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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

PBS Coals, Inc.	:	Clear Run Treatment Trust
t/a Reimer, Inc.	:	In-stream Manganese Enforcement
Friedens, Pennsylvania	:	Revised Monitoring Plan and Schedule

SECOND CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement is entered into this 12th day of March, 1999, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection ("Department"), and PBS Coals, Inc. ("PBS") and Reimer Inc.

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 et seq. ("Surface Mining Act"); the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 35 P.S. §§ 1406.1-1406.21; the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. § 30.51 et seq. ("Coal Refuse Disposal Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq. ("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. PBS is a Delaware corporation authorized to do business in Pennsylvania, with an office and principal place of business at 1576 Stoystown Road, Friedens, Pennsylvania, 15541, engaged in the business of mining coal by the surface and underground methods. On April 1, 1988, PBS became the successor by merger to NSM Coal Company Limited and NSM Coals, Inc. (collectively "NSM"), two corporations formerly engaged in the business of mining coal by the surface method in Pennsylvania. Robert Scott is the president of PBS. PBS trades under the name Reimer, Inc. Reimer and PBS are herein collectively referred to as "PBS."

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C. The Clear Run watershed consists of approximately 3,500 acres on the western slope of Allegheny Mountain, mostly south of U.S. Route 30, in Stonycreek Township, Somerset County. Clear Run is one of two major tributaries to Indian Lake, a man-made body of water, which is surrounded by Indian Lake Borough, a residential and recreational community. Clear Run is designated as a cold water fishery pursuant to 25 Pa. Code Chapter 93. Indian Lake discharges to Lake Stonycreek, another resort lake, and ultimately to Stony Creek. See map attached as Exhibit 1.

D. Since 1982, the Department has issued NSM or PBS three surface mining permits, SMP #56813006, SMP #56840107 and SMP #56920112, all in Stonycreek Township, Somerset County and all within the Clear Run watershed. The Department issued a fourth permit, SMP 56663112, to Reimer to mine a site in Stonycreek Township, which site is largely within the Clear Run watershed. The four permits are sometimes hereafter collectively referred to as the "PBS permits" and the four sites as the "PBS Sites." See map attached as Exhibit 2.

E. SMP #56813006 (the "Clear Run Mine") was originally issued to NSM Coals, Inc. as Mine Drainage Permit #56810116 on October 29, 1982 and consists of 850 acres. The site was re-permitted under primacy as SMP #56813006 for 1,006 acres and renewed for reclamation only on July 31, 1989. NSM mined the Lower Kittanning, Middle Kittanning, Lower Freeport and Upper Freeport seams. Approximately 600 acres were affected under this permit. Bonds totaling \$1,376,500 are posted on the Clear Run Mine.

F. SMP #56840107 (the "Clear Run No. 2 Mine") was issued February 3, 1987 to NSM and consists of 407 acres. NSM mined the same seams on SMP #56840107 as on SMP #56813006. SMP #56840107 was renewed on October 8, 1991 and on August 12, 1996. Approximately 295 acres have been affected by mining. Bonds totaling \$795,000 are posted on the Clear Run No. 2 Mine.

G. SMP #56920112 ("Job No. 5") was issued on May 26, 1993 to PBS for 76.3 acres. PBS mined the Lower Freeport seam under this permit and affected approximately 46 acres. Bonds totaling \$137,400 are posted on Job No. 5.

H. SMP 56663112 (the "Craighead-Boone Run Mine") was originally issued to Reimer as Mine Drainage Permit 5366BSM100 on February 21, 1967. The site was re-permitted under primacy as

SMP 56663112 on January 3, 1985 for 431 acres and renewed on September 2, 1989 and October 24, 1994. Reimer mined the Middle Kittanning, Upper Kittanning, Lower Freeport and Upper Freeport seams. Bonds totaling \$940,500 are posted on the Craighead-Boone Run Mine.

I. Mining of the PBS Sites which comprise approximately 25 percent of the Clear Run watershed has resulted in significant surface water degradation and groundwater contamination.

J. There are numerous discharges of mine drainage on, emanating from or hydrologically connected to, the PBS Sites whose combined flows, based on data available as of February 1997, range from 502 to 1022 gallons per minute. These discharges are sometimes hereafter collectively referred to as the "PBS Discharges."

