

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

Sherpa Mining Contractors, Inc. : SMP No. 56950111(Burgess No. 2 Strip Mine)  
337 Benny Road : Shade Township, Somerset County  
Hooversville, PA 15936 :  
: Alternative Financial Assurance Mechanism

POST-MINING TREATMENT TRUST CONSENT ORDER AND AGREEMENT

This Post-Mining Treatment Trust Consent Order and Agreement is entered into this 24<sup>th</sup> day of January, 2018, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection (Department), and Sherpa Mining Contractors, Inc. (Sherpa).

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, 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, 52 P.S. §§ 1406.1 *et seq.* (Subsidence Act); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, 52 P.S. §§ 30.51 *et seq.* (Coal Refuse Disposal Act); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, 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, 71 P.S. § 510-17 (Administrative Code) and the 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 include the establishment of a site-specific trust fund funded by a mine 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 Post-Mining Discharge Treatment 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 the 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. Sherpa is a Pennsylvania corporation with an office and place of business at 337 Benny Road, Hooversville, PA 15936, whose business includes surface mining of coal in Pennsylvania.

D. Andrew Hewitson is the sole officer and President of Sherpa and is responsible for the day-to-day operation of the company.

E. Sherpa is and has been engaged in coal mining in the Commonwealth of Pennsylvania pursuant to Surface Mining Operators License No. 6928.

F. Sherpa is the permittee and operator of the Burgess No. 2 Strip Mine (Burgess Mine) pursuant to Surface Mining Permit No. 56950111, located in Shade Township, Somerset County, which is associated with post-mining discharge liability.

**Burgess No. 2 Strip Mine**

G. The original permit (Coal Surface Mining Permit No. 56950111) for the Burgess Mine was issued to the Cooney Brothers Coal Company on April 12, 1996. Cooney Brothers

continued to actively mine the site until 2003. The permit was transferred to Sherpa on May 12, 2003. The surface mining permit and the NPDES permit were renewed on July 6, 2016.

H. The Burgess Mine is currently reclaimed, though it has several treatment ponds and sediment ponds still in service. The only activity remaining on the mine site is the active treatment of mine discharges.

I. A summary of the reclamation bonds currently posted for the Burgess Mine is as follows:

BOND TYPE	FINANCIAL GUARANTOR	BOND INSTRUMENT NO.	BOND STATUS	BOND AMOUNT
Surety	Rockwood Casualty Ins. Co.	ISM-2029	Active	\$532,000.00
LRFG Bond	DEP	4840-97-CFG	Active	\$393,608.00

**Post-Mining Discharges**

J. The Burgess Mine has three discharges that are hydrologically connected to the permit and are located on the permit (identified as SP92/SP205, AMD1, and SP71). The “Annex Pit Sump” was opened in the vicinity of SP-92, which was located on the west end of an old strip pit that pre-dated Cooney Brothers mining activities. SP92 was mined out by Cooney Brothers and later backfilled and reclaimed by Sherpa. On August 1, 2000, the Department approved a permit revision and Sherpa installed a drain to collect and divert the annex pit sump mine water (SP205) which is currently treated in Pond 3. Discharge AMD1 is a composite of the seeps that make up the Sub-F Hydrologic Unit #2. The manganese limit for this Unit is 5.0 mg/l. This limit has been exceeded over a long period of time. These mine drainage seeps are treated in Pond 5 and then diverted through Pond 3. Discharge SP71 shows flows of less than 1 gpm and is considered diminimus, but it is monitored to assure there is no off-site impact.

K. A topographic map depicting the location of Discharges SP92/SP205, AMD1, and SP71 is attached as Exhibit A. The latitude and longitude coordinates for the discharges are as follows: **SP205** lat.40°10'12" - long.078°51'28"; **AMD1** lat.40°10'09" - long.078°51'33"; **SP71** lat. 40°09'50" - long.078°51'07".

