

IN THE MATTER OF:

Docket # 993087  
ENF # 4960

PBS Coals, Inc.  
1576 Stoystown Road  
Friedens, Pennsylvania 15541

and

Smithfield Trust Company  
20 Stanwix Street, Suite 650  
Pittsburgh, PA 15222-4801

POST-MINING DISCHARGE TREATMENT TRUST AGREEMENT

This Trust Agreement ("Trust" or "Agreement") entered into this 17<sup>th</sup> day of March, 1999, by and between PBS Coals, Inc., with its principal place of business at Friedens, Pennsylvania ("Settlor") and Smithfield Trust Company, with its principal place of business at Pittsburgh, Pennsylvania and incorporated under the laws of the Commonwealth of Pennsylvania, ("Trustee").

WHEREAS, the Settlor has entered into a Consent Order and Agreement on the same day as this Trust Agreement ("CO&A") with the Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter referred to as "Department" or "Beneficiary") which contains, among other things, a requirement that the Settlor provide financial guarantees to assure that funds will be available to provide for the Settlor's legal obligation to operate five mine drainage treatment systems to pump and treat and otherwise prevent discharges of mine drainage emanating from or hydrologically connected to a number of Settlor's mines; and

WHEREAS, the five treatment systems consist of: the "Job 1 System", located on the Clear Run Mine, Permit Nos. 56813006 and 56813006; the "Childers System", located on the Clear Run No. 2 Mine, Permit No. 56840107; the "Indian Lake System", located in Indian Lake Borough near Clear Run Road, hydrologically

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connected to Permit No. 50663112; the "Job 8 System", located on the Clear Run Mine, Permit Nos. 56813006 and 56813006; and the "Job 5 System", located on the Job 5 Mine, Permit No. 56920112, which are collectively referred to as the "Clear Run Treatment Systems"; and

WHEREAS, the use of a trust fund is authorized as an alternative financial assurance mechanism under provisions of the Pennsylvania Surface Mining Conservation and Reclamation Act and which contemplates such a trust is for the public purpose of protecting the environment and the health and welfare of the public, without limitation on duration, 52 P.S. §1396.4(d) and (d.2), 25 Pa. Code §86.158(f); and

WHEREAS, the Settlor has elected to establish this trust to assure funds will be available in the future to provide for Settlor's legal obligation to operate the "Clear Run Treatment Systems" in the event Settlor should ever fail, refuse or become unable to continue to operate the "Clear Run Treatment Systems".

WHEREAS, the Settlor, acting through its duly authorized officials or representatives and with the approval of the Department, has selected the Trustee under this Agreement; and

WHEREAS, the Trustee has agreed and is willing to perform the duties as are required to be performed pursuant to this Agreement.

WHEREAS, the Department has joined in the Agreement to evidence its acceptance of the terms and conditions set forth herein, as well as the powers and authorities granted hereunder.

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

### ESTABLISHMENT OF THE TRUST

§1.1 The Settlor and the Trustee hereby establish this Trust for the benefit of the Department or its successor, to be utilized for the sole purpose of providing for the continued operation of the Clear Run Treatment Systems in the event Settlor should fail, refuse or become unable to operate the Clear Run Treatment Systems. For the purposes of this Trust Agreement, operation includes, but is not limited to the operation, maintenance and replacement of the currently existing and functioning treatment facilities approved by the Department and any other which may be required in the future.

§1.2 The Settlor and the Trustee intend for the Department to be the legal beneficiary of this Trust and to have all rights of a beneficiary under the law, as well as all rights granted under this Trust Agreement. The Department and the Settlor shall have access to the Trust as provided herein.

§1.3 The Trust principal, excluding any surety bonds held for safekeeping for benefit of the Trust as hereinafter provided, shall consist of:

(a) The initial payment or transfer to the Trustee of \$336,000.00 by Settlor.

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(b) The delivery by the Settlor to the Trustee various surety bonds provided by Settlor and which shall name the Trustee as the Department's designee for purposes of declaring a forfeiture of the surety bonds. The total sum of the surety bonds are \$3,249,400.00. The Trustee shall hold such surety bonds for purposes of safekeeping, but 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 bonds in full force and effect, shall remain the obligation of the Settlor.

