

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

file  
56863069  
E. L. Fishery  
Somerset Co.

In the Matter of:

Action Mining, Inc. : Civil Penalties  
1117 Shaw Mines Road : Reclamation in Lieu of  
Meyersdale, PA 15552-7228 : Monetary Civil Penalties

993077

CONSENT ORDER AND SETTLEMENT AGREEMENT

This Consent Order and Settlement Agreement ("COSA") is entered into this 30<sup>th</sup> day of June, 1999, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), the Pennsylvania Fish and Boat Commission ("PFBC") and Action Mining, Inc. ("Action").

Findings

The Department and the PFBC have found and determined the following:

A. The Department is the agency with the duty and 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 Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended 52 P.S. §1396.1, et seq. ("Surface Mining Act"), the Coal Refuse Disposal Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 et seq. ("Coal Refuse Disposal Act"), Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17A ("Administrative Code"), and the regulations promulgated thereunder. This Consent Order and Settlement Agreement is entered pursuant to these statutes and regulations.

B. The PFBC is the agency with the duty and authority to enforce the Fish and Boat Code, the Act of October 16, 1980, P.L. 996, No. 175, 30 Pa. CSA § 101 et seq.

C. Action is a corporation with a business address of 1117 Shaw Mines Road, Meyersdale, Pennsylvania 15552-7228.

D. The following persons are, and have been since 1991 officers, directors and shareholders of Action:

Larry Sanner, President and Shareholder

Douglas Sanner, Board of Directors and Shareholder

Judith S. Pletcher, Treasurer

Roberta J. Wyant, Secretary and Shareholder

Pamela S. Moore, Board of Directors and Shareholder

E. Action has been the permittee and operator of two adjacent bituminous coal surface mines located in Elk Lick Township, Somerset County, known respectively as the Summit #3 and Summit #2 Mines. Action was authorized to conduct surface mining on the Summit #3 and Summit #2 sites pursuant to Surface Mining Permit ("SMP") Nos. 56823066 and 56663069, respectively. There is \$140,495 in bonds posted for the Summit #3 Mine and \$860,800 in bonds posted for the Summit #2 Mine.

F. The Summit #3 and portions of the Summit #2 Mines are located within the western portion of the watershed of an unnamed tributary to the Casselman River which flows through the village of Coal Run. Hereafter, the tributary is referred to as "Coal Run." Coal Run and the Casselman River are waters of the Commonwealth as defined at Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

G. Three deep mine discharges, MD24, MD25 and MD26, are located on Action's Summit #3 Mine and are hydrogeologically connected to both the Summit #3 and to the Summit #2 Mines. The three discharges, which existed prior to Action's operations on the Summit #3 and Summit #2 SMPs, are located upgradient of a surface water monitoring point located on Coal Run for the Summit #3 Mine known as SW10(3). SW10(3) was, prior to Action's operations, and is severely degraded by acid mine drainage. The concentration of iron, manganese, sulfates and acidity has increased significantly between the time when first samples were collected, in 1984 and 1985, and 1996.

H. Beginning in late 1985 or early 1986, Action opened a pit on the Summit #3 Mine which was an extension of a cut located on the Summit #2 Mine and which was upgradient of discharges MD24, MD25 and MD 26.

I. During the period from 1986 to 1990, while mining progressed away from discharges MD24, MD25 and MD26, the concentration of iron, manganese, sulfates and acidity at those discharges increased. In 1990 and into 1991, Action returned its mining operations to the area upslope and upgradient of MD24, MD25 and MD26. During this period, the concentration of iron, manganese, sulfates and acidity at those discharges again increased.

J. Beginning in September 1991, Action reported, in its quarterly monitoring submission to the Department, that discharges MD24 and MD25 had ceased to flow. Until December 1995, Action continued to report these discharges as dry in its quarterly monitoring reports.

K. Beginning in September 1991, degradation at monitoring point SW10(3) significantly worsened.

L. Discharge point 14A was a large volume discharge of acid mine drainage located between discharge MD24 and Coal Run. Water quality data and flow from 14A were similar to that at MD24 just prior to the time MD24 ceased to flow. Discharge 14A did not exist prior to the issuance of the Summit #3 Mine. The first documentation of discharge 14A is a Department sample collected on June 10, 1992, after discharge MD24 ceased to flow.

