

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of:

MARTINS CREEK, LLC, and	:	Natural Resource Damages
TALEN GENERATION, LLC,	:	PPL Martins Creek Fly Ash Spill
835 Hamilton Street, Suite 150	:	
Allentown, PA 18101	:	

**CONSENT ORDER AND AGREEMENT**

This Consent Order and Agreement (“CO&A”) is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2015, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection (“PADEP”), the Pennsylvania Fish and Boat Commission (“PFBC”) and Martins Creek, LLC, formerly known as PPL Martins Creek LLC (“Martins Creek”), and Talen Generation, LLC (“Talen Generation”), formerly known as PPL Generation, LLC.

**The Parties**

A. The PADEP, is the executive agency with the authority and duty to administer and enforce the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101-6020.1305 (“HSCA”); 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. The PFBC, is an independent administrative agency with the duty and authority to enforce the Fish and Boat Code, Act of October 16, 1980, P.L. 996, *as amended*, 30 Pa. C.S.A. §§ 101-7314 (“Fish and Boat Code”).

C. Martins Creek is a Delaware limited liability company registered to conduct business in the Commonwealth of Pennsylvania, with a registered business address of 835

Hamilton Street, Suite 150, Allentown, Pennsylvania 18101. Martins Creek owns and operates the Martins Creek Steam Electric Station located in Lower Mount Bethel Township, Northampton County, Pennsylvania and its associated structures and appurtenances, including Ash Basin No. 4 (“Facility”).

D. Talen Generation is a Delaware limited liability company registered to conduct business in the Commonwealth of Pennsylvania with a registered business address of 835 Hamilton Street, Suite 150 Allentown, Pennsylvania 18101-1179. Talen Generation is the parent company of Martins Creek.

E. Martins Creek and Talen Generation may be collectively referred to herein as “the Settlers”.

### **The Event**

F. The Facility consisted, in part, of two coal fired electric generating units (“Units 1 and 2”), which were decommissioned on September 15, 2007. Units 1 and 2 had a generating capacity of approximately 150 megawatts each. The combustion of pulverized coal in Units 1 and 2 during the electricity generating process created both bottom ash and fly ash. This ash was mixed with water and piped to large outdoor impoundments for settling prior to being discharged to the Delaware River under the terms of a National Pollution Discharge Elimination System (“NPDES”) permit. One of those impoundments is called Ash Basin No. 4.

G. Ash Basin No. 4 is approximately 40 acres in size and was constructed by Defendant PPL in or around 1989. PPL was permitted by the PADEP to dispose of fly ash, as well as other types of waste from the Facility, including bottom ash, sediment from the Facility’s Industrial Waste Treatment Basin and iron sludge from boiler cleaning activities in Ash Basin

No. 4. For purposes of this CO&A, the material that was discharged from Ash Basin No. 4, beginning on August 23, 2005, is referred to herein as “fly ash” or “fly ash slurry”, even though the discharge may have contained the other types of waste referred to in this paragraph.

H. On August 23, 2005, a wooden stop log in the discharge structure of Ash Basin No. 4 failed, causing an unpermitted and uncontrolled discharge of fly ash slurry down the discharge pipeline. Most of the fly ash slurry discharged directly into the Delaware River. Large amounts also ran across DePues Ferry Road and onto adjacent fields and the Oughoughton Creek bed.

I. On August 23, 2005, PPL began taking measures to stop the discharge from Ash Basin No. 4 and to remove fly ash deposited on the ground, in the Oughoughton Creek and in the Delaware River. Major ash removal operations began in August 2005 and continued through mid-March 2006.

J. On November 18, 2005, the PADEP filed a Complaint against PPL Generation, LLC and PPL Martins Creek, LLC in Commonwealth Court, requesting, in part, that the Court order the Defendants to locate and remove remaining deposits of fly ash, pay a civil penalty to the PADEP and evaluate and restore all damages to natural resources caused by the spill.

K. Settlers were implementing cleanup plans when the PADEP’s Complaint was filed. In total, there were four major cleanup plans that the PADEP reviewed, commented on and approved. The review and approval was done with input from members of a Natural Resource Damage Assessment Team (“NRDA Team”) that was formed by the PADEP following the August 2005 discharge and which is currently made up of the PADEP, the New Jersey

Department of Environmental Protection (“NJDEP”), and the PFBC, with participation and input from Delaware River Basin Commission (“DRBC”).