K. PBS operates three major treatment systems and two lesser systems in the Clear Run watershed to treat the PBS Discharges as well as providing incidental treatment at other locations in the watershed. These systems are sometimes collectively hereafter referred to as the "Clear Run Treatment Systems." The locations of the systems are shown on the map attached as Exhibit 2.

L. The first major treatment system is the "Job 1 System" which treats water from the "Job 1 Chimney Sump" and the effluent from Pond ES-3. Water is pumped from the sump and piped by gravity from the pond, both of which are located in backfilled areas on the Clear Run Mine, to a treatment plant and settling ponds. PBS began operating the Job 1 System in November 1988. Data from samples of untreated water flowing into the Job 1 System indicate the following median water quantity and quality:

flow	344 gpm
pH	5.2 su
alkalinity	11 ppm
acidity	146 ppm
iron	54 ppm
manganese	32 ppm
aluminum	1.3 ppm
specific conductance	2025 ppm
sulfates	1300 ppm

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M. The second major treatment system is the "Childers System" which treats the flows from three artesian private water supply wells and a discharge which flows by gravity to a holding pond located on the Clear Run No. 2 Mine. Two of the wells flow by gravity to the holding pond; the other is pumped. The water is pumped from the holding pond to a treatment plant and a series of retention ponds. PBS began operating the Childers System in December 1988. Data taken from samples of untreated water flowing within the Childers System indicate the following median water quantity and quality:

flow	227 gpm
pH	5.7 su
alkalinity	9 ppm
acidity	278 ppm
iron	151 ppm
manganese	17.5 ppm
aluminum	0.2 ppm
specific conductance	1600 ppm
sulfates	950 ppm

N. The third major treatment system is the "Indian Lake System" which treats contaminated groundwater pumped from three wells to a treatment plant located near Clear Run Road. PBS began operating the Indian Lake System in January 1991. Data from samples of untreated water flowing into the Indian Lake System indicate the following median water quantity and quality:

flow	91 gpm
pH	6.4 su
alkalinity	110 ppm
acidity	7 ppm
iron	34 ppm
manganese	7.78 ppm
aluminum	0.22 ppm
specific conductance	2150 ppm
sulfates	1375 ppm

O. The "Job 8 System" treats a discharge which is located on backfilled portions of the Clear Run No. 2 mine and which flows by gravity for treatment to the Clear Run Mine. PBS began

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operating the Job 8 System in August 1990. Data from samples of untreated water flowing into the Job 8 System indicates the following median water quantity and quality:

flow	10 gpm
pH	3.6 su
alkalinity	0 ppm
acidity	240 ppm
iron	4.38 ppm
manganese	68 ppm
aluminum	13.6 ppm
specific conductance	2500 ppm
sulfates	1525 ppm

P. The "Job 5 System" treats a discharge which is located on the backfill of Job 5 and flows by gravity to a pyrolusite drain and then to a holding pond. PBS began operating the Job 5 System in March 1995. The limited data available from samples of untreated water flowing into the Job 5 System indicate the following median water quantity and quality:

flow	8.5 gpm
pH	5.6 su
alkalinity	28 ppm
acidity	90 ppm
iron	< .30 ppm
manganese	30.0 ppm
aluminum	3.0 ppm
sulfates	1409 ppm

Q. The effluent limits for each of the Clear Run Treatment Systems, with the exception of the Job 5 System, are those set forth in 25 Pa. Code § 87.102. The effluent limits for the Job 5 System are found in Part A of SMP #56920112.

R. On January 26, 1991, the Department, the Pennsylvania Fish Commission (now the Pennsylvania Fish and Boat Commission) and NSM entered into a Consent Order and Agreement concerning the degradation of Clear Run and the groundwater contamination caused by the Clear Run Mine and the Clear Run No. 2 Mine (the "1990 COA"). Among other things, the 1990 COA required

NSM to conduct and submit a groundwater investigation and assessment, submit treatment and abatement plans and conduct extensive monitoring. The 1990 COA is being superseded by this Agreement.

