

PARTICIPATION AGREEMENT  
FOR THE CLEANS STREAMS FOUNDATION, INC. TRUST

This Participation Agreement ("Participation Agreement") entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between Harbison-Walker Refractories Company ("Harbison-Walker" or "Participant"), a Pennsylvania corporation, with its place of business at Cherrington Corporate Center, 400 Fairway Drive, Moon Township, Pennsylvania 15108, and the CLEAN STREAMS FOUNDATION, INC. ("Trustee" or "Foundation"), a Pennsylvania nonprofit corporation, with its registered place of business at 100 West Station Square Blvd, Suite 1940, Pittsburgh, PA 15219

WHEREAS, the Participant wishes to provide funds or other assets and/or financial guarantees to assure that funds will be available in the future 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:

## **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, the Postmining Treatment Trust Consent Order and Agreement between Harbison-Walker and the Department, and this Participation Agreement entered into

with Harbison-Walker.

## **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 the Postmining Treatment Trust Consent Order and Agreement between Harbison-Walker and the Department, Exhibit "A" attached hereto (hereinafter "Treatment Systems").

§2.2 The Trustee agrees to establish within the Trust Fund two Sub-Accounts designated as "Harbison-Walker Sanborne Treatment Primary Trust Account" and "Harbison-Walker Sanborne Treatment Capital Improvement Trust Account" ( the "Sub-Accounts").

§2.3 The Participant agrees to make an initial payment or transfer to the Harbison-Walker Sanborne Treatment Primary Trust Account of \$25,000.

§2.4 The Participant agrees to make total payments or transfers to the Harbison-Walker Sanborne Treatment Primary Trust Account and to the Harbison-Walker Sanborne Treatment Capital Improvement Trust Account as agreed upon between the Participant and the Department pursuant to the Postmining Treatment Trust Consent Order and Agreement between the Department and Harbison-Walker, which is attached hereto as Exhibit A.

§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 such 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 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 or derived from the foregoing items in this §3.1.

(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 and as otherwise provided in the Postmining Treatment Trust Consent Order and Agreement. 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 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.

§3.5 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, pledge, attachment, garnishment, sequestration, levy or other legal process, either voluntary, 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.

§3.6 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.

§3.7 The Trustee shall at least quarterly furnish the Participant 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 statement.

§3.8 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 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. Each Participant, upon request, shall furnish the Trustee with such information as may be reasonably required in connection with the preparation of such income tax or information returns.

## ARTICLE FOUR AMENDMENTS

§4.1 This Participation Agreement may be amended by an instrument in writing, executed by the Participant and the Trustee, with the consent and acknowledgment of the Department, or by the Trustee and the Department in the event Participant ceases to exist or defaults, but during the existence of the Participant any amendment under this paragraph cannot in any manner affect the irrevocable nature of the Trust.

## 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 Participant, 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:

Participant: Harbison-Walker Refractories Company  
Cherrington Corporate Center  
400 Fairway Drive  
Moon Township, PA 15108

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

Beneficiary: Pennsylvania Department of Environmental Protection  
Director, Bureau of Mining and Reclamation  
Fifth Floor, Rachel Carson Building  
400 Market Street  
Harrisburg, PA 17105-8461

§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.

## 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.

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:**

HARBISON-WALKER REFRACTORIES COMPANY

By \_\_\_\_\_

Its \_\_\_\_\_

*Jon A. Allegretti*  
*President*

**TRUSTEE:**

THE CLEAN STREAMS FOUNDATION, INC.

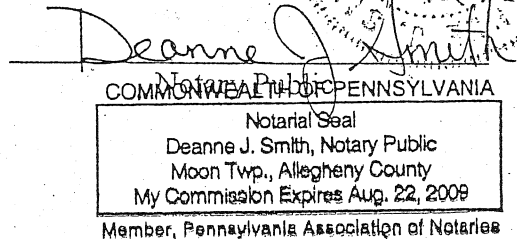
By \_\_\_\_\_

Its \_\_\_\_\_

STATE OF Pennsylvania  
COUNTY OF Allegheny to-wit:

The foregoing instrument was acknowledged before me this 22<sup>nd</sup> day of September, 2005, by Jon A. Allegretti, the President of HARBISON-WALKER REFRACTORIES COMPANY

My commission expires 8/22/2009.



