

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Action Mining, Inc. : SMP No. 56663069 (Summit No. 2 Mine)
1117 Shaw Mines Road : SMP No. 56823066 (Summit No. 3 Mine)
Meyersdale, PA 15552-7228 : SMP No. 56803015 (Elk Lick No. 1 Mine)
: SMP No. 56950101 (Poorbaugh Strip)
: SMP No. 56860104 (Schrock Strip)
: MDP No. 5679123 (Romesburg Strip Mine)

and

Future Industries, Inc. : SMP No. 56880103 (Jopa No. 1)
P.O. Box 157 : Somerset County
Meyersdale, PA 15552-0157 : Alternative Financial Assurance Mechanism
: CO&A

POSTMINING TREATMENT TRUST CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement is entered into this 18th day of February 2010 ^(ME),
by and between the Commonwealth of Pennsylvania, Department of Environmental Protection
("Department"), and Action Mining, Inc. and Future Industries, Inc.

The Department has found and determined the following:

A. The Department is the agency with authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P. L. 1987, as amended, 35 P. S. §§ 691.1 et seq., ("Clean Streams Law"); the Surface Mine Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, as amended, 52 P. S. § 1396.1 et seq., ("Surface Mining Act"), Section 1917-A of the Administrative Code, Act of April 9, 1929, P. L. 177, as amended, 71 P.S. § 510-17, and the Rules and Regulations adopted thereunder.

B. Action Mining, Inc. ("Action") is a Pennsylvania corporation with a business address of 1117 Shaw Mines Road, Meyersdale, Pennsylvania 15552-7228, whose officers are Larry R. Sanner and Douglas L. Sanner. Larry R. Sanner is the president and is responsible for the day to day operations. Action's business includes the mining of bituminous coal by the

surface method in the Commonwealth of Pennsylvania pursuant to Surface Mining Operator's License No. 1423.

C. Future Industries, Inc. ("Future") is a Pennsylvania corporation with a business address of P.O. Box 157, Meyersdale, Pennsylvania 15552-0157, whose officers are Larry R. Sanner and Douglas L. Sanner. Larry R. Sanner is the president and is responsible for the day to day operations. Future's business includes the mining of bituminous coal by the surface method in the Commonwealth of Pennsylvania. pursuant to Surface Mining Operator's License No. 1655.

D. Action and Future are two separate corporations that each have the same corporate officers. The mining permits associated with post-mining discharge liabilities for these entities have been combined into a single post mining treatment trust agreement under Action.

E. Action and Future are permittees of the following bituminous surface coal mines that are associated with post-mining discharge liability:

| NAME | SMP/MDP | TOWNSHIP | COUNTY |
|----------------------|----------------------|-----------------|---------------|
| Summit No. 2 Mine | 56663069 (Action) | Summit | Somerset |
| Summit No. 3 Mine | 56823066 (Action) | Summit | Somerset |
| Elk Lick No. 1 Mine | 56803015 (Action) | Elk Lick/Summit | Somerset |
| Poorbaugh Strip | 56950101 (Action) | Brothersvalley | Somerset |
| Schrock Strip | 56860104 (Action) | Brothersvalley | Somerset |
| Romesburg Strip Mine | 5679123 (Action MDP) | Southhampton | Somerset |
| Jopa No. 1 | 56880103 (Future) | Summit | Somerset |

**ORIGINAL POSTMINING TREATMENT CO&A AND TRUST OBLIGATION FOR
SUMMIT NO. 2 MINE, SUMMIT NO. 3 MINE AND ELK LICK NO. 1 MINE**

F. On February 12, 2002, Action entered into a Postmining Treatment Trust Consent Order and Agreement ("2002 COA") to assure long term treatment of discharges on the Summit 2, Summit 3 and Elk Lick 1 mine sites.

G. Also, on February 12, 2002, Action signed a Post-Mining Discharge Treatment Trust Agreement ("Trust Agreement") which established (the Action Mining Treatment Trust or "Trust"), a post-mining treatment trust with Somerset Trust Company as Trustee.

H. As of the July 28, 2008, annual meeting which is required by Paragraph 16 of the 2002 COA, the Department determined that Action has complied with its obligations under the 2002 COA and had fully funded the Trust.

I. Action would like to add four additional sites (described in Paragraphs K through II below) into the Trust to meet its long-term post mining treatment obligations for those four permits. At the same time, the Department and Action have agreed to make certain other changes, including establishment of a capital improvement subaccount and a provision for liability insurance.

J. In addition to this COA, Action is amending the Trust Agreement.

POORBAUGH STRIP (56950101)

K. The permit for the Poorbaugh Strip was initially issued to Action as SMP 56950101 on August 24, 1995.

L. All mining has been completed on the Poorbaugh Strip mine site. The only activity which remains is treatment of acid mine drainage discharges that are identified as MD1, MD2 and MD3. All discharges are characterized by depressed pH, acidity greater than alkalinity, and elevated metals concentrations that exceed the limitations of 25 Pa Code § 87.102.