L. The first three phases of cleanup under plans I-III were completed between September 2005 and March 2006. Phase IV, which largely involved studying the effects of the ash discharge on the river, river habitat and wildlife, was performed following completion of the first three phases and included a shoreline inspection program, a sediment sampling program, a surface water sampling program and an ecological investigation.

M. On May 20, 2008, a Consent Decree between the PADEP, Settlers, and a group of citizen Intervenors in the PADEP’s lawsuit was entered as an Order of Commonwealth Court. The Consent Decree required, in relevant part, the removal of any remaining fly ash, payment of a \$1.5 million civil penalty and submittal of a Phase IV Completion Report (“Phase IV Report”) after completion of Phase III of the cleanup. The Consent Decree also explicitly reserved the PADEP’s right to bring an action in the future to recover Natural Resource Damages.

N. In its Phase IV Report, Settlers concluded, in part, that while the fly ash release resulted in temporary increased loading for select metals into the Delaware River, the increase in metals concentrations did not result in widespread exceedances of human-health based or ecological screening values for surface water or sediment. Data collected also did not indicate that the release had any adverse impact to the ecological community of the Delaware River or any of the representative species investigated. Furthermore, Settlers asserted that metals concentrations in fish and mussel tissue were below risk-based concentrations. Based on the Phase IV investigation results, Settlers concluded that additional data collection or remedial action was not warranted or recommended.

O. Representatives from the PADEP and other NRDA Team members reviewed the Phase IV Report and disagreed with Settlor's conclusion that the release had no adverse impact on the ecological community of the Delaware River. The PADEP and the other NRDA Team members, together with DRBC, determined that the spill and associated cleanup measures undertaken by Settlor to remove fly ash from the Delaware River did, in fact, have an impact on the ecological community of the Delaware River and that resource restoration is necessary.

P. The PADEP, working with the NRDA Team, developed a report entitled, "PPL Martins Creek Natural Resource Damage Assessment – Environmental Assessment and Restoration Plan" (the "NRDA Report"). The NRDA Report concluded that there were damages to natural resources as a result of the spill and cleanup, and that dam removal and mussel restoration projects outlined in the NRDA Report would provide appropriate and beneficial compensation to the ecological community and the public for damages to natural resource caused by the August 2005 fly ash release.

#### **Authority**

Q. Section 301(14) of HSCA, 35 P.S. § 6020.301(14), provides that the PADEP has the duty to act as trustee of the Commonwealth's natural resources. The PADEP may assess and collect damages to natural resources for the purposes of HSCA and the Federal Superfund Act for those natural resources under its trusteeship.

R. Section 702 of HSCA, 35 P.S. § 6020.702 provides, in relevant part, that a person who is responsible for a release of a hazardous substances from a site, as specified in 35 P.S. § 6020.701, is strictly liable for enumerated response costs, including damages for injury to, destruction of, or loss of natural resources within the Commonwealth or belonging to, managed

by, controlled by or appertaining to the United States, the Commonwealth or a political subdivision. This includes the reasonable costs of assessing injury, destruction or loss resulting from such a release.

S. Section 2506 of the Fish and Boat Code, 30 Pa. C.S.A. § 2506, provides that the PFBC, as an agency of the Commonwealth authorized to regulate, control, manage and perpetuate fish, may, in addition to criminal penalties provided in Title 30, bring civil suits in trespass on behalf of the Commonwealth for the value of any fish killed or any stream or streambed destroyed or injured in violation of Chapter 25. In determining the value of fish killed, the PFBC may consider all factors that give value to such fish. These factors may include, but need not be limited to, the commercial resale value, the replacement costs or the recreational value of angling for the fish killed. In addition, the PFBC is entitled to recover the costs of gathering the evidence, including expert testimony, in any civil suit brought under this section where the defendant is found otherwise liable for damages.

T. Section 102 of the Fish and Boat Code, 30 Pa. C.S. § 102, defines “Fish,” when used as a noun, as all game fish, fish bait, bait fish, amphibians, reptiles and aquatic organisms. Section 102 defines “Aquatic organism” as any plant or animal that grows or lives in or upon the water.

U. The PADEP and the PFBC have the authority under the statutes cited above to pursue and collect Natural Resource Damages. As stated in Paragraph M, the PADEP reserved the right to pursue Natural Resource Damages in the May 20, 2008 Consent Decree with PPL. Through this Consent Order and Agreement, the PADEP and the PFBC are resolving their

claims for Natural Resource Damages against the Settlers that they determined resulted from the August 2005 fly ash release from Ash Basin No. 4 and the subsequent cleanup.