S. On July 26, 1995, PBS submitted to the Department and the Pennsylvania Fish and Boat Commission a report prepared by its consultant, Free-Col Laboratories, Inc., which contained the results of toxicity tests conducted using three species, including brook trout, and using water from Clear Run. The Fish Commission reviewed the PBS study and has stated that it believes the in-stream level of manganese could rise to two parts per million without having an impact on aquatic life. The Department has relied on the Fish Commission's analysis and recommendations.

T. Since 1996, the Department and PBS have had numerous meetings and discussions concerning the establishment of long-term financial assurance for the treatment of water within the Clear Run watershed and for the operation of the Clear Run Treatment Systems. The long term financial assurance is intended to provide sufficient sums to fund treatment for not less than fifty (50) years, based on current assumptions, projections and formulae. A variety of proposals were discussed; the plan agreed to by the parties is set forth in Paragraphs 1-34 of this Agreement.

U. PBS stated that if the Department exercised modified monitoring frequency and location and enforcement discretion with respect to the in-stream manganese limit, the company could alter the design and/or operation of Clear Run Treatment Systems, and the money saved would be diverted into long-term financial assurance. PBS did not request relaxation of, and the Department has not otherwise altered, the effluent limits for the Clear Run Treatment Systems. The parties have agreed that the monitoring point on Clear Run at Peninsula Drive (SW106) will serve as the point of compliance on Clear Run for in-stream manganese. For all parameters other than manganese, the Department will continue to apply and enforce the in-stream criteria found in *25 Pa. Code* Chapter 93 anywhere in Clear Run. The Department has agreed that it will exercise its enforcement discretion to excuse levels which exceed in-stream criteria due to precipitation events.

V. The parties have also discussed the need for a mechanism to obtain accurate and timely information on the costs of operating and maintaining the Clear Run Treatment Systems in order to calculate the proper size of the bond and other costs and values associated with the bond and the trust. Finally, the parties agreed that an annual account of the costs of treatment would be provided to the Department by PBS during the period of time PBS is operating the Clear Run Treatment Systems.

W. The parties agreed to use the information and figures which will be provided by the annual accountings to calculate and adjust the proper size of the trust during the first 50-year period in which the trust will exist. The parties agreed to use the formula set forth in Paragraph 3 to calculate the present value of a fifty (50) year trust fund for treatment.

X. PBS has identified other discharges in the Clear Run watershed not on property currently owned or permitted by PBS and not believed to be associated with PBS' mining operations. PBS has expressed an interest in treating and/or abating these other discharges, perhaps as a reclamation in lieu of civil penalty project should PBS be assessed civil penalties on sites other than the PBS Sites. These other discharges are located on the west side of Route 160 on the Sam Childers' property and also near the Indian Lake airport. As set forth in Paragraph 17, the Department has agreed to consider, as a priority, on a case by case basis, proposals which PBS may make toward the future abatement of these other discharges. The Department has further agreed that, so long as there are projects which enhance the quality of Clear Run, it will not direct PBS to projects outside the watershed.

Y. PBS and the Department entered into a First Consent Order and Agreement dated July 29, 1998 which required, among other things, that PBS to escrow \$236,000. The July 29 agreement is being superseded by this agreement.

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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 PBS 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; and Section 1917-A of the Administrative Code, supra. The failure of PBS to comply with any term or condition of this Consent Order and Agreement shall subject PBS to all penalties and remedies provided by those statutes for failing to comply with an order of the Department, except that the civil penalties for certain violations have been agreed upon and set forth in Paragraph 18.

2. **Findings.**

(a) PBS agrees that the findings in Paragraphs A through Y are true and correct and; in any matter or proceeding involving PBS and the Department, PBS 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.**

Accounting. The accounting required by Paragraph 5 of this Agreement.

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

Annual Anniversary Date. April 30 of each year or thirty (30) days after the last day of any fiscal year which PBS may adopt in the future.

Calculated Treatment Costs. The projected future annual cost of treatment, based on the Actual Treatment Cost, compounded at three percent (3%) annually. For purposes of this

definition, the Actual Treatment Cost is assumed to be \$250,000; this assumption does not change unless an adjustment is made in accordance with Paragraph 10.