M. MD1 is an on-permit discharge that Action has been treating with caustic soda, since May 2003. The MD1 treatment facility consists of a limestone-filled sump that collects the seepages and directs this flow to and through a ditch where caustic soda is added before entering two settling ponds and is located on property owned by George Poorbaugh, Jr. and Jennie Poorbaugh.

N. MD2 and MD3 are discharges that Action has been treating with caustic soda, since March 2005.

O. The MD2 and MD3 treatment system consists of 3 small sumps that collect the seepages and directs this flow to a 3000 gallon plastic tank where it is pumped to the MD1 treatment facility for caustic soda addition prior to entering the two settling ponds.

P. The collection and pumping components of the MD2 and MD3 treatment system are located on the Barbara Westgren and Lynn Merrill Turpack , property.

Q. Annual costs for operating and maintaining the Poorbaugh treatment system are \$16,226.00. Capital costs for the treatment systems are \$17,062.00 and the present value of recapitalization is \$6,601.00.

R. The following surety bonds have been posted on the Poorbaugh Strip in the amount of \$70,527.00:

| BOND | SURETY | AMOUNT |
|-------------|-------------------------------------|---------------|
| ISM1571 | Rockwood Casualty Insurance Company | \$56,427.00 |
| ISM1638 | Rockwood Casualty Insurance Company | \$8,700.00 |
| ISM1925 | Rockwood Casualty Insurance Company | \$5,400.00 |

SCHROCK STRIP (56860104)

S. The permit for Schrock Strip was initially issued to Action on May 27, 1987.

T. All mining has been completed on the Schrock Strip. The only activity that remains is the treatment of acid mine drainage discharges identified as 279 and 287. Discharge 287 is characterized by depressed pH, acidity greater than alkalinity, and iron and manganese concentrations that exceed the limitations of 25 Pa Code § 87.102. Discharge 279 is a low-flow alkaline discharge with elevated iron and manganese levels.

U. In November 1996, the Department issued an order to Action for degradation to an unnamed tributary to Bear Run resulting from the 279 and 287 discharges. Action did not appeal the order. In May 1997, Action constructed a passive system to treat the discharges. The treatment facility for these discharges consists of: 1) Seep 287 which is an artesian upwelling in a pond and is piped aboveground to a vertical flow treatment pond where the outflow is directed to Sediment Pond 1, and then to sediment Pond 2; 2) Seep 279 is ditched directly to Sediment Pond 2. The treatment occurs on property owned by Dwight D. Lepley (previously Edgar D. Schrock).

V. Annual treatment costs for operating and maintaining this passive treatment system are **\$935.00**. Capital costs for the treatment system are **\$32,000.00** and the present value of recapitalization is **\$34,968.00**.

W. The following surety bonds have been posted on the Schrock Strip in the amount of \$54,035.00:

| BOND | SURETY | AMOUNT |
|-------------|-------------------------------------|---------------|
| ISM1008 | Rockwood Casualty Insurance Company | \$49,035.00 |
| ISM1607 | Rockwood Casualty Insurance Company | \$4,000.00 |
| ISM1639 | Rockwood Casualty Insurance Company | \$1,000.00 |

ROMESBURG STRIP MINE (5679123)

X. The permit for the Romesburg Strip Mine was initially issued as MDP No. 4074SM29 to the Southhampton Coal Company on April 24, 1975. This permit was transferred to Sanner Brothers Coal Company on December 20, 1976. The permit was updated, its number changed to 5679123, and was issued to Sanner Brothers Coal Company on August 18, 1980. MDP No. 5679123 was then transferred to Sanner Energies, Inc. on September 20, 1991. On July 5, 2005, the name was changed to Action Mining, Inc., due to the merger of Sanner Energies, Inc.

Y. All mining has been completed on the Romesburg Strip Mine. The only activity that remains is the treatment of discharges of acid mine drainage identified as RAW1, RAW2, RAW3, and RAW4. Discharges RAW1, RAW2, and RAW3 are characterized by depressed pH, acidity greater than alkalinity, and iron and manganese concentrations that exceed the limitations of 25 Pa Code § 87.102. Discharge RAW4 is alkaline, but has elevated metals.

Z. Action has been treating these on-permit discharges since 1982 using caustic soda and two ponds. RAW1, RAW2 and RAW3 flow into one pond. RAW4 flows into the other pond.

AA. The treatment system for these discharges is constructed on property owned by Virgil Romesburg.

BB. Annual treatment costs for operating and maintaining the Romesburg Strip Mine treatment system are **\$10,888.00**. Capital costs for the treatment system are **\$22,170.00** and the present value of recapitalization is **\$8,577.00**.

CC. The following surety bonds have been posted on the Romesburg Strip Mine in the amount of \$62,000.00:

| BOND | SURETY | AMOUNT |
|---------|-------------------------------------|-------------|
| ISM1124 | Rockwood Casualty Insurance Company | \$60,000.00 |
| ISM1657 | Rockwood Casualty Insurance Company | \$2,000.00 |

JOPA NO 1 (56880103)

DD. The permit for Jopa No. 1 was initially issued to Action on September 23, 1988, and subsequently transferred to Future Industries, Inc. on April 21, 1989.

