

Sam Smith
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JUN 06 2002

PARTICIPATION AGREEMENT
FOR THE CLEANS STREAMS FOUNDATION, INC. TRUST

Dept. of Environmental Protection
Harrisburg District Office

This Participation Agreement ("Participation Agreement") entered into this 16th day of April, 200 2, by and between Action Mining, Inc., a Pennsylvania corporation, with its principal place of business at 117 Shaw Mines Road, Meyersdale, Pennsylvania 15552 ("Participant"), and the CLEAN STREAMS FOUNDATION, INC. ("Trustee" or "Foundation"), a Pennsylvania nonprofit corporation, with its registered place of business at 160 North McKean Street, Kittanning, Pennsylvania 16201.

WHEREAS, the Participant has agreed to provide \$100,000 and to contribute land for the operation of certain treatment systems, for the prevention of pollution, and for the protection of natural resources; and

WHEREAS, the Trustee has established through a Declaration of Trust, dated April 7, 2001 which Declaration of Trust establishes a Trust which purpose is to help assure that funds are available to the Commonwealth of Pennsylvania in the future to operate and maintain treatment systems, to prevent pollution, and to protect natural resources from the adverse impacts of untreated discharges into waters of the Commonwealth (the "Trust"); and

WHEREAS, the Trustee has agreed and is willing to accept the Participant's funds and guarantees and perform the duties as are required to be performed pursuant to this Participation Agreement and the Declaration of Trust; and

NOW THEREFORE, in consideration of the foregoing and of the mutual promises and undertakings of the parties as set forth herein, and with the intention of being legally bound hereby, the parties agree as follows:

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ARTICLE ONE

DEFINITIONS

§1.1 The "Department" means the Pennsylvania Department of Environmental Protection, and its successor if any, which is the governmental agency with responsibilities related to the administration of the water pollution control and mining reclamation programs in Pennsylvania.

§1.2 "Operate" means, but is not limited to, the operation, maintenance, improvement, and replacement of the currently existing and functioning treatment facilities approved by the Department and any other facilities which may be required in the future.

§1.3 "Participant" means an individual, organization, or corporation that has elected to participate in the Trust pursuant to a Participation Agreement entered into between the Participant and the Foundation, for purposes of providing funds and/or financial guarantees to assure that funds will be available in the future for the operation of certain treatment systems, for the public purpose of prevention or abatement of pollution, and for the protection of natural resources, the environment, and the health and welfare of the public.

§1.4 "Treatment Systems" means those certain treatment systems and activities which are more particularly described in a Participation Agreement for which a Participant has provided funds and/or financial guarantees to be held in trust by the Foundation as an alternate financial assurance mechanism which provides for the sound future treatment of discharges for the public purpose of protecting the environment and the health and welfare of the public.

§1.5 "Trustee" means the Foundation acting as trustee under the terms and provisions of this Declaration of Trust and a Participation Agreement entered into with a Participant.

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ARTICLE TWO

PARTICIPATION IN THE TRUST

§2.1 The Participant agrees to provide certain funds, assets, and/or financial guarantees to be held by the Trustee for purposes of assuring that funds are available in the future for the operation of certain treatment systems, for the prevention of pollution, and for the protection of natural resources; which systems are more particularly described in Exhibit "A" attached hereto (hereinafter "Treatment Systems").

§2.2 The Trustee agrees to establish within the Trust Fund a Sub-Account designated as "Sub-Account For the Pletcher Farm Passive Treatment System ("Sub-Account").

§2.3 The Participant agrees to make an initial payment or transfer to the Trust of \$20,000.00 simultaneously with its execution of this Participation Agreement.

§2.4 The Participant agrees to make total payments or transfers to the Trust as agreed upon between the Participant and the Department pursuant to the Agreement between the Department and the Participant dated February 12, 2002, which is attached hereto as Exhibit B.

