

**PARTICIPATION AGREEMENT**

**FOR THE CLEAN STREAMS FOUNDATION, INC. TRUST**

This Participation Agreement ("Participation Agreement") entered into this <sup>14</sup> day of November 2008, by and between R.E.M. COAL CO., INC., ("R.E.M.") a corporation, with a mailing address of Attn: Don Bullers, RR 3, Box 369, Brookville, Pennsylvania, 5825 Aetna Insurance Co. ("Aetna"), a corporation, with its principal place of business at 436 Walnut Street, Philadelphia, Pennsylvania, 19106, (collectively, the "Participants"), and the CLEAN STREAMS FOUNDATION, INC. ("Trustee" or "Foundation"), a Pennsylvania nonprofit corporation, with its registered place of business at 160 North McKean Street, Kittanning Pennsylvania 16201

WHEREAS, the Participants wish to provide funds or other assets and/or financial guarantees to assure that funds will be available in the future for the operation of certain treatment systems, for the prevention of pollution, and for the protection of natural resources; and

WHEREAS, the Trustee has established through a Declaration of Trust, dated April 7 2001, which Declaration of Trust establishes a Trust which purpose is to help assure that fund are available to the Commonwealth of Pennsylvania in the future to operate and maintain treatment systems, to prevent pollution, and to protect natural resources from the adverse impacts of untreated discharges into waters of the Commonwealth (the "Trust"); and

WHEREAS, the Trustee has agreed and is willing to accept the Participants' funds and guarantees and perform the duties as are required to be performed pursuant to this Participation Agreement and the Declaration of Trust; and

NOW THEREFORE, in consideration of the foregoing and of the mutual promises and

undertakings of the parties as set forth herein, and with the intention of being legally bound hereby, the parties agree as follows:

## **ARTICLE ONE**

### **DEFINITIONS**

The "Department" means the Pennsylvania Department of Environmental Protection, and its successor if any, which is the governmental agency with responsibilities related to the administration of the water pollution control and mining reclamation programs in Pennsylvania.

"Operate" means, but is not limited to, the operation, maintenance, improvement, and replacement of the currently existing and functioning treatment facilities approved by the Department and any other facilities which may be required in the future.

"Participants" means one or more individuals, organizations, or corporations that have elected to participate in the Trust pursuant to a Participation Agreement entered into between the Participants and the Foundation, for purposes of providing funds and/or financial guarantees to assure that funds will be available in the future for the operation of certain treatment systems, for the public purpose of prevention or abatement of pollution, and for the protection of natural resources, the environment, and the health and welfare of the public.

"Treatment Systems" means those certain treatment systems and activities which are more particularly described in a consent order and agreement for which a Participant has provided funds and/or financial guarantees to be held in trust by the Foundation as an alternate financial assurance mechanism which provides for the sound future treatment of discharges for the public purpose of protecting the environment and the health and welfare of the public.

"Trustee" means the Foundation acting as trustee under the terms and provisions

of this Declaration of Trust and a Participation Agreement entered into with a Participant or Participants.

## ARTICLE TWO

### PARTICIPATION IN THE TRUST

The Participants agree to provide certain funds, assets, and/or financial guarantees to be held by the Trustee for purposes of assuring that funds are available in the future for the operation and maintenance of certain active treatment systems for acid mine drainage from the R.E.M. Kemmer and Oliveburg Mines, as described in the Consent Order and Agreement, dated May 15, 2008, between the Department and the Participants, attached hereto as Exhibit A.

The Trustee agrees to establish within the Trust Fund a Sub-Account, designated as the "R.E.M. Treatment Trust Account" ("Sub-Account").

The Participants agree to make an initial payment or transfer to the Trust to be deposited to the Sub-Account of \$207,673.00 within fifteen (15) days of its execution of this Participation Agreement, with R.E.M. contributing \$29,800.00 and Aetna contributing \$177,873.00.

Any guarantees, including but not limited to, letters of credit, insurance, surety bonds, etc., delivered by the Participants shall be held by the Trustee until the Department either directs the Trustee to release such guarantee or portion thereof or the Department directs the Trustee to forfeit said bonds or enforce said guarantee and for the Trustee to deposit the proceeds of such guarantee into the Trust Fund. The Trustee shall be under no obligation to pay any premiums or other costs associated therewith. Instead, all such premiums and costs, as well as the responsibility for maintaining the guarantees in full force and effect, shall remain the obligation of the Participants. The Trustee shall take no action with respect to guarantees except

as directed, in writing, by the Department in accordance with the provisions of this Declaration of Trust, and the Trustee shall not be liable to any party for acting in accordance with such directions.

Any payments made by the Participants or on their behalf to the Trustee for deposit into the Trust shall consist of cash, bank checks, bank wire transfers, negotiable instruments, or other property acceptable to the Trustee. The Trustee shall have no responsibility for the amount or adequacy of such payment, but the Trustee shall notify the Department in writing of any deficiencies in the payments agreed to be made by the Participants whenever the Trustee has knowledge of such deficiencies.