L. The raw water quality of Discharges SP92/SP205, AMD1, SP71, as compiled by the Department, is set forth in Exhibit B.

M. The NPDES Permit No. PA0213225 (NPDES Permit) for the Burgess Mine contains an Outfall (007) for the mine drainage treatment facility which is used to treat Discharges SP205 and AMD1. The required effluent limits applicable for Discharges SP205 and AMD1 are set forth in the NPDES Permit, which expires April 12, 2021. The current limits are set forth in the table below. This Permit is renewed every five years (pursuant to the authority in 25 Pa. Code Chapter 92a) at which time the effluent limits may change.

**Effluent Limits for SP205 and AMD1**

<b>Parameter</b>	<b>30-Day Average</b>	<b>Daily Maximum</b>	<b>Instantaneous Maximum</b>
Iron (total)	1.5 mg/l	3.0 mg/l	3.7 mg/l
Manganese (total)	1.2 mg/l	2.4 mg/l	3.0 mg/l
Suspended solids	35 mg/l	70 mg/l	90 mg/l
Aluminum (Total)	0.9 mg/l	1.8 mg/l	2.2 mg/l
pH <sup>1</sup>		greater than 6.0; less than 9.0	
Alkalinity greater than acidity <sup>1</sup>			

<sup>1</sup>The parameter is applicable at all times.

N. Sherpa agrees it has the legal responsibility, pursuant to, *inter alia*, the Surface Mining Act and the Clean Streams Law, to properly treat or abate the discharges identified in Paragraph J above. In addition, any additional discharges or seeps that are determined by the

Department to be the responsibility of Sherpa shall also be considered part of this treatment trust and the cost of treating any additional discharges or seeps will be included in the annual meetings pursuant to Paragraphs 4 and 16 below.

**Post-Mining Treatment Trust**

O. A drain collects and diverts Discharge SP205 which flows into Treatment Pond 3 where the discharge is treated with hydrogen peroxide and caustic soda and then the treated water settles in Pond 3 (Treatment System). The AMD1 discharge mine drainage seeps are diverted through Pond 5 and then treated in Pond 3. The treated water discharges at Outfall 007 to an unnamed tributary to Shade Creek. Attached as Exhibit C is the map of the treatment system.

P. The Treatment System was not adequately treating the effluent from the post-mining discharges to permit standards for manganese, and the Department ordered Sherpa to modify the Treatment System by adding a manganese removal bed to the chemical treatment.

Q. The Treatment System is situated on land owned by the Wilmore Coal Company. Sherpa shall obtain from Wilmore Coal Company a properly executed Consent to Right of Entry form which grants the parties and the trustee access to the Treatment System. A copy of the Department's model treatment trust Consent to Right of Entry form is attached as Exhibit D.

R. A grant from the Marcellus Legacy Fund (Contract No. C000064413, known as the Shade Creek 2016 Project) ("Marcellus Legacy Fund Grant") has been awarded by the Commonwealth of Pennsylvania's Commonwealth Financing Authority to assist Sherpa in constructing modifications to the existing Treatment System, including adding a passive limestone bed to improve the treatment of the mine drainage discharges caused by previous Cooney Brothers mining. The Marcellus Legacy Fund Grant provides funding for operation, maintenance and repair of the Treatment System in the amount of up to \$229,099.00 which will be used as the initial

deposit into the Sherpa Mining Treatment Trust.

S. In order to calculate the amount necessary to fully fund the trust, the Department and Sherpa have agreed to use actual operation and maintenance costs from past operation of the Treatment System, or AMDTreat cost estimates where insufficient operation and maintenance cost data exist. A summary of current annual operation and maintenance costs for the Treatment System is as follows:

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

CATEGORY	SAMPLING	LABOR	MAINTENANCE	PUMPING SLUDGE	CHEMICAL	OTHER
Rate	(\$35/sample)	(\$35/hr. )				
Annual Cost	\$1,121	\$9,100	\$561	\$1,150	\$4,270	\$250

Based on actual operation and maintenance costs from past operations and AMDTreat cost estimates, the current annual cost of operating and maintaining the Treatment System is \$16,452.00. The AMDTreat cost estimates are attached as Exhibit E.