EE. Jopa No. 1 is an active mine and has several postmining discharges with ongoing treatment of these discharges of acid mine drainage identified as S7, S14, S45 (Marco Polo), and SW42/44. These discharges/seeps are characterized by depressed pH, acidity greater than alkalinity, and manganese concentrations that exceed the limitations of 25 Pa Code § 87.102, as well as elevated aluminum concentrations.

FF. Action constructed passive treatment systems for these discharges in 2005.

GG. Each passive system is made up of an Aluminator © (vertical flow treatment pond) with all associated piping and valves, emergency spillway, and flush pond. The treatment systems for these discharges are constructed on properties owned by Robert, Richard and Edmund Sanner; Larry R., Kathryn K., Douglas L. and Roxanne S. Sanner; Larry R. & Kathryn K. Sanner and Terry M. & Judith S. Pletcher; and Alexander M. & Marilyn K. Yacynch.

HH. Annual costs for operating and maintaining this treatment system are **\$6,161.00**. Capital costs for this system are **\$115,170.00** and the present value of recapitalization is **\$99,603.00**.

II. The following surety bonds have been posted on Jopa No. 1 in the amount of \$570,285.00:

| BOND | SURETY | AMOUNT |
|---------|-------------------------------------|--------------|
| SM1638 | Rockwood Casualty Insurance Company | \$131,500.00 |
| ISM1136 | Rockwood Casualty Insurance Company | \$140,200.00 |
| ISM1158 | Rockwood Casualty Insurance Company | \$36,520.00 |

| | | |
|---------|-------------------------------------|--------------|
| ISM1296 | Rockwood Casualty Insurance Company | \$7,580.00 |
| ISM1355 | Rockwood Casualty Insurance Company | \$46,200.00 |
| ISM1441 | Rockwood Casualty Insurance Company | \$20,950.00 |
| ISM1465 | Rockwood Casualty Insurance Company | \$107,240.00 |
| ISM1735 | Rockwood Casualty Insurance Company | \$80,095.00 |

GENERAL MATTERS

JJ. Action has the legal responsibility to treat or abate the discharges identified in Paragraphs F through HH.

KK. The effluent limits applicable to the discharges that are the subject of this agreement are found at 25 Pa. Code Chapter 87.102.

LL. The parties agree to use the information and figures which will be provided by the accounting required by Paragraph 4 for the existing treatment systems. The parties also agree to use the formulas set forth below to calculate the present value of the alternative financial assurance mechanism.

MM. The parties have discussed the need to obtain accurate and timely information on the costs of operating and maintaining the treatment systems in order to maintain the proper amount of financial backing. The parties have agreed the total current annual cost of operating and maintaining all the treatment systems covered by the 2002 COA and this agreement is **\$87,588.53** and the total present value of recapitalization costs is **\$249,315.00**.

NN. Action is willing to provide an alternative financial assurance mechanism in the amount of **\$1,968,129.97 (at 0.4% Trustee Fee)** as the financially backed enforceable contract to provide for the long-term treatment of post-mining discharges and to secure the release of its reclamation bonds in accordance with this COA.

OO. The discharges will require treatment essentially in perpetuity. That is the reason the Department has asked Action to establish the trust that is the subject of this Agreement.

Among other things, Action and/or its successor and/or the Department and/or its agents will require access as long as the discharges require treatment.

PP. Action has expressed an interest to include/add these sites as an amendment to the current Action Mining Trust with a revised payment schedule.

QQ. As set forth in Paragraph 14 below, Action must obtain "Consent to Right of Entry" forms from the property owners of the mine sites which were the subject of the 2002 COA as well as the four sites which are being added to the trust pursuant to this agreement. Action has previously obtained and recorded Landowner Consent forms from all property owners of the mine sites that are subject to the 2002 COA. Action has informed the Department that the company may not be able to obtain signed forms from one or more of the property owners who have previously signed the Landowner Consent forms. The Department requested that Action use its best efforts to obtain signatures from all the property owners and, in accordance with Paragraph 14.a. below, to provide documentation of its efforts with respect to any owner whose signature it was unable to obtain. The property owners are listed as Exhibit A.

RR. The parties agreed that the initial payment required by Paragraph 6 below will be the amount presently currently in the existing Action Mining Treatment Trust.

ORDER

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

1. This Consent Order and Agreement is an Order of the Department authorized and issued pursuant to Section 5 of the Clean Streams Law, 35 P.S. § 691.5; Section 4.3 of the Surface Mining Act, 52 P.S. § 1396.4c; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17. The failure of Action to comply with any term or condition of this Consent Order and Agreement shall subject Action to all penalties and remedies provided by those statutes for failing to comply with an order of the Department.

2. Findings

a. Action agrees that the findings in Paragraphs A through RR are true and correct and, in any matter or proceeding involving Action and the Department relating to this COA, Action shall not challenge the accuracy or validity of these findings.