STATE OF \_\_\_\_\_,  
COUNTY OF \_\_\_\_\_, to-wit:

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, the \_\_\_\_\_ of the CLEAN STREAMS FOUNDATION, INC.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

## CONSENT AND ACKNOWLEDGMENT

The Department of Environmental Protection hereby consents to Participant entering into this Participation Agreement pursuant to the Postmining Treatment Trust Consent Order and Agreement between Harbison-Walker and the Department dated 9/22/05 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: M. Michael W. Smith

Its: District Mining Manager

Date: 9/23/05

EXHIBIT "A"

AGREEMENTS BETWEEN

THE PARTICIPANT AND THE DEPARTMENT

DECLARATION OF TRUST  
FOR THE CLEAN STREAMS FOUNDATION, INC.

This Declaration of Trust ("Trust") is made on this 7<sup>th</sup> day of April, 2001, by the CLEAN STREAMS FOUNDATION, INC., a Pennsylvania nonprofit corporation, with its registered office at 160 North McKean Street, Kittanning, Pennsylvania 16201 (hereinafter, the "Foundation" or the "Trustee").

WHEREAS, the Clean Streams Foundation, Inc. is a non-profit corporation, organized under the laws of the Commonwealth of Pennsylvania and internal revenue code section 501(c)(3); and

WHEREAS, the purpose of the Foundation is to help assure that funds will be available in the future to operate and maintain treatment systems, to prevent or abate pollution, and to protect natural resources from the adverse impacts of untreated or improperly treated discharges into waters of the Commonwealth; and

WHEREAS, the Pennsylvania Surface Mining Conservation and Reclamation Act (SMCRA), requires a permittee to post with the Department of Environmental Protection, Commonwealth of Pennsylvania (Department), a bond for each operation conditioned upon the permittee performing all of the requirements of SMCRA, the Clean Streams Law and the Coal Refuse Disposal Control Act and SMCRA further provides for the bond to be released where all reclamation standards have been satisfied with the exception of consistently meeting mine drainage effluent standards provided the permittee has made provisions with the Department for the sound future treatment of the discharges. (52 P.S. Section 1396.4(d) and (g)); and

WHEREAS, the Pennsylvania Surface Mining Conservation and Reclamation Act authorizes the use of a trust fund, without limitation on duration, as an alternative financial assurance mechanism for the public purpose of protecting the environment and the health and welfare of the public by providing for the sound future treatment of discharges from mining operations. (52 P.S. Section 1396.4(d) and (d.2), 25 Pa. Code Section 86.158(f)); and

WHEREAS, the Foundation desires to act as the Trustee of funds to assure that such funds are available in the future to operate and maintain treatment systems, to prevent and abate pollution, and to protect natural resources from the adverse impacts of untreated or improperly treated discharges into waters of the Commonwealth.

NOW THEREFORE, in consideration of the foregoing and of the premises and undertakings set forth herein, and with the intention of being legally bound hereby, the Foundation makes this Declaration of Trust as follows:

## 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.

## ARTICLE TWO

### ESTABLISHMENT OF THE TRUST

§2.1 The Foundation hereby declares that it is establishing a Trust for the benefit of the Commonwealth of Pennsylvania acting through the Department to be utilized for the purpose of holding and administering funds paid to the Foundation for the operation of water treatment systems, to prevent and abate pollution, and to protect natural resources from the adverse impacts of untreated or improperly treated discharges into waters of the Commonwealth.

§2.2 The Foundation intends for the Commonwealth acting through the

Department to be the legal beneficiary of the Trust and to have all rights of a beneficiary under the law, as well as the rights granted under this Declaration of Trust.

§2.3 The Foundation shall accept payments, transfers, or property from Participants to provide funds and financial guarantees to assure that funds will be available in the future for the operation of certain treatment systems, for the prevention of pollution, and for the protection of natural resources and protection of the public health and welfare.

