Non-ABS Sites).
- b. a “partially-funded trust” is a trust fund for which the assets held by the trust are insufficient to provide perpetual treatment of all of the discharges covered by the trust; and
- c. a “Department-directed trust” is a trust fund for which the operator of the mines covered by the trust has ceased to exist, or the reclamation bonds for the mines covered by the trust have been forfeited by the Department, and the Department, in accordance with the instrument creating the trust, directs the trust’s expenditures on mine drainage treatment.

Since the creation of the Reclamation Fee O&M Trust Account and the category of “ABS Legacy Sites” in 2008, the Department has considered all Primacy ABS bond forfeiture sites covered by a mixed-site, partially-funded, Department-directed trust to be ABS Legacy Sites. Further, for all such trusts the Department has used funds from the ABS Reclamation Fee O&M Trust Account to pay for the discharge treatment at the ABS Legacy Sites. The Department will continue to implement this variety of trust in this same manner. Specifically:

1. For a mixed-site, partially-funded, Department-directed trust, the Department will consider the Primacy ABS bond forfeiture sites to be ABS Legacy Sites.

2. For all mixed-site, partially-funded, Department-directed trusts, the Department will use funds from the ABS Reclamation Fee O&M Trust Account or the ABS Legacy Sites Trust Account to pay for the discharge treatment at the ABS Legacy Sites.

ATTACHMENT #1
ABS Legacy Sites

Permit Number	Mine Operator	Mine Site
03840112	Darmac Coal Inc.	Darmac #14
03890108	Darmac Coal Inc.	Silver Rock
05830101	L&B Coal Co.	No. 5
10820121	Pengrove Coal Co.	Ruth
10830121	Sunbeam Coal Corp.	Jacques
10860118	C&K Coal Co.	Snyder Sertik
10940105	Doverspike Bros. Coal Co.	Emrick
11693000	K&J Coal Co.	Westover
11783035	C&K Coal Co.	Bell Woodcock
11813019	PA Energy Corp.	Horse Hill Strip
11823002	C&K Coal Co.	Stroud
11850106	C&K Coal Co.	Cambria 51
11950102	Laurel Land Development, Inc.	McDermott
14663003	Power Operating	Dugan 2
14663004	Power Operating	Dugan 4
14663010	R.S. Carlin	Mine #26
14803008	Avery Coal	Pine Glen
16713004	C&K Coal Co.	Hill Estate
16803011	Glacial Minerals Inc.	Vosburg
16803030	C&K Coal Co.	Smith Heasley
16820107	REM Coal Co. Inc.	Truittsburg
16830114	C&K Coal Co.	Tremba Horner
16840103	C&K Coal Co.	Kriebel
16850101	Glacial Minerals Inc.	Blair Mine
17723164	Al Hamilton Contr. Co.	Little Beth
17753159	Al Hamilton Contr. Co.	Miller Stein
17803054	Thompson Bros.	Alder Run
17803176	Al Hamilton Contr. Co.	Sandturn
17810104	Thompson Bros.	Morris #2
17810154	Thompson Bros.	001 Strip
17813143	Chews Contracting	Little D
17820106	Al Hamilton Contr. Co.	Pearce
17820114	Power Operating	Vought
17820132	Benjamin Coal	Little Beaver #1
17820143	Avery Coal Co.	Victoria
17820166	Al Hamilton Contr. Co.	Carnwath
17850109	Al Hamilton Contr. Co.	Ralston
17860105	Benjamin Coal	Marshall
17870114	M & M Const. Co. Inc.	Latherow Mine

ATTACHMENT #1
ABS Legacy Sites

Permit Number	Mine Operator	Mine Site
17880129	K&J Coal Co.	Gaber/Brown
17890115	Al Hamilton Contr. Co.	Kaufman
17921605	Thomas Coal Sales	Greenwood Tipple
17970107	Al Hamilton Contr. Co.	Kaufman North
18860101	Lobb Inc.	Narco
26753065	Purco Coal Inc.	Watkiss Mine
26830108	Arthur Brooks Coal Co.	Honsacker Site
26840110	James Rumble & Wm. Bane	Luzerne Twp. Mine
26931601	Global Coal Recovery Inc.	Isabella Mine
30840102	Greene County Coal	McNatt Strip
32823035	Acme Drilling	Broom Strip
33743044	REM Coal Co. Inc.	Smail
33803040	REM Coal Co. Inc.	Orcutt
33830117	Gurosik Coal Co. Inc.	King
33840111	Doverspike Bros. Coal Co.	Mowery Mne
56763022	Delta Mining Inc.	Maust Mine
56773084	D&E Const. Co.	Moore Strip
56773136	Bituminous Coals Inc	Addison Strip
56783046	H&H Coal Co.	James E. Long
56793053	Delta Mining Inc.	Hay 2
56793078	Windber High Std. Coal	Brant Strip
56803014	Delta Mining Inc.	Bashore Mine
56813054	L&L Mining Inc.	Berkey
56823108	C & O Coal Co.	Burkholder Strip
56840103	Metco Mining & Minerals Inc.	Ankey Mine
56840112	Amer. Dev. Co.	Job 33
56960111	Big J Mining Inc.	Sorber Mine
57830101	Bernice Mining	Lewis Mine
61783001	C&K Coal Co.	Racic
61820102	H&D Coal	Merola
61820105	Pengrove Coal Co.	Martin Mine
65703058	Frank Kowalski	Kowalski No. 1 Strip
65830202	Delta Penn Corp.	Hostetter Mine
65940108	Bulldog Excav.	Andrews Strip