(c) Such payments from time to time and at any time by the Settlor to the Trustee as such are directed by the Department as provided by the Consent Order and Agreement of the same date as this Trust Agreement.

(d) Cash, funds or property from any other person to the Trustee and accepted by the Trustee.

(e) Any proceeds from surety bonds held by the Trustee and forfeited in accordance with provisions of this Agreement.

(f) All investments, reinvestments, assets or proceeds attributable to or derived from the foregoing items in this §1.3.

**§1.4** The surety bonds delivered by Settlor shall be held for safekeeping by the Trustee until the Department either directs the Trustee to release such bond or portion thereof or the Department directs the Trustee to forfeit the surety bonds and deposit the proceeds of such forfeiture into the Trust. The Trustee shall take no action with respect to the surety bonds except as directed, in writing, by the

Department in accordance with the provisions of this Agreement and the Trustee shall not be liable to any party for acting in accordance with such directions.

§1.5 All of the preceding payments, surety bonds, proceeds and assets referred to in §1.3 shall constitute the Trust principal and, together with all earnings, accretions and profits therefrom, less any payments or distributions made by the Trustee pursuant to the terms of this Agreement, shall constitute the Trust Fund.

§1.6 The Trustee shall establish within the Trust Fund a sub-account designated as "Sub-Account For Perpetual Treatment" (hereinafter "Sub-Account") and shall consist of either an initial payment or transfer to the Trustee by the Settlor of \$245,000 or in the alternative, shall be a payment or payments made by Settlor during a period of time which begins at the inception of this Trust and ends on the close of the first business day of January, 2003, and which singly or in the aggregate shall be not less than \$345,000.00. Such payment or payments may be made by Settlor from time to time and at anytime from inception of this Trust until the close of the first business day of January, 2003. The Trustee shall manage and make payments from the Sub-Account in accordance with the provisions of ARTICLE TWO, Distribution Payments, and ARTICLE THREE, Trust Management, as set forth in this Trust Agreement.

§1.7 The Trust Fund and any other property held by the Trustee pursuant to this Trust 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

Settlor and shall not be subject or applied to the debts, obligations or liabilities of the Settlor, 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 Settlor shall have no legal title to any part of the Trust Fund, and it is the intention of the parties to this Agreement that the Settlor's entry into the Trust shall extinguish and remove all of Settlor's interest in the Trust from Settlor's estate under the Bankruptcy Code or similar laws.

§1.8 Except as otherwise provided in this Agreement, all payments made to the Trustee or deposits into the Trust by the Settlor shall be irrevocable once made, and upon delivery thereof by the Settlor, all interest of the Settlor 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.

§1.9 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.

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

## ARTICLE TWO

### DISTRIBUTION PAYMENTS

§2.1 The Trustee shall make distribution payments from the Trust upon the written order of the Department and the Department shall designate the account from which such payment shall be made. The Department shall have the authority to designate, in writing, any person or entity to receive distribution payments from the Trust, which may include, but is not limited to, the Settlor or Settlor's successors, assignees or designees. The Trustee shall, upon receipt of a written order for payment from the Department, make distribution payments from the Trust as directed in the Department's written order. The Trustee shall be fully protected and entitled to rely upon the written orders of the Department, and shall not be liable to any party for acting in accordance with such directions.

§2.2 The Trustee is authorized, upon the written order of the Department, 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, upon the written order of the Department, 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 this provision. This Authorization is in addition to any other powers granted to the Trustee by this Agreement 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.

§2.3 Except as provided by this Agreement, no other disposition of monies shall be made unless directed, in writing, by the Department.

### ARTICLE THREE

#### TRUSTEE MANAGEMENT

§3.1 With the exception of the discretion granted the Trustee under §1.6 of ARTICLE ONE, 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 Agreement.

§3.2 The Trustee shall discharge its investment duty solely in the interest of the Department as the beneficiary of this Trust and, subject to the provisions of §3.3(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.

§3.3 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 which have their assets invested in equity shares, including any mutual 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 or regional stock exchange or that are capable of being valued in accordance with any other daily recognized valuation methodology.