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

$$PV = A(1+i) [(1-((1+E)/(1+i))^N)/(i-E)]$$

where:

PV	=	Present Value of the O+M Costs
A	=	Current Actual Treatment Cost
i	=	Interest Rate (assumed to be 9% or .09)*
E	=	Inflation Rate (assumed to be 3% or .03)*
N	=	Trust period (50 years)

* These assumptions will remain the same unless the parties agree otherwise.

Sub-Account For Perpetual Treatment. A restricted account established within the Trust to provide for perpetual treatment after the first 50-year period.

Target Valuation. 115% of the present value of the future cost of treatment as determined by the Formula.

Trust Valuation. The cash, cash equivalents, investments at market value and the face amount of surety bond currently held by the Trust at the close of business on the Annual Anniversary Date. The Trust Valuation does not include the Sub-Account For Perpetual Treatment.

4. **Rider.**

On the date of this Agreement, PBS shall deliver a fully executed rider or riders to the \$3,249,400 in surety bonds posted for the PBS Sites prior to this Agreement.

5. **Annual Treatment Costs; Records; Factors; Accounting.**

a. PBS 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: Reagent;

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Polymer; Electrical; Sludge Removal; Labor; Maintenance; Equipment; Sampling; and Miscellaneous. The individual items which shall be tracked and reported for each general category are set forth in Exhibit 3 which is attached and incorporated by reference.

- b. PBS shall keep separate records for each of the Clear Run Treatment Systems.
- c. PBS 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 April 1 and continuing through March 31 of each year, or other fiscal year as PBS 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 PBS and by the President of PBS attesting to the completeness and accuracy of the records of the costs and expenses of annual treatment as reported in the Accounting.
- d. The Accounting shall include the total of the civil penalties assessed for each year pursuant to Paragraph 18.a. and 18.b.
- e. PBS' obligation to keep records and provide the Accounting shall continue for the period during which PBS is operating the Clear Run Treatment Systems or fifty (50) years from the date of this Agreement, whichever period is shorter.
- f. In the event of a dispute about the costs and expenses of treatment incurred by PBS, PBS shall bear the burden of proving the accuracy and completeness of the Accounting and the records upon which the Accounting is based. A report which shall mean a Special Report prepared under Generally Accepted Auditing Standards as to the treatment costs incurred by PBS, prepared by an independent public accountant, shall satisfy PBS' burden of proof as to any of these matters.

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6. Clear Run Treatment Trust.

PBS shall establish an irrevocable trust to be known as the Clear Run Treatment Trust ("Trust" or "CRTT"). The purpose of the CRTT is to secure PBS' obligations to treat discharges of mine drainage, including its obligations to operate the Clear Run Treatment Systems, within the Clear Run watershed for a fifty (50) year period commencing on the date of this Agreement and in perpetuity thereafter. The agreement establishing the trust (the "Post-Mining Discharge Treatment Trust Agreement") is attached as Exhibit 4.

7. Initial Payment to Trust.

Upon its execution of this Agreement, PBS shall pay an amount of \$336,000 (which includes \$16,000 in civil penalties), together with any other civil penalties which have accrued under the 1990 COA but have not yet been paid, into the CRTT. This amount was placed in escrow by PBS pursuant to the First Consent Order and Agreement dated July 29, 1998.

8. Additional Payment into Trust.

In addition to the initial payment required by Paragraph 7, PBS shall pay into the CRTT the sum of \$100,000 per year for five (5) years. PBS shall commence monthly payments of \$10,000 beginning with March, 1999. PBS is only required to make ten (10) monthly payments in any one calendar year and has the right to decide which ten (10) months in a year it shall make payments. PBS is not required to pay more than \$100,000 during any calendar year. PBS may discontinue the payments under this Paragraph if it is projected, using the Trust Valuation and the Formula, that the Trust Valuation will remain greater than or equal to the Target Valuation in all future years. The determination whether the Trust Valuation is greater than the Target Valuation will be made by the Department on the Annual Anniversary Date.