### **ARTICLE THREE**

#### **ADMINISTRATION**

The principal of the Sub-Account shall consist of:

- (a) The payments or transfers to the Trustee made by the Participants pursuant to this Agreement for said Sub-Account
- (b) Such payments from time to time and at any time to the Trustee as such may be directed by the Department pursuant to any agreement between the Department and the Participants.
- (c) Cash, funds or property transferred from any person to the Trustee and accepted by the Trustee for said Sub-Account.
- (d) Any proceeds from surety bonds which are transferred to the Trustee for said Sub-Account.
- (e) All investments, reinvestments, assets or proceeds attributable to or derived from the foregoing items in this §3.1

(f) All earnings, accretions and profits received with respect to the foregoing items in this §3.1

The Trustee shall hold and administer the funds of the Sub-Account in accordance with the terms and conditions of the Declaration of Trust.

The Trustee shall distribute such amounts from the Sub-Account as the Department shall direct to pay for the operation of the Kemmer and Oliveburg Mines treatment systems described in §2.1. This amount shall be paid to a third-party administrator to the Trust, who shall be responsible for paying the costs of operating the treatment systems in accordance with any instructions that may be issued by the Department in relation thereto.

The Participants hereby adopt the Declaration of Trust as the document which governs the administration of this Participation Agreement and the Sub-Account and directs the Trustee to hold and administer the Sub-Account in accordance with the terms and conditions of the Declaration of Trust. The Participants acknowledge that the Commonwealth of Pennsylvania acting through the Department is the legal beneficiary of the Trust and has all rights of a beneficiary under the law, as well as the rights granted under the Declaration of Trust. The Department shall have access to the Trust as provided therein.

The funds in the Sub-Account and any other property held by the Trustee pursuant to this Participation Agreement shall not be subject to assignment, alienation, pledge, attachment, garnishment, sequestration, levy or other legal process, either voluntary, involuntary or by operation of law, by, on behalf of, or in respect of the Participants and shall not be subject or applied to the debts, obligations or liabilities of the Participants, including, without limitation, any direct action or seizure by any creditor or claimant under any writ or proceeding at law or in equity. Furthermore, the Participants shall have no legal title to any part of the Trust Fund, and it

is the intention of the parties to this Participation Agreement that the Participants' entry into the Trust shall extinguish and remove all of Participants' interest in the Trust from the Participants estate(s) under the Bankruptcy Code or similar laws.

Except as otherwise provided in this Participation Agreement, all payments made to the Trustee or deposits into the Trust by the Participants shall be irrevocable once made, and upon delivery thereof by the Participants, all interest of the Participants therein shall cease and terminate, and no part thereof, nor any income therefrom, shall be used for or devoted to purposes other than for the exclusive benefit of the Department and the Trust as provided herein.

Any payments made by the Participants or on their behalf to the Trustee for deposit into the Trust shall consist of cash, bank checks, bank wire transfers or other negotiable instruments acceptable to the Trustee. The Trustee shall have no responsibility for the amount or adequacy of such payment, but the Trustee shall notify the Department of any deficiencies in the payments agreed to be made by the Participants whenever the Trustee has knowledge of such deficiencies.

The Trustee shall at least quarterly furnish the Participants a statement providing an accounting of all transactions involving the Sub-Account and confirming the value of the Sub-Account. Such statement shall value Trust investments at market value which shall be that market value determined not more than thirty (30) days prior to the date of statement.

The Trustee shall be responsible for the keeping of all appropriate books and records relating to the receipt and disbursement of all moneys and assets under this Agreement. The Trustee shall also cause to be prepared all income tax or information returns required to be filed with respect to the Trust and shall execute and file such returns. Each Participant, upon

request, shall furnish the Trustee with such information as may be reasonably required in connection with the preparation of such income tax or information returns

#### ARTICLE FOUR

##### AMENDMENTS

This Participation Agreement may be amended by an instrument in writing, executed by the Participants and the Trustee, with the consent and acknowledgment of the Department, or by the Trustee and the Department in the event Participants cease to exist or default, but during the existence of the Participants any amendment under this paragraph cannot in any manner affect the irrevocable nature of the Trust.

