

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of:

Babb Creek Watershed Association, Inc.	:	Requirements for Funding
2538 Route 405 Highway	:	Operation and Maintenance of Antrim
Muncy, Pennsylvania 17756	:	Treatment System

**CONSENT ORDER AND AGREEMENT**

This Consent Order and Agreement is entered into this 8<sup>th</sup> day of August, 2001, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), and the Babb Creek Watershed Association, Inc. ("BCWA").

The Department has found and determined the following:

**Parties**

A. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("Surface Mining Act"); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 et seq. ("Coal Refuse Disposal Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("Clean Streams Law"); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code") and the rules and regulations promulgated thereunder.

B. BCWA is a non-profit community corporation with a business address of 2538 Route 405 Highway, Muncy, Pennsylvania 17756 whose purpose is to preserve, sustain and enhance the water quality and aquatic ecology of Babb and Pine Creeks and whose activities

include stream restoration and improvement projects. BCWA became a 501(c)(3) corporation on December 15, 2000.

### **Babb Creek**

C. Babb Creek, a tributary of Pine Creek, is located in Tioga County. The Babb Creek watershed drains an area of approximately 130 square miles. Babb Creek flows into Pine Creek at the village of Blackwell. Pine Creek, upstream from Blackwell, is a State Wild and Scenic River which flows through a steep-sided gorge known as the Grand Canyon of Pennsylvania. In recent years river otters, fishers, bald eagles and ospreys have returned or have been reintroduced into the Pine Creek watershed. Babb Creek contributes about 13% of Pine Creek's flow and 100% of the pollution caused by acid mine drainage. The main tributary streams of Babb Creek include Stony Fork and Wilson Creek, which drain the western half of the watershed, and Long Run and Lick Creek, which drain the eastern half of the watershed. Much of the Babb Creek watershed is located on State forest lands administered by the Tioga State Forest.

D. The higher elevations within the Babb Creek watershed are underlain by several seams of bituminous coal including the Bloss, Seymore, and Cushing Seams. Coal was discovered in Blossburg in 1792; and the first drift mine was opened in 1815. The first mines in the Babb Creek watershed were opened in the area around Arnot in 1865 at the head of the watershed. Mines were developed farther down the watershed as the railroad first formed in Blossburg in 1866 was extended to support the logging, mining and tanning industries. While most of the deep mines were played out and abandoned by the 1930s, strip mining continued in various locations throughout the watershed until 1990.

E. Most of the tributary streams of the Babb Creek watershed were probably biologically dead by the end of the 19<sup>th</sup> century. Among the streams affected were Lick Creek, Babb Creek, Red Run Creek, Wilson Creek, Bridge Run, Basswood Run, Paint Run and Stony Fork Creek, all of which are within the Babb Creek Watershed. Acid mine drainage flowing down Babb Creek severely affected Pine Creek below the confluence at Blackwell.

F. A 1990 stream survey by the Pennsylvania Fish and Boat Commission found no fish and extremely small numbers of benthic invertebrates within the impacted sections of Babb Creek. A 1993 Department survey showed reductions in invertebrate diversity and population density as far as five miles downstream from Blackwell in Pine Creek. Studies done by Hughey (1991; 1992; 1997) and Hughey and Meyers (1995) defined the impact to be a 5.23 mile section of Pine Creek from the mouth of Babb Creek downstream to Cedar Run, another large tributary stream. This impacted section of Pine Creek had been included on The Department's 303(d) list of Impaired Streams.

#### **Antrim Treatment System**

G. Antrim Mining, Inc. ("Antrim") operated five surface coal mining sites in Duncan Township, Tioga County all within the Babb Creek watershed.

H. On November 16, 1990, the Department issued Antrim a compliance order requiring Antrim to provide interim and permanent treatment of a discharge known as the Backswitch or BI-16 discharge.

I. On June 18, 1991, the Department issued Antrim a compliance order requiring Antrim to provide interim and permanent treatment of a discharge known as the Antrim No. 1 or BI-14 discharge. The Antrim No. 1 discharge flowed at the average rate of approximately 800 gallons a minute and discharged into Bridge Run, a tributary of Wilson Creek.

J. On September 25, 1991, the Department and Antrim entered into a Consent Decree before Commonwealth Court concerning the deadlines for providing interim treatment for the Antrim No. 1 discharge.

K. In a Consent Order Agreement and Adjudication dated December 31, 1991, (the "Consent Adjudication") the Department and Antrim entered into a comprehensive agreement to provide interim and permanent treatment of the Backswitch and Antrim No. 1 discharges. Pursuant to the Consent Adjudication, Antrim constructed and operated a permanent treatment facility for the two discharges.