9. Payments for Sub-Account For Perpetual Treatment.

a. In addition to the payment required by Paragraphs 7 and 8, PBS shall pay an additional sum into the CRTT sufficient to fund treatment for an additional period after the first 50

years. To fulfill its obligation under this Paragraph, PBS shall either pay \$245,000 immediately upon execution of this Agreement or, in the alternative, make one or more payments on or before January 2, 2003, which payments singly or in the aggregate shall not be less than \$345,000.

b. The payments under this Paragraph are intended solely to fund the Sub-Account For Perpetual Treatment ("Sub-Account") and shall not be used in any calculation of the Trust Valuation or any adjustment made pursuant to Paragraphs 10 through 12.

c. If PBS is still operating the Clear Run Treatment Systems fifty (50) years after the date of this Agreement, PBS may request that the Department direct the Trustee to make payments from the Sub-Account to PBS for the purpose of continued operation of the treatment systems or to minimize the tax consequences, if any, to PBS. The Department's decision concerning any request from PBS shall be in the Department's sole discretion and shall not be appealable to the Environmental Hearing Board or any court.

d. If the valuation of the Sub-Account on any Annual Anniversary Date exceeds 17.1 times the Calculated Treatment Cost in the fiftieth (50th) year of this Agreement, as may be adjusted from time to time pursuant to Paragraph 10, the Department will direct the Trustee to pay the difference between the valuation of the Sub-Account and 17.1 times the Calculated Treatment Cost in the fiftieth year to PBS. In the event any monies are ever paid by the Trust to PBS under this subparagraph, PBS will no longer be entitled to pay stipulated civil penalties, if any, into the Trust as otherwise provided under Paragraph 18.

10. Adjustments to the Target Valuation for Ten Percent Changes in Actual Treatment Costs.

a. If the Actual Treatment Cost calculated for any year is greater than or equal to 110% or less than or equal to 90% of the Calculated Treatment Cost, the Department will calculate a

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new Present Value using the Formula. The new Actual Treatment Cost and a trust period equal to the remaining years in the original 50-year trust will be used when applying the Formula. A new Target Valuation will be determined by calculating 115% of the new Present Value.

b. If the new Target Valuation is calculated pursuant to this Paragraph, it will be the basis for future adjustments under Paragraphs 11 and 12 of this Agreement.

c. The first recalculation under this Paragraph will occur as soon after March 31, 2000 as PBS provides the Department the Accounting of the Actual Treatment Costs for fiscal year 1998 and 1999. This first recalculation shall occur even if the Actual Treatment Cost for 1999 is not greater than or equal to 110% or less than or equal to 90% of the Calculated Treatment Cost. For purposes of this subparagraph, Actual Treatment Cost will be the average of the Accountings for fiscal year 1999 and the prorated Accounting for August 1, 1998 through March 31, 1999. Thereafter, all other recalculations will be in accordance with subparagraph a.

11. Trust Valuation Greater Than Target Valuation; Bond Reductions/Cash Payouts.

On any Annual Anniversary Date, if the Trust Valuation is greater than the Target Valuation, then the following bond reduction/cash payouts to PBS will be made:

a. At the end of any year in which the Trust Valuation is greater than the Target Valuation, surety bonds shall be released in the greatest amount that results in the projected Trust Valuation, assuming 9% growth of investment, remaining greater than or equal to the Target Valuation in the current year and all future years.

b. If in the year that the last remaining surety bond is to be released there is not sufficient surety bond remaining to equal the difference between the Target Valuation and the Trust Valuation, the remaining surety bond will be released and the balance will be in the form of a cash payout.

c. Thereafter, cash payouts will be made in an amount equal to the difference between the Trust Valuation and the Target Valuation.

12. Target Valuation Greater Than Trust Valuation; Additional Payments into the Trust.

On any Annual Anniversary Date, if the Trust Valuation is less than the Target Valuation, PBS shall make an additional payment into the Trust in an amount equal to the difference between the Target Valuation and the Trust Valuation, provided that PBS shall not be required to make an additional payment that exceeds the amount set forth in Exhibit 5 for the year(s) the shortfall exists. If the additional payment in any year as limited by this Paragraph results in the Trust Valuation remaining less than the Target Valuation, then additional payments subject to the same limitation shall be made in each subsequent year until the Trust Valuation equals the Target Valuation.

13. 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 Clear Run 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 CRTT; to calculate, recalculate or adjust the size of the Target Valuation, the Calculated Treatment Cost, and bond reductions, payouts from or additional payments into the CRTT; and to address any other issues that may concern the Agreement or its implementation.