§2.5 Any guarantees, including but not limited to, letters of credit, insurance, surety bonds, etc., delivered by the Participant shall be held by the Trustee until the Department either directs the Trustee to release such guarantee or portion thereof or the Department directs the Trustee to forfeit said bonds or enforce said guarantee and for the Trustee to deposit the proceeds of such guarantee into the Trust Fund. The Trustee shall be under no obligation to pay any premiums or other costs associated therewith. Instead, all premiums and costs, as well as the responsibility for maintaining the guarantees in full force and effect, shall remain the obligation of the Participant. The Trustee shall take no action

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with respect to guarantees except as directed, in writing, by the Department in accordance with the provisions of this Declaration of Trust, and the Trustee shall not be liable to any party for acting in accordance with such directions.

§2.6 Any payments made by the Participant or on its behalf to the Trustee for deposit into the Trust shall consist of cash, bank checks, bank wire transfers, negotiable instruments, or other property acceptable to the Trustee. The Trustee shall have no responsibility for the amount or adequacy of such payment, but the Trustee shall notify the Department in writing of any deficiencies in the payments agreed to be made by the Participant whenever the Trustee has knowledge of such deficiencies.

ARTICLE THREE

ADMINISTRATION

§3.1 The principal of the Sub-Account shall consist of:

- (a) The payments or transfers to the Trustee made by the Participant pursuant to this Agreement for said Sub-Account.
- (b) Such payments from time to time and at any time to the Trustee as such may be directed by the Department pursuant to any agreement between the Department and the Participant.
- (c) Cash, funds or property transferred from any person to the Trustee and accepted by the Trustee for said Sub-Account.
- (d) Any proceeds from surety bonds which are transferred to the Trustee for said Sub-Account.
- (e) All investments, reinvestments, assets or proceeds attributable to the Sub-Account derived from the foregoing items in this §3.1.

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(f) All earnings, accretions and profits received with respect to the foregoing items in this §3.1.

§3.2 The Trustee shall hold and administer the funds of the Sub-Account in accordance with the terms and conditions of the Declaration of Trust

§3.3 The Trustee shall distribute such amounts from the Sub-Account as the Department shall direct to pay for the operation of the Treatment System or Treatment Systems. This amount shall be paid to a third party administrator to the Trust, who shall be responsible for paying the costs of operating the Treatment System in accordance with any instructions that may be issued by the Department in relation thereto.

§3.4 The Participant understands that the Trust is intended to be categorized, for federal and state income tax purposes, as a charitable trust in accordance with and under the provisions of Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and any implementing regulation cited therein or any corresponding successor provision.

§3.5 The Participant hereby adopts the Declaration of Trust as the document which governs the administration of this Participation Agreement and the Sub-Account and directs the Trustee to hold and administer the Sub-Account in accordance with the terms and conditions of the Declaration of Trust. The Participant acknowledges that the Commonwealth of Pennsylvania acting through the Department is the legal beneficiary of the Trust and has all rights of a beneficiary under the law, as well as the rights granted under the Declaration of Trust. The Department shall have access to the Trust as provided therein.

§3.6 The funds in the Sub-Account and any other property held by the Trustee pursuant to this Participation Agreement shall not be subject to assignment, alienation, attachment, garnishment, sequestration, levy or other legal process, either voluntary or involuntary or by operation of law, by, on behalf of, or in respect of the Participant and shall

not be subject or applied to the debts, obligations or liabilities of the Participant, including, without limitation, any direct action or seizure by any creditor or claimant under any writ or proceeding at law or in equity. Furthermore, the Participant shall have no legal title to any part of the Trust Fund, and it is the intention of the parties to this Participation Agreement that the Participant's entry into the Trust shall extinguish and remove all of Participant's interest in the Trust from Participant's estate under the Bankruptcy Code or similar laws.

§3.7 Except as otherwise provided in this Participation Agreement, all payments made to the Trustee or deposits into the Trust by the Participant shall be irrevocable once made, and upon delivery thereof by the Participant, all interest of the Participant therein shall cease and terminate, and no part thereof, nor any income therefrom, shall be used for or devoted to purposes other than for the exclusive benefit of the Department and the Trust as provided herein.