L. On October 1, 1996, the Department and Antrim amended the Consent Adjudication (the "First Amendment") to allow Antrim to reduce the expense of operating the existing treatment system by the construction of a new permanent treatment system which uses a clarifier rather than settling ponds to remove metals.

M. The new Antrim treatment system ("the Antrim Treatment System") is constructed at a different location and at an elevation below the two mine discharges so that the water can flow via a reservoir formed by a collection dam to the treatment facility by gravity flow rather than by pumping. The new treatment system uses a waste lime product that is a partially calcined limestone gravel (lime with a limestone core). The reagent is ground, and water is added to make a slurry. The lime is added to the mine discharge in an inline mixer where it is discharged to a large concrete clarifier tank. The sludge is collected off the bottom of the tank and pumped up the hill and discharged in a strip cut that serves as a disposal area for the sludge. Treated water from the clarifier discharges to an unnamed tributary of Bridge Run, which is a tributary to Wilson Creek at a monitoring point identified as Outfall #009 on the map

attached as Exhibit 1. The new facility was relocated in order to reduce short and long term treatment costs.

N. The Antrim Treatment System treats nearly 50% of the acid load flowing from Wilson Creek into Babb Creek and then into Pine Creek. Within two years after the Antrim Treatment System began operation, local fishermen reported that mayfly hatches markedly increased in Pine Creek downstream from Blackwell.

O. Antrim also constructed an emergency treatment system immediately downgradient of the Backswitch Discharge. The monitoring point for the emergency treatment system is identified as outfall #004 on the map attached as Exhibit 1. The emergency treatment system consists of a soda ash hopper and two detention ponds and is intended to be used any time the Backswitch Discharge cannot be conveyed, for any reason, to the Antrim Treatment System.

#### **Babb Creek Restoration Efforts**

P. In the same time period as the Department's enforcement action against Antrim, the Pennsylvania Environmental Defense Foundation ("PEDF") initiated a citizens' suit against Antrim in United States District Court for the Middle District of Pennsylvania, alleging that Antrim's mining operations had violated the federal Clean Water Act, worsened acid mine drainage pollution in Babb Creek and increased the harm to Pine Creek's benthic invertebrate community.

Q. PEDF and Antrim negotiated a settlement of the suit which, among other provisions, established the Babb Creek Trust Fund. The trust was to be funded out of a dedicated portion of dumping fees paid at the Phoenix Resources, Inc. Landfill, (the "Waste Facility") which was owned by the same party as Antrim. The trust fund was to be administered jointly by

PEDF and Antrim, and its use was specifically restricted to construction and operation of acid mine drainage treatment and abatement projects within the Babb Creek watershed.

R. In pursuit of the objectives of the Babb Creek Trust Fund, PEDF representatives sought the assistance of certain professionals within The Department, other state agencies and organizations to begin addressing acid mine drainage in Babb Creek.

S. One outgrowth of the inquiries was the Babb Creek Reclamation Task Force as a cooperative partnership of parties interested in restoring the water quality and aquatic ecology of Babb Creek and eliminating the deleterious effects that Babb Creek was having on Pine Creek. The task force was comprised of government agencies (Pennsylvania Fish and Boat Commission, Pennsylvania Game Commission, United States Geologic Survey, the Department of Conservation and Natural Resources and the Department of Environmental Protection), PEDF, local conservation groups (Arnot Sportsmen, Slate Run Sportsmen, Pine Creek Preservation Association, Pine Creek Headwaters Protection Group, Trout Unlimited, and others), academia (Penn State), industry (including Antrim, Phoenix Resources, Signor Bros. Contracting, Wolf's General Store, and others) and volunteers. The task force began undertaking the construction of treatment systems throughout the Babb Creek watershed.

T. In October 1990, the task force constructed two limestone diversion wells in the headwaters of the Lick Creek. Those diversion wells were extensively improved in June 1991 and introduce substantial alkalinity into the stream as well as raising the pH.

U. In July 1994, the task force constructed a small diversion well to treat the abandoned Klondike deep mine discharge which flows into Lick Creek below the original two diversion wells.

V. In 1994, Babb Creek was selected as one of eight watersheds which would be part of the Department's comprehensive mine reclamation strategy which sought to eliminate all sources of acid mine drainage in the watershed. The program is a cooperative effort between the Department and other government agencies, industry, conservation groups, academia, and volunteers. The program is intended to focus on a watershed, pool and coordinate existing resources to accomplish more restoration.

