

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In the Matter of:

[Operator Name &
Address]

:
:
:
:
:

Mines & Permit Nos.

Alternative Financial Assurance Mechanism

POSTMINING TREATMENT TRUST CONSENT ORDER AND AGREEMENT

This Consent Order and Agreement is entered into this _____ day of _____, 20___, by and between the Commonwealth of Pennsylvania, Department of Environmental Protection (Department), and [Operator].

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 § 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 [Participation] Agreement constitutes an alternative financial assurance mechanism authorized by § 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 SMCRA, 52 P.S. § 1396.4c, Sections 3.1 and 9 of the Coal Refuse Disposal Act, 52. P.S. §§

30.53a and 30.59, and Section 9 of the Subsidence Act, 52 P.S. § 1406.9, the Department has authority to issue such orders as are necessary to aid in the enforcement of the provisions of these acts, including orders compelling an operator to establish a post-mining discharge treatment trust as an alternative financial assurance mechanism.

C. *{Identify operator; provide name, type of business organization (e.g. Pennsylvania corporation), operator's business address, type of mining the operator conducts, operator's mining license number, and names of individual(s) who have power to bind the operator (e.g. corporate officers)}*

D. [Operator] is the permittee of the following coal mines which are associated with post-mining discharge liability:

NAME	PERMIT NO.	TOWNSHIP	COUNTY

E. *{Describe the status of the mines identified in paragraph D and provide other pertinent background information related to the mining operations.}*

F. *{Describe the status of surface reclamation and other pertinent reclamation activity for each mine.}*

G. A summary of the reclamation bonds currently posted for the [name of mine] is as follows:

PERMIT NO.	BOND TYPE	FINANCIAL GUARANTOR	BOND INSTRUMENT NO.	BOND STATUS	BOND AMOUNT

{Provide additional pertinent bond information for each mine site and, if appropriate, describe any Department Conversion Assistance or Remining Financial Guarantees on account for each mine site. Please note that a Conversion Assistance Financial Guarantee is required to be replaced by a bond or a trust agreement as soon as a discharge occurs on a site covered by Conversion Assistance.}

Post-Mining Discharges

H. *{Describe the discharges associated with each mine that are being addressed by this COA,*

including any relevant compliance history. State whether the discharge is located on permit or hydrologically connected to the permit. The description should include the name, and precise location, of each discharge being addressed by the COA. Use latitude and longitude coordinates in the description.}

I. A topographic map depicting the location of the [name of discharge] is attached as Exhibit []. The latitude and longitude coordinates for [name of discharge] are as follows: _____.
 {A topographic map which marks the coordinates of the discharge(s) relevant to the COA should be attached as an exhibit.}

J. The raw water quality of the [name of discharge] discharge, as compiled by the Department on [date] from analytical sampling results for the period from [date] through [date], is set forth in Exhibit A. {Provide detailed data on the raw water quality for each of the discharges addressed by the COA, including flow information expressed in gallons per minute for maximum, average and median flows. Raw water quality data, and the applicable effluent limits, for each discharge are necessary because they are factors used to calculate treatment costs and, consequently, the amount of the fully-funded trust.}

K. The required effluent limits applicable for [name of discharge] discharge are as follows:

Effluent Limits for [name of discharge]

Parameter	30-Day Average	Daily Maximum	Instantaneous Maximum
Iron (total)	[1.5 to 3.0] mg/l	[3.0 to 6.0] mg/l	[3.5 to 7.0] mg/l
Manganese (total)	[1.0 to 2.0] mg/l	[2.0 to 4.0] mg/l	[2.5 to 5.0] mg/l
Suspended solids	[10 to 35] mg/l	[20 to 70] mg/l	[25 to 90] mg/l
Aluminum (Total)	[0.75 to 2.0] mg/l	[1.5 to 4.0] mg/l	[2.0 to 5.0] mg/l
pH ¹		greater than 6.0; less than 9.0	
Alkalinity greater than acidity ¹			

¹The parameter is applicable at all times.

