

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

|   |   |                                   |
|---|---|-----------------------------------|
| E. P. Bender Coal Company               | : | Co # 093040                       |
| P. O. Box 565-566, South Main Street    | : | SMP No. 11793025 (SGL 108A)       |
| Carrolltown, PA 15722                   | : | SMP No. 11930102 (54 Job SGL 184) |
|   | : | SMP No. 11850111 (39 Job)         |
| and                                     | : | Dean Township, Cambria County     |
|   | : |                                   |
| E. P. Bender Coal Co., Inc.             | : | Post Mining Treatment Trust       |
| P. O. Box 594, Main and Lehmier Streets | : |                                   |
| Carrolltown, PA 15722-0594              | : |                                   |

**POSTMINING TREATMENT TRUST CONSENT ORDER AND AGREEMENT**

This Consent Order and Agreement is entered into this 30th day of September, 2009, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), the Estate of E. P. Bender trading as E. P. Bender Coal Company and E. P. Bender Coal Co., Inc. (collectively "Bender").

The Department has found and determined the following:

A. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a ("Surface Mining Act"); the Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, *as amended*, 52 P.S. §§ 701-101 - 701-706 ("Bituminous Coal Mine Act"); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §§ 30.51-30.206 ("Coal Refuse Disposal Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of

April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code") and the rules and regulations promulgated thereunder:

B. Pursuant to Section 4(d.2) of the Surface Mining Act, 52 P.S. § 1396.4(d.2), the Department may establish alternative financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program. These mechanisms may include, but are not limited to, the establishment of a site-specific trust funded by the operator for the treatment of post-mining discharges of mine drainage. The post-mining treatment trust being established as required by this Consent Order and Agreement through the accompanying Participation Trust Agreement constitutes an alternative financial assurance mechanism authorized by Section 4(d.2) of the Surface Mining Act. Pursuant to Sections 5, 315 and 610 of the Clean Streams Law, 35 P.S. §§ 691.5, 691.315 and 691.610, Section 4.3 of the Surface Mining Act, 52 P.S. § 1396.4c, Sections 3.1 and 9 of the Coal Refuse Disposal Act, 52 P.S. §§ 30.53a and 30.59, and Section 9 of the Subsidence Act, 52 P.S. § 1406.9, the Department has authority to issue such orders as are necessary to aid in the enforcement of the provisions of these acts, including orders compelling an operator to establish a post-mining discharge treatment trust as an alternative financial assurance mechanism.

C. E. P. Bender Coal Company is a fictitious name company with a business address of P. O. Box 565-566, South Main Street, Carrolltown, PA 15722. The company's business includes the mining of bituminous coal by the surface method in Pennsylvania pursuant to Surface Mining Operator's License No. 1273. Martha Bender is the Executrix of the Estate of E. P. Bender, deceased, trading as E. P. Bender Coal Company and is the person responsible for the day-to-day operations of E.P. Bender Coal Company.

D. E. P. Bender Coal Co., Inc. is a Pennsylvania corporation with a business address of P.O.Box 594, Main and Lehmier Streets, Carrolltown, PA 15722. The company's business includes the mining of bituminous coal by the surface method in Pennsylvania pursuant to Surface Mining Operator's License No. 5026. Martha Bender is the President and person responsible for the day-to-day operations of E. P. Bender Coal Co., Inc.

E. E. P. Bender Coal Company is the permittee of the following bituminous surface coal mines:

| NAME     | PERMIT NO. | TOWNSHIP | COUNTY  |
|----------|------------|----------|---------|
| SGL 108A | 11793025   | Dean     | Cambria |
| Job 39   | 11850111   | Dean     | Cambria |

F. E. P. Bender Coal Co., Inc. is the permittee of the following bituminous surface coal mine:

| NAME           | PERMIT NO. | TOWNSHIP | COUNTY  |
|----------------|------------|----------|---------|
| 54 Job SGL 184 | 11930102   | Dean     | Cambria |

**SGL 108A and Job 39 Mines**

G. The SGL 108A Mine Site was originally operated under Mine Drainage Permit No. 1179105, issued on May 22, 1979. On October 22, 1984, the mine was repermited under Surface Mining Permit ("SMP") No. 11793025.