T. In order to calculate the amount necessary to fully fund the trust, the Department and Sherpa have agreed to use recapitalization and demolition cost data generated by the Department's AMDTreat software tool. According to the AMDTreat software tool, the present value of recapitalization costs for the Treatment System is \$41,748.00. Attached as Exhibit F is the AMDTreat Recapitalization Cost Schedule from the AMDTreat analysis for the Treatment System.

U. Sherpa is willing to establish a post-mining treatment trust with Somerset Trust Company as an alternative financial assurance mechanism, (and a financially-backed enforceable contract), in order to provide for the long-term treatment of post-mining discharges and secure the

release of reclamation bonds upon completion of all other reclamation and bond release requirements. Sherpa agrees to establish the Sherpa Mining Treatment Trust by executing a Post-Mining Treatment Trust Agreement with Somerset Trust Company which conforms with the Department's model trust agreement.

V. The parties have discussed the need to obtain accurate and timely information on the costs of operating and maintaining the Treatment System in order to maintain the proper amount of financial assurance.

W. The parties have agreed to use the formulas set forth below to calculate the present value of the Sherpa Mining Treatment Trust. The parties agree that the present value of the fully-funded Sherpa Mining Treatment Trust for the discharges covered by this Consent Order and Agreement is \$ 428,489.51. This sum constitutes the current present value of the estimated future operation and maintenance costs for the Treatment System, the current present value of the estimated future recapitalization costs for the Treatment System, and the current present value of the estimated future insurance. The parties have also agreed to use the information and figures which will be provided by the Accounting required by Paragraph 4 below to recalculate and adjust the amount of the Sherpa Mining Treatment Trust as described in Paragraphs 8 and 10 below. The parties have agreed that Sherpa may fund the Treatment Trust pursuant to a payment schedule as set forth in Paragraph 6.b., 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 Sherpa as follows:

1. This Consent Order and Agreement is an Order of the Department authorized and issued pursuant to Sections 5 and 610 of the Clean Streams Law, 35 P.S. §§ 691.5 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; 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 Sherpa to comply with any term or condition of this Consent Order and Agreement shall subject Sherpa to all penalties and remedies provided by those statutes for failing to comply with an order of the Department.

**2. Findings**

a. Sherpa agrees that the findings in Paragraphs A through W are true and correct and, in any matter or proceeding involving Sherpa and the Department, Sherpa shall not challenge the accuracy or validity of these findings.

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

**3. Definitions**

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

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

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

d. Calculated Treatment Cost. The projected future annual cost of treatment,



based on the Actual Treatment Cost, compounded at three and one tenth percent (3.1%) annually.

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

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

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

$$\begin{aligned} PV &= (A/[E-I]) + A \\ \text{where: } PV &= \text{Present Value of the O\&M Costs} \\ A &= \text{Current Actual Treatment Cost} \\ E &= \text{Expected annual earnings/Interest Rate (assumed to be} \\ &\quad \text{8.43\% or .0834)} \\ I &= \text{Inflation Rate (assumed to be 3.1\% or .031)} \end{aligned}$$

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

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

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

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

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

a. Sherpa shall keep accurate financial records of all the costs and expenses of

5. Treatment Trust

a. Sherpa shall establish an irrevocable trust to be known as the Sherpa Mining Treatment Trust by executing a Post-Mining Treatment Trust Agreement with Somerset Trust Company. The Sherpa Mining Treatment Trust shall secure Sherpa's obligation to treat Discharges SP205 and AMD1, including its legal obligation to operate and maintain the Treatment System in perpetuity or until water treatment is no longer necessary. The Sherpa Mining Treatment Trust shall also secure Sherpa's obligation to provide financial resources to the Department and the citizens of the Commonwealth sufficient to operate and maintain the Treatment System and to treat the mine drainage in perpetuity in the event Sherpa becomes unable or unwilling to meet these obligations. The Sherpa Mining Treatment Trust shall provide for the demolition of treatment facilities and reclamation of the treatment site should treatment no longer be needed. The agreement establishing the Sherpa Mining Treatment Trust is attached as Exhibit G.