W. In April 1995, the hatches of mayflies in Pine Creek below Blackwell were described by local fishermen as sustained and prolific. In addition, Green Drake mayflies hatched for the first time in lower Pine Creek since the early 1980s.

X. In September 1995, two additional diversion wells were constructed by the task force on Red Run, another small polluted tributary of Lick Creek between the original diversion wells and the Klondike diversion well.

Y. In December 1995, the task force obtained funding for the construction of a successive alkaline producing system ("SAPS") and a anoxic limestone drain ("ALD") to treat the Arnot No. 2 deep mine discharge in the Lick Creek headwaters about a mile upstream from the original diversion wells. The SAPS was completed on December 19, 1996.

Z. A sixth diversion well which treats an additional discharge of the Arnot No. 2 deep mine located near the town of Arnot at the headwaters of Lick Creek was completed in November 1997.

AA. In 1998, the task force constructed an additional SAPS on the Klondike Mine discharge to replace the diversion well which had been operating with minimum effect since 1994. The diversion well was retained as a backup for use in high flows and when the SAPS is drained for maintenance.

BB. Also in 1998, the Babb Creek Trust Fund paid for reclamation of a 7-acre mine spoil pile at the Klondike Mine located on Tioga State Forest land. The spoil pile was graded to a gentler slope, covered with an organic compost and planted with grasses and clover to provide an herbaceous food source for wildlife.

CC. A surface coal mining permit was issued to Signor Brothers on October 19, 1999 for coal and coal refuse removal from an abandoned railroad grade. The 3.2 acre permit covered an approximately 2200 foot long section where the railroad grade was constructed of coal material. The site is located on Tioga State Forest property, adjacent to Babb Creek. The creek had eroded and/or breached portions of the coal bearing railroad grade. Erosion of the material has been a source of sediment and acid producing material for the stream. Prior to coal removal, Signor Brothers placed stream bank stabilization structures designed by the Pennsylvania Fish and Boat Commission at two locations where the stream was eroding the coal material. This project removed acid and sediment producing material that is impacting Babb Creek. The project reclaimed the 3.2 acres at no cost to the Commonwealth.

DD. On October 20, 1999, The Department and the James M. Stott Coal Co., Inc. entered into a Consent Order and Agreement under which Stott would construct two passive treatment systems at the Bear Run Mine discharges. The mine is located west of the confluence of Babb Creek and Lick Creek and the drainage from the two discharges flows to Babb Creek below the stream confluence. The mine and its discharges are located in the Tioga State Forest. A relatively small and constant flow of water flows from the main entry where the coal and coal refuse were removed from the mine on the west side of the underground mine. A second high flow discharge is located farther to the east. The Department considered both discharges to be amenable to passive treatment with a vertical flow treatment system or SAPS. Stott initiated the



project on September 15, 1999. The treated water would supplement existing treatment facilities in the headwaters of Babb and Lick Creeks and should have a measurable improvement in the water of Babb Creek down to the confluence of Wilson Creek. Stott completed the system in November 2000.

EE. Mayfly hatches on Pine Creek in 1997 were reported to have been the best in more than twenty years. Stream surveys were conducted on Babb Creek by the Pennsylvania Fish and Boat Commission in 1990 and 1996. While the 1990 stream survey found no fish and decreased benthic macroinvertebrates at all stations, the 1996 survey found fish at all stations and a dramatic increase in the number of acid sensitive benthic macroinvertebrates. Another PFBC survey in August 1999, however, found substantial numbers of stream-born brown and brook trout living in the headwaters of Babb Creek just below the confluence of Lick Creek. There and at other stations, the PFBC fisheries biologists also found numerous species of minnows and a greatly expanded diversity of macroinvertebrates, all evidence that AMD treatment systems in the upper watershed are having their desired effect of reversing damage to the stream ecology.

FF. On November 24, 1999, the Department's Water Pollution Biologist Martin A. Friday submitted a report recommending that the 5.23 mile section of Pine Creek removed from the 303(d) list of impaired streams. Friday found all stations studied in the Pine Creek stream segment to be unimpaired according to a multiple metric bioassessment analysis. Friday states in his report, "AMD reclamation projects in the Babb Creek drainage are having a positive influence on downstream benthic communities. Macroinvertebrate diversity and abundance are the highest on record for the lower end of Babb Creek. Biological condition of benthic communities in Pine Creek below Babb Creek are similar to reference conditions upstream of

Babb Creek." These findings are additional evidence that the cooperative partnership established at the outset by the Babb Creek Reclamation Task Force has been successful in its overall objectives of improving water quality and restoring polluted waterways for the recreational use and enjoyment of the people of Pennsylvania.

