

**PARTICIPATION AGREEMENT  
FOR THE CLEANS STREAMS FOUNDATION, INC. TRUST**

This Participation Agreement ("Participation Agreement") entered into this 29<sup>th</sup> day of June 2006, by and between COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES ("DCNR") and the CLEAN STREAMS FOUNDATION, INC. ("Trustee" or "Foundation"), a Pennsylvania nonprofit corporation, with its place of business at 100 West Station Square Boulevard, Suite 1940, Pittsburgh, PA 15219.

WHEREAS, DCNR wishes to provide certain funds and property as described in the Memorandum of Understanding between DCNR and the Pennsylvania Department of Environmental Protection ("DEP") dated on or about June 7, 2006, which is incorporated herein by reference (the "Ohiopyle MOU"), for the design, permitting, construction, operation, maintenance and replacement, as necessary, of certain active and passive treatment facilities required to treat seeps and discharges on the former Smith Mine, Baldwin and Potato Ridge Mine properties located in Stewart Township, Fayette County, Pennsylvania; and

WHEREAS, the Foundation has established, through a Declaration of Trust dated April 7, 2001, a trust for the purpose of helping to assure that funds are available to the Commonwealth of Pennsylvania (the "Commonwealth") 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");

WHEREAS, the Trustee has agreed to establish the Ohiopyle Mines Treatment System Sub-Account ("Ohiopyle Sub-Account") within the Trust to fund certain treatment system facilities pursuant to a Participation Agreement with Kaiser Aluminum & Chemical Corporation ("Kaiser") dated on or about June 29<sup>7</sup>, 2006 (the "Kaiser Participation Agreement");

WHEREAS, the Trustee has agreed and is willing to accept certain funds and property from DCNR and Kaiser for deposit into the Ohiopyle Sub-Account and to perform the duties required pursuant to this Participation Agreement, the Kaiser 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 Unless otherwise defined herein, the capitalized terms in this Participation Agreement shall have the definitions set forth in the Declaration of Trust and the Ohiopyle MOU.

**ARTICLE TWO**  
**PARTICIPATION IN THE TRUST**

§2.1 DCNR agrees to transfer funds to the Ohiopyle Sub-Account as provided in the Ohiopyle MOU.

§2.2 The Foundation shall use its best efforts to expedite actions necessary for the design and construction of new facilities required to treat seeps and discharges from the Potato Ridge Mine, Smith Mine and Baldwin properties pursuant to this Participation Agreement.

§2.3 DCNR shall transfer the Smith Mine Discharge Property and Baldwin Property to the Foundation by deed as provided in the Ohiopyle MOU.

§2.4 DCNR agrees to lease Smith Mine Discharge and Baldwin Properties to CSF through a separate lease agreement to allow CSF to conduct activities associated with the

construction of treatment systems and initial treatment on the properties until the properties can be transferred to CSF.

**ARTICLE THREE**  
**ADMINISTRATION**

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

a. Funds and property transferred by DCNR pursuant to this Participation

Agreement;

b. Funds and property transferred by Kaiser pursuant to the Kaiser Participation

Agreement;

c. All investments, reinvestments, assets or proceeds attributable to or derived from the foregoing items in this §3.1.

(d) 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 Ohiopyle Sub-Account in accordance with the terms and conditions of the Declaration of Trust.

§3.3 The Trustee shall distribute such amounts from the Ohiopyle Sub-Account as DEP shall direct to pay for the design, permitting, construction, operation, maintenance and replacement, as necessary, of the treatment systems contemplated by this Agreement. This amount shall be paid to a third party administrator to the Trust, who shall be responsible for paying the costs associated with the treatment systems in accordance with any instructions that may be issued by DEP in relation thereto.

§3.4 DCNR understands that the Trust is intended to be categorized, for federal and state income tax purposes, as a charitable trust in accordance with and under the provisions of

Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and any implementing regulation cited therein or any corresponding successor provision.