M. Discharge 14A emanated from buried pipes which ran upslope from that discharge toward and on to the Summit #3 Mine. Discharge 14A is hydrogeologically connected to both the Summit #3 and Summit #2 Mines.

N. On February 23, 1996, the Department issued Administrative Order No. 963015 (the "1996 Order") to Action. In the 1996 Order, the Department found that Action had polluted water which discharged from the Summit #3 and Summit #2 Mines at discharge 14A, and which in turn had degraded

Coal Run as evidenced by water quality data at monitoring point SW10(3). The Department also found that, by installing the pipe from which discharge 14A emanated, Action: 1) conducted mining activities off of its bonded and/or permitted areas; 2) had adversely affected and impacted the post-mining hydrologic balance; 3) had caused or allowed discharges of acid mine drainage to the groundwater and to Coal Run, which are waters of the Commonwealth. The 1996 Order is attached as Exhibit A.

O. The discharges identified in the 1996 Order constitute: 1) an unauthorized discharge of mine drainage from Action's Summit #3 and Summit #2 Mines to the surface waters and to the groundwater of the Commonwealth, in violation of Sections 301, 307, 315, 401 and 402 of the Clean Streams Law, 35 P.S. §§691.301, 691.307, 691.315, 691.401 and 691.402.; 2) a condition which is causing pollution and/or the threat of pollution to the surface waters and groundwater of the Commonwealth in violation of Section 316 of the Clean Streams Law, 35 P.S. §691.316 (Action is an occupier of those mine sites as defined in Section 316 by virtue of their status as permittee); 3) a statutory and a common law nuisance pursuant to Sections 3, 307(c), 315(a) and 401 of the Clean Streams Law, 35 P.S. §691.3, 691.307(c), 691.315(a) and 691.401.

P. The 1996 Order, among other things, required Action to:

1. Within 10 days, expose all the buried pipe which led to Discharge Point 14A;
2. Within 30 days, install interim treatment for the water emanating from the buried pipe and associated trench;
3. Within 30 days, submit a plan for permanent treatment of the three discharges; and
4. Commence implementation of permanent treatment within three days of Department approval, and complete construction and installation within 90 days of the date of the order.

Q. On March 22, 1996, Action appealed the 1996 Order to the Environmental Hearing Board ("EHB") which is docketed at EHB Docket No. 96-071-R. Action denied each and every finding in the 1996 Order.

R. On or before March 4, 1996, Action began to uncover the buried pipes upslope of the 14A discharge. In addition to the buried pipes which conveyed water from the vicinity of MD24 to 14A, Action uncovered buried pipes carrying water from the vicinities of MD25 and MD26 away from Action's permitted area.

S. On or before March 22, 1996, Action began to provide interim treatment of MD24, MD25, and MD26.

T. On March 26, 1996, Action submitted to the Department a plan for the permanent treatment of the three discharges.

U. On or about May 1, 1997, Action submitted to the Department a geotechnical report and hydrologic evaluation that identified and analyzed several separate treatment options for treatment of the Discharges.

V. By letter dated May 20, 1997 (the "1997 Letter"), the Department rejected one of the proposed treatment options and instructed Action to:

1. Select any of the other proposed treatment options.
2. Begin construction of the treatment option by June 4, 1997.
3. Complete construction and begin operation of the treatment facility by July 21, 1997.

W. On May 27, 1997, Action appealed the 1997 Letter which is attached hereto Exhibit B. The appeal is docketed at 97-119-R. The second appeal was consolidated with the appeal docketed at 96-071-R.

X. On August 28, 1997, the Department issued a Failure to Abate Cease Order to Action for failing to comply with the 1996 Order and 1997 Letter.

Y. On October 20, 1997, the permanent water treatment system (the "Conventional Treatment System") was operating and interim treatment had stopped.

Z. On February 23, 1998, the Department and Action executed an agreement tolling running of any statute of limitations applicable to the proposal or assessment of a civil penalty for the matters in the 1996 Order. The Tolling Agreement remains in effect.