H. Bender completed coal removal at the SGL 108A mine site on or about June 1997 and completed backfilling, grading and revegetation of the mine site on or about June 2000.

I. In July 2000, the Department determined that Bender had degraded Monitoring Points C and D, and in October 2000, the Department determined that Bender was responsible

for the toe of spoil seep zone which includes acid mine discharges identified as C, CD1, CD2, CD3, CD4, CD5, CD6, and D (collectively "SGL108A Discharges"). The SGL108A Discharges are identified and located on the topographic map attached hereto as **Exhibit A**.

J. The raw water quality of the SGL 108A Discharges is characterized by a pH less than 6.0, acidity greater than alkalinity, an iron concentration in excess of 7.0 mg/l, and a manganese concentration in excess of 5.0 mg/l. The flows and specific raw water quality of each of these discharges is set forth in **Exhibit B**.

K. Bender conducted coal mining activities within the groundwater recharge area for the SGL 108A Discharges. There exists a hydrologic connection between the area in which Bender conducted coal mining activities and the SGL 108A Discharges.

L. Bender has the legal responsibility to treat or abate the SGL 108A Discharges pursuant to, *inter alia*, the Surface Mining Act and Clean Streams Law.

M. On or about December 2001, Bender constructed a treatment system to treat the SGL 108A Discharges. The SGL 108A Treatment System consists of a diversion channel that collects the SGL 108A Discharges and directs it through a slaked calcium-oxide treatment plant, through a settling pond, and then to a polishing pond. The sludge from the two ponds is pumped through a borehole into an abandoned underground clay mine. The SGL 108A Treatment System is depicted on the map attached hereto as **Exhibit C**.

N. Surface Mining Permit ("SMP") No. 11850111 for the Job 39 Mine was issued to Bender on August 15, 1986.

O. Bender completed coal removal at the Job 39 Mine on or about February 1992 and completed backfilling, grading and revegetation of the mine site on or about May 1992.

P. Because of the proximity of the two mine sites, SMP No. 11850111 for the Job 39 Mine was amended to include the 11.2 acres of land on which the SGL 108A Discharges, SGL108A Treatment System and access road are located.

Q. The treated effluent from the SGL 108A Treatment System discharges to Brubaker Run, a water of the Commonwealth, under authority of SMP No. 11850111 and NPDES Permit No. PA0597490.

R. The effluent limitations applicable to the discharge from the SGL 108A Treatment System are as follows:

| <u>Discharge Parameter</u>    | <u>Average Monthly</u> | <u>Maximum Daily</u> | <u>Instant Maximum</u> |
|-------------------------------|------------------------|----------------------|------------------------|
| Iron, total (mg/l)            | 3.0                    | 6.0                  | 7.0                    |
| Manganese, total (mg/l)       | 2.0                    | 4.0                  | 5.0                    |
| Total suspended solids (mg/l) | 35.0                   | 70.0                 | 90.0                   |

- pH not less than 6.0 nor greater than 9.0 at all times.
- Alkalinity must exceed acidity at all times.

S. The SGL 108A Discharges and the SGL 108A Treatment System are located on property owned by Marian Watt of 346 Lynch Road, Ashville, PA. A portion of the access road to the SGL 108A Treatment System is located on property owned by the Pennsylvania Game Commission.

T. Bender previously obtained a Consent to Right of Entry, also known as a Supplemental 'C', from Marian Watt and the Pennsylvania Game Commission. Both Supplemental 'C's' were recorded in the Recorder of Deeds Office in Cambria County on May 16, 2001. In accordance with Paragraph 14 of this Consent Order and Agreement, Bender must obtain a newly executed Consent to Right of Entry that grants the parties and the trustee a right

of access to the properties on which the SGL 108A Discharges and the SGL 108A Treatment System are located, a copy of which is attached hereto as **Exhibit F**.