§2.4 The Foundation shall establish within the Trust a sub-account for each of the Treatment Systems or Participants covered by the Trust ("Sub-Account"). All payments and transfers by a Participant, all proceeds from guarantees provided by such Participant, transfers from any person to the Trustee which are designated to be used for said Treatment System, and all earnings thereon shall be credited to such Sub-Account, and all payments for the continued operation of the Treatment System shall be debited against such Sub-Account. The Trustee shall manage and make payments from the Sub-Account in accordance with the provisions of ARTICLE THREE, Distribution Payments, and ARTICLE FOUR, Trust Management, as set forth in this Declaration of Trust.

§2.5 The Trust Fund shall consist of:

- (a) All payments or transfers to the Trustee by Participants.
- (b) Such payments from time to time and at any time by Participants to the Trustee as such are directed by the Department.
- (c) Cash, funds or property from any person to the Trustee and accepted by the Trustee.
- (d) Any proceeds from guarantees, including but not limited to, letters of credit, insurance, surety bonds, etc., held by the Trustee and paid into the Trust Fund.



(e) All investments, reinvestments, assets or proceeds attributable to or derived from the foregoing items in this §2.5.

(f) All earnings, accretion and profits received with respect to the foregoing items in this §2.5.

§2.6 The Trust Fund and any other property held by the Trustee pursuant to this Declaration of Trust shall not be subject to assignment, alienation, pledge, attachment, garnishment, sequestration, levy or other legal process, either voluntary, 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, or other property held by the Trustee, and it is the intention that a Participant's payments or transfers to 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.

§2.7 Except as otherwise provided in this Declaration of Trust or in a 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 as provided for herein.

§2.8 The Trust Fund shall be held, administered, invested and reinvested by the Trustee, IN TRUST, as hereinafter provided, and all distributions therefrom shall be made in accordance with the provisions hereof.

## ARTICLE THREE

### DISTRIBUTION PAYMENTS

§3.1 The Trustee shall make distribution payments from the Trust upon the written direction of the Department and the Department shall designate the Sub-Account from which such payment shall be made in each written direction. The Department shall have the authority to designate, in writing, any person or entity to receive distribution payments from the Trust. The Trustee shall, upon receipt of a written direction for payment from the Department, make distribution payments from the Trust as directed by the Department. The Trustee shall be fully protected and entitled to rely upon the written directions of the Department, and shall not be liable to any party for acting in accordance with such directions.

§3.2 The Trustee is authorized to enter into contracts, take title to easements, rights of way and other property interests as necessary to carry out the purposes of the Trust. The Trustee is authorized to contract with or otherwise engage the services of, and pay reasonable compensation to, such persons or entities as the Trustee may require to carry out the purposes of the Trust. This Authorization is in addition to any other powers granted to the Trustee by this Declaration of Trust with regard to the retention or compensation of agents. Any property acquired or services provided under this provision shall not be deemed to be acquired or provided to the Trustee or the Department, but shall be deemed to be acquired or provided on behalf of the Trust, and the Trustee shall not incur any liability under the Trust when acting in accordance with the provisions of this paragraph.

§3.3 Except as provided by this Declaration of Trust, no other disposition of moneys shall be made unless directed, in writing, by the Department.

## ARTICLE FOUR

### TRUST MANAGEMENT

§4.1 The Trustee shall cause the Trust Fund to be held by a custodian, which must be a state-chartered or national bank or other financial institution that has trust powers or a trust company having offices in Pennsylvania whose activities are regulated by a state or federal agency which is approved by the Department.

§4.2 The Trustee is authorized to retain a third party administrator for purposes of performing the day-to-day administration of the Trust. The third party administrator shall perform those functions related to the Trust as directed by the Trustee and the Department. The third party administrator may receive payments from the Trust that are to be used to pay for operating the Treatment Systems and related activities. It shall be the responsibility of the third party administrator to pay the costs of operating the Treatment Systems in accordance with any instructions that may be issued by the Department in relation thereto.

§4.3 The Trustee shall invest and reinvest the principal and income of the Trust and shall keep the trust invested as a single fund, without distinction between principal and income. The Trustee shall add to principal any income not distributed pursuant to the provisions of this Declaration of Trust.