14. PBS' Continuing Obligation.

Neither PBS' agreement to fund the CRTT nor the full or partial funding of the Trust, nor the exhaustion of the Trust shall in any way limit PBS' obligation to operate the Clear Run Treatment Systems. Furthermore, exhaustion of the Trust shall not excuse PBS from operating the Clear Run Treatment Systems.

15. Manganese In-stream Limits.

a. So long as PBS is in compliance with the terms and conditions of the Consent Order and Agreement, the Department agrees that it will exercise its enforcement discretion with

respect to the 25 Pa. Code Chapter 93 in-stream manganese limit of 1.0 mg/l and will not take an enforcement action until PBS exceeds an in-stream level of 2.0 mg/l as measured at the Peninsula Drive sampling point (SW106). Except as set forth in subparagraph b., below, the Department agrees that it will limit its enforcement actions with respect to in-stream exceedences above 2.0 mg/l to the assessment of civil penalties in accordance with Paragraph 18. In the event that changes 25 Pa. Code Chapter 93 or other Pennsylvania laws or regulations in the future would authorize an increased in-stream manganese above 2.0 mg/l, the manganese limit in this Agreement shall be increased accordingly.

b. In the event the Department determines that in-stream levels of manganese above 2.0 mg/l as measured at Peninsula Drive are causing an impact of any kind on Clear Run below Peninsula Drive (SW106) or in Indian Lake, the Department may require additional measures in accordance with Paragraphs 21 and 22.

c. For parameters other than manganese sampled anywhere in Clear Run, the Department will continue to apply and enforce the in-stream criteria found in 25 Pa. Code Chapter 93. However, the Department agrees that it will exercise its enforcement discretion to excuse levels which exceed instream criteria due to precipitation.

d. Nothing in this Agreement alters, in any way, the effluent limits for the Clear Run Treatment Systems which limits are described in paragraph Q.

16. Monitoring: Reduced Number of Points; Frequency Issue; Split Sampling.

To the extent it has not already done so pursuant to the First Consent Order and Agreement dated July 29, 1998, immediately upon its execution of this Consent Order and Agreement, PBS shall institute the following water quality monitoring plan on the Clear Run watershed:

a. The following four points: SW106 (Clear Run at Peninsula Drive); T1 (Job 1 Treatment Plant); T2 (Childer's Treatment Plant); and T3 (Indian Lake Treatment Plant) shall be sampled daily.

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b. The following five points: Job 1 raw water feed; Childer's raw water feed; Job 8 raw water feed; Indian Lake treatment raw water feed; and SW105 shall be sampled weekly. The frequency of monitoring at these five weekly monitoring points will be reduced to monthly one year after the date of execution of this agreement.

c. The following four points: SW10B; SW12; T5 (the Job 5 seep before and after treatment); and the Job 8 treatment system shall be sampled monthly.

d. The following nineteen (19) points: the Job 5 sump; W7A; W8A; W11A; W13; W14; W15A; W19; W58A; W59; SW3; SW8; SW20; SW 34; SW112; SW113; SW109; SW13; and SW 14 shall be sampled quarterly.

e. All treatment and sediment ponds, unless otherwise specified in this Paragraph, shall be sampled in accordance with the monitoring requirements specified in Part A of the permit on which the pond is located.

f. Flow measurements shall be included as part of the sampling of all discharges and surface water points.

g. The data collected for the daily, weekly and monthly monitoring points shall be submitted to the Department monthly and shall be due by the fifteenth day of the month following the month in which the data was collected. The data collected for the quarterly monitoring points shall be submitted to the Department quarterly and shall be due within 28 days of the end of the quarter.

h. The monitoring plan described in this Paragraph supersedes the monitoring requirements in Paragraph 1 of the 1990 COA and in SMPs 56813006, 56840107 and 56920112. The monitoring requirements of this Paragraph also supersede the monitoring plan for those monitoring points on SMP 56663112 within the Clear Run watershed, but does not change the monitoring program for those portions of SMP 56663112 which are within the Boone Run watershed.

i. The Department will publish public notice of the permit modifications in this Paragraph.