b. Sherpa shall establish within the Sherpa Mining Treatment Trust two sub-accounts: (i) a sub-account designated as the Primary Trust Account; and, (ii) a sub-account designated as the Capital Improvement Account.

c. Upon 30 days prior notice to the Department, Sherpa may post an appropriate bond or bonds with the Department, in the amount determined by the Department in accordance with applicable bonding requirements, in order to guarantee Sherpa's obligation to treat or abate Discharges SP205 and AMD1, (not including the portion secured by the Grant, which monies and interest shall stay in the trust and which are governed by the terms of the Grant). Upon posting sufficient bonds to guarantee Sherpa's obligation, the Department shall direct the Trustee to distribute the trust funds (not including the portion secured by the Grant funds) to the Settlor in accordance with Articles 4 and 12 of the Post-Mining Discharge Treatment Trust Agreement

attached as Exhibit G.

**6. Funding of the Primary Trust Account and Surety Bond Release**

a. Initial Payment to the Primary Trust Account: Sherpa shall deposit all of the Marcellus Legacy Fund Grant money received which has been allotted to operation, maintenance and repair of the Treatment System, up to an amount of \$229,099.00, into a special subaccount within the Primary Trust Account immediately upon receipt of the Marcellus Legacy Fund Grant money from the Commonwealth Financing Authority. If the amount of the Marcellus Legacy Fund Grant received is less than \$229,099.00, then Sherpa shall make up the shortfall with an additional payment on or before July 1, 2022, which shall be adjusted based on the performance of the trust fund so as to fully fund the Sherpa Mining Treatment Trust.

b. Ongoing Payments to the Primary Trust Account: Sherpa shall make subsequent payments on a yearly basis in the amount of \$54,456.17 into the Primary Trust Account until the Sherpa Mining Treatment Trust is fully funded in accordance with the payment schedule set forth below:

i. On July 1, 2019, Sherpa shall deposit \$54,456.17 into the Primary Trust Account.

ii. On July 1, 2020, Sherpa shall deposit \$54,456.17 into the Primary Trust Account.

iii. On July 1, 2021, Sherpa shall deposit \$54,456.17 into the Primary Trust Account. \*

\*The final payment amount may need to be adjusted to correspond with the performance of the trust fund. Payments are required without notice. If the full amount of \$229,099 in Marcellus Legacy Grant Funds is not deposited in 2018, then Sherpa shall make up

the shortfall with an additional payment to be deposited by July 1, 2022 which shall be adjusted based on the performance of the Trust Fund so as to fully fund the Sherpa Mining Treatment Trust.

c. The projected value of the fully funded Treatment Trust at the end of each year from 2018 to 2021 is set forth in Exhibit H, assuming an annual growth rate of 8.43%, inflation of 3.1%, and no change in operation and maintenance costs.

d. Release of Surety Bonds: Once the Sherpa Mining Treatment Trust has been fully funded by Sherpa and the mine drainage treatment facility on the mine site is adequately treating the discharges, Sherpa may apply for the release of the bonds identified in Paragraph I, above under the Department's normal bond release procedures.

**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 Sherpa. 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 I.

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 I.

d. If the Primary Trust Valuation is less than the Primary Basis Valuation, then Sherpa 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 & 6 on Exhibit I.

e. This provision does not apply until Sherpa has fulfilled its obligation to make ongoing payments under Paragraph 6.b, above and the Sherpa Mining Treatment Trust is fully funded.

**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 J 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 Sherpa. 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 AMDTreat 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 F. 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 F and this Consent Order and Agreement, and shall be used in making all future calculations involving the Capital Improvement Account.

**11. Transfer of Funds to the Capital Improvement Account**

a. If the Primary Trust Valuation after any Distribution Payment under Paragraph 7, above is greater than the Primary Target Valuation, then a transfer of funds to the Capital Improvement Account shall be made if the current balance in the Capital Improvement Account is less than the required balance for the current year as indicated on Exhibit J. 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 Sherpa any time a planned capital replacement is made as indicated on Exhibit J. 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 J, 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 J, 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 Sherpa's obligation to make a contribution payment under Paragraph 7.d. This amount is depicted graphically at Point 5 on Exhibit I. However, the amount of surplus funds transferred to the Primary Trust Account may exceed Sherpa'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 I.