§3.8 Any payments made by the Participant or on its behalf to the Trustee for deposit into the Trust shall consist of cash, bank checks, bank wire transfers or other negotiable instruments acceptable to the Trustee. The Trustee shall have no responsibility for the amount or adequacy of such payment, but the Trustee shall notify the Department of any deficiencies in the payments agreed to be made by the Participant whenever the Trustee has knowledge of such deficiencies.

§3.9 The Trustee shall quarterly furnish the Department a statement providing an accounting of all transactions involving the Sub-Account and confirming the value of the Sub-Account. Such statement shall value Trust investments at market value which shall be that market value determined not more than thirty (30) days prior to the date of the statement.

§3.10 The Trustee shall be responsible for the keeping of all appropriate books and records relating to the receipt and disbursement of all moneys and assets under this

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Agreement. The Trustee shall also cause to be prepared all income tax or information returns required to be filed with respect to the Trust and shall execute and file such returns.

ARTICLE FOUR

AMENDMENTS

§4.1 This Participation Agreement may be amended by an instrument in writing, executed by the Trustee and the Department.

ARTICLE FIVE

NOTICES

§5.1 All notices, inquiries, directions or other written communications made or given pursuant to the Trust shall be given to the Department and the Trustee by certified mail, return receipt requested, addressed to the following addresses, and shall be deemed to be received upon the earlier of the date of signed receipt of the certified mailing or seven (7) days following the date of mailing:

Trustee: Clean Streams Foundation, Inc.
c/o Jack J. Steiner, Esq.
160 North McKean Street
Kittanning, Pennsylvania 16201

With a copy to:

Clean Streams Foundation, Inc.
c/o Dean K. Hunt, Esq.
520 West Short Street
Lexington, Kentucky 40507-1252

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Beneficiary: Department of Environmental Protection
McMurray District Office
3913 Washington Road
McMurray, PA 15317-2532
Attention: Samuel C. Faith, Mineral Resources Program Specialist;
James Brahosky, Director; Bureau of District Mining Operations

§5.2 Any change in the above addresses shall be made by giving notice to all parties to this Participation Agreement.

ARTICLE SIX

DISPUTES

§6.1 In the event of any dispute between the parties, the parties agree to attempt to resolve the dispute through negotiation or a method of alternative dispute resolution. No litigation shall be commenced without a certification by an authorized officer, employee, or agent of any party that the dispute cannot be resolved by negotiation or alternative dispute resolution provided in writing at least 20 days before commencing legal action.

§6.2 A party receiving such notice shall have 10 days after receipt of said notice to demand that said dispute be resolved by binding arbitration. If arbitration is requested, the dispute shall be resolved in accordance with the arbitration rules of the American Arbitration Association then in effect without regard to the date of execution of this Agreement.

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ARTICLE SEVEN

CONSTRUCTION

§7.1 As used in this Agreement, words in the singular include the plural and words in the plural include the singular. Words used in this Agreement shall be given the meaning set forth in the Declaration of Trust, or in the absence of a definition therein, their plain and ordinary meaning, except that, words used in a financial or investment context that are terms of art shall be given their commonly accepted meaning when used in the context of financial services and investment practices. The headings of each section of this Agreement are for descriptive purposes only and shall not affect the interpretation or legal efficacy of this Agreement.

§7.2 Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability. Such prohibition or unenforceability shall not invalidate the remaining provisions hereof; nor shall such prohibition or unenforceability in a jurisdiction render any provision invalid or unenforceable in any other jurisdiction.

§7.3 All covenants and agreements contained herein shall be binding upon and inure to the benefit of the Participant, the Department and the Trustee, as well as their successors and assigns. Similarly, any request, notice, direction, consent, waiver or other writing or action taken by the Participant, the Department or the Trustee shall bind their successors and assigns.

§7.4 This Agreement shall be construed and governed in all respects in accordance with the laws of the Commonwealth of Pennsylvania.