(c) The Trustee may sell at public or private sale any shares acquired under this article.

(d) 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.

(e) 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 risk or mitigate loss.

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

(g) 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 §10.3 of ARTICLE TEN of this Agreement.

§3.4 The Trustee agrees, to the extent practicable and not inconsistent with the investment guidelines of §3.3, to coordinate the investment objectives of the Trust with the state and federal income tax circumstances of the Settlor. To that end, the Trustee shall meet with the Settlor at least twice annually, with one meeting to occur at the end of the third quarter of the Settlor's fiscal year to consider any investments that may act in a manner that would minimize the income tax consequences to the Settlor. The Trustee, in its discretion, may invest in such investments to the extent the investment does not conflict with the investment guidelines of §3.3.

#### ARTICLE FOUR

##### EXPRESS POWERS OF TRUSTEE

§4.1 Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement 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 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, and to execute and deliver any and all instruments which may be necessary or expedient in any powers granted under this Trust Agreement.

§4.2 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 Agreement 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.

§4.3 The Trustee shall not be required to furnish any bond or other security in any jurisdiction.

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§4.4 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 Trust Agreement.

## ARTICLE FIVE

### CLAIMS

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

§5.2 The Trustee shall give prompt written notice to the Department and the Settlor 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 Settlor of any controversies, demands, actions, losses, damages, costs or expenses or any other matter likely to give rise to a claim.

§5.3 After receiving written notice from the Trustee of a claim, the Department will consult with the Settlor regarding Settlor's views of the claim. Notwithstanding this consultation with the Settlor, at the expiration of a period of twenty calendar days from the date the Department received written notice of a claim, the Department shall have the right, to be exercised in the sole discretion of the Department, to proceed under the provisions of §5.4.

§5.4 The Department shall have the right, but not the duty to: (i) Direct the Trustee to initiate, terminate, settle, compromise or otherwise adjust claims in

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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 Trust, and the Trustee shall be entitled to assess against the Trust Fund 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, 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 interests of the Trust.

## ARTICLE SIX

### EVALUATION AND REPORTS

§6.1 The Trustee shall at least quarter-annually furnish to the Department and to the Settlor, 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. If requested by the Settlor, the

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Trustee shall also furnish an annual statement to the Settlor as of the close of the Settlor's fiscal year, which statement shall be due thirty (30) days after the close of the fiscal year period.

§6.2 The Trustee shall be responsible for the keeping of all appropriate books and records relating to the receipt and disbursement of all monies and assets under this Trust Agreement. In addition, whenever called upon to do so, the Trustee shall exhibit to the Settlor and 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 returns required to be filed with respect to the Trust and shall execute and file such returns. The Settlor and the Department, upon request, shall furnish the Trustee with such information as may be reasonably required in connection with the preparation of such income tax returns.

## ARTICLE SEVEN

### EXPENSES, TAXES AND TRUSTEE COMPENSATION

§7.1 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 B. The Trustee must provide the Department and the Settlor written notice of any proposed future changes of the Trustee compensation arrangement. The

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Department has thirty (30) days after receipt of the proposed changes to consult with the Settlor and approve or disapprove the proposed changes to the Trustee compensation arrangement.

§7.2 The Trust is intended to be categorized, for federal income tax purposes, as a grantor trust in accordance with and under the provisions of United States Treasury Regulation Section 301.7701-4(e)(1), (2), (3) and (4) and any implementing regulations cited therein or any corresponding successor provision. All federal taxes of any kinds that may be assessed or levied against or in respect of the Trust shall be paid by the Settlor and shall not be taken from the Trust. The Trustee shall enter into such Agreements with the Settlor as are necessary to carry out this provision.

§7.3 The Trust is intended to be categorized, for state income tax purposes, as a Pennsylvania charitable trust.

(a) Should it be determined this Trust is not a charitable trust or Pennsylvania law changes so this Trust becomes taxable for Pennsylvania income tax purposes, then Settlor agrees that Settlor will contribute to the Trustee the amount of the Pennsylvania income tax assessed or levied against or in respect of the Trust. The Trustee shall use the money contributed by the Settlor to pay the income tax assessed or levied against or in respect of the Trust. The money to pay the tax assessed or levied against the Trust shall not be taken from the Trust. The Trustee shall enter into such agreements with the Settlor as are necessary to carry out this provision.