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

3. Definitions

a. Accounting. The accounting required by Paragraph 4 of this Agreement.

b. Actual Treatment Cost. The average of three consecutive years of the costs and expenses of treatment, calculated by using the Accountings for those three years.

c. Annual Anniversary Date. The annual recurrence of the month and day that this Consent Order and Agreement is executed

d. Calculated Treatment Cost. The projected future annual cost of treatment, based on the Actual Treatment Cost, compounded at three and one tenth percent (3.1%) annually.

e. Capital Improvement Account. The sub-account within the Trust that is primarily used to finance anticipated and periodic capital expenditures for the Treatment Systems.

f. Distribution Payment. The Trustee's disbursement of money from the Trust made at the written direction of the Department to a person and in an amount specified by the Department and as provided by this Consent Order and Agreement.

g. Formula. The equation used to calculate the Present Value of the future operation and maintenance ("O&M") of the Treatment Systems. The equation is:

$$PV = (A/[E-I]) + A$$

where: PV = Present Value of the O&M Costs

A = Current Actual Treatment Cost

E = Expected annual earnings/Interest Rate (assumed to be 9.53 %) *

I = Inflation Rate (assumed to be 3.1% or .031)

* This assumption will remain the same unless the parties agree otherwise.

h. Primary Basis Valuation. 100% of the present value of the future cost of treatment as determined by the Formula.

i. Primary Target Valuation. 116% of the present value of the future cost of treatment as determined by the Formula.

j. Primary Trust Account. The sub-account within the Trust that is primarily used to finance annual operating and maintenance costs of the Treatment Systems.

k. Primary Trust Valuation. The cash, cash equivalents, investments at market value of investments and the face amount of surety bond currently held by the Trust in the Primary Trust Account.

4. Annual Treatment Costs; Records; Factors; Accounting

a. Action shall keep accurate financial records of all the costs and expenses of annual treatment for each year. The various cost factors fall into several general categories, including, but not limited to: Reagent; Polymer; Electrical; Sludge Removal; Labor, including benefits; Maintenance; Sampling; Overhead; and Miscellaneous. The individual item shall be tracked and reported for each general category.

b. Action shall keep separate records for each of the treatment systems.

c. Action shall provide an annual accounting of the costs and expenses of annual treatment ("the Accounting") to the Department on or before the 90th day following the last day of the fiscal year for which the Accounting is being provided. The Accounting shall cover the period beginning October 1 and continuing through September 30 of each year, or other fiscal year as Action may adopt for its corporate finances in the future, and shall be in accordance with Generally Accepted Accounting Principles. The Accounting shall be accompanied by an affidavit of the treasurer or other corporate officer responsible for the financial affairs of Action and by the President of Action attesting to the completeness and accuracy of the records of the costs and expenses of annual treatment as reported in the Accounting.

d. Action's obligation to keep records and provide the Accounting shall continue for the period during which Action is operating the Treatment Systems.

e. In the event of a dispute about the costs and expenses of treatment incurred by Action, Action shall bear the burden of proving the accuracy and completeness of the Accounting and the records upon which the Accounting is based. A Special Report prepared under Generally Accepted Accounting Principles as to the treatment costs incurred by Action, prepared by an independent licensed public or certified public accountant, shall satisfy Action's burden of proof as to any of these matters.

5. Treatment Trust

a. Action has established an irrevocable trust known as the Action Treatment Trust ("Trust"). The Trust shall secure Action's obligation to treat all the Action discharges listed in Paragraphs F through HH, including its obligation to operate and maintain either the treatment systems in perpetuity, as required by law, or until water treatment is no longer necessary, and to provide financial resources to the Department on behalf of the citizens of the Commonwealth to maintain and operate the treatment systems, and to treat the mine drainage in perpetuity in the event Action becomes unable or unwilling to meet its obligations. The Trust shall also provide for the demolition of treatment facilities and reclamation of the treatment site should treatment no longer be needed. The agreement establishing the Trust is attached as **Exhibit F**.

b. Action shall establish within the Trust two sub-accounts: a sub-account designated as the Primary Trust Account; and a sub-account designated as the Capital Improvement Account.

6. Funding of the Primary Trust Account

a. Initial Payment to the Primary Trust Account: Upon its execution of this Consent Order and Agreement, Action shall deposit the amount that is currently in the existing Action Mining Treatment Trust into the Primary Trust Account of the new Action Mining Treatment Trust. Of this amount, **\$98,293.19** should be placed into the Capital Improvement Sub-account.

b. Ongoing Payments to the Primary Trust Account: Action will deposit subsequent payments into the Primary Trust Account as follows:

- i. **On February 12, 2010, Action shall deposit \$110,000.00 into the Primary Trust Account.**
- ii. **On February 12, 2011, Action shall deposit \$110,000.00 into the Primary Trust Account.**
- iii. **On February 12, 2012, Action shall deposit \$110,000.00 into the Primary Trust Account.**
- iv. **On February 12, 2013, Action shall deposit \$110,000.00 into the Primary Trust Account.**
- v. **On February 12, 2014, Action shall deposit \$86,551.00 into the primary Trust Account. This final payment amount may need adjusted to correspond with the performance of the Trust Fund.**

Payment will be required without notice.

c. The necessary value; i.e. Primary Target Valuation, of the Treatment Trust at the end of each year from 2009 to 2029, assuming an annual growth rate of 9.53%, inflation of 3.1% and no change in operating and maintenance costs, is set forth in **Exhibit G**.