AA. The Department and PFBC have determined and Action has agreed that a civil penalty in the amount of \$625,000 is appropriate for the violations cited in the 1996 Order and the August 28, 1997 Failure to Abate Cease Order. Action has agreed to pay \$169,000 to the Department, \$24,000 to Pennsylvania Wild Resources Conservation Fund to subsidize re-introduction of otters into the Casselman River and Laurel Hill Creek, pay Youghiogheny Riverwatch, Inc. \$32,000 for three projects described in Exhibit C, and for the remaining \$400,000 to perform reclamation in lieu of the monetary payment. The otter re-introduction is described in the proposal prepared by Professor Thomas Serfass of Frostburg State University and attached as Exhibit D.

BB. Action has proposed to install a passive treatment system (the "Passive Treatment System") on the Pletcher Farm in Elk Lick Township, Somerset County to treat Coal Run, in lieu of the monetary payment of civil penalties in the amount of \$400,000. The Pletcher Farm is owned by members of the family which owns and operates Action.

CC. The Passive Treatment System will treat up to 300 gallons per minute from Coal Run, on a continuous basis, to the BPJ standards found in 25 Pa. Code § 87.102.

DD. Installation of the Passive Treatment System in a manner provided by this Consent Order and Settlement Agreement will cost at least \$400,000 and have a value of at least \$400,000, an amount equal to or greater than \$400,000 which is the amount of the civil penalty in Paragraph AA that will not be paid in cash.

EE. As is set forth in Paragraph 4 below, Action must submit a more detailed proposal for the Passive Treatment System to the Department and PFBC for approval.

FF. It would cost more than \$400,000 for the Department to install the Passive Treatment System on the Pletcher Farm.

GG. The owners of Pletcher Farm have agreed that, if requested by the Department to do so in writing, they will donate the portion of the Pletcher Farm containing the Passive Treatment System to an entity designated by the Department.

HH. The Department and Action are continuing to negotiate a second agreement which would address two other discharges in the Coal Run watershed.

II. Action has agreed to set up a Trust Fund to provide long-term financial assurance for the continuous operation of the Conventional Treatment System and the Passive Treatment System. The Department has agreed that it will accept \$100,000 as the amount necessary for the Trust Fund for the Passive Treatment System. The Trust Fund will be included in the second agreement which the Department and Action are negotiating.

JJ. The Department, PFBC and Action wish to enter into this Consent Order and Settlement Agreement to provide for the cash payment of \$225,000 in civil penalties, and for the installation and continuous operation of the Passive Treatment System by Action in lieu of the Department's collection of the remaining \$400,000 in monetary civil penalties.

KK. The Department is aware that there is ongoing federal criminal investigation which the Department believes, concerns the buried pipes and the failure to monitor, report and properly treat the three discharges referred to in Paragraph F.

LL. Section 2506 of the Fish and Boat Code, 30 Pa.C.S. § 2506, provides that the PFBC, as an agency of the Commonwealth authorized to regulate, control, manage and perpetuate fish, may bring civil actions on behalf of the Commonwealth for the value of any fish killed or any stream or stream bed destroyed or injured by disturbance of waterways or watersheds, littering, pollution, misuse of property and waters, or interference with hatchery or nursery waters.

MM. The acts or omissions described in the preceding paragraphs violate one or more provisions of Chapter 25 of the Fish and Boat Code, 30 Pa.C.S. Ch. 25, and subject Action to a claim for civil damages under Section 2506 of the Fish and Boat Code, 30 Pa.C.S.A. § 2506.

### ORDER

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

1. **Authority.**

This Consent Order and Settlement 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; Section 3.1 of the Coal Refuse Disposal Act, 52 P.S. §30.53a; and Section 1917-A of the Administrative Code, supra. The failure of Action to comply with any term or condition of this Consent Order and Settlement 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 E, BB through EE, and GG and HH are true and correct and, in any matter or proceeding involving Action and the Department, Action shall not challenge the accuracy or validity of these findings.

b. The Department, PFBC and Action agree that Action does not admit to any of the Findings in Paragraphs F through AA, FF, and II through MM. In addition, the parties agree that Action's execution of this COSA does not constitute an admission of any of the conduct described in Paragraphs F through AA, FF, and II through MM. However, should the Department bring a proceeding



to enforce this Consent Order and Settlement Agreement, Action waives any rights it might have to dispute the Findings referred to in this subparagraph.