17. **Reclamation-in-Lieu-of-Civil Penalty Projects at Other Discharges in Watershed.**

a. If the Department assesses civil penalties for violations at any PBS mine sites other than those listed in Paragraphs D through H, PBS may submit one or more proposed reclamation-in-lieu of payment of penalty project(s) for any of the discharges described in Paragraph X. The Department agrees to review any proposals on a priority basis. If the Department approves a proposed project, the Department and PBS shall enter into a Consent Order and Agreement which complies with normal Department practice.

b. The Department agrees to assist with respect to access in any manner it deems appropriate and reasonable.

c. The Department agrees that, so long as there are projects which enhance the water quality of Clear Run, it will not direct PBS to projects outside the Clear Run watershed.

d. If the Department disapproves of a project, PBS shall submit a proposal for another project or pay the assessed penalty; PBS may not appeal the Department's disapproval of the proposed project to the Environmental Hearing Board or to any court. Approval of one project shall not be construed, in any way, to mean that a subsequent project will be approved.

18. **Stipulated Civil Penalties.**

a. In the event PBS fails to meet the effluent limits established for the discharges from the treatment systems described in Paragraphs L-N, PBS shall pay a civil penalty in accordance with the following schedule:

- i. \$1,000 per violation for the first six violations (1-6)
- ii. \$2,000 per violation for the second six violations (7-12);
- iii. \$3,000 per violation for the third six violations (12-18);
- iv. \$4,000 per violation for the fourth six violations (19-24); and
- v. \$5,000 per violation for any subsequent violations.

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For purposes of this subparagraph, all violations at any one of the Clear Run Treatment System are one violation for that system for that day.

b. In the event a sample taken at Peninsula Drive exceeds 2 ppm for manganese, regardless of the reason, PBS shall pay a civil penalty according to the same schedule as subparagraph a. All manganese violations in one day are considered to be one violation.

c. For purposes of subparagraphs a. and b. above:

i. samples taken by the Department, PBS or any of their consultants or designees shall be used in determining if a civil penalty shall be assessed; and

ii. the schedule of assessments shall restart on the 1st day of each Accounting Year.

d. in lieu of paying any penalty, assessed pursuant to subparagraphs a. and b., PBS shall pay the equivalent sum(s) into the CRTT; and

e. all penalties assessed or equivalent sums paid during a year shall count as a cost in the annual cost of treatment for that year and shall be included in the Accounting as required by Paragraph 5.d.

f. Civil penalties for any other violations on the PBS Sites will be assessed in accordance with normal Department procedures. In lieu of paying the civil penalties, PBS shall pay the equivalent amount into the CRTT. Penalties under this subparagraph shall not be included as a cost in the annual cost of treatment.

g. In lieu of paying any civil penalties which are assessed for violations of in-stream criteria other than manganese anywhere in Clear Run, PBS shall pay the equivalent amount into the CRTT.

h. The Department's ability to collect stipulated penalties pursuant to this Paragraph is in addition to any other rights or remedies it may have. The stipulated penalties are, however, the only civil penalty the Department may assess or collect.

i. Once no more surety bonds remain posted for the PBS Sites, any payments pursuant to this Paragraph shall be placed into the Sub-Account For Perpetual Treatment and shall not be returned or repaid to PBS. As is set forth in Paragraph 9.d., once a payment has been made pursuant to that provision, PBS shall not be entitled to pay the equivalent of any stipulated penalty into the Trust.

19. Tax Deductibility: Civil Penalties.

Unless 26 U.S.C. § 162(f) is repealed and not replaced by a comparable provision which would continue to prohibit the deduction of fines and penalties, PBS shall not deduct any of the civil penalties assessed pursuant to Paragraph 18 for any tax purpose or otherwise obtain favorable tax treatment for such penalties. As an attachment to the Accounting required by Paragraph 5, PBS shall submit an affidavit of the corporate officer responsible for the financial affairs of PBS certifying that PBS has not deducted or obtained favorable tax treatment of any of the civil penalties.

20. Two Earlier COAs.

The 1990 COA and the First Consent Order and Agreement dated July 29, 1998 are superseded.

21. Additional Remedies.

a. In the event PBS 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. The remedies provided by this 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.

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22. Reservation of Rights.