#### ARTICLE FIVE

##### NOTICES

All notices, inquiries, directions or other written communications made or given pursuant to the Trust shall be given to the Participants, the Department and the Trustee by certified mail, return receipt requested, addressed to the following addresses, and shall be deemed to be received upon the earlier of the date of signed receipt of the certified mailing or seven (7) days following the date of mailing:

Participant: R.E.M. Coal Co., Inc.  
Attn: Don Bullers  
RR 3 Box 369  
Brookville, Pennsylvania 15825-8412

Aetna Ins. Co.  
Attn: Jack Mangan  
436 Walnut Street, WA10A  
Philadelphia, Pennsylvania 19106

With a courtesy copy to:

Stephen G. Allen, Esq.  
Stites & Harbison, PLLC

250 West Main Street, Suite 2300  
Lexington, Kentucky 40503

Trustee: Clean Streams Foundation, Inc.  
c/o Jack J. Steiner, Esq.  
160 North McKean Street  
Kittanning, Pennsylvania 16201

With a copy to:

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

Beneficiary: Pennsylvania Department of Environmental Protection  
Director, Bureau of District Mining Operations  
Armbrust Professional Center  
8205 Route 819  
Greensburg, PA 15601-0982

Any change in the above addresses shall be made by giving notice to all parties to this Participation Agreement.

## ARTICLE SIX

### DISPUTES

In the event of any dispute between the parties, the parties agree to attempt to resolve the dispute through negotiation or a method of alternative dispute resolution. No litigation shall be commenced without a certification by an authorized officer, employee, or agent of any party that the dispute cannot be resolved by negotiation or alternative dispute resolution provided in writing at least 20 days before commencing legal action.

A party receiving such notice shall have 10 days after receipt of said notice to demand that said dispute be resolved by binding arbitration. If arbitration is requested, the

dispute shall be resolved in accordance with the arbitration rules of the American Arbitration Association then in effect without regard to the date of execution of this Agreement.

## ARTICLE SEVEN

### CONSTRUCTION

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. Words used in this Agreement shall be given the meaning set forth in the Declaration of Trust, or in the absence of a definition therein, their plain and ordinary meaning, except that, words used in a financial or investment context that are terms of art shall be given their commonly accepted meaning when used in the context of financial services and investment practices. The headings of each section of this Agreement are for descriptive purposes only and shall not affect the interpretation or legal efficacy of this Agreement.

Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability. Such prohibition or unenforceability shall not invalidate the remaining provisions hereof; nor shall such prohibition or unenforceability in a jurisdiction render any provision invalid or unenforceable in any other jurisdiction.

All covenants and agreements contained herein shall be binding upon and inure to the benefit of the Participants, the Department and the Trustee, as well as their successors and assigns. Similarly, any request, notice, direction, consent, waiver or other writing or action taken by the Participant, the Department or the Trustee shall bind their successors and assigns.

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

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by

their respective officers or representatives duly authorized and their corporate seals to be hereunto affixed and attested as of the date first written above.

**PARTICIPANT:**

R.E.M. COAL CO., INC.

By Amor D. Buller

Its \_\_\_\_\_

STATE OF Pennsylvania  
COUNTY OF Clearfield, to-wit:

The foregoing instrument was acknowledged before me this 6<sup>th</sup> day of November, 2008, by Amor D. Buller, the President of the R.E.M. Coal Co., Inc.

My commission expires \_\_\_\_\_

COMMONWEALTH OF PENNSYLVANIA  
Notarial Seal  
Eleanor Haky, Notary Public  
City of Dubois, Clearfield County  
My Commission Expires March 24, 2012  
Member, Pennsylvania Association of Notaries

Eleanor Haky  
Notary Public

**PARTICIPANT:**

Aetna Ins Co.  
ACE-INA

By John J. Mangano

Its Director

STATE OF PA  
COUNTY OF Phila., to-wit:

The foregoing instrument was acknowledged before me this 14 day of October, 2008, by John J. Mangano, the Director of the ACE-INA.

My commission expires December 15, 2010

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
SHARON M. DEAN, Notary Public  
City of Philadelphia, Phila. County  
My Commission Expires December 15, 2010

Sharon M. Dean

Notary Public

TRUSTEE:

THE CLEAN STREAMS FOUNDATION, INC

By Wayne Masternau

Its Chairman

STATE OF Kentucky  
COUNTY OF Fayette to-wit:

The foregoing instrument was acknowledged before me this 14<sup>th</sup> day of November, 2008, by Wayne Masternau, the Chairman of the CLEAN STREAMS FOUNDATION, INC.

My commission expires July 10, 2010

Barbara L. Hartleb  
Notary Public

## CONSENT AND ACKNOWLEDGMENT

The Department of Environmental Protection hereby consents to Participants entering into this Participation Agreement pursuant to the Agreement between the Participants and the Department dated September 9, 2008 and acknowledges the Commonwealth of Pennsylvania's and the Department's status as the beneficiary of the Trust and to evidence its consent and acknowledgment of the terms and conditions set forth herein, as well as the powers and authorities granted to the Department hereunder.

### BENEFICIARY:

THE DEPARTMENT OF ENVIRONMENTAL PROTECTION  
COMMONWEALTH OF PENNSYLVANIA

By Michael Teretti

Its DIRECTOR, DISTRICT MINING OPERATIONS

**EXHIBIT "A"**  
**CONSENT ORDER AND AGREEMENT BETWEEN**  
**THE PARTICIPANTS AND THE DEPARTMENT**

BV68:32712:294301:1:LEXINGTON