**Formation of the Antrim Discharge Treatment Trust**

GG. Antrim constructed and successfully operated the Antrim Treatment System required by the First Amendment. Antrim employed RNS Service, Inc. ("RNS") as a contractor to operate the system.

HH. On March 8, 1999, the Department and Antrim entered into a Second Amendment to the Consent Adjudication, in which, among other things, the Department has agreed to accept \$1,500,495 as the sufficient amount to fully discharge Antrim's obligations to fund the Discharge Treatment Trust (the "the Antrim Trust") required by Paragraph 9 of the Consent Adjudication, as modified by the First Amendment).

II. Antrim paid the entire amount on March 8, 1999 and the Department, Antrim and Woodlands Bank ("Woodlands"), a Williamsport bank, entered into a Post-Mining Discharge Treatment Trust Agreement. Among other things, Woodlands agreed to hold legal title to the Antrim Treatment System and certain other associated real and personal property. A copy of the Agreement is attached as Exhibit 2.

JJ. PEDF is being paid 30 cents per ton of waste deposited in the Waste Facility which is now permitted as a construction and demolition landfill. On November 21, 1998, the Board of Trustees of PEDF agreed that ten cents (\$.10) of the 30 cents (\$.30), now being paid into the Babb Creek Trust will be paid into the Antrim Trust. The ten cents (\$.10) per ton payments should increase the trust by \$280,000, helping to ensure the trust's ability to provide

funding for operation and maintenance of the modified treatment plant for more than fifty (50) years, based on current assumptions.

KK. Antrim had stated to the Department that the company intended to liquidate pursuant to the Pennsylvania Business Corporation Act. On September 28, 1999, Antrim informed the Department that the company had been dissolved as of September 16, 1999.

LL. Antrim was the permittee of NPDES Permit No. 0596728SMP59850101 which authorizes the discharges from the Antrim Treatment System of treated drainage. On the same date as the date of this Agreement, the Department revoked the NPDES permit.

MM. Members of the task force and others who were concerned generally with the continued improvement of Babb and Pine Creeks and specifically with the importance of operating and maintaining the Antrim Treatment System in order to the beneficial impact of that system and the others which had been constructed in the Babb Creek Watershed agreed, at the suggestion of the Department, to form a new entity.

NN. BCWA was formed as a non-profit entity and received its articles of incorporation from the Pennsylvania Department of State on November 24, 1998 (Entity Number 2847475)(Federal EIN 23-2995774). Neither BCWA nor any of its members profited from Antrim's operations. The BCWA and its members are volunteers; the association's purpose is to protect, sustain and enhance the water quality and aquatic ecology of the Babb Creek and Pine Creek Watersheds by, among other things, operating the various treatment systems.

OO. Antrim, the Department and BCWA had numerous discussions concerning BCWA's operation and maintenance of the Antrim Treatment System. BCWA stated that its willingness to operate and maintain the Antrim Treatment System at no profit.

PP. BCWA and the Department agreed to enter into a separate Consent Order and Agreement which will govern operation and maintenance of the Antrim Treatment System after December 31, 1999 or the dissolution of Antrim, whichever occurs sooner.

QQ. Among other things, BCWA has indicated that it will operate the Antrim Treatment System to meet whatever effluent limitations the Department believes are appropriate.

RR. The agreement was and is intended to reflect the cooperative spirit that has governed the dealings to date between the Department and BCWA. Both parties view their working relationship as a partnership but realize the need to memorialize the various activities which need to be performed in the future in an agreement and have agreed that a Consent Order and Agreement is the appropriate document to set forth the rights and obligations of the parties.

SS. BCWA asked for, and the Department agreed to, certain provisions which would reflect the unique and cooperative as opposed to adversarial circumstances which gave rise to this Consent Order and Agreement. Among other things, the remedies sections, ability to make unilateral changes, and the exercise of prosecutorial paragraphs are intended to protect the Department's interests without causing damage to the nature of the relationship between the Department and BCWA which is undertaking its responsibilities as a volunteer group. However, none of the provisions are intended to alter the nature of the Consent Order and Agreement which is an order of the Department and not a contract of any kind.