ATTACHMENT #2
Potential ABS Legacy Sites

Permit Number	Mine Operator	Mine Site
11773037	Cooney Bros. Coal Co.	Caroff Strip
11803038	Cooney Bros. Coal Co.	Pot Ridge 2 Strip
11813039	Cooney Bros. Coal Co.	Feller 2 Strip
11813040	Cooney Bros. Coal Co.	Dunlo 1 Strip
11830102	MB Energy Inc.	Gabiak Strip
11860104	Cooney Bros. Coal Co.	Bethlehem Strip
17970102	Enercorp Inc.	Forcey Mine
32810135	MB Energy Inc.	Dietrich Mine
32820134	MB Energy Inc.	CBC Strip
32823005	Blairsville Assoc.	Eagle Strip & Auger
32841601	Robindale Energy Servs., Inc.	Dilltown Preparation Plant
32880108	MB Energy Inc.	Brush Valley 1 Mine
32950104	Big Mack Leasing Co. Inc.	Iselin 18 Mine
54733020	BET Assoc. IV LLC	LCN Mine
56663098	PBS Coals Inc.	Jolin Strip / Job 12
56663135	PBS Coals Inc.	Walker Mine
56743138	Cooney Bros. Coal Co.	Pot Ridge Lasky Strip
56813050	Shade Mining Co.	Shade 3 Mine
56813104	PBS Coals Inc.	Roberts Mine
56841605	Croner, Inc.	Goodtown Preparation Plant
56860104	Rosebud Mining Co.	Schrock Strip
56880103	Rosebud Mining Co.	Jopa 1
56890102	Svonavec Inc.	Ohler Strip
56950101	Rosebud Mining Co.	Poorbaugh Strip
56950105	Marquise Mining Corp.	MF Land Operation
56960106	Rosebud Mining Co.	Horner
56960107	PBS Coals Inc.	Acosta
65810113	MB Energy Inc.	Campbell Skovira Mine
65860105	MB Energy Inc.	Ridge Road Mine

ATTACHMENT #3
ABS Bond Forfeiture Sites
That Need
Land Reclamation Work

Permit Number	Mine Operator	Mine Site
14663004	Power Operating Co. Inc.	Dugan 4
17820114	Power Operating Co. Inc.	Vought
17841605	Benjamin Coal Co.	3 Prep Plant
26931601	Global Coal Recovery Inc.	Isabella Mine
26840202	Grandstone Coal Co.	Grandstone Site
40920101	Laurel Run Corp.	Laurel Run Mine
49851605	Twin Creek Coal Co.	Swift Breaker Mine
54813225	Shamrock Coal Co. Inc.	Reber 4 Mine
54830110	J&W Coal Co.	Lake Run 1 Mine
65860201	Aspenenergy Inc.	Wilpen Operation
65920108	Bituminous Proc. Co. Inc.	Wyano Mine
65920201	Ebony Coal Co.	Claridge Sub F Refuse Pile

ATTACHMENT #4
 ABS Legacy Sites That Need
 Treatment System Work

Permit Number	Mine Operator	Mine Site
05830101	L&B Coal Co.	No. 5
10820121	Pengrove Coal Co.	Ruth
10830121	Sunbeam Coal Corp.	Jacques
10940105	Doverspike Bros. Coal Co.	Emrick
11950102	Laurel Land Development, Inc.	McDermott
14663010	R.S. Carlin	Mine #26
14803008	Avery Coal	Pine Glen
17723164	Al Hamilton Contr. Co.	Little Beth
17803054	Thompson Bros.	Alder Run
17810104	Thompson Bros.	Morris #2
17820132	Benjamin Coal	Little Beaver #1
17820143	Avery Coal Co.	Victoria
17820166	Al Hamilton Contr. Co.	Carnwath
17850109	Al Hamilton Contr. Co.	Ralston
17860105	Benjamin Coal	Marshall
17890115	Al Hamilton Contr. Co.	Kaufman
17970107	Al Hamilton Contr. Co.	Kaufman North
26753065	Purco Coal Inc.	Watkiss Mine
26830108	Arthur Brooks Coal Co.	Honsacker Site
26840110	James Rumble & Wm. Bane	Luzerne Twp. Mine
26931601	Global Coal Recovery Inc.	Isabella Mine
56813054	L&L Mining Inc.	Berkey
56840112	Amer. Dev. Co.	Job 33
61820105	Pengrove Coal Co.	Martin Mine
65703058	Frank Kowalski	Kowalski No. 1 Strip
65830202	Delta Penn Corp.	Hostetter Mine
65940108	Bulldog Excav.	Andrews Strip