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

**3. Civil Penalty and Other Payments.**

a. Action shall pay a cash civil penalty in the amount of \$169,000 referenced in Paragraph AA in accordance with the following schedule: \$44,000 on June 30, 1999; and \$125,000 on or before August 15, 1999. The payments shall be by corporate check or the like, made payable to the "Commonwealth of Pennsylvania" and submitted to District Mining Manager, District Mining Operations, 437 South Center Street, P. O. Box 625, Ebensburg, PA 15931.

b. Actrion shall pay \$24,000 on June 30, 1999 to the Pennsylvania Wild Resources Conservation Fund.

c. Action shall pay \$32,000, on June 30, 1999, to Youghiogeny Riverwatch, Inc. for the three projects described in Exhibit C.

d. In resolution of the PFBC's claim for civil damages, its right to file criminal charges for any of the alleged violations, conduct or conditions described in the findings, which the PFBC is authorized to pursue under the Fish and Boat Code, 30 Pa.C.S. et seq., the PFBC hereby accepts the execution and delivery of this Consent Order and Settlement Agreement by Action, and the payments to Youghiogeny Riverwatch, Inc. for fish stocking, and Action's promise to construct the Passive Treatment System at the Pletcher Farm in accordance with this Consent Order and Settlement.

**4. Passive Treatment.**

a. Within forty-five (45) days of the execution of this Agreement by Action, Action shall submit to the Department and PFBC for approval detailed plans for the installation of the Passive Treatment System at the Pletcher Farm as well as a schedule of implementation. Should the Department

or PFBC request revision of the plan, Action shall submit the revision within fifteen (15) days.

b. Within thirty (30) days of the Department's and PFBC's approval of the plan for the installation of the Passive Treatment System, Action shall commence construction of the Passive Treatment System and shall complete construction by December 31, 2000.

c. All treatment units, structures, and facilities to be installed, all maintenance and repair work, and all reclamation to be done by Action or by others for Action at the Pletcher Farm, shall be designed, built, operated, and performed in accordance with the plan approved by the Department for the Passive Treatment System, and in such a way so as not to cause any air, water, or solid waste problem in violation of the laws of the Commonwealth or the Regulations of the Department.

d. Except as provided below, Action shall not deduct any costs incurred in connection with or in any way associated with the Passive Treatment System project, the \$24,000 payment to the Pennsylvania Wild Resource Conservation Fund, or the \$32,000 payment to Youghiogheny Riverwatch, Inc. for the three projects described in Exhibit C, or the \$169,000 payment to the Department, for any tax purpose or otherwise obtain favorable tax treatment for such costs. Within thirty (30) days of the filing of Action's Federal income tax return for any year in which Action contributed to the Passive Treatment System, Action shall submit an affidavit of a responsible company official certifying that Action has not deducted or obtained favorable tax treatment of any of the cost of the reclamation of the Passive Treatment System project on the Pletcher Farm. However, Action may deduct any costs associated with the maintenance of the Passive Treatment System and/or with the establishment of, and contributions to, the trust which is still the subject of negotiation.

e. If Action fails to comply with any requirement of paragraphs 4.a through 4.d., the Department will send written notice to Action. If Action has not completed such requirement within thirty (30) days after receipt of said notice, it shall pay to the Department \$400,000, being the full amount of civil penalties included in the Passive Treatment System project on the Pletcher Farm.

f. Within 30 days of a Department directive to do so, the owners of Pletcher Farm, on behalf of Action, shall tender a special warranty deed, in form and substance satisfactory to the parties, for the portion of the Pletcher Farm containing the Passive Treatment System to an entity designated by the Department.