### Order

After full and complete negotiation of all matters set forth in this Consent Order and Agreement and upon mutual exchange of covenants contained herein, the parties desiring to avoid litigation and intending to be legally bound, it is hereby ORDERED by the Department and AGREED to by BCWA as follows:

1. **Authority.** This Consent Order and Agreement is an Order of the Department authorized and issued pursuant to Section 5 of the Clean Streams Law, 35 P.S. §691.5; and Section 1917-A of the Administrative Code, *supra*.

2. **Findings.**

a. BCWA agrees that the findings in Paragraphs A through SS are true and correct and, in any matter or proceeding involving BCWA and the Department, BCWA shall not challenge the accuracy or validity of these findings.

b. The parties do not authorize any other persons to use the findings in this Consent Order and Agreement in any matter or proceeding.

3. **Water Quality Requirements.**

a. Whenever the combined flow of the Backswitch and Antrim No. 1 discharges is less than or equal to 2,000 gpm, BCWA shall operate the Antrim Treatment System to achieve the following at Outfall #009:

1. Alkalinity shall exceed acidity.

2. Iron shall be less than 7 mg/l measured as an instantaneous maximum, less than 6 mg/l measured as a daily average, and less than 3 mg/l measured as a monthly average.

3. Manganese shall be less than 5 mg/l measured as an instantaneous maximum, less than 4 mg/l measured as a daily average, and less than 2 mg/l measured as a monthly average.

4. Total suspended solids shall be less than 90 mg/l measured as an instantaneous maximum, less than 70 mg/l measured as a daily average, and less than 35 mg/l measured as a monthly average.

5. pH shall be between 6 and 10.

b. Whenever the combined flows from the Backswitch and Antrim No. 1 discharges exceed 2,000 gpm, BCWA will release additional lime slurry into the unnamed tributary to Bridge Run, the same stream that receives the discharge from the Antrim Treatment System, sufficient to maintain an in-stream pH between 6 and 10 and alkalinity exceeding acidity. The Antrim Treatment System shall still be operated at maximum capacity with treatment plant effluent to meet the effluent limitations set forth in subparagraph (a).

c. Whenever the flows from the Backswitch discharge exceed the capacity of the pipeline that conveys the Backswitch discharge to the Antrim Treatment System, or at any time that the Backswitch Discharge cannot be conveyed, for any reason, to the Antrim Treatment plant, the Backswitch emergency treatment system, described in Paragraph O, should be deployed. BCWA shall activate the Backswitch emergency treatment system within 30 minutes after water from the Backswitch Discharge is first unable to enter the pipeline that runs from the Backswitch Discharge to the reservoir, and shall notify the Department within four hours that it has activated the Backswitch emergency treatment system. The method of notifying the Department shall be the same as set forth in Paragraph 3.e.

d. At all times when the combined flow of the Antrim and Backswitch discharges combined exceeds 2000 gpm and water is flowing out of the collection reservoir through the emergency spillway, BCWA shall:

1. Within 12 hours after water begins to flow out of the collection dam through the emergency spillway, notify The Department of the occurrence and cause of the release of water through the emergency spillway, and report to The Department a field pH reading taken in the unnamed tributary to Bridge Run, at the monitoring point identified as #010

on the map attached as Exhibit 1, which point is approximately 150 feet below Outfall #009.

This notification shall be made by calling the Department's Hawk Run District Office at 814-342-8200. After business hours, BCWA shall notify the Department in accordance with subparagraph e., and shall notify the Surface Mine Conservation Inspector assigned to inspect the Antrim Treatment Plant.

2. Within 30 minutes after water begins to flow through the emergency spillway, BCWA shall activate the emergency system for conveying lime slurry from the treatment plant to the unnamed tributary to Bridge Run via the discharge pipe from the Antrim Treatment System. However, at no time shall BCWA release additional lime slurry if pH readings at monitoring point 010 indicate a pH greater than 10.0.

3. Maintain records showing the duration and cause(s) of all periods during which water flows out of the collection reservoir through the emergency spillway.

e. BCWA may discontinue the use of the Antrim Treatment System for limited periods in order to perform routine maintenance or emergency maintenance on the system. Routine maintenance shall be authorized only if BCWA provides at least 72 hours advance notice by telephone to the Department's Hawk Run District Mining Office. Non-routine maintenance shall be authorized only after BCWA notifies the Department's Hawk Run District Office of the need to perform non-routine maintenance within four hours after BCWA determines such maintenance is necessary. This notification shall be made by calling the Department's Hawk Run District Office at (814) 342-8200. After business hours, a message containing the required information shall be placed on the Hawk Run District Office answering machine at the telephone number listed above. For both routine and non-routine maintenance,

the maintenance shall be authorized only if the period during which the use of the system is discontinued is limited to the period necessary to perform the maintenance.