§4.4 The Trustee shall discharge its investment duty solely in the interest of the Department as the beneficiary of the Trust and, subject to the provisions of §4.5(g), the Trustee shall seek to manage the Trust with that degree of judgment, skill and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence, who are familiar with such matters, exercise in the management of their own affairs.

§4.5 For purposes of investing or reinvesting the assets in the Trust, the Trustee shall have investment discretion subject to the following guidelines:

- (a) The Trustee may purchase shares of any mutual funds or "money market funds" which have their assets invested in equity shares, including any fund for which the Trustee or any affiliate may be an advisor, subadvisor, manager, custodian or Trustee.
- (b) The Trustee may purchase any equity shares listed on a national stock exchange or that are capable of being valued in accordance with any other daily recognized valuation methodology.
- (c) The Trustee may purchase any bonds listed on a national exchange or that are capable of being valued in accordance with any other daily recognized valuation methodology, including, but not limited to, bonds or obligations of any state or municipality, or that are obligations of or are guaranteed by the United States of America.
- (d) The Trustee may invest in any interest bearing bank account or "money-market" account.
- (e) The Trustee may sell at public or private sale any assets acquired under this article.
- (f) In regard to any shares or equity interests the Trustee may hold, the Trustee may join in any merger, reorganization, voting-trust plan or any other concerted action of owners or shareholders.
- (g) The Trustee, in the exercise of its investment powers, may utilize puts and calls, short sales, options and warrants or other investment strategies generally recognized as prudent when utilized to enhance returns, reduce risks or mitigate loss.

(b) The Trustee may hold cash awaiting investment or distribution for a reasonable period of time, provided however, when possible and consistent with sound investment practices, shall invest such cash in overnight investments.

(i) The Trustee shall not be responsible for any losses incurred hereunder whether it be due to market fluctuations or otherwise, except in the case of its own gross negligence or willful misconduct or that of its agents. The Trustee shall not be liable for any losses incurred on any investments made with the approval of the Department pursuant to §11.2 of ARTICLE ELEVEN of this Declaration of Trust.

§4.6 The Trustee agrees, to the extent practicable and not inconsistent with the investment guidelines of §4.5, to coordinate the investment objectives of the Trust with consideration of the state and federal income tax consequences. To that end, the Trustee shall consider any investments that may act in a manner that would minimize the income tax consequences of the investment to the extent that the investment does not conflict with the investment guidelines of §4.5.

§4.7 Upon the receipt of any withdrawal instruction from the Department, the Trustee shall direct the custodian, in writing or verbally to be followed by written or facsimile confirmation, to pay said funds to the third party administrator for expenditure in accordance with any instructions of the Department.

§4.8 Whenever a withdrawal payment is made in relation to a particular Treatment System, the Sub-Account related to such Treatment System shall be reduced by the amount of such payment.

## ARTICLE FIVE

### EXPRESS POWERS OF TRUSTEE

§5.1 Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Declaration of Trust or by law, the Trustee is expressly authorized and empowered:

(a) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted.

(b) To register any securities held in the Trust in its own name or in the name of a nominee and to hold any security in bearer form or book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve Bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Trust and that such securities are not commingled with or made a part of any other account of another customer of the Trustee or of the Trustee itself.

(c) To hold title to real and personal property and to generally exercise all rights and privileges appurtenant to any property held by the Trustee as may be necessary to preserve, protect, transfer, convey or sell such property as may be directed by the Department, and to execute and deliver any and all instruments which may be necessary or

expedient in any powers granted under this Declaration of Trust.

§5.2 The Trustee may, from time to time, consult with counsel of its own choosing with respect to any question arising as to the construction or interpretation of this Declaration of Trust or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting in good faith upon the advice of its counsel.

§5.3 No person dealing with the Trust or the Trustee shall be obligated to inquire as to the authority of the Trustee in connection with the acquisition, investment, management or disposition of the Trust Funds or in connection with the exercise of any other power granted by this Declaration of Trust.

## ARTICLE SIX

### CLAIMS

§6.1 The Trustee shall not initiate, terminate, settle, compromise or otherwise adjust claims in favor of or against the Trust without written consent of the Department.