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ARTICLE EIGHT

TERMINATION

§8.1 Participant's rights, liabilities and duties hereunder shall terminate, when Participant shall have contributed the land and a total of \$100,000.00 to the Foundation as required by the Agreement between the Department and the Participant dated February 12, 2002, which is attached hereto as Exhibit "B".

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective officers or representatives duly authorized and their corporate seals to be hereunto affixed and attested as of the date first written above.

PARTICIPANT:

Action Mining Inc

By Larry R. Sanner Pres.

Its Larry R. Sanner Pres.

TRUSTEE:

THE CLEAN STREAMS FOUNDATION, INC.

By Wayne Masterson

Its Wayne Masterson

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STATE OF PENNSYLVANIA
COUNTY OF SOMERSET, to-wit:

The foregoing instrument was acknowledged before me this 7th day of March, 2002, by Larry R. Sanner, the President of the Action Mining Inc.

My commission expires January 31, 2003.

Diana S. Mosholder
Notary Public

STATE OF Kentucky
COUNTY OF Fayette, to-wit:

The foregoing instrument was acknowledged before me this 16th day of April, 2002, by Wayne Markuman, the Trustee of the CLEAN STREAMS FOUNDATION, INC.

My commission expires January 4, 2006.

Anne Bell McKune
Notary Public

This instrument was prepared by Jeff Yost, Esq., Jackson & Kelly PLLC, 175 East Main Street, Suite 500, P.O. Box 2150, Lexington, Kentucky 40588-9945, (859) 255-9500.

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CONSENT AND ACKNOWLEDGMENT

The Department of Environmental Protection hereby consents to Participant entering into this Participation Agreement pursuant to the Agreement between the Participant and the Department dated April 16, 2002 and acknowledges the Commonwealth of Pennsylvania's and the Department's status as the beneficiary of the Trust and to evidence its consent and acknowledgment of the terms and conditions set forth herein, as well as the powers and authorities granted to the Department hereunder.

BENEFICIARY:

THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
COMMONWEALTH OF PENNSYLVANIA

By Amel R. Barnes

Its District Mining Mgr. - Cambria Office

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EXHIBIT "A"

DESCRIPTION OF TREATMENT SYSTEM

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Ellick Top
Somerset County Pa.

- Hayship L-drain (sub F)
- TF21 (buried pipe) needs Trust
- Metro switch
- limestone channel
- GG coal Run design