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

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

**14. Real and Personal Property**



a. Within 30 days of the effective date of this Consent Order and Agreement, Sherpa shall create an inventory of all the equipment, facilities, and other personal property used for the treatment of Discharges SP205 and AMD1 described in Paragraph O above (“Personal Property”). Upon completion of the inventory, Sherpa shall submit the inventory to the Department for review and approval in a similar form as the Personal Property List attached hereto as Exhibit K. Within 30 days of receipt of written approval of the inventory by the Department, Sherpa shall transfer and convey to the Trustee, without reservation, all Personal Property including, but not limited to, the equipment and other property listed in the inventory in order to ensure continued treatment of the discharges in the event Sherpa enters bankruptcy, ceases to exist, or is unable or unwilling to continue treatment. Said transfer and conveyance shall be substantially in the same form as the Bill of Sale and License Agreement attached hereto as Exhibit L.

b. The provisions of Paragraph 14.a. notwithstanding, for so long as Sherpa is continuing treatment, Sherpa shall be responsible for maintaining and replacing/upgrading, as appropriate, the Personal Property used for the treatment of Discharges SP205 and AMD1. Sherpa’s replacement/upgrade of any of the Personal Property previously conveyed as set forth in Paragraph 14.a. above, to the Trustee shall only be done with the express written consent of the Trustee and the Department. All parts, additional equipment, replacements, and upgrades to the Personal Property shall immediately and automatically become the property of Somerset Trust as Trustee of the Sherpa Mining Treatment Trust.

c. Within 30 days of the effective date of this Consent Order and Agreement, Sherpa shall submit to the Department and the Trustee all Rights of Entry required by the Department and the Trustee to gain legal access to the real property containing the equipment and facilities for the treatment of Discharges SP205 and AMD1. These Rights of Entry are more fully

described in Paragraph Q above. Each Right of Entry shall be substantially in the same form as the Right of Entry attached hereto as Exhibit D. If any portion of a property subject to a Right of Entry is sold, Sherpa shall obtain a properly executed Consent to Right of Entry form from the new owner and submit it to the Department and the Trustee within 90 days of the sale.

**15. Public Liability Insurance**

a. Sherpa shall maintain in effect public liability insurance coverage for the operation, maintenance, improvement and all other activities associated with the Treatment System and the real and personal property which is identified in the Post Mining Discharge 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 above, Sherpa shall ensure that the public liability insurance policy is at all times consistent with the requirements of 25 Pa. Code § 86.168(a) - (f). Pursuant to the requirement set forth at 25 Pa. Code § 86.168(a) that a permittee submit proof which certifies that a public liability insurance policy is in force meeting the requirements of Chapter 86, Sherpa shall submit such proof to the Department at the Annual Meeting described in Paragraph 16, below.

c. 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 Sherpa 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 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 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 Sherpa Mining Treatment Trust; (iv) to calculate, recalculate or adjust the size of the Primary Target Valuation, the Calculated Treatment Cost, and distribution payments from or additional payments into the Sherpa Mining Treatment Trust; and, (v) to address any other issues that may concern this Consent Order and Agreement or its implementation.

b. The Operator 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. Sherpa's Continuing Obligation**

Neither Sherpa's agreement to fund the Sherpa Mining Treatment Trust, nor the full or partial funding of the Sherpa Mining Treatment Trust, nor the exhaustion of the Sherpa Mining Treatment Trust shall in any way limit Sherpa's obligation to operate the Treatment System and to treat the discharges covered by this Consent Order and Agreement in a manner which meets the effluent limitations described in Paragraph M above. Furthermore, exhaustion of the Sherpa Mining Treatment Trust shall not excuse Sherpa from Sherpa's obligation to adequately treat or to abate the discharges.