(b) If, at any time, it is determined by a taxing authority with jurisdiction in the matter that this Trust is not a Pennsylvania charitable trust, the Settlor and the Trustee agree the Department shall have the right to appeal the decision to the appropriate authority. Should the Department not prevail on appeal or should Pennsylvania law change such that the Trust becomes taxable for Pennsylvania 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 Pennsylvania charitable trust or to meet the requirements of Pennsylvania law such that the Trust would not be taxable for Pennsylvania 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 Pennsylvania charitable trust for Pennsylvania 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 any of the rights, obligations and duties of the Settlor as are provided in this Trust Agreement and in the consent order and agreement between the Department and the Settlor executed the same day as this Trust Agreement.

§7.4 If at any time that the Trust itself shall become liable for any taxes, and if the Settlor shall fail, refuse or be unable to pay these taxes from its own funds, then the Trustee shall pay from the Trust Fund all such taxes then due and owing. As soon as possible after the happening of the Settlor failing, refusing or becoming unable to pay such taxes, except to the extent that the Settlor disputes the payment



of such taxes in good faith, 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 this Agreement. Further, unless the Department and the Trustee otherwise agree to the contrary, immediately upon the happening of the Settlor's failure, refusal or inability to pay any such taxes, the Trustee is directed and empowered (notwithstanding any provision of this Agreement 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 in those investments set forth in §10.3 of ARTICLE TEN (Department's Assumption of the Trust) of this Agreement.

## ARTICLE EIGHT

### SUCCESSOR TRUSTEE

§8.1 The Trustee may resign or the Settlor may replace the Trustee at Settlor's discretion, which discretion 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 by the Settlor after giving sixty (60) days notice to the Department. The Trustee's resignation or replacement shall not be effective until a successor trustee has been appointed and such appointment confirmed, in writing, by the Department, which confirmation will not be unreasonably withheld. The successor trustee shall have the same powers and

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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 Trustee, Settlor 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 hereunder 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 NINE

### INSTRUCTIONS OF THE TRUSTEE

§9.1 All orders, requests and instructions by the Department to the Trustee shall be in writing, signed by such persons as are designated in the attached Schedule A, or such other persons as the Department may designate by amendment, in writing, to Schedule A. The Trustee shall be fully protected and shall not be liable to any party for acting in accordance with the Department's orders, requests and instructions when authorized by this Agreement, 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

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orders, 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 A or any amendment thereto, shall with due diligence ascertain if such persons are designated by the Beneficiary and have authority to act on behalf of the Beneficiary hereunder.

## ARTICLE TEN

### BENEFICIARY ASSUMPTION OF THE TRUST

§10.1 If at any time during the period of this Trust, the Settlor: (i) fails, refuses or is unable to make payments to the Trust, (ii) fails, refuses or is unable to operate, maintain, or replace the treatment facility, or (iii) fails, refuses or is unable to pay the taxes that may be assessed or levied against or in respect of the Trust, the Department shall provide the Settlor and the Trustee written notice, sent certified mail, return receipt requested, of such default and the Department's intention to assume ownership of the Trust within ninety (90) days of the date of such notice. However, if Settlor's failure or refusal to pay taxes assessed or levied against the Trust is because Settlor is legally contesting the taxes, such failure or refusal will not be considered a default by the Settlor. If the Settlor cannot with due diligence cure its default or Settlor commences to cure its default within the ninety (90) day period, but fails to diligently thereafter pursue such cure of its default, then the Department shall have the right to immediately notify the Trustee of the Settlor's failure to cure its default and, immediately upon receipt of the Department's notification, the Trustee shall: (i) declare forfeit any and all surety

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bonds where the Trustee has been identified as the Department's designee for purposes of forfeiture and deposit all proceeds therefrom in the Trust and (ii) vest in the Department all rights, titles and interest in the Trust.