f. The discharge from Outfall #009 shall be monitored continuously for pH and sampled at least twice monthly for pH, alkalinity, acidity, Fe, Mn, Al and sulfates.

g. If discharging, Outfall #004 shall be sampled twice monthly for pH, alkalinity, acidity, Fe, Mn, Al and sulfates.

h. Monitoring point #010 shall be monitored daily for pH whenever water is flowing through the emergency spillway at the collection dam. Raw (untreated) water from monitoring point B1-14 (the Backswitch Discharge) and B1-16 (the Antrim Discharge) shall be monitored quarterly for pH, alkalinity, acidity, Fe, Mn, Al, sulfates and flow rate.

i. All monitoring results shall be submitted on a quarterly basis to the Hawk Run District Office (monthly for overflow periods). The Department will furnish BCWA with a collector ID number and equipment to perform twice monthly sampling and will provide analysis of samples at the Department's laboratory. BCWA shall collect and deliver samples to the Department pick-up box located at the Mansfield District Office, 600 Gateway Drive, Mansfield, Pennsylvania 16933.

j. The Department, in its sole discretion, may modify the water quality requirements in subparagraph (a) or the procedures in subparagraphs (b), (c), (d), (e), (f), (g), (h) and (i). The Department agrees to provide written notice of any modifications to BCWA.

#### **4. Operation of the Antrim Treatment System.**

a. The Department will direct the Trustee to authorize BCWA access to the Antrim Treatment System, the Antrim No. 1 discharge, the Backswitch discharge, and all



associated real and personal property as needed to operate and maintain the Antrim Treatment System.

b. BCWA shall furnish the following to assure continued operation of the Antrim Treatment System:

1. A duly qualified plant operator at such intervals and for such time periods as are reasonably necessary to provide for operation of the treatment plant.
2. All materials, supplies, utilities and labor as is reasonably necessary to provide for the normal day-to-day operation of the treatment plant.
3. Preparation of any and all reports required by local, state or federal authorities.
4. Removal of all snow and ice, grass cutting and weeding at the plant.
5. Performance of general maintenance work on the equipment of the plant as well as any repairs to equipment or needed capital improvements to the plant.

c. The Department agrees to provide limited technical and engineering assistance when needed regarding operation of the Antrim Treatment System.

**5. Budget and Release of Money from the Trust.**

a. BCWA will prepare annually a budget request that will detail the anticipated operating expenses to run the Antrim Treatment System. This budget will be

submitted to The Department for approval at least 60 days prior to the beginning of the fiscal year which, for purposes of this agreement, shall be January 1 through December 31.

1. At a minimum, the budget will itemize costs under the following categories: administrative expenses, plant operator expenses, employee travel, processing supplies, utilities, maintenance, rental equipment, and plant repairs. The budget will include a summary of the expenses incurred during the first six months of the current fiscal year.

2. The Department will review the proposed budget and authorize funds to be transferred from the Trust to a special operating account (the "Operating Account") up to the budgeted amount for the year.

3. The Department shall have the sole discretion in determining the budget amount to be authorized.

4. Withdrawals in excess of the budgeted amount must be submitted to The Department for special authorization, with the exception that budgeted items in any one of the categories enumerated in Paragraph 5.a.1. above may exceed the approved amount by no more than 10%, so long as the total amount of the proposed budget is not exceeded.

b. No less than 60 days following the end of each fiscal year, BCWA will prepare a summary of yearly expenditures and, upon request, a complete audit of all expenses.

c. Budgeted funds not spent at the end of the fiscal year will remain in the Operating Account, and will be deducted from the next year's budget. For example, if \$3,000 remains at the end of one fiscal year, and the budget request for the next fiscal year is \$60,000, then \$57,000 will be authorized to be transferred into the Operating Account with a transfer of \$12,000 for the first quarter and \$15,000 for subsequent quarters.

d. If sufficient funds are available, the Department may, at its discretion, authorize the trustee to release additional funds for other water-quality improvement projects within the Babb Creek watershed

e. The Department shall have the right to review all financial and transaction records of BCWA at any time.

**6. Limits on Liability for Officers or Members of BCWA.**

The Department agrees that it will exercise its enforcement discretion and not pursue officers or members of BCWA for violations of this Consent Order and Agreement. The only exceptions would be for criminal conduct, for any willful or reckless conduct which damaged the environment or the Antrim Treatment System or for any improper use of the funds from the Trust.