7. Annual Distribution or Contribution Payments - Primary Trust Account

a. All calculations under this Paragraph shall be based on values as determined on the Annual Anniversary Date.

b. If the Primary Trust Valuation does not include the value of surety bonds, then Distribution Payments shall be made according to Paragraph 7.c. Otherwise, Distribution Payments shall be made according to Paragraph 7.d. and e.

c. If at the end of any year the Primary Trust Valuation is greater than the Primary Target Valuation, then a Distribution Payment shall be made to Action. The amount of such Distribution Payment will be equal to the difference between the Primary Trust Valuation and

the Primary Target Valuation, or equal to the Calculated Treatment Cost, whichever is less. This amount is depicted graphically at Point 1, 2 and 3 on **Exhibit C**.

d. If at the end of any year the Primary Trust Valuation is greater than the Primary Target Valuation, then a Distribution Payment shall be made to Action in the form of a surety bond reduction of the surety bond(s) identified in Paragraphs R, W, CC and II. This amount is depicted graphically at Point 1 on **Exhibit C**. Such surety bond reduction shall be in an amount determined by the following formula:

$$BR = ((1 + RoR) (TR - B) + B) - (1.03(TV))$$

Where: BR = surety bond reduction
B = surety bond amount
RoR = assumed net rate of return or effective rate of return
TV = Primary Target Valuation
TR = Primary Trust Valuation

e. In the year the final bond is released, if the Primary Trust Valuation after the final surety bond release remains greater than the newly calculated Primary Target Valuation, then an additional Distribution Payment shall be made under paragraph 7.c.

f. If the Primary Trust Valuation is less than or equal to the Primary Target Valuation, but greater than or equal to the Primary Basis Valuation, then no Distribution Payment shall be made and no additional contribution shall be required. This provision is depicted graphically as Point 4 on **Exhibit C**.

g. If the Primary Trust Valuation is less than the Primary Basis Valuation, then Action shall make an additional contribution into the Primary Trust Account in an amount equal to the difference between the Primary Basis Valuation and the Primary Trust Valuation, or in an amount equal to the Calculated Treatment Cost, whichever is less except as provided in Paragraph 13.a. This amount is depicted graphically as points 5 and 6 on **Exhibit C**. This provision does not apply until Action has fulfilled its obligations to make ongoing payments under Paragraph 6.b.

8. Adjustments to the Primary Target Valuation for Deviations Between Actual Treatment Cost and Calculated Treatment Cost

a. All calculations under this paragraph shall be based on values as determined on the Annual Anniversary Date and before any Distribution Payment.

b. If the Actual Treatment Cost for any year is greater than or equal to 110% of the Calculated Treatment Cost, the Department will calculate a new Primary Basis Valuation using the Formula and the newly determined Actual Treatment Cost. A new Primary Target Valuation will then be determined by calculating 116% percent of the new Primary Basis Valuation.

Exhibit D is a graphical depiction of the adjustment.

9. Distribution Payments for Adjustments to the Primary Target Valuation

a. If the Primary Trust Valuation does not include the value of pledged surety bonds, then Distribution Payments shall be made according to Paragraph 9.c. Otherwise, Distribution Payments shall be made according to Paragraph 9.d.

b. If the newly calculated Primary Target Valuation which has been adjusted under Paragraph 8 above is less than the Primary Trust Valuation, no distribution payment shall be made under this paragraph.

c. If the newly calculated Primary Target Valuation which has been adjusted under Paragraph 8 above is based on a reduced Actual Treatment Cost, and the Primary Trust Valuation is greater than the newly calculated Primary Target Valuation, then a Distribution Payment shall be made to Action. The amount of such Distribution Payment will be equal to the percent change in Actual Treatment Cost times the Primary Trust Valuation, or in an amount equal to the difference between the Primary Trust Valuation and the newly calculated Primary Target Valuation, whichever is less. The amount of such Distribution Payment shall be determined by the following formulas:

$$DP = TR (1 - (\text{new ATC} / \text{prior ATC}))$$

Or

$$DP = TR - \text{new TV}$$

Where: DP = Distribution Payment
 TR = Primary Trust Valuation
 TV = Primary Target Valuation
 ATC = Actual Treatment Cost

d. If the newly calculated Primary Target Valuation which has been adjusted under Paragraph 8 above is based on reduced Actual Treatment Cost, and the Primary Trust Valuation is greater than the newly calculated Primary Target Valuation, than a distribution payment shall be made to Action in the form of a surety bond reduction. Such bond reduction shall be in an amount determined by the following formula:

$$BR = (1+RoR) (TR - B)+ B) - (1.03(TV))$$

Where: BR = surety bond reduction
 RoR = assumed net rate of return or effective rate of return
 TV = Primary Target Valuation
 TR = Primary Trust Valuation
 B = surety bond amount

e. In the year the final surety bond is released, if the Primary Trust Valuation after the final surety bond release remains greater than the newly calculated Primary Target Valuation, then an additional Distribution Payment shall be made under Paragraph 9.c.