§6.2 The Trustee shall give prompt written notice to the Department and the affected Participant of each claim in favor of or against the Trust, specifying the amount and nature of such claim. The Trustee shall also give prompt written notice to the Department and the affected Participant of any controversies, demands, actions, losses, damages, costs or expenses or any other matter likely to give rise to a claim.

§6.3 The Department shall have the right, but not the duty to: (i) assume prosecution or defense of any claim in favor of or against the Trust, (ii) direct the Trustee to initiate, terminate, settle, compromise, prosecute, defend, or otherwise adjust claims in favor of or against the Trust, and (ii) participate in the prosecution of or defense against, any claim

in favor of or against the Trust. To the extent the Department directs the Trustee to assume prosecution or defense of any claim, the Trustee shall retain counsel of the Department's choosing or counsel selected by the Trustee and approved by the Department. If the Department directs the Trustee to assume the prosecution or defense of any claim, the Trustee shall prosecute or defend the claim at the expense of the Sub-Account for the affected Treatment System, and the Trustee shall be entitled to assess against the Trust Funds in such Sub-Account all costs associated therewith. Upon notice to the Trustee that the Department will assume prosecution or defense of any claim, the Trustee will not be responsible for the subsequent prosecution or defense, nor for any loss arising therefrom. If the Department fails to instruct the Trustee with respect to the prosecution or defense of any claim, the Trustee may prosecute or defend such claim, at the expense of the Trust and of the affected Sub-Account, but shall be under no duty to do so, and shall have no liability for its failure or refusal to prosecute or defend the claim if it deems such action to be in the best interest of the Trust.

## ARTICLE SEVEN

### EVALUATION AND REPORTS

§7.1 The Trustee shall at least quarterly furnish to the Department, a statement providing an accounting of all transactions involving the Trust and confirming the value of the Trust. 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 statement.

§7.2 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 Declaration of Trust. In addition, whenever called upon to do so, the Trustee shall exhibit to



the Department all documents, instruments, or reports relating to the Trust or the Trust Fund. 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 EIGHT

### EXPENSES, TAXES AND TRUSTEE COMPENSATION

§8.1 Compensation of the Trustee and all other reasonable and customary expenses incurred by the Trustee, including fees for legal services rendered to the Trustee, but excepting all taxes of any kind that may be assessed or levied against or in respect of the Trust, shall be taken and paid from the Trust Fund at such time as the Trustee shall deem appropriate. The initial compensation arrangement of the Trustee is set forth in a letter attached hereto and marked Schedule A. The Trustee must provide the Department and each Participant written notice of any proposed future changes of the Trustee compensation arrangement. The Department has thirty (30) days after receipt of the proposed changes to consult with the Participants and approve or disapprove the proposed changed to the Trustee compensation arrangement.

§8.2 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.

(a) Should it be determined that the Trust established pursuant to this Declaration of Trust is not a charitable trust or the law changes so the Trust becomes taxable for income tax purposes, then the Trustee shall notify the Department and the Participant. The money to pay the tax assessed or levied against the Trust shall not be taken from the

Trust unless the Trustee is authorized to do so by the Department or is otherwise required to do so by law.

(b) If, at any time, it is determined by a taxing authority with jurisdiction in the matter that the Trust is not a charitable trust, the Department and/or the Trustee shall have the right to appeal the decision to the appropriate authority. Should the Department or the Trustee not prevail on appeal or should the law change such that the Trust becomes taxable for income tax purposes, then the Department shall have the right, but not the duty, to petition the appropriate judicial forum to reform the Trust to be a charitable trust or to meet the requirement of law such that the Trust would not be taxable for income tax purposes. If the Department elects not to exercise its right to petition to reform the Trust, then the Trustee is empowered with the right to petition the appropriate judicial forum to reform the trust to be a charitable trust for income tax purposes. Notwithstanding any provision of this subsection (b) to the contrary, the Trust may not be reformed such that the purpose and objectives of the Trust cannot be met or that would alter the rights, obligations and duties of the Participants.