**7. BCWA Acknowledgments.**

a. BCWA may not assert in any forum or proceeding that it is a third party beneficiary of the Trust.

b. BCWA may not assert in any forum or proceeding that the Consent Order and Agreement is a contract and/or that contract law has any applicability to this document or its interpretation.

**8. Annual and Special Meetings between BCWA and The Department.**

a. The parties have agreed to meet annually at mutually convenient locations on May of each year to discuss the preceding year's operation and maintenance, the budgetary process, the financial status of the Trust, any problems which have arisen in the previous year and any other issue which either party believes may be relevant to the agreement or the relationship between the parties. The Trustee shall be invited to attend the annual meeting.

b. Upon fifteen (15) days written notice, either party may call a special meeting to discuss any issue which might be the subject at an annual meeting.

9. **Additional Remedies.**

a. In the event BCWA fails to comply with any provision of this Consent Order and Agreement, the Department may, in addition to the remedies prescribed herein, pursue any remedy available for a violation of an order of the Department, including an action to enforce this Consent Order and Agreement.

b. The remedies provided by this Paragraph are cumulative and the exercise of one does not preclude the exercise of any other. The failure of the Department to pursue any remedy shall not be deemed to be a waiver of that remedy.

10. **Reservation of Rights.** The Department reserves the right to require additional measures to achieve compliance with applicable law. BCWA reserves the right to challenge any action which the Department may take to require those measures.

11. **Liability of BCWA.** BCWA shall be liable for any violations of the Consent Order and Agreement, including those caused by, contributed to, or allowed by its officers, agents, employees, or contractors. BCWA also shall be liable for any violation of this Consent Order and Agreement caused by, contributed to, or allowed by its successors and assigns.

12. **Correspondence with Department.** All correspondence with the Department concerning this Consent Order and Agreement shall be addressed to:

District Mining Manager  
Hawk Run District Mining Office  
Empire Road, P. O. Box 209  
Hawk Run, PA 16840-0209  
(814) 342-8200  
FAX: (814) 342-8216

13. **Correspondence with BCWA.** All correspondence with BCWA concerning this

Babb Creek Watershed Association, Inc.  
c/o James Barr  
2538 Route 405 Highway  
Muncy, Pennsylvania 17756  
(570) 546-8799

BCWA shall notify the Department whenever there is a change in the contact person's name, title, or address. Service of any notice or any legal process for any purpose under this Consent Order and Agreement, including its enforcement, may be made by mailing a copy by first class mail to the above address.

14. **Force Majeure.**

a. In the event that BCWA is prevented from complying in a timely manner with any time limit imposed in this Consent Order and Agreement solely because of a strike, fire, flood, act of God, or other circumstances beyond BCWA's control and which BCWA, by the exercise of all reasonable diligence, is unable to prevent, then BCWA may petition the Department for an extension of time.

b. BCWA shall only be entitled to the benefits of this paragraph if it notifies the Department within five (5) working days by telephone and within ten (10) working days in writing of the date it becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay,

the expected duration of the delay, and the efforts which have been made and are being made by BCWA to mitigate the effects of the event and to minimize the length of the delay. The initial written submission may be supplemented within 10 working days of its submission. BCWA's failure to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and of no effect as to the particular incident involved.

c. The Department will decide whether to grant all or part of the extension requested on the basis of all documentation submitted by BCWA and other information available to the Department. In any subsequent litigation, the operator shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information then available to it.

d. The Department has deleted the portion of this Paragraph dealing with increased costs because all costs associated with BCWA's performance under the agreement are funded through the Trust to which the Department is the beneficiary.

15. **Severability.** The paragraphs of this Consent Order and Agreement shall be severable and should any part hereof be declared invalid or unenforceable, the remainder shall continue in full force and effect between the parties.

16. **Entire Agreement.** This Consent Order and Agreement shall constitute the entire integrated agreement of the parties. No prior or contemporaneous communications or prior drafts shall be relevant or admissible for purposes of determining the meaning or extent of any provisions herein in any litigation or any other proceeding.

17. **Attorney Fees.** The parties shall bear their respective attorney fees, expenses and other costs in the prosecution or defense of this matter or any related matters, arising prior to execution of this Consent Order and Agreement.

18. **Modifications.** No changes, additions, modifications, or amendments of this Consent Order and Agreement shall be effective unless they are set out in writing and signed by the parties hereto.

19. **Titles.** A title used at the beginning of any paragraph of this Consent Order and Agreement may be used to aid in the construction of that paragraph, but shall not be treated as controlling.