10. Capital Improvement Account

a. Action shall establish within the Trust a sub-account designated as the Capital Improvement Account. Assets of the Capital Improvement Account may be commingled with assets of the Primary Trust Account for purposes of investment, but must be accounted for and reported separately as if they are assets of a separate and distinct fund.

b. On the date of this Consent Order and Agreement the required annual balance of the Capital Improvement Account for a 75-year period shall be determined and made a part of this agreement as **Exhibit E**.

c. To determine the required balance in the Capital Improvement Account the following methodology shall be used.

- i. For each planned capital replacement component or activity, the current cost of that component or the cost to complete that activity will be determined.
- ii. For each planned capital replacement component or activity, the estimated number of years in the life cycle of the component or the number of years between when the activity is needed will be determined.
- iii. If the treatment system has been in operation for a significant period of time, then for each planned capital replacement component or activity, the estimated number of years until the next replacement or activity is needed will be determined.
- iv. For each planned capital replacement component or activity, the future value of the first replacement or activity will be calculated using a Present Value equal to the current cost, a rate of 3.1 percent, the amount of payment equal to \$0.00, the number of payment periods equal to the number of years from the date of this agreement or activity, and a beginning of period payment.
- v. For each planned capital replacement component or activity, the Present Value will be calculated using the Future Value calculated in Paragraph 10.c.iv. above, a rate equal to the assumed net rate of return used elsewhere in this agreement, and all other variables the same as used in Paragraph 10.c.iv. above.
- vi. For each planned capital replacement component or activity, the Future Value of the second and each subsequent capital replacement or activity will be calculated using the same values as in Paragraph 10.c.iv. above except the value for the number of payment periods. The value for the number of payment periods for the second replacement or activity will be equal to the number of years until the next replacement or activity plus the

number of years in the expected life cycle as determined in Paragraph 10.c.ii. above. The number of payment periods for the third replacement will be equal to the number of years until the next replacement or activity plus two times the number of years in the expected life cycle. The number of periods for the fourth replacement will be equal to the number of years until the first replacement plus three times the years in the life cycle. The Future Value of each replacement will be calculated in like manner until the number of periods is equal to the number of years until the last replacement or activity is expected to occur that does not exceed 75 years from the year the calculations are being made.

- vii. For each planned capital replacement component or activity, the Present Value of the second and each subsequent capital replacement or activity will be calculated using the same values as in Paragraph 10.c.v. above except the value for the number of payment periods which shall be determined in like manner to Paragraph 10.c.vi. above.
- viii. The required balance in the Capital Improvement Account for the current year shall be equal to the sum of all Present Values calculated in Paragraph 10.c.v. and vii above.
- ix. The required balance in the Capital Improvement Account shall be recalculated on an annual basis and each time a Distribution Payment is contemplated under Paragraph 12. Such recalculation shall be deemed an amendment to **Exhibit E** and this Consent Order and Agreement, and shall be used in making all future calculations involving the Capital Improvement Account.

11. Transfer of Funds to the Capital Improvement Account

- a. The provisions of this Paragraph do not apply if the Primary Trust Valuation includes the value of surety bonds.

b. If the Primary Trust Valuation after any Distribution Payment under Paragraph 7 above is greater than the Primary Target Valuation, then a transfer of funds to the Capital Improvement Account shall be made if the current balance in the Capital Improvement Account is less than the required balance for the current year as indicated on **Exhibit E**. The amount of such transfer will be equal to the difference between the required balance and the current balance, or in an amount equal to the difference between the Primary Trust Valuation and the Primary Target Valuation, whichever is less.

12. Distribution Payments from the Capital Improvement Account

a. A distribution payment shall be made to Action any time a planned capital replacement is made as indicated on **Exhibit E**. The capital replacement and maintenance activities shall be made as needed, which may be sooner or later than the projected time. The amount of the Distribution Payment shall be equal to the calculated cost of the Capital Improvement as indicated on **Exhibit E**, or in an amount equal to the difference between the current balance in the Capital Improvement Account and the required balance after the capital improvement Distribution Payment, whichever is less.

b. Each time a Distribution Payment from the Capital Improvement Account is contemplated under this Paragraph or Paragraph 13 below, the required balance in the Capital Improvement Account must be recalculated to determine the required balance after the proposed Distribution Payment, and to determine the appropriate Distribution Payment.

13. Miscellaneous Distribution Payments from the Primary Trust Account and the Capital Improvement Account

If the Primary Trust Valuation exceeds the Primary Target Valuation in the Primary Trust Account, or if the balance in the Capital Improvement Account exceeds the required balance as indicated on **Exhibit E**, then such surplus funds may be used for the following purposes:

a. Surplus funds in the Capital Improvement Account shall be transferred to the Primary Trust Account to reduce or completely satisfy Action's obligation to make a contribution payment under Paragraph 7.g. This amount is depicted graphically at Point 5 on

Exhibit C. However, the amount of surplus funds transferred to the Primary Trust Account may exceed Action's obligation under Paragraph 7.g. if additional funds are needed so that the Primary Trust Valuation equals the Primary Basis Valuation. This amount is depicted graphically at Point 6 on **Exhibit C.**

b. Surplus funds in the Capital Improvement Account or the Primary Trust Account may be used by Action to pay for unanticipated capital expenditures, or anticipated capital expenditures that exceed the calculated cost of the capital improvement as indicated on **Exhibit E.**

c. Surplus funds in the Capital Improvement Account or the Primary Trust Account may be used by the Action to finance implementation of a new treatment technology, provided the application of such treatment technology is first approved by the Department.

d. Surplus funds in the Capital Improvement Account or the Primary Trust Account may be used by the Action to implement remediation or abatement activities to reduce or eliminate the discharge, or to improve the quality of the discharge, provided the Department first approves such activities.