§8.3 If at any time the Trust itself shall become liable for any taxes, then the Trustee shall pay from the Trust and debit against any affected Sub-Account all such taxes then due and owing. As soon as possible after the happening of such event, the Trustee and the Department shall negotiate and enter into an agreement in respect of Trustee's payment of the taxes during the continuance of the Trust. Unless the Department directs to the contrary, immediately upon the happening of such event, the Trustee is directed and empowered (notwithstanding any provisions of this Declaration of Trust to the contrary) to change the investment objective of the Trust to an objective which minimizes the tax

liability of the Trust, giving due consideration to market conditions so as to avoid, to the extent possible, losses on the conversion of existing instruments. In carrying out this investment objective, the Trustee shall invest to the extent practicable in those investments set forth in §11.2 ARTICLE ELEVEN (Department's Assumption of the Trust) of this Declaration of Trust. Nothing in this section shall be deemed to nullify any obligation of a Participant for payment of any tax obligation or to compensate the Trust for such tax payments.

## ARTICLE NINE

### SUCCESSOR TRUSTEE

§9.1 The Trustee may resign or the Department may replace the Trustee for cause, which replacement is limited to replacement with a corporate trustee with trust powers and which is regulated by a state or federal agency. Any such action, however, shall only be effective after giving sixty (60) days notice to the Trustee. The Trustee's resignation or replacement shall not be effective until a successor trustee has been appointed, in writing, by the Department. The successor trustee shall have the same powers and duties as those conferred upon the Trustee, hereunder and shall be subject to the same reservations, limitations, terms and conditions. The successor trustee shall specify the date on which it will assume administration of the Trust, in writing, sent to the Trustees, all Participants and the Department, by certified mail, return receipt requested, not less than thirty (30) days before such assumption takes effect. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, convey and pay-over to the successor trustee the funds, surety bonds, and properties then constituting the Trust Fund and shall be discharged from any further liability or responsibility with regard to the administration of

the Trust.

## ARTICLE TEN

### INSTRUCTIONS OF THE TRUSTEE

§10.1 All directions, requests and instructions by the Department to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule B, or such other persons as the Department may designate by amendment, in writing, to Schedule B. The Trustee shall be fully protected and shall not be liable to any party for acting in accordance with the Department's directions, requests and instructions when authorized by this Declaration of Trust, and, to the extent necessary, shall be held harmless from the Trust Fund. The Trustee shall not have the right to assume, in the absence of written notice to the contrary, that an event constituting a change or termination of the authority of any person to act on behalf of the Department hereunder has occurred. The Trustee, upon receipt of directions, requests or instructions by the Department which are signed by persons purporting to be designated by the Department, but not listed on the Attached Schedule B or any amendment thereto, shall with due diligence ascertain if such persons are designated by the Department and have authority to act on behalf of the Department hereunder.

## ARTICLE ELEVEN

### DEPARTMENT'S ASSUMPTION OF THE TRUST

§11.1 If at any time during the period of the Trust established pursuant to this Declaration of Trust, the Department determines that a Participant has defaulted on any agreement, or statutory or regulatory obligation, the Trustee shall take necessary actions to vest in the Department all rights, titles and interest in such Sub-Account. The Department shall have the right to continue the Trust as to the Sub-Account or direct the Trustee to

terminate the Trust as to the Sub-Account and pay over to the Department any remaining funds in the Sub-Account, less final administration expenses of the Trustee. Upon payment of such funds to the Department, the Trustee shall not be subject to any action by the Participant or the Department with regard to any claim or matter arising from the administration of the Trust as to the Sub-Account.

§11.2 If the Department continues the Trust as to the Sub-Account, then the Department may direct and empower the Trustee (notwithstanding any provision of this Declaration of Trust to the contrary) to change the investment objective of the Sub-Account to an objective which minimizes the tax liability of the Trust, giving due consideration to market conditions so as to avoid, to the extent possible, losses on conversion of existing investments. If the Trustee is ever directed by the Department to carry out the preceding investment objective, the Trustee shall invest only in the following:

(a) Any bonds or obligations of any state or municipality that are exempt from federal income tax.