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

23. Liability of PBS.

PBS 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. PBS also shall be liable for any violation of this Consent Order and Agreement caused by, contributed to, or allowed by its successors and assigns.

24. 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 PBS Sites or any part thereof.

b. If PBS intends to transfer any legal or equitable interest in the PBS Sites which is affected by this Consent Order and Agreement, PBS 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 Ebensburg District Mining Office of the Department of such intent.

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

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25. 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
Ebensburg District Mining Office
R.D. 3, Wilmore Road
Box 625
Ebensburg, PA 17110

26. Correspondence with PBS.

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

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

PBS 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.

27. Force Majeure.

a. In the event that PBS 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 PBS' control and which PBS, by the exercise of all reasonable diligence, is unable to prevent, then PBS 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 PBS' control. PBS' economic inability to comply with any of the obligations of this Consent Order and Agreement shall not be grounds for any extension of time.

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b. PBS 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 PBS 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. PBS' 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 PBS and other information available to the Department. In any subsequent litigation, PBS 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.

28. 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.

29. 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.

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30. 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.

31. Modifications.

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.

32. 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.

33. Dispute Resolution.

a. PBS may initiate dispute resolution under this Paragraph, in response to any decision required of the Department under this Agreement.

b. To initiate dispute resolution, PBS shall provide written notice to the Department within 10 days of the decision in dispute. PBS shall have an additional 10 days to provide the Department with a written list of objections to the decision in dispute, the relevant facts, analysis and opinions and other supporting data ("Statement of Position"). The Department shall have 20 days to provide its Statement of Position.

c. Within the twenty (20) day period following receipt of the Department's Statement of Position, the District Mining Manager and the PBS' President shall confer in an attempt to resolve the dispute. In the event the parties are unable to resolve the dispute within this period, the Statement of Position shall be provided to the Department's Director of District Mining Operations to issue a final decision resolving the dispute.

d. During the pendency of the dispute resolution procedures set forth in subparagraphs (b) and (c), any obligation to be performed under this Consent Order and Agreement

which performance is directly dependent upon the resolution of the dispute shall be postponed for a period of time not to exceed the actual time taken to resolve the dispute pursuant to subparagraphs (b) and (c) or as otherwise agreed by the parties. All other obligations and activities shall be completed in accordance with the terms of this Consent Order and Agreement.

e. Any time period for dispute resolution set forth herein may be extended by written agreement of the parties.

34. Decisions under Consent Order.

Except for Paragraphs 10 and 11, 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 PBS may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

35. Successors.

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

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 PBS 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 PBS; that PBS consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that PBS hereby knowingly waives its rights

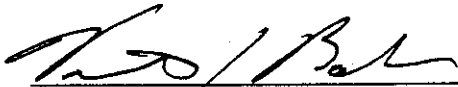
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to appeal this Consent Order and Agreement and to challenge its content or validity, which rights may be available under Section 4 of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No 1988-94, 35 P.S. § 7514; the Administrative Agency Law, 2 Pa.C.S § 103(a) and Chapters 5A and 7A; or any other provision of law. Signature by PBS' attorney certifies only that the agreement has been signed after consulting with counsel.

FOR PBS COALS, INC.



Robert Scott, President



Vincent Barbera, Esquire
Attorney for PBS Coals, Inc.

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION



Jeffrey Jarrett
Director
District Mining Operations



Martin H. Sokolow, Jr.
Regional Counsel
Southcentral Region

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EXHIBIT 3

ITEMS TO BE INCLUDED IN ANNUAL TREATMENT COST ACCOUNTING

CATEGORY	JOB 1 SYSTEM	CHILDERS SYSTEM	INDIAN LAKE SYSTEM	JOB 8 SYSTEM	JOB 5 SYSTEM	SUM FOR ALL SYSTEMS
<u>Labor costs:</u>						
Regular Wages:						
Overtime Wages:						
Fringes:						
Total Payroll & Related:						
<u>Consumables:</u>						
Caustic:						
Lime:						
Soda Ash:						
Electricity:						
<u>Other:</u>						
Water Sampling:						
Repair and Maintenance*:						
Miscellaneous:						
Penalties:						
Total of All Costs:						

*Repair and Maintenance includes sludge removal costs and equipment costs.

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