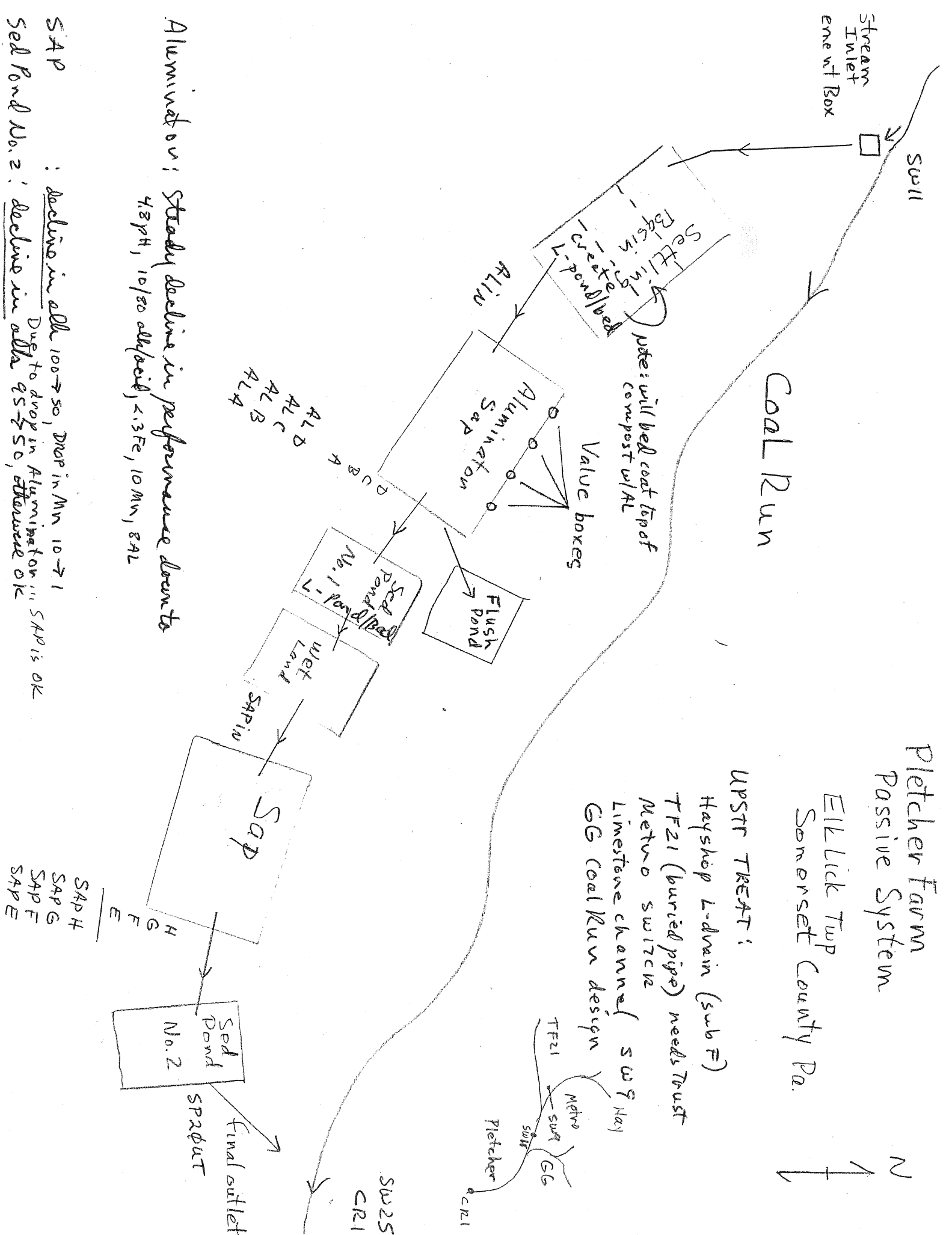


EXHIBIT "B"

AGREEMENTS BETWEEN

THE PARTICIPANT AND THE DEPARTMENT

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Pennsylvania Department of Environmental Protection

Bureau of District Mining Operations
286 Industrial Park Road
Ebensburg, PA 15931-4119
February 8, 2001

Cambria Office

814-472-1900
FAX NUMBER 814-472-1898

Larry Sanner, President
Action Mining, Inc.
1117 Shaw Mines Road
Meyersdale, PA 15552

Re: Action Mining, Inc.
Consent Order and Agreement No. 993077

Dear Mr. Sanner:

As a result of our meetings on January 4 in Ebensburg and January 30 in Meyersdale, the Department and Action Mining have reached an agreement in principle on the following matters.

- Action will submit a proposal for funding the trust for its Chemical Treatment System by March 2, 2001.
- Action will submit a proposal for funding the \$100,000 trust on Coal Run and a proposal for the continued operation and maintenance of the passive treatment system on Coal Run by March 2, 2001. The level of treatment will be as follows:

Action will direct flows from Coal Run into the passive treatment facility according to the following schedule:

- 200 gpm minimum from April 15 through November 15.
- 50 gpm minimum flow November 15 through April 15.
- If flows in the Casselman River indicate that a higher level of treatment is required, the Department may require Action to increase the flow into the passive treatment facility.
- Routine maintenance of the treatment system will include the regulation of the intake on Coal Run, and flows to each cell in the system, the flushing of ponds when required, and any minor grading or pipe repair that may be necessary. Action agrees to budget \$5,000 per year to operate and maintain the system. The routine maintenance referenced above can be completed at a cost of \$1400 annually and Action calculated sampling costs of \$3600 annually for a sum of \$5000. The Department agrees to assume the responsibility and costs for sampling



at an annual savings of \$3600 to Action. The \$3600 shall then be dedicated to any non-routine maintenance requirements. Any non-routine maintenance requirements must be evaluated by the Department prior to implementation and the Department's engineer's estimated cost will be applied to each case and deducted from the \$3600 amount. The Department reserves the right to disapprove any non-routine maintenance requirements that it determines unnecessary. Any balance from the \$3600 annual budget shall be placed in the following year's budget to address non-routine maintenance items. (In effect raising the amount available from \$5000 to the sum of \$5000 and the remaining balance). If non-routine maintenance costs in excess of the balance available occurs, the Department will not require Action to expend money in excess of the balance in the maintenance budget and will explore other options for completing any necessary corrective work. At the end of the 5 year period or at any time during the 5 year period that Action chooses to fully fund the trust, any remaining balance in the maintenance budget belongs to Action.

- Action shall maintain an obligation to operate and maintain the treatment system until the time the trust is fully funded at the \$100,000 amount. Action may donate the property to an outside organization and may contract out the routine operation and maintenance of the passive treatment system however Action's obligation to the Department continues until the trust is fully funded at \$100,000.

- The Department will continue to negotiate with Svonavec, Inc. to complete a Rec in Lieu project that includes the reconstruction of the Coal Run stream channel next to the passive treatment facility. If the Department is unable to reach agreement with Svonavec, Action will be given the same opportunity at the same cost (credit) to reconstruct the stream channel. Action will advise the Department by February 12, 2001, whether they have an interest in performing the stream reconstruction.

- The Department will not consider dividing the Shaw Mines section of the Summit #2 permit into a permit separate from the Coal Run treatment area; that action would decrease the amount of bond available to cover the long-term treatment costs associated with the discharges on Coal Run. Likewise the Department will not consider bond rollovers for the Summit #2 site; doing rollovers would increase the overall site liability (treatment costs plus reclamation costs), without a corresponding increase in bond amount. Also, there are significant logistical problems associated with processing completion reports on sites with discharges. However, the Department can consider a request from Action Mining to delete areas from the Summit #2 permit that are not already bonded and are not hydrologically connected to discharges for which Action Mining has been found responsible. Action could then submit separate permits for these deleted areas, receive Subchapter F protection for pre-existing discharges, and could roll bonds over on these new permits (provided that there are no water quality problems associated with the new permits).

Larry Sanner, President

-3-

February 8, 2001

Please advise me whether the above accurately summarizes our discussion at the two meetings. If you have any questions or comments, please do not hesitate to contact me.

Sincerely,



Donald R. Barnes
District Mining Manager

cc: Mike Sokolow
Tim Kania
Joel Q. Pontorero
Jim Brahosky
File 56823066
File 56663069

DRB:bk

FILE
566344-7

AFFIDAVIT OF NONDEDUCTION

Company Name Action Mining, Inc.
Address 1117 Shaw Mines Rd
Meyersdale PA 15552-7228
Tax Year Ending December 31, 2000

Statement Pursuit to Consent and Settlement Agreement

In accordance with the above Consent Order dated June 30, 1999, I hereby certify that Action Mining, Inc. has not deducted or obtained favorable tax treatment for any of the following:

- \$400,000 payment to passive Treatment Project (Pletcher Farm)
- \$24,000 payment to the Pennsylvania Wild Resource Conservation Fund
- \$32,000 payment to Youghiogeny Riverwatch Inc.
- \$169,000 payment to the Department of Environmental Protection.

Action Mining, Inc.