20. **Decisions under Consent Order and Agreement.** Any decision which the Department makes under the provisions of this Consent Order and Agreement is intended to be neither a final action under 25 Pa. Code §1021.2, nor an adjudication under 2 Pa. C.S. §101. Any objection which BCWA may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

a. BCWA may initiate dispute resolution under this Paragraph, in response to any decision required of the Department under Paragraph 5.

b. To initiate dispute resolution, BCWA shall provide written notice to the Department within 10 days of the decision in dispute. BCWA shall have an additional 10 days to provide the Department with a written list of objections to the decision in dispute, the relevant facts, analysis and opinions and other supporting data (hereinafter called "Statement of Position." The Department shall have 20 days to provide its Statement of Position.

c. Within the twenty (20) period following receipt of the Department's Statement of Position, the Hawk Run District Mining Manager and BCWA's representative shall confer in an attempt to resolve the dispute. In the event the parties are unable to resolve the dispute within this period, the Statements of Position shall be provided to the Department's Director of District Mining Operations to issue a final decision resolving the dispute.

d. During the pendency of the dispute resolution procedures set forth in subparagraphs (b) and (c), any obligation to be performed under this Consent Order and Agreement which is the subject of such dispute and any associated activities whose performance is directly dependent upon the resolution of the dispute shall be postponed for a period of time not to exceed the actual time taken to resolve the dispute pursuant to subparagraphs (b) and (c) or as otherwise agreed by the parties. All other obligations and activities shall be completed in accordance with the terms of this Consent Order and Agreement.

e. Any time period for dispute resolution set forth herein may be extended by written agreement of the parties.

**22. Termination of the Agreement.**

a. This Consent Order and Agreement goes into effect on \_\_\_\_\_, 2001. This Consent Order and Agreement will automatically terminate five years after the date of the Agreement unless both parties party, at least 6 months before the end of the 5-year period, meet and agree to extend the agreement for an additional period, or otherwise terminate in accordance with Subparagraphs b or c below.

b. Should BCWA fail to adequately maintain the Antrim Treatment System in good working order, make necessary repairs and improvements, fail to meet water quality requirements, or otherwise not comply with this Consent Order and Agreement, The Department may, at its sole discretion, terminate this Agreement and direct the Trustee to cancel future payments from the Trust to BCWA. The Department will give BCWA 30 days written notice of a termination under this subparagraph unless exigent circumstances exist.

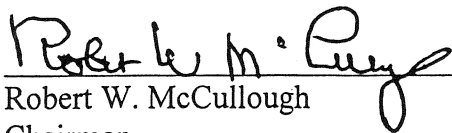
c. Upon 90 days written notice to the Department, BCWA may voluntarily terminate this Agreement.

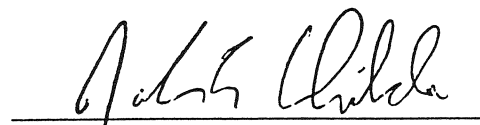


d. Upon termination of this Agreement, for any reason, BCWA immediately shall return all real and personal property to the Department and any unexpended funds to the Trustee.

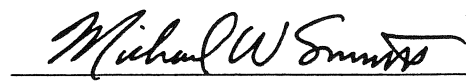
The undersigned representatives of BCWA certify under penalty of law, as provided by 18 Pa. C.S. §4904, that they are authorized to execute this Consent Order and Agreement on behalf of BCWA; that BCWA consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that BCWA hereby knowingly waives its rights to appeal this Consent Order and Agreement and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 1988-94, 35 P.S. §7514; the Administrative Agency Law, 2 Pa. C.S. §103(a) and Chapters 5A and 7A; or any other provision of law. Signature by BCWA's attorney certifies only that the agreement has been signed after consulting with counsel.

FOR BABB CREEK WATERSHED  
ASSOCIATION, INC.:

  
Robert W. McCullough  
Chairman

  
John E. Childe  
Attorney for Babb Creek Watershed  
Association, Inc.

FOR THE COMMONWEALTH OF  
PENNSYLVANIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION:

  
Michael W. Smith  
District Mining Manager  
Hawk Run District Mining Office

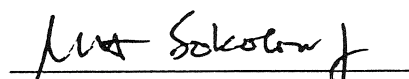
  
Martin H. Sokolow, Jr.  
Regional Counsel  
Southcentral Regional Counsel

EXHIBIT 1  
BACKSWITCH AND ANTRIM #1 TREATMENT PLAN

NO SCALE  
12-06-00

PA 287