§10.2 Upon vesting in the Department all rights, titles and interest in the Trust, the Department shall have the right to continue the Trust or direct the Trustee to terminate the Trust and pay over to the Department any remaining funds, 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 Settlor or the Department with regard to any claim or matter arising from the administration of this Trust.

§10.3 If the Department continues the Trust, then the Department may direct and empower the Trustee (notwithstanding any provision of this Agreement 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 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 (a).

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

## ARTICLE ELEVEN

### TRUSTEE EXCULPATION

§11.1 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" 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. §§6021.7 through 6027.14, and its liability shall be limited as provided under Section 6 of the Act.

§11.2 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 nonexercise of any discretion or power under this Agreement nor for anything whatever in connection with the Trust hereunder, except for its own gross negligence or willful misconduct or that of its agents. 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 §11.2 shall also extend to the employees and agents of the Trustee.

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## ARTICLE TWELVE

### IRREVOCABILITY AND TERMINATION

§12.1 The Trust shall be irrevocable and, except as provided in §16.5 of ARTICLE SIXTEEN hereof, shall continue from the date of inception, unless otherwise terminated by the occurrence of any one of the following:

- (a) The Beneficiary determines that the Trust is no longer required; or
- (b) The Trustee determines administration of the Trust renders it impractical to continue the Trust and the Settlor and the Beneficiary agree. In the event the Settlor disagrees with the Trustee's determination that the administration of the Trust renders it impractical to continue the Trust, and Settlor's disagreement results in continuation of the Trust, then the Settlor shall pay all expenses, fees, compensation and taxes associated with continuing the Trust.

§12.2 Upon termination of the Trust, under §12.1(a), the Trustee shall distribute any residuum, less final trust administration expenses of the Trustee, to the Settlor, or any successors or assigns of the Settlor. Should the Settlor not exist at the time of termination and there are no successor or assigns of the Settlor, then the residuum shall be distributed to the Department. Upon termination of the Trust under §12.1(b), 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 THIRTEEN**

**AMENDMENTS**

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

**ARTICLE FOURTEEN**

**NOTICES**

§14.1 All notices, inquiries, directions or other written communications made or given pursuant to the Trust shall be given to the Settlor, 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:

Settlor:        PBS Coals, Inc.  
                  1576 Stoystown Road  
                  Friedens, PA 15541

Department:    Director, Bureau of District Mining Operations  
                     Department of Environmental Protection  
                     3913 Washington Road  
                     McMurray, PA 15317

and

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District Mining Manager  
Ebensburg District Office  
Department of Environmental Protection  
437 South Center Street  
P.O. Box 625  
Ebensburg, PA 15931-0625

Trustee: Smithfield Trust Company  
20 Stanwix Street, Suite 650  
Pittsburgh, PA 15222-4801

§14.2 Any change in the above addresses shall be made by giving notice to all parties to the Trust.

## ARTICLE FIFTEEN

### INTERPRETATION

§15.1 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 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.

## ARTICLE SIXTEEN

### CONSTRUCTION

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

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§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 Trust Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

§16.4 All covenants and agreements contained herein shall be binding upon and inure to the benefit of the Settlor, 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 Settlor, the Department or the Trustee shall bind their successors and assigns.

§16.5 It is the intention of the parties hereto that this Trust remain in existence until terminated in accordance with the provisions of ARTICLE TWELVE 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 Pennsylvania Surface Mining Conservation 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 Clear Run Treatment Systems will continue to be operated to protect the environment and the health and welfare of the public should the Settlor ever fail,

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refuse or become unable to continue to operate the Clear Run Treatment Systems. 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 Trust Agreement, and the Trust Fund shall be distributed to the Beneficiary, less final trust administration expenses of the Trustee.

**ARTICLE SEVENTEEN**

**SITUS**

§17.1 It is the intention of the parties hereto that the Trust created by this Trust Agreement shall have a legal situs in Allegheny County, Pennsylvania.

\*\*\*\*\*

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IN WITNESS WHEREOF, the parties have cause 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.