U. Bender posted the following financial instruments with the Department to ensure reclamation at the SGL 108A Mine and Job 39 Mine:

| <b>INSTRUMENT – SGL 108A MINE</b>                     | <b>AMOUNT</b>       |
|---|---------------------|
| Ace Property & Casualty Company Bond No. K02438240    | \$524,100.00        |
| Insurance Company of North America Bond No. K03230648 | \$109,600.00        |
| Insurance Company of North America Bond No. K03369390 | \$103,200.00        |
| Insurance Company of North America Bond No. K03695803 | \$ 70,100.00        |
| Insurance Company of North America Bond No. K03969290 | \$ 78,600.00        |
| First Commonwealth Bank Letter of Credit (#30)        | <u>\$ 99,200.00</u> |
| Total =   | \$984,800.00        |

| <b>INSTRUMENT – JOB 39 MINE</b>              | <b>AMOUNT</b> |
|--|---------------|
| First Commonwealth Bank Letter of Credit #18 | \$11,200.00   |

V. The annual treatment cost for operating and maintaining the SGL 108A Treatment System is **Ninety Four Thousand, Six Hundred and Ninety Dollars (\$94,690.00)**, and the present value of recapitalization costs is **Seventy Eight Thousand, Six Hundred and Eighty Nine Dollars (\$78,689.00)**.

#### **54 Job SGL 184 Mine**

W. Surface Mine Permit No. 11930102 for the 54 Job SGL 184 Mine was issued to E. P. Bender Coal Company on September 8, 1993 as a Subchapter F permit. On November 22, 1993, this permit was transferred to E. P. Bender Coal Company, Inc.

X. Bender completed coal removal at the 54 Job SGL 184 Mine on or about April 2002 and completed backfilling, grading and revegetation of the mine site on or about May 2002.

Y. On or about March 1998, discharges of acid mine drainage, identified as Subchapter F Monitoring Points 18 and 24 (“SGL 184 Discharges”), became degraded. Both of

these discharges are located within the boundaries of SMP No. 11930102, as shown on the map attached as **Exhibit A'**.

Z. The raw water quality of the SGL 184 Discharges is characterized by a pH less than 6.0, acidity greater than alkalinity, and a manganese concentration in excess of 5.0 mg/l. The flow and specific raw water quality of the SGL 184 Discharges is set forth in **Exhibit B**.

AA. Bender has the legal responsibility to treat or abate the SGL 184 Discharges pursuant to, *inter alia*, the Surface Mining Act and Clean Streams Law.

BB. On or about March 2002, Bender constructed a passive treatment facility to treat the SGL 184 Discharges. The treatment facility combines the two SGL 184 Discharges and directs them to a vertical flow treatment pond, and then through a long, shallow, baffled wetland and into a polishing/settling pond ("SGL 184 Treatment System"). The SGL 184 Treatment System is depicted on the map attached hereto as **Exhibit C'**.

CC. The treated effluent from the SGL 184 Treatment System discharges into Clearfield Creek, a water of the Commonwealth, under authority of SMP No. 11930102 and NPDES Permit No. PA02129393.

DD. The effluent limitations applicable to the discharge from the SGL 184 Treatment System are as follows:

| <u>Discharge<br/>Parameter</u> | <u>Average<br/>Monthly</u> | <u>Maximum<br/>Daily</u> | <u>Instant<br/>Maximum</u> |
|--------------------------------|----------------------------|--------------------------|----------------------------|
| Iron, total (mg/l)             | 3.0                        | 6.0                      | 7.0                        |
| Manganese, total (mg/l)        | 2.0                        | 4.0                      | 5.0                        |
| Total suspended solids (mg/l)  | 35.0                       | 70.0                     | 90.0                       |

- pH not less than 6.0 nor greater than 9.0 at all times.
- Alkalinity must exceed acidity at all times.

EE. The SGL 184 Treatment System is located on property owned by the Pennsylvania Game Commission. Bender previously obtained a Consent to Right of Entry, also known as a Supplemental 'C', from the Pennsylvania Game Commission and this document was recorded in the Recorder of Deeds Office in Cambria County on June 4, 2001. In accordance with Paragraph 14 of this Consent Order and Agreement, Bender must obtain a newly executed Consent to Right of Entry that grants the parties and the trustee a right of access to the property on which the SGL 184 Discharges and SGL 184 Treatment System are located, a copy of which is attached hereto as **Exhibit F**.