14. Real and Personal Property

a. Within one (1) year of executing this Consent Order and Agreement, Action must submit original, recorded "Consent to Right of Entry" documents from the property owners listed as Exhibit A, unless Action is unable to obtain a landowner's consent. To the extent that Action is unable to obtain the signature of any property owner, the company shall submit an affidavit documenting the efforts the company expended in attempting to obtain each signature.

b. Action will convey to the Trust title to all equipment, pumps, plumbing, buildings, structure etc. which together compose the Treatment Facilities which are described on **Exhibit B.** Title will be delivered to the Trustee upon execution of this COA.

15. Public Liability Insurance

a. Action shall maintain in effect public liability insurance coverage for the operation, maintenance, improvement and all other activities associated with the Treatment Systems and the real and personal property that are identified in the Post Mining Treatment Trust Agreement as part of the Trust Principal. The Trustee and the Commonwealth of Pennsylvania shall be listed as additional insureds on the policy.

b. The public liability insurance shall be written on an occurrence basis and shall provide bodily injury and property damage coverage in the minimum amounts of \$500,000 per person and \$1,000,000 per occurrence. The insurance shall include a rider requiring the insurer to notify the Department 30 days prior to substantive changes being made to the policy or prior to termination or failure to renew. Proof of insurance shall consist of a certificate of insurance filed annually with the Department that certifies Action has a public liability insurance policy in force meeting the requirements of this paragraph.

16. Annual Meeting

The parties will meet on or before the 30th day following delivery to the Department of the Accounting of each year: to review and discuss the Accounting for the then completed fiscal year; to review the effectiveness of the Treatment Systems and any change in the fiscal year; to resolve any issues which arise as a result of that change or the performance of the trust fund; to calculate, recalculate or adjust the size of the Primary Target Valuation, the Calculated Treatment Cost, and distribution payments from or additional payments into the trust fund; and to address any other issues that may concern this Consent Order and Agreement or its implementation.

17. Action's Continuing Obligation

Neither Action's agreement to fund the Trust nor the full or partial funding of the Trust, nor the exhaustion of the Trust shall in any way limit Action's obligation to operate the Treatment System.

Furthermore, exhaustion of the Trust shall not excuse Action from Action's obligation to adequately treat or to abate the discharges.

18. Stipulated Civil Penalties

a. In the event Action fails to comply in a timely manner with any term or provision of this Consent Order and Agreement within thirty (30) days after receipt of written notice from the Department specifying the specific provision Action is not in compliance with, Action shall be in violation of this Consent Order and Agreement and, in addition to other applicable remedies, shall pay a civil penalty in the amount of \$100.00 per day for each violation.

b. Stipulated civil penalty payments shall be payable monthly on or before the fifteenth day of each succeeding month. The payment shall be by corporate check or the like, made payable to the "Commonwealth of Pennsylvania" and submitted to the:

District Mining Manager
Cambria District Mining Operations
286 Industrial Park road
Ebensburg, PA 15931

c. Any payment under this paragraph shall neither waive Action's duty to meet its obligations under this Consent Order and Agreement nor preclude the Department from commencing an action to compel Action's compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only Action's liability for civil penalties arising from the violation of this Consent Order and Agreement for which the payment is made.

d. Stipulated civil penalties shall be due within thirty (30) days after the written notice specified in Paragraph 18(a) above.

19. Additional Remedies

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

b. In the event Action defaults on the obligations of this Consent Order and Agreement Action will be subject to a permit block on the Department's compliance tracking system and the Federal Applicant Violator System and the Department will, in addition to any other remedy or penalty prescribed herein, list Action as a violator on the Department's compliance tracking system and on the Federal Applicant Violator System.

c. The remedies provided by this Consent Order and Agreement are cumulative and the exercise of one does not preclude the exercise of any other. The failure of the Department to pursue any remedy shall not be deemed to be a waiver of that remedy. The payment of a stipulated civil penalty, however, shall preclude any further assessment of civil penalties for the violation for which the stipulated civil penalty is paid.

20. Reservation of Rights

The Department reserves the right to require additional measures to achieve compliance with applicable law. Action reserves the right to challenge any action which the Department may take to require those measures.