V. To fully resolve the claims for Natural Resource Damages, the Settlers have agreed to pay a total of \$1,325,200.00 toward dam removal and mussel restoration projects. This includes \$952,150.00 to be paid directly to DRBC under the requirements of this CO&A. This money will be managed by DRBC in accordance with the DRBC Letter Agreement (Attachment “A”) for the benefit of the Pennsylvania-based restoration projects discussed therein. It also includes \$373,050.00 to be paid pursuant to a separate administrative settlement with NJDEP and distributed for the benefit of the New Jersey-based restoration projects in accordance with the Settlers’ agreement with New Jersey.

W. In accordance with Section 1113 of HSCA, 35 P.S. § 6020.1113, the PADEP published legal notice of this proposed settlement in the *Pennsylvania Bulletin* and a newspaper of general circulation in the area of the release. The notice included the material terms of the settlement and the manner of submitting written comments during a 60-day public comment period. (Attachment “B”)

X. On December 15, 2015, the PADEP notified the Settlers that it received no comments that disclosed facts or considerations that indicated to the PADEP and the members of the NRDA Team that this CO&A was inappropriate, improper, or inadequate.

Y. The violations described in Paragraph H constitute unlawful conduct under Section 1108 of HSCA, 35 P.S. § 6020.1108; a statutory nuisance under Section 1101 of HSCA, 35 P.S. § 6020.1101; and subject PPL to a claim for Natural Resource Damages, under Section 702(a)(4) of HSCA. Those acts or omissions also violate one or more provisions of Chapter 25

of the Fish and Boat Code, 30 Pa. C.S.A. Ch. 25, and subject Settlers to a claim for civil damages under Section 2506 of the Fish and Boat Code, 30 Pa. C.S.A. § 2506.

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 desiring to avoid litigation and intending to be legally bound, it is hereby ORDERED by the PADEP and AGREED to by the Settlers as follows:

1. Authority. This Consent Order and Agreement is an Order of the PADEP authorized and issued pursuant to Section 301 of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.301; and Section 1917-A of the Administrative Code, 71 P.S. § 510-17.

2. Findings.

a. The Settlers agree that the findings in Paragraphs A through Y of this Consent Order and Agreement are true and correct and, in any matter or proceeding involving the Settlers and the Department, Settlers 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. Corrective Action. The following is required pursuant to this Consent Order and Agreement:

a. Within twenty (20) calendar days after the Settlers' receipt of the executed Consent Order and Agreement from the PADEP and PFBC, the Settlers shall pay to the DRBC the sum of \$902,150.00 which, together with the payment in Paragraph 3.b, shall constitute the "Settlement Payment." The Settlement Payment shall be in full and complete settlement of claims against the Settlers for compensation for any damages to, and restoration of, the lost value of, injury to, or destruction of Natural Resources, as that term is defined in Section 103 of HSCA, 35 P.S. § 6020.103, and natural resource services that are attributable to the unpermitted fly ash discharge and cleanup. The Settlement Payment includes the Settlers' cash contribution toward dam removal projects discussed in Attachment "A", or any replacement projects agreed to by PADEP and PFBC in accordance with Attachment "A". It also includes 15% for dam removal contingency fees, and \$50,000.00 for DRBC's administration fees. The Settlement Payment will be administered in accordance with the Letter Agreement between the PADEP, the DRBC and the PFBC (Attachment "A"). Any funds remaining from the Settlement Payment after implementation of the dam removal projects will be allocated based on the consensus of the PADEP and the PFBC.

b. Within twenty (20) calendar days after the Settlers' receipt of the executed Consent Order and Agreement from the PADEP and the PFBC, the Settlers shall also pay to the DRBC a separate sum of \$50,000.00 for a mussel restoration project(s). DRBC shall submit the details of a mussel restoration project(s) to the NRDA Team for approval in accordance with Attachment "A". Once a mussel restoration project(s) is agreed upon by the NRDA Team members, DRBC will implement the project(s). As stated in Attachment "A", DRBC will provide progress and general accounting reports to the NRDA Team on a quarterly basis within

the first week of each calendar quarter. The progress and general accounting reports will be reviewed by the NRDA Team members. Any funds remaining from the Settlement Payment after implementation of the mussel restoration projects will be distributed based on the consensus of the NRDA Team members.