(b) Shares of any mutual fund or "money market fund" which has one hundred percent (100%) of its assets invested in the investments of the type described in the preceding subsections.

(c) Such other investments as may be approved by the Department.

## ARTICLE TWELVE

### TRUSTEE EXCULPATION

§12.1 The Trustee shall not be responsible for the enforcement or policing of any environmental action, nor be required to defend any claims relating thereto. The Trustee shall be a mere title holder and "fiduciary."

§12.2 As to all actions taken by the Trustee with respect to the administration of the Trust, the Trustee shall not be answerable or liable for the exercise or non-exercise of any discretion or power under this Declaration of Trust nor for anything whatever in connection with the Trust hereunder, except for its own gross negligence or willful misconduct or that of its agent. Except in the case of the Trustee's own gross negligence or willful misconduct, the Trustee shall be entitled to be exonerated and indemnified from the Trust fund against any and all losses, claims, costs, expenses and liabilities arising out of or in connection with the administration or distribution of the Trust Fund or the affairs of the Trust. In addition to the foregoing, as specified hereinbefore, the Trustee shall not be liable to any party for actions taken in accordance with the directions of the Department. The provisions of this §12.2 shall also extend to the employees and agents of the Trustee.

§12.3 The Trustee shall not be responsible for the enforcement or policing of any environmental action nor be required to defend any claims relating thereto. The Trustee shall be a mere title holder and "fiduciary" as defined in the Pennsylvania Act entitled: "The Economic Development Agency, Fiduciary and Lender Environmental Liability Protection Act," Act No. 3 of 1995, P.L. 33, 35 P.S. §§6027.1 through 6027.14, and its liability shall be limited as provided under Section 6 of the Act, 35 P.S. §6027.6.

## ARTICLE THIRTEEN

### IRREVOCABILITY AND TERMINATION

§13.1 The Trust or any Sub-Account in the Trust, shall be irrevocable and, except as provided in §11.1 of ARTICLE ELEVEN hereof, shall continue from the date of inception, unless otherwise terminated by the occurrence of any one of the following:

- (a) The Department determines that the Trust or any Sub-Account in the

Trust is no longer required; or

(b) The Trustee determines, for administrative reasons, it is impractical to continue the Trust or any Sub-Account in the Trust and the Department and all affected Participants agree. In the event any affected Participant disagrees with the Trustee's determination that the administration of the Trust renders it impractical to continue the Trust, and such Participant's disagreement results in continuation of the trust, then such Participant shall pay all expenses, fees, compensation and taxes associated with continuing the Trust.

§13.2 Upon termination of the Trust or any Sub-Account in the Trust under §13.1, the Trustee shall distribute any residuum, less final trust administration expenses of the Trustee, to the Department, unless directed otherwise, in writing, by the Department.

## ARTICLE FOURTEEN

### AMENDMENTS

§14.1 This Declaration of Trust may be amended by an instrument in writing, executed by the Trustee and the Department, but during the existence of any Participant any amendment under this paragraph cannot in any manner affect the irrevocable nature of the Trust.

## ARTICLE FIFTEEN

### NOTICES

§15.1 All notices, inquiries, directions or other written communications made or given pursuant to the Trust shall be given to the Department, the Participant, and the Trustee by certified mail, return receipt requested, 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.

§15.2 Any change in address shall be made by giving notice to all parties to the Trust.

## ARTICLE SIXTEEN

### CONSTRUCTION

§16.1 As used in this Declaration of Trust, words in the singular include the plural and words in the plural include the singular. Words shall be given 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 Declaration of Trust are for descriptive purposes only and shall not affect the interpretation or legal efficacy of this Declaration of Trust.

§16.2 In case of the merger or consolidation of any corporate Trustee serving hereunder, the resultant company shall become such trustee's successor without notice to any party.

§16.3 Any provision of this Declaration of Trust 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.

§16.4 All covenants and agreements contained herein shall be binding upon and inure to the benefit of the Department, the Trustee and all Participants, as well as their successors and assigns. Similarly, any request, notice, direction, consent, waiver or other



writing or action taken by the Department, the Trustee or any Participant shall bind their successors and assigns.