**18. Stipulated Civil Penalties**

a. In the event Sherpa fails to comply in a timely manner with any term or

provision of this Consent Order and Agreement, Sherpa shall be in violation of this Consent Order and Agreement and, in addition to other applicable remedies, shall pay a civil penalty in the amount of \$100.00 per day for each violation.

b. Stipulated civil penalty payments shall be payable monthly on or before the fifteenth day of each succeeding month, and shall be forwarded to:

District Mining Manager  
Department of Environmental Protection  
Cambria District Mining Office  
286 Industrial Park Road  
Ebensburg, PA 15931-4119  
Telephone: 814-472-1900

c. Any payment under this paragraph shall neither waive Sherpa's duty to meet its obligations under this Consent Order and Agreement nor preclude the Department from commencing an action to compel Sherpa's compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only Sherpa'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 Sherpa 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 Sherpa defaults on the obligations of this Consent Order and Agreement, Sherpa 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 Sherpa 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. Sherpa reserves the right to challenge any action which the Department may take to require those measures.

**21. Liability of Sherpa**

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

**22. Transfer of Sites**

a. The duties and obligations under this Consent Order and Agreement shall not be modified, diminished, terminated or otherwise altered by the transfer of any legal or equitable interest in the Sherpa Mine Site or any part thereof.

b. If Sherpa intends to transfer any legal or equitable interest in the Sherpa Mine Site which is affected by this Consent Order and Agreement, Sherpa 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, 186 Enterprise Drive, Philipsburg, PA 16866 and the District Mining Manager identified in Paragraph 23, below of such intent.

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

**23. Correspondence with Department**

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

District Mining Manager  
Department of Environmental Protection  
Cambria District Mining Office  
286 Industrial Park Road  
Ebensburg, PA 15931-4119  
Telephone: 814-472-1900

**24. Correspondence with Sherpa**

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

Andrew Hewitson, President  
Sherpa Mining Contractors, Inc  
337 Benny Road  
Hooversville, PA 15936

b. Sherpa 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 Sherpa 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 Sherpa's control and which Sherpa, by the exercise of all reasonable diligence, is unable to prevent, then Sherpa 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 Sherpa's control. Sherpa'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. Sherpa 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 Sherpa 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. Sherpa'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 Sherpa and other information available to the Department. In any subsequent litigation, Sherpa 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, 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**



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 Sherpa may have to the decision will be preserved until the Department enforces this Consent Order and Agreement.

**32. Successors**

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

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

**33. Counterpart Signatures**

The parties agree that this Consent Order and Agreement may be executed by counterpart signatures, each of which shall be deemed an original agreement, and all of which together shall constitute one and the same agreement between the parties. Signatures transmitted via electronic means shall be valid and effective.

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 Sherpa certify under penalty of law, as provided by 18 Pa.C.S. § 4904, that they

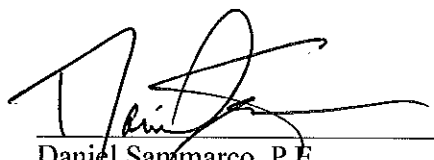
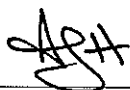
are authorized to execute this Consent Order and Agreement on behalf of Sherpa; that Sherpa consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that Sherpa hereby knowingly waives its rights to appeal this Consent Order and Agreement and to challenge its 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 Sherpa's attorney certifies only that the agreement has been signed after consulting with counsel.

FOR SHERPA MINING  
CONTRACTORS, INC:

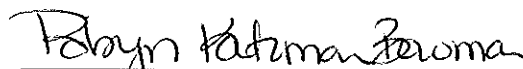
FOR THE COMMONWEALTH  
OF PENNSYLVANIA,  
DEPARTMENT OF  
ENVIRONMENTAL  
PROTECTION:



Andrew Hewitson,  
President

  
Daniel Sammarco, P.E.  
District Mining Manager

Name  
Attorney for Sherpa Mining Contractors,  
Inc.  
(or initials of company officer indicating  
waiver of opportunity for attorney review)

  
Robyn Katzman Bowman  
Supervisory Counsel  
Southcentral Region OCC