4. Stipulated Civil Penalties.

a. In the event the Settlers fail to comply in a timely manner with any term or provision of this Consent Order and Agreement, the Settlers 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 \$2,500.00 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 made payable by corporate check or the like made payable to Commonwealth of Pennsylvania, Clean Water Fund, pursuant to Section 8 of the Clean Streams Law, 35 P.S. § 691.8, and forwarded to the Clean Water Program Manager, as described in Paragraph 9 (Correspondence with the Department) below.

c. Any payment under this paragraph shall neither waive the Settlers' duty to meet its obligations under this Consent Order and Agreement nor preclude the PADEP from commencing an action to compel the Settlers' compliance with the terms and conditions of this Consent Order and Agreement. The payment resolves only the Settlers' 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.

5. Additional Remedies.

a. In the event the Settlers fail to comply with any provision of this Consent Order and Agreement, the PADEP may, in addition to the remedies prescribed herein, pursue any remedy available for a violation of an order of the PADEP, including an action to enforce this Consent Order and Agreement.

b. The remedies provided by this paragraph and Paragraph 4 (Stipulated Civil Penalties) are cumulative and the exercise of one does not preclude the exercise of any other. The failure of the PADEP 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.

6. Reservation of Rights. PADEP reserves the right to require additional measures to achieve compliance with applicable law. The Settlers reserve the right to challenge any action which the PADEP may take to require those measures.

7. Liability of Operator. The Settlers 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. The Settlers also shall be liable for any violation of this Consent Order and Agreement caused by, contributed to, or allowed by its successors and/or assigns.

8. Transfer of Site.

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 Facility or any part thereof. This Consent Order and Agreement shall inure to the benefit of the Settlers' successors and assigns.

b. If the Settlers intend to transfer any legal or equitable interest in the Facility which is affected by this Consent Order and Agreement, the Settlers 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 Northeast Regional Office of the PADEP of such intent.

9. Correspondence with the Department. All correspondence with the PADEP concerning this Consent Order and Agreement shall be addressed to the following individual:

Bharat R. Patel, P.E.  
Clean Water Program Manager  
Department of Environmental Protection  
2 Public Square  
Wilkes-Barre, PA 18711-0790  
Phone: (570) 826-2511  
Facsimile: (570) 830-3016

10. Correspondence with PFBC. All correspondence with PFBC concerning this Consent Order and Agreement shall be addressed to the following individual:

Mark A. Hartle, Chief, Aquatic Resources Section  
Pennsylvania Fish and Boat Commission  
Division of Environmental Services  
450 Robinson Lane  
Bellefonte, PA 16823  
Phone: (814) 359-5133  
Facsimile: (814) 359-5175

11. Correspondence with the Settlers. All correspondence with the Settlers concerning this Consent Order and Agreement shall be addressed to:

Joseph P. Murach  
Plant Manager  
Martins Creek  
6605 Foul Rift Road  
Bangor, PA 18013-4857  
Phone: (610)-498-6269

Robert J. Barkanic, P.E.  
Senior Director External Affairs  
PPL Energy Supply  
835 Hamilton Street  
Suite 150 – Floor 2  
Allentown, PA 18101-1179  
Phone: (610) 774-6722  
Facsimile: (610) 774-2755

The Settlers shall notify the PADEP and PFBC 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 or to the attorney for the Settlers.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. Decisions under Consent Order and Agreement. Any decision which the PADEP 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 the Settlers may have to the decision will be preserved until the PADEP enforces this Consent Order and Agreement. At no time, however, may the Settlers challenge the content or validity of this Consent Order and Agreement.

18. Termination of Consent Order and Agreement. This Consent Order and Agreement shall terminate upon completion by the Settlers of all actions required under Paragraph 3 and Paragraph 4, if applicable.

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 the Settlers 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 the Settlers. Signature by the Settlers' attorney certifies only that the Consent Order and Agreement has been signed after consulting with counsel.

(Signatures are on the following page.)

FOR MARTINS CREEK, LLC:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Bonnie A. Barnett, Esq.  
Attorney for Martins Creek, LLC

FOR THE COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION:

\_\_\_\_\_  
Bharat R. Patel, P.E.  
Manager, Clean Water Program

\_\_\_\_\_  
Sean L. Robbins  
Assistant Counsel

FOR TALEN GENERATION, LLC:

\_\_\_\_\_  
Name  
Title

\_\_\_\_\_  
Name  
Title

\_\_\_\_\_  
Bonnie A. Barnett, Esq.  
Attorney for Talen Generation, LLC

FOR THE PENNSYLVANIA  
FISH AND BOAT COMMISSION:

\_\_\_\_\_  
John A. Arway  
Executive Director

\_\_\_\_\_  
Laurie E. Shepler  
Chief Counsel