FF. Bender posted the following financial instruments with the Department to ensure reclamation at the SGL 184 Mine:

| <b>INSTRUMENT – 54 JOB SGL 184 MINE</b>                       | <b>AMOUNT</b>      |
|---|--------------------|
| Travelers Casualty & Surety Co. of America Bond No. 103332848 | \$425,400.00       |
| First Commonwealth Bank Letter of Credit #19                  | <u>\$ 4,100.00</u> |
| Total =   | \$429,500.00       |

GG. The annual treatment cost for operating and maintaining the SGL 184 Treatment System is **One Thousand, Nine Hundred and Thirty Four Dollars (\$1,934.00)**, and the present value of recapitalization costs is **Ninety Three Thousand, Two Hundred and Fifteen Dollars (\$93,215.00)**.

HH. Bender desires to establish an irrevocable post-mining treatment trust with First Commonwealth Bank – Trust Division as an alternative financial assurance mechanism to provide for the long-term treatment of post-mining discharges from the SGL 108A Mine and the 54 Job SGL 184 Mine, and secure the release of reclamation bonds upon completion of all other reclamation requirements. Bender agrees to establish the trust by executing a Post-Mining



Treatment Trust Agreement with First Commonwealth Bank – Trust Division that conforms with the Department’s model trust agreement (“Trust”).

II. In order to calculate the amount necessary to fully fund the Trust, the Department and Bender have agreed to use actual operation and maintenance costs from past operations of the SGL 108A and SGL 184 Treatment Systems (“Treatment Systems”), or AMD Treat cost estimates where insufficient operation and maintenance cost data exist. A summary of current annual operation and maintenance costs for the Treatment Systems is as follows:

**Table of Current Annual Operation and Maintenance Costs**

| CATEGORY    | SAMPLING<br>\$/sample | LABOR<br>\$/hr. | MAINTENANCE | CHEMICAL<br>Calcium<br>Oxide | ELECTRICITY<br>AND SLUDGE<br>REMOVAL |
|-------------|-----------------------|-----------------|-------------|------------------------------|--------------------------------------|
| Rate        | \$25/sample           | \$35/hr.        | -           | \$115/ton                    | -                                    |
| Annual Cost | \$2415                | \$9099          | \$2310      | \$72,000                     | \$10,800                             |

JJ. Based on actual operation and maintenance costs from past operations and AMD Treat cost estimates, the current annual cost of operating and maintaining the Treatment Systems is **Ninety Six Thousand, Six Hundred and Twenty Four Dollars (\$96,624.00)**.

KK. According to the AMDTreat software tool, the present value of recapitalization cost for the Treatment Systems is **One Hundred Seventy One Thousand, Nine Hundred and Four Dollars (\$171,904.00)**. The AMD Treat Recapitalization Cost schedule for the Treatment Systems is attached hereto as **Exhibit G**.

LL. In order to ensure adequate funding of the alternative financial assurance mechanism, the Department requires accurate and timely information on the costs related to operation and maintenance of the SGL 108A and SGL 184 Treatment Systems.

MM. The parties have agreed to use the formulas and procedures in this Consent Order and Agreement to determine the present value of the Trust. The parties agree that **Two Million, Sixty Six Thousand and Forty Eight Dollars and Fifty Nine Cents (\$2,066,048.59 @ 0.4% Trustee Fee)** represents the current present value of the estimated future operation and maintenance costs for the Treatment Systems, and the current present value of the estimated future recapitalization costs for the Treatment Systems. The parties have also agreed to use the information and figures that will be provided by the Accounting required by Paragraph 4 to recalculate and adjust the amount of the Trust as described in Paragraphs 8 and 10 below.

### 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 Bender 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; Sections 3.1 and 9 of the Coal Refuse Disposal Act, 52 P.S. §§ 30.53a and 30.59; Section 9 of the Subsidence Act, 52 P.S. § 1409.9, and Section 1917-A of the Administrative Code, 71 P.S. § 510-17. The failure of Bender to comply with any term or condition of this Consent Order and Agreement shall subject Bender to all penalties and remedies provided by those statutes for failing to comply with an order of the Department.