**ATTEST:**

Jay Zimmerman, Sec.  
Name and Title

Jay Zimmerman  
Signature

**SETTLOR: PBS Coals Inc.**

Robert Scott, Pres.  
Name and Title

Robert Scott  
Signature

**ATTEST:**

Robert Y. Kopf, Jr., Chairman & CEO  
Name and Title

Robert Y. Kopf Jr.  
Signature

**TRUSTEE: Smithfield Trust Co.**

Douglas W. Sherratt, President  
Name and Title

Douglas W. Sherratt  
Signature

**Department of Environmental Protection, Commonwealth of Pennsylvania**

Joseph G. Pizarich, Assistant Director  
Name and Title

Joseph G. Pizarich  
Signature

Joffrey D. Jarrett, Dir. BDMS  
Name and Title

Joffrey D. Jarrett  
Signature

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**ACKNOWLEDGMENT**

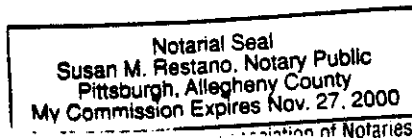
**COMMONWEALTH OF PENNSYLVANIA** :  
: **SS**  
**COUNTY OF ALLEGHENY**

On this, the 17<sup>th</sup> day of March, 1999, before me, a Notary Public, personally appeared DOUGLAS W. SHERRATT, who acknowledged himself to be the PRESIDENT of SMITHFIELD TRUST COMPANY and that he as such PRESIDENT being authorized to do so, executed the foregoing Instrument for the purposes therein contained on behalf of SMITHFIELD TRUST COMPANY.

WITNESS my hand and official seal the day and year aforesaid.

Susan M. Restano  
Notary Public

My Commission Expires



59 MAR 25 AM 10:14

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ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :  
COUNTY OF Somerset : SS

On this, the 17<sup>th</sup> day of ~~October, 1998~~ March 1999, before me, a Notary Public,  
personally appeared Robert Scott, who acknowledged  
himself/~~herself~~ to be the president of PBS COALS,  
INC., and that he/~~she~~ as such president, being  
authorized to do so, executed the foregoing Instrument for the purposes therein  
contained on behalf of PBS COALS, INC.

WITNESS my hand and official seal the day and year aforesaid.

Cindy L. Berkey  
Notary Public

My Commission Expires

Notarial Seal  
Cindy L. Berkey, Notary Public  
Somerset Twp., Somerset County  
Commission Expires Sept. 7, 2000  
Pennsylvania Association of Notaries

59 MAR 25 AM 11:14

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ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :  
COUNTY OF Somerset : SS

On this, the 17<sup>th</sup> day of March, 1999, before me, a Notary Public,

personally appeared Jeffrey D. Jarrett, who acknowledged  
himself/herself to be the Director BDMs of the

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE  
COMMONWEALTH OF PENNSYLVANIA, and that he/she as such  
Director BDMs, being authorized to do so, executed the  
foregoing Instrument for the purposes therein contained on behalf of the  
DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE  
COMMONWEALTH OF PENNSYLVANIA.

WITNESS my hand and official seal the day and year aforesaid.

Cindy L. Berkey  
Notary Public

My Commission Expires Notarial Seal  
Cindy L. Berkey, Notary Public  
Somerset Twp., Somerset County  
My Commission Expires Sept. 7, 2000  
Member, Pennsylvania Association of Notaries

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**SCHEDULE A**

**TO**

**POST-MINING DISCHARGE TREATMENT TRUST AGREEMENT**

**Officers, Employees or Agents of the Department of  
Environmental Protection Entitled to Direct the Actions of the  
Trustee Under the Trust Agreement**

1. **Jeffrey D. Jarrett, Director  
District Mining Operations  
Department of Environmental Protection**

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**SMITHFIELD TRUST COMPANY**  
**FEE SCHEDULE**

---

**TRUSTEE'S FEE**

\$ 500,000 ~ \$1,000,000	@	1.50%
\$1,000,000 ~ \$3,000,000	@	1.25%
\$3,000,000 ~ \$5,000,000	@	1.00%
*Over \$5,000,000	@	0.90%

(Minimum Annual Fee - \$7,500)

**INVESTMENT ADVISORY FEES**

\$ 500,000 ~ \$1,000,000	@	1.35%
\$1,000,000 ~ \$3,000,000	@	1.125%
\$3,000,000 ~ \$5,000,000	@	0.90%
*Over \$5,000,000	@	0.80%