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

§3.6 The funds in the Ohiopyle 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 DCNR and shall not be subject or applied to the debts, obligations or liabilities of DCNR, including, without limitation, any direct action or seizure by any creditor or claimant under any writ or proceeding at law or in equity.

§3.7 Except as otherwise provided in this Participation Agreement, all payments made to the Trustee or deposits into the Ohiopyle Sub-Account by DCNR shall be irrevocable once made, and upon delivery thereof by DCNR, all interest of DCNR 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 DEP and the Trust as provided herein.

§3.8 The Trustee shall at least quarterly furnish DEP and DCNR a statement providing an accounting of all transactions involving the Ohiopyle Sub-Account and confirming the value

of the Ohiopyle 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.

§3.9 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 Participation 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.

§3.10 The Trustee is authorized to divide the funds in the Ohiopyle Sub-Account into one or more sub-accounts as it may deem appropriate.

#### **ARTICLE FOUR** **AMENDMENTS**

§4.1 This Participation Agreement may be amended by an instrument in writing, executed by DCNR and the Trustee, with the consent and acknowledgment of the DEP, or by the Trustee and the DEP, provided that any amendment under this paragraph shall not in any manner affect DCNR or the irrevocable nature of the Trust.

#### **ARTICLE FIVE** **NOTICES**

§5.1 All notices, inquiries, directions or other written communications made or given pursuant to this Participation Agreement and the Trust shall be given to DCNR, DEP 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: Pennsylvania Department of Conservation and Natural Resources  
Director, Bureau of State Parks  
8<sup>th</sup> Floor, Rachel Carson State Office Building  
400 Market Street  
Harrisburg, Pennsylvania 17105-8767

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

Beneficiary: Pennsylvania Department of Environmental Protection  
Deputy Secretary for Mineral Resources Management  
16th Floor, Rachel Carson State Office Building  
P.O. Box 2063  
400 Market Street  
Harrisburg, Pennsylvania 17105-2063

§5.2 Any change in the above addresses or method of providing notice 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 Commercial Arbitration Rules of the American Arbitration Association then in effect without regard to the date of execution of this Participation Agreement.

#### **ARTICLE SEVEN CONSTRUCTION**

§7.1 As used in this Participation Agreement, words in the singular include the plural and words in the plural include the singular. Words used in this Participation Agreement shall be

given the meaning set forth in the Declaration of Trust, the Ohio Pyle MOU or this Participation Agreement, 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 Participation Agreement are for descriptive purposes only and shall not affect the interpretation or legal efficacy of this Participation Agreement.

§7.2 Any provision of this Participation 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 the Parties, including their successors and assigns, and shall inure to the benefit of the Parties and the DEP, including their successors and assigns. Similarly, any request, notice, direction, consent, waiver or other writing or action taken by DCNR, DEP or the Trustee shall bind their successors and assigns.

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

THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK.

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

THE CLEAN STREAMS FOUNDATION, INC.

By Wayne Washburn  
Its Board Chairman

Attest: [Signature]

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES:

Michael W. Bearden  
By \_\_\_\_\_  
Its \_\_\_\_\_

Form & Legality Review:

Kristy A. Hammel  
DCNR Chief Counsel

[Signature]  
Executive Deputy General Counsel  
Office of General Counsel

[Signature]  
Deputy Attorney General  
Office of Attorney General

ME 400009729

Certification of Availability of Funds:

Account Code: 6014805000 3826211001 6343117 - 8 612,597.22  
1039506000 3826211001 6343117 2,049,902.76

[Signature] 6/22/04  
Comptroller

**CONSENT AND ACKNOWLEDGMENT**

The Department of Environmental Protection hereby consents to DCNR entering into this Participation Agreement pursuant to the Ohioyle MOU and acknowledges the status of the Commonwealth and the Department 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 *Paul R. Rontoni*

Its *DISTRICT MINING MGR.*