2. Findings

a. For the purposes of this Consent Order and Agreement only, Bender does not dispute the findings in Paragraphs A through MM and, in any matter or proceeding involving Bender and the Department, Bender 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 method required by Paragraph 4 of this Consent Order and Agreement.

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

c. Annual Anniversary Date. Thirty (30) days after the last day of Bender's fiscal year or thirty (30) days after the last day of any fiscal year that Bender may adopt in the future.

d. Calculated Treatment Cost. The projected future annual costs 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, 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:

$$\begin{aligned} \text{PV} &= (A/[E-I]) + A \\ \text{where: PV} &= \text{Present Value of the O\&M Costs} \\ A &= \text{Actual Treatment Cost} \\ E &= \text{Expected annual earnings/Interest Rate} \\ I &= \text{Inflation Rate (assumed to be 3.1\% or .031)} \end{aligned}$$

h. Primary Basis Valuation. One hundred percent (100%) of the present value of the future costs of operating and maintaining the Treatment Systems, as determined by the Formula.

i. Primary Target Valuation. One hundred and sixteen percent (116%) of the present value of the future costs of operating and maintaining the Treatment Systems 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, the market value of investments, and the face amount of surety bonds currently held by the Trust in the Primary Trust Account.

4. Annual Treatment Costs; Records; Factors; Accounting

a. Bender shall maintain accurate financial records of all costs and expenses associated with operation and maintenance of the Treatment Systems. The various costs shall be reported using the following categories: Reagent; Polymer; Electrical; Sludge Removal; Labor, including benefits; Maintenance; Sampling; Overhead; and Miscellaneous. Bender shall maintain and report each individual item that comprises each general category. Bender shall

keep separate records for the costs and expenses associated with operation and maintenance of the SGL 108A and SGL 184 Treatment Systems.

b. Bender shall provide an annual accounting of the costs and expenses of operating and maintaining the Treatment Systems to the Department on or before ninety (90) days following the last day of the fiscal year for which the Accounting is being provided ("the Accounting"). The Accounting shall cover the period beginning the first day of January and continuing through the final day of December of each year, or other fiscal year as Bender may adopt for its corporate finances in the future, and shall be in accordance with Generally Accepted Accounting Principles. The Accounting shall be signed by the treasurer or other corporate officer responsible for the financial affairs of Bender and by the President of Bender. Each signature shall be accompanied by a written statement as follows: "The statements contained herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities."

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

d. In the event of a dispute about the costs and expenses of the Treatment Systems incurred by Bender, Bender 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 pursuant to Generally Accepted Accounting Principles as to the treatment costs and expenses incurred by Bender, prepared by an independent licensed public or certified public accountant, shall satisfy Bender's burden of proof under this paragraph.

5. Treatment Trust

a. Bender shall establish an irrevocable Trust by executing a Post-Mining Treatment Trust Agreement with First Commonwealth Bank – Trust Division. The Trust shall secure Bender's obligation to treat the SGL 108A and SGL 184 Discharges, including its legal obligation to operate and maintain the Treatment Systems in perpetuity or until treatment is no longer necessary. The Trust shall also secure Bender's obligation to provide financial resources to the Department and the citizens of the Commonwealth to maintain and operate the Treatment Systems, and to treat the SGL 108A and SGL 184 Discharges in perpetuity in the event Bender becomes unable or unwilling to meet these obligations. The Trust shall also provide for the demolition of treatment facilities and reclamation of the treatment sites should treatment no longer be needed. The agreement establishing the Trust is attached hereto as **Exhibit H**.

b. Bender 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

Upon execution of this Consent Order and Agreement, Bender shall deposit an amount of **Two Million, Sixty Six Thousand and Forty Eight Dollars and Fifty Nine Cents (\$2,066,048.59 at 0.4% Trustee Fee)** into the Primary Trust Account. This sum constitutes the current present value of the amount necessary to fully fund the Trust, and includes the current present value of the future operation and maintenance of the Treatment Systems and the current amount needed to finance anticipated and periodic capital expenditures for the Treatment Systems. Upon said payment, Bender may seek the release of the bonds identified in Paragraphs FF and U pursuant to the requirements of 25 Pa. Code §§ 86.170 – 86.175.