5. **Permit and License Review.** So long as Action complies with the terms and conditions of this Consent Order and Settlement Agreement, Action shall be deemed for purposes of permit and license review to be in compliance with Paragraphs 3 and 4 with respect to the violations and site conditions that are addressed by this Consent Order and Settlement Agreement. No permit or license shall be denied, suspended, revoked or withheld on the grounds of compliance history solely on the basis of the violations and site conditions addressed by this Consent Order and Settlement Agreement, but these violations and site conditions may be considered by the Department for the purpose of compliance history review in conjunction with any other violation.

6. **Additional Remedies.**

a. In the event Action fails to comply with any provision of this Consent Order and Settlement 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 Settlement Agreement.

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

7. **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.

8. **Liability of Action.** Action shall be liable for any violations of the Consent Order and Settlement 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 Settlement Agreement caused by, contributed to, or allowed by its successors and assigns.

9. **Transfer of Site.**

a. The duties and obligations under this Consent Order and Settlement Agreement shall not be modified, diminished, terminated or otherwise altered by the transfer of any legal or equitable interest in the Summit #2, and/or Summit #3 Mines or any part thereof.

b. If Action intends to transfer any legal or equitable interest in the three Mines which are affected by this Consent Order and Settlement Agreement, Action shall serve a copy of this Consent Order and Settlement 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 Ebensburg District Office of the Department of such intent.

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

Scott Horrell  
District Mining Manager  
Ebensburg District Office  
437 South Center Street  
P. O. Box 625  
Ebensburg, PA 15931-0625  
Phone: (814) 472-1900  
FAX: (814) 472-1898

11. **Correspondence with Action.** All correspondence with Action concerning this Consent

Order and Settlement Agreement shall be addressed to:

Action Mining, Inc.  
R. D. 3, Box 138A  
Meyersdale, PA 15552  
Phone: (814) 634-5948  
FAX: (814) 634-5997

with a copy to:

Gregg M. Rosen, Esquire  
Sable, Pusateri, Rosen, Gordon & Adams, P.C.  
7<sup>th</sup> Floor  
Frick Building  
Pittsburgh, PA 15219

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 Settlement Agreement, including its enforcement, may be made by mailing a copy by first class mail to the above address.

12. **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 Settlement 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 Settlement 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 Settlement 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 five (5) working days by telephone and within ten (10) working days in writing of the

date it becomes aware or reasonably should have become aware of the event impeding performance. The written submission shall include all necessary documentation, as well as a notarized affidavit from an authorized individual specifying the reasons for the delay, the expected duration of the delay, and the efforts which have been made and are being made by Action to mitigate the effects of the event and to minimize the length of the delay. The initial written submission may be supplemented within 10 working days of its submission. 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, the operator shall have the burden of proving that the Department's refusal to grant the requested extension was an abuse of discretion based upon the information then available to it.

13. **Severability.** The paragraphs of this Consent Order and Settlement 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.

14. **Entire Agreement.** This Consent Order and Settlement 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.

15. **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 Settlement Agreement.

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

parties hereto.

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

18. **Decisions under Consent Order.** Any decision which the Department makes under the provisions of this Consent Order and Settlement 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 the decision will be preserved until the Department enforces this Consent Order and Settlement Agreement.

IN WITNESS WHEREOF, the parties have caused this COSA 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 COSA on behalf of Action, that Action consents to the entry of this COSA as an ASSESSMENT of the Department and as a SETTLEMENT of the PFBC; that Action hereby knowingly waives any right to a hearing under the statutes referenced in this COSA; and that Action knowingly waives its right to appeal this COSA, 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 or law.

FOR ACTION MINING, INC.

FOR THE COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION:

Larry Sanner 6/30/99  
Larry Sanner Date  
President

Scott Horrell 6/30/99  
Scott Horrell Date  
District Mining Manager

\_\_\_\_\_  
Judith S. Pletcher Date  
Treasurer

Martin H. Sokolow, Jr. 6.30.99  
Martin H. Sokolow, Jr. Date  
Regional Counsel

Gregg Rosen 30/june 99  
Gregg Rosen, Esquire Date  
Attorney for Action Mining, Inc.

FOR THE PENNSYLVANIA FISH AND BOAT  
COMMISSION:

Dennis T. Guise 6/30/99  
Dennis T. Guise Date  
Deputy Executive Director/Chief Counsel