(Minimum Annual Fee - \$6,750)

**CUSTODY FEES**

\$1,000,000 ~ \$3,000,000	@	0.50%
\$3,000,000 ~ \$5,000,000	@	0.25%
*Over \$5,000,000	@	0.15%

(Minimum Annual Fee - \$5,000)

**EXECUTOR OR ADMINISTRATOR**

**Principal Fee (Based on Estate Inventory Value)**

First \$250,000	@	5.00%
\$ 250,000 ~ \$ 500,000	@	4.00%
\$ 500,000 ~ \$1,000,000	@	3.00%
\$1,000,000 ~ \$3,000,000	@	2.50%
Over \$3,000,000	@	2.00%

**Income Fee**

On all income collected	@	5.00%
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**GUARDIANSHIPS**

(Same as Trustee's Fees - Subject to Orphans' Court Approval)

\*Accounts over \$5,000,000 may have fees negotiated based on total family assets under management.

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(REV. 6/98)



## EXHIBIT 5

YEAR	PAYMENT
1999	\$250,000.00
2000	\$257,500.00
2001	\$265,225.00
2002	\$273,181.75
2003	\$281,377.20
2004	\$289,818.52
2005	\$298,513.07
2006	\$307,468.47
2007	\$316,692.52
2008	\$326,193.30
2009	\$335,979.09
2010	\$346,058.47
2011	\$356,440.22
2012	\$367,133.43
2013	\$378,147.43
2014	\$389,491.85
2015	\$401,176.61
2016	\$413,211.91
2017	\$425,608.27
2018	\$438,376.51
2019	\$451,527.81
2020	\$465,073.64
2021	\$479,025.85
2022	\$493,396.63
2023	\$508,198.53
2024	\$523,444.48
2025	\$539,147.82
2026	\$555,322.25
2027	\$571,981.92
2028	\$589,141.38
2029	\$606,815.62
2030	\$625,020.09
2031	\$643,770.69
2032	\$663,083.81
2033	\$682,976.32
2034	\$703,465.61
2035	\$724,569.58
2036	\$746,306.67
2037	\$768,695.87
2038	\$791,756.75
2039	\$815,509.45
2040	\$839,974.73
2041	\$865,173.97
2042	\$891,129.19
2043	\$917,863.07
2044	\$945,398.96
2045	\$973,760.93
2046	\$1,002,973.76
2047	\$1,033,062.97
2048	\$1,064,054.86
2049	\$1,095,976.50

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Pennsylvania Department of Environmental Protection

Office of Chief Counsel  
Rachel Carson State Office Building  
P.O. Box 8464  
Harrisburg, PA 17105-8464  
October 5, 1998

717-787-7060  
FAX 717-787-9378

Bureau of Regulatory Counsel

VIA OVERNIGHT MAIL

Vincent J. Barbera, Esq.  
Barbera, Clapper, Bener,  
Rullo & Melvin  
146 W. Main Street  
P.O. Box 775  
Somerset, PA 15501-0775

Robert Scott, President  
PBS Coals, Inc.  
P.O. Box 260  
Friedens, PA 15541

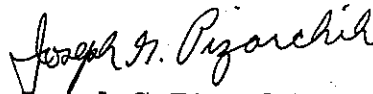
Re: Clear Run Treatment Trust and Consent Order and Agreement

Dear Gentlemen:

Enclosed for your review is the revised Consent Order and Agreement dated October 5, 1998, the Post Mining Discharge Treatment Trust Agreement dated October 2, 1998 and the Surety Bond Rider dated September 18, 1998. For ease of reading and understanding, a red lined version of these documents are not enclosed. Please read each entire document.

Once you have reviewed the documents, we will be happy to meet with you again to discuss any questions you may have.

Sincerely,

  
Joseph G. Pizarchik  
Assistant Director

Enclosures

cc: Jeff Jarrett  
~~Scott Florell~~  
Mike Sokolow  
Tim Kania  
George Knoll

cc: 56813006 Stonycreek/Somerset  
56840107 Stonycreek/Somerset  
Case File