§16.5 It is the intention of this Declaration of Trust that the Trust remain in existence until terminated in accordance with the provisions of ARTICLE THIRTEEN hereof and that the Trust be exempt from the application of any rule against perpetuities by reason of the Department's beneficial interest herein because the Trust is authorized by the Surface Mining Control and Reclamation Act which contemplates no limitation on duration, and because the Trust is for the public purpose of assuring funds will be available in the future to ensure the Treatment Systems will continue to be operated to protect the environment and the health and welfare of the public. However, in the event that it is ever finally determined by a court with jurisdiction in the matter, that the Trust is subject to any such rule, then the Trust shall terminate twenty-one (21) years less one (1) day, after the death of the last descendent of Ambassador Joseph P. Kennedy living on the date of this Declaration of Trust, and the Trust Fund shall be distributed to the Department, less final trust administration expenses of the Trustee.

§16.6 This Declaration of Trust shall be construed and governed in all respects in accordance with the laws of the Commonwealth of Pennsylvania.

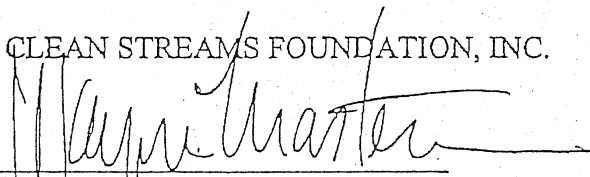
IN WITNESS WHEREOF, the Trustee has caused this Declaration of Trust to be executed by its duly authorized representative and attested as of the date first written above.

TRUSTEE:

THE CLEAN STREAMS FOUNDATION, INC.

By

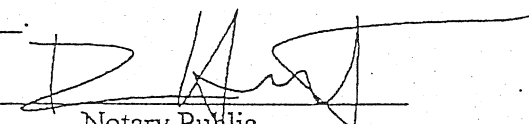
Its

  
Board Chairman

STATE OF Kentucky  
COUNTY OF Fayette, to-wit:

The foregoing instrument was acknowledged before me this 7<sup>th</sup> day of April, 2001, by Wayne Masterman, the Board Chairman of the CLEAN STREAMS FOUNDATION, INC.

My commission expires 2/26/2002.

  
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.

## SCHEDULE A

### TRUSTEE COMPENSATION SCHEDULE

1. The Trustee's compensation shall be determined according to the provisions of this schedule. (Schedule A of the Declaration of Trust for the Clean Streams Foundation, Inc. dated April 7, 2001.)
2. The Trustee's compensation shall be determined on a monthly basis and shall be equal to one-twelfth (1/12) of one and one-half (1 ½ %) percent of the Trust's asset value. The Trustee's compensation shall be in payment for all brokerage and custodial services, administrative expenses, and corporate operating expenses.
3. The Trustee's compensation shall be paid each month in advance, based on the month-end asset value for the previous month. The Trustee's compensation shall be deducted on the fifth business day of the month following the month-end. The Trustee's compensation shall be charged to each Trust Account and Sub-Account and automatically debited on the payment date. Payment will be reflected on the next account statement.
4. For the purpose of computing the Trustee's compensation, the value of assets shall be determined in good faith to reflect their estimated fair market value. To this end, the Trustee shall use statement values of settlement positions in custodial accounts whenever available.

## SCHEDULE B

### OFFICERS, EMPLOYEES OR AGENTS OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION ENTITLED TO DIRECT THE ACTIONS OF THE TRUSTEE

Revised October 3, 2003

1. For any sub-account under the Declaration of Trust:  
J. Scott Roberts, Deputy Secretary  
Mineral Resources Management  
Department of Environmental Protection  
OR his Designee.
2. For the Barnes & Tucker Fund Trust:  
Scott Horrell, Environmental Program Manager  
Cambria District Office Bureau of Abandoned Mine Reclamation
3. For the LTV Steel Trust:  
Michael Terretti, District Mining Manager  
Greensburg District Mining Office  
Department of Environmental Protection
4. For the Al Hamilton Trust:  
Michael W. Smith, District Mining Manager  
Hawk Run District Mining Office  
Department of Environmental Protection