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 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 Bender. 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 D**.

c. 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 D**.

d. If the Primary Trust Valuation is less than the Primary Basis Valuation, then Bender 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 D**.

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% percent or less than or equal to 90% percent 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 E** is a graphical depiction of the adjustment.

9. Distribution Payments for Adjustments to the Primary Target Valuation

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

b. 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 Bender. 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



10. Capital Improvement Account

a. 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. The required balance in the Capital Improvement Account has been determined by use of the AMD Treat Recapitalization tool based on the following methodology: For each planned capital replacement activity, the current cost and the projected year of replacement, are determined. The future cost of each replacement activity is calculated by compounding the present cost at a rate of 3.1% annually. The year in which each replacement activity will be needed is projected based on typical component life cycles. Assuming a net rate of return on investment of 8.43% the initial amount of the Capital Improvement Account must be sufficient to cover all anticipated expenditures for capital replacement activities for a 75-year period.

c. A schedule for the Capital Improvement Account balance and projected capital expenditures is made a part of this Agreement as **Exhibit G**. The required balance in the Capital Improvement Account may be recalculated on an annual basis or each time a Distribution Payment is contemplated under Paragraph 12. Such recalculation shall be deemed an amendment to **Exhibit G** 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

If the Primary Trust Valuation after any Distribution Payment under Paragraph 7 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 G**. 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 Bender any time a planned capital replacement is made as indicated on **Exhibit G**. 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 G**, 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 G**, 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 Bender's obligation to make a contribution payment under Paragraph 7.d. This amount is depicted graphically at Point 5 on **Exhibit D**. However, the amount of surplus funds transferred to the Primary Trust Account may exceed Bender's obligation under paragraph 7.d 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 D**.

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

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

14. Real and Personal Property

a. Within one (1) year of executing this Consent Order and Agreement, Bender shall submit original, recorded "Consent to Right of Entry" documents from Marian Watt and The Pennsylvania Game Commission granting access, operation, and maintenance rights of

access concerning the Treatment Systems. Bender shall assign to the Trustee all rights of access to the SGL 108A and SGL 184 Mines possessed by Bender.

b. Bender shall convey to the Trustee title to all equipment, pumps, plumbing, structures, tanks, etc., that together compose the Treatment Systems, which are described in the Post-Mining Discharge Treatment Trust Agreement attached hereto as **Exhibit H**. Title shall be delivered to the Trustee on or before execution of this Consent Order and Agreement.

15. Public Liability Insurance

a. Bender shall maintain in effect public liability insurance coverage for the operation, maintenance, improvement and all other activities associated with the SGL 108A and SGL 184 Treatment Systems and the real and personal property which is 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. In addition to the requirements of Paragraph 15.a, 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 thirty (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 which certifies Bender has a public liability insurance policy in force meeting the requirements of this Paragraph.

16. Annual Requirements

a. The parties will meet on or before the thirtieth (30<sup>th</sup>) day following

delivery to the Department of the Accounting of each year: (i) to review and discuss the Accounting for the then completed fiscal year; (ii) to review the effectiveness of the SGL 108A and SGL 184 Treatment Systems and any change in the fiscal year; (iii) to resolve any issues which arise as a result of that change or the performance of the Trust; (iv) to calculate, recalculate or adjust the size of the Primary Target Valuation, the Calculated Treatment Cost, and distribution payments from or additional contribution payments into the Trust; and (v) to address any other issues that may concern this Consent Order and Agreement or its implementation.

b. Bender shall provide annually to the Department, on forms furnished by the Department, the information required by 25 Pa. Code § 86.62(b) and (c) (relating to identification of interests).

17. Bender's Continuing Obligation.

Neither Bender'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 Bender's obligation to operate the Treatment Systems and to treat the SGL 108A and SGL 184 Discharges in a manner that meets all applicable effluent limitations. Furthermore, exhaustion of the Trust shall not excuse Bender's obligation to adequately treat or abate the discharges.