By

Title

Date

Judith A. Pletcher
Treasurer
3/8/01

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or PFBC request revision of the plan, Action shall submit the revision within fifteen (15) days.

b. Within thirty (30) days of the Department's and PFBC's approval of the plan for the installation of the Passive Treatment System, Action shall commence construction of the Passive Treatment System and shall complete construction by December 31, 2000.

c. All treatment units, structures, and facilities to be installed, all maintenance and repair work, and all reclamation to be done by Action or by others for Action at the Pletcher Farm, shall be designed, built, operated, and performed in accordance with the plan approved by the Department for the Passive Treatment System, and in such a way so as not to cause any air, water, or solid waste problem in violation of the laws of the Commonwealth or the Regulations of the Department.

d. Except as provided below, Action shall not deduct any costs incurred in connection with or in any way associated with the Passive Treatment System project, the \$24,000 payment to the Pennsylvania Wild Resource Conservation Fund, or the \$32,000 payment to Youghiogheny Riverwatch, Inc. for the three projects described in Exhibit C, or the \$169,000 payment to the Department, for any tax purpose or otherwise obtain favorable tax treatment for such costs. Within thirty (30) days of the filing of Action's Federal income tax return for any year in which Action contributed to the Passive Treatment System, Action shall submit an affidavit of a responsible company official certifying that Action has not deducted or obtained favorable tax treatment of any of the cost of the reclamation of the Passive Treatment System project on the Pletcher Farm. However, Action may deduct any costs associated with the maintenance of the Passive Treatment System and/or with the establishment of, and contributions to, the trust which is still the subject of negotiation.

e. If Action fails to comply with any requirement of paragraphs 4.a through 4.d., the Department will send written notice to Action. If Action has not completed such requirement within thirty (30) days after receipt of said notice, it shall pay to the Department \$400,000, being the full amount of civil penalties included in the Passive Treatment System project on the Pletcher Farm.

eF.A.C.T.S. (Role: COMP) Date: 08/13/99 [Enforcement Details Screen]

File Edit Application Client Site Facility Compliance Fee Collection Bonding Views Reports Administration Window Help

Enforcements

Enf Id 4487 Prog Specific Id 1-02154 Penalty Assessed

Enf Type COA Consent Order and Agreement Date Referred 06/30/1999

Client 463 1423 ACTION MINING INC

General Violations **Milestones** Related Enf Rel Clients Pen Actions Payments Admin

| Description | Due Date | Date Completed |
|--|------------|----------------|
| CASH PAYMENT TO DEPT. \$44,000 | 06/30/1999 | 06/30/1999 |
| CASH PMT.-PA.WILD RES.\$24,000 | 06/30/1999 | 06/30/1999 |
| CASH PMT.-YOUGH.RIV. \$32,000 | 06/30/1999 | 07/14/1999 |
| CASH PAYMENT TO DEPT.\$125,000 | 08/15/1999 | 08/25/1999 |
| BEGIN CONSTRUCTION OF PASS.TMT.(\$400,000) | 08/08/2000 | 08/04/2000 |
| COMPLETE REC.IN LIEU, PASS.TMT.\$400,000 | 12/31/2000 | 11/20/2000 |
| AFFADAVIT OF IRS LIABILITY RE: PASS TMT | 05/15/2001 | 03/09/2001 |
| | | |
| | | |
| | | |

Back Go To

Enter details for Milestone Description - Editor Available

Record 8/8 <OSC> <DBG>

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\$169,000 has been paid to DEP \$125,000 + \$44,000 THE CHECKS ARE BEING held by M. Sokolow. A Rec in Lieu project has been proposed. Originally the State Line Disch. But due to Landowner problem this fell through. Now the proposal is the Metro Discharge. Appears that this was intended to be an amendment to col/A 993077 (Not yet done) Action has been given credit of \$26,000 for additional work on the Fletcher System at the Ward Beals property and \$13987. for the Design of the STATELINE Disch Treatment system (Now property of DEP)

Amount Left For Metro Rec in Lieu

| |
|---------------------|
| \$169,000. |
| - 13887 |
| - 26000 |
| <u>\$129,113.00</u> |

THE STATELINE DESIGN and THE METRO proposal ARE IN SEPARATE FOLDERS