21. Liability of Action

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

22. Transfer of Sites

a. The duties and obligations under this Consent Order and Agreement shall not be modified, diminished, terminated or otherwise altered by the transfer of any legal or equitable interest in the Summit No. 2 Mine, Summit No. 3 Mine, Elk Lick No. 1 Mine, Poorbaugh Strip, Schrock Strip, Romesburg Strip Mine, and Jopa No. 1 or any part thereof.

b. If Action intends to transfer any legal or equitable interest in the Summit No. 2 Mine, Summit No. 3 Mine, Elk Lick No. 1 Mine, Poorbaugh Strip, Schrock Strip, Romesburg

Strip Mine, and Jopa No. 1 which is affected by this Consent Order and Agreement, Action shall serve a copy of this Consent Order and Agreement upon the prospective transferee of the legal and equitable interest at least thirty (30) days prior to the contemplated transfer and shall simultaneously inform the Director, District Mining Operations of such intent.

c. The Department in its sole discretion may agree to modify or terminate Action's duties and obligations under this Consent Order and Agreement upon transfer of the Summit No. 2 Mine, Summit No. 3 Mine, Elk Lick No. 1 Mine, Poorbaugh Strip, Schrock Strip, Romesburg Strip Mine, and Jopa No. 1. Action waives any right that it may have to challenge the Department's decision in this regard.

23. Correspondence with Department

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

John P. Varner, District Mining Manager
Department of Environmental Protection
286 Industrial Park road
Ebensburg, PA 15931

24. Correspondence with Action

a. All correspondence with Action concerning this Consent Order and Agreement shall be addressed to:

Larry R. Sanner, President
Action Mining, Inc.
1117 Shaw Mines Road
Meyersdale, PA 15552-7228

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

25. Force Majeure

a. In the event that Action is prevented from complying in a timely manner with any time limit imposed in this Consent Order and Agreement solely because of a strike, fire, flood, act of God, or other circumstances beyond Action's control and which Action, by the exercise of all reasonable diligence, is unable to prevent, then Action may petition the Department for an extension of time. An increase in the cost of performing the obligations set forth in this Consent Order and Agreement shall not constitute circumstances beyond Action's control. Action's economic inability to comply with any of the obligations of this Consent Order and Agreement shall not be grounds for any extension of time.

b. Action shall only be entitled to the benefits of this paragraph if it notifies the Department within ten (10) working days by telephone and within twenty (20) working days in writing of the date it becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by Action to mitigate the effects of the event and to minimize the length of the delay. The initial written submission may be supplemented within ten (10) working days of its submission. Action's failure to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and of no effect as to the particular incident involved.

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

26. Severability

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

27. Entire Agreement

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

28. Attorney Fees

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

29. Modifications

Except as provided in Paragraph 10.c.ix, no changes, additions, modifications, or amendments of this Consent Order and Agreement shall be effective unless they are set out in writing and signed by the parties hereto.

30. Titles

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

31. Decisions under Consent Order

Except for decisions of the Department under Paragraphs 4 through 14, any decision which the Department makes under the provisions of this Consent Order and Agreement is intended to be neither a final action under 25 Pa. Code § 1021.2, nor an adjudication under 2 Pa. C.S. § 101. Any objection which Action may have to decisions other than those under Paragraphs 4 through 14 will be preserved until the Department enforces this Consent Order and Agreement.

32. Successors

This Consent Order and Agreement shall be fully and completely binding upon any successor of Action. For purposes of this Paragraph, successor shall mean any corporation or entity: 1) Action consolidates with or merges into or permits to merge with it and Action is not the surviving corporation or entity; or 2) which acquires, by purchase or otherwise, all or substantially all of Action's properties or assets which include, but is not limited to, voting stock of Action. Successor does not include any corporation or other entity to which Action transfers or assigns all or substantially all of its financial or non-financial liabilities.

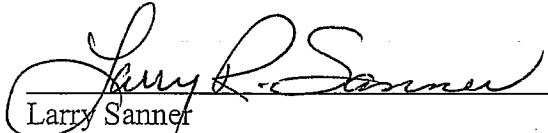
Action shall notify the Department, without delay, of any successor as defined herein and shall provide such successor with a copy of this Consent Order and Agreement.

33. Counterpart Signatures

The parties agree to execute this Consent Order and Agreement by counterpart signatures transmitted via facsimile.

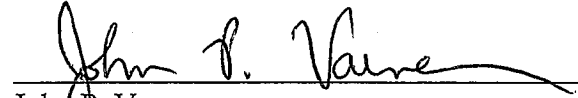
IN WITNESS WHEREOF, the parties hereto have caused this Consent Order and Agreement to be executed by their duly authorized representatives. The undersigned representatives of Action certify under penalty of law, as provided by 18 Pa. C.S. § 4904, that they are authorized to execute this Consent Order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

FOR ACTION MINING, INC.



Larry Sanner
President, Action Mining, Inc

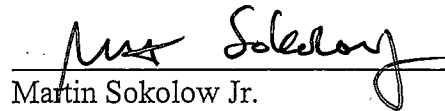
FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:



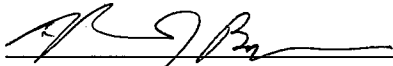
John P. Varner
District Mining Manager



Douglas Sanner
Director, Action Mining, Inc.



Martin Sokolow Jr.
Regional Counsel



Attorney for Action

(corporate seal)