18. Stipulated Civil Penalties

a. In the event Bender fails to comply in a timely manner with any term or provision of this Consent Order and Agreement, Bender 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 one hundred dollars (\$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, and shall be forwarded to:

District Mining Manager  
Department of Environmental Protection  
Cambria District Mining Office  
286 Industrial Park Road  
Ebensburg, PA 15931

c. Any payment under this paragraph shall neither waive Bender's duty to meet its obligations under this Consent Order and Agreement nor preclude the Department from commencing an action to compel Bender's compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only Bender'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 automatically and without notice.

19. Additional Remedies

a. In the event Bender 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 Bender defaults on the obligations of this Consent Order and Agreement, Bender 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 Bender 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. Bender reserves the right to challenge any action that the Department may take to require those measures.

21. Liability of Bender

Bender 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. Bender 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 Interest

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 SGL 108A and SGL 184 Mines.

b. If Bender intends to transfer any legal or equitable interest in the SGL 108A or SGL 184 Mines, Bender 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, Department of Environmental Protection, District Mining Office, 8205 Route 819, Greensburg, PA 15601, Telephone: (724) 925-5500; Facsimile: (724) 925-5557 and the District Mining Manager identified in Paragraph 23 of such intent.

c. The Department in its sole discretion may agree to modify or terminate Bender's duties and obligations under this Consent Order and Agreement upon such transfer of interest. Bender hereby knowingly waives any right that it may have to challenge the Department's decision under this paragraph.

23. Correspondence with Department

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

District Mining Manager  
Department of Environmental Protection  
Cambria District Mining Office  
286 Industrial Park Road  
Ebensburg, PA 15931

With a copy to: Director, District Mining Operations  
Greensburg District Mining Office  
Armbrust Professional Center  
8205 Route 819  
Greensburg, PA 15601

24. Correspondence with Bender

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

Martha Bender, President  
E. P. Bender Coal Company, Inc.  
P. O. Box 594  
Carrolltown, PA 15722-0594

b. Bender 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 Bender 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 circumstance beyond Bender's control and which, by the exercise of all reasonable diligence, is unable to prevent, then Bender 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 Bender's control. Bender'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. Bender 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 Bender 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. Bender'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 Bender and other information available

to the Department. In any subsequent litigation, Bender 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., 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 and Agreement

Except for Paragraphs 7, 12 and 13, any decision that 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 that Bender may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

32. Successors

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

b. Bender 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.

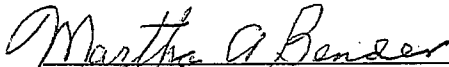
33. Counterpart Signatures

This Consent Order and Agreement may be executed in identical counterparts, with each counterpart signed by the respective party.

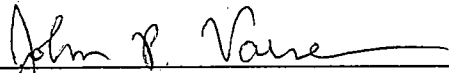
IN WITNESS WHEREOF, the parties hereto have caused this Consent Order and Agreement to be executed by their duly authorized representatives. The undersigned representatives of Bender certify under penalty of law, as provided by 18 Pa.C.S. § 4904, that

they are authorized to execute this Consent Order and Agreement on behalf of Bender; that Bender consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that Bender 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 Bender's attorney certifies only that the agreement has been signed after consulting with counsel.

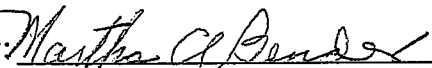
FOR E.P. BENDER COAL COMPANY:

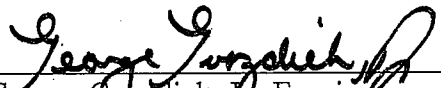
  
Martha A. Bender, Executrix of the  
Estate of E. P. Bender, deceased,  
Trading as E. P. Bender Coal Company

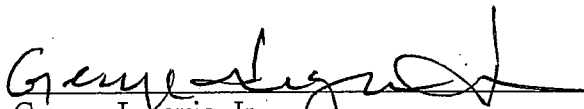
FOR THE COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION:

  
John P. Varner  
District Mining Manager

FOR E.P. BENDER COAL CO., INC.:

By:   
Martha A. Bender  
President

  
George Gvozdech, Jr., Esquire  
Counsel for Martha A. Bender, Executrix  
of the Estate of E. P. Bender, deceased,  
trading as E. P. Bender Coal Company,  
and E. P. Bender Coal Co., Inc.

  
George Jugovic, Jr.  
Assistant Counsel