{Specific effluent limits for the discharge should be inserted; the applicable range is provided in the model table. A separate table should be used for each discharge.}

L. {Provide a description of the NPDES permit applicable for each discharge covered by the COA, including current status of NPDES permit(s) for the mining operations. The COA should also address how each NPDES permit will be handled going forward.}

M. [Operator] agrees it has the legal responsibility, pursuant *inter alia* to the Surface Mining Act and the Clean Streams Law, to properly treat or abate the discharge(s) identified in Paragraph H above.

Post-Mining Treatment Trust

N. {Describe the treatment system that has been constructed (or will be constructed) to treat each discharge. Include a schematic of the treatment system where appropriate.} (Treatment System).

O. The Treatment System is situated on land owned by [name of landowner]. [Operator] has obtained from [name of landowner] 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 executed Consent to Right of Entry is attached as Exhibit B. {If the treatment system is situated on land owned by a third party, the operator will have to obtain a signed Consent to Right of Entry form which grants access to operator, the Department and trustee/trustee's agent.}

P. {State the amount of operator's capital cost incurred to initially construct each treatment system. If the system has not yet been constructed, state the current estimated capital cost to construct each system and describe the basis for calculation of estimated capital costs.}

Q. In order to calculate the amount necessary to fully fund the trust, the Department and [Operator] have agreed to use actual operation and maintenance costs from past operations 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	CHEMICAL	SLUDGE REMOVAL
Rate	(\$/sample)	(\$/hr.)				
Annual Cost						

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 \$ _____. {State the operator's annual operation and maintenance costs for each treatment system and the basis for determining those costs, e.g. based on actual operating costs for a particular year or period of years. }

R. In order to calculate the amount necessary to fully fund the trust, the Department and [operator]

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 is \$ _____. Attached as Exhibit E is the AMDTreat Recapitalization Cost schedule for the Treatment System. *{State the present value of the recapitalization costs for each treatment system as calculated by the AMDTreat analytical tool. For each treatment facility, attach the AMDTreat Recapitalization Cost Worksheet from the AMDTreat analysis for that facility as an exhibit.}*

S. [Operator] is willing to establish a post-mining treatment trust with [name of financial institution] 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 requirements. [Operator] agrees to establish the [name of Trust] by executing a Post-Mining Treatment Trust [Participation] Agreement with [name of financial institution] which conforms with the Department's model trust agreement. *{If the operator is executing a Participation Agreement with, e.g., the Clean Streams Foundation, this paragraph should refer to execution of Participation Agreement by the operator.}*

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

U. The parties have agreed to use the formulas set forth below to calculate the present value of the [name of Trust]. The parties agree that the present value of the fully-funded {name of Trust} for the discharges covered by this Consent Order and Agreement is \$ _____. *{Insert total trust fund amount.}* This sum constitutes the current present value of the estimated future operation and maintenance costs for the Treatment System, and the current present value of the estimated future recapitalization costs for the Treatment System. The parties have also agreed to use the information and figures which will be provided by the Accounting required by Paragraph 4 to recalculate and adjust the amount of the [name of Trust] as described in Paragraphs 8 and 10 below. *{If a payment schedule has been agreed upon, this paragraph should include a description of the parties' agreement to a payment schedule and refer to paragraph 6.b.}*

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 [Operator] 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 [Operator] to comply with any term or condition of this Consent Order and Agreement shall subject [Operator] to all penalties and remedies provided by those statutes for failing to comply with an order of the Department.

2. Findings

a. [Operator] agrees that the findings in Paragraphs A through ___ are true and correct and, in any matter or proceeding involving [Operator] and the Department, [Operator] 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 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 [Operator's] fiscal year or thirty (30) days after the last day of any fiscal year which [Operator] may adopt in the future. *{This is the preferred anniversary date. A less preferential option is the annual recurrence of the month and day that this Consent Order and Agreement is executed.}*

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 Systems.

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

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

* *{The expected annual earnings of the trust will depend on the trust's investment parameters, including the amount of the trustee's fee. The Department will consider a fairly aggressive investment strategy consisting of up to 80% stocks and 20% bonds, however the operator can select a more conservative investment strategy. The trustee's fee schedule must be negotiated by the operator. The rate of return used to calculate a trust amount is determined as part of the negotiation process for the COA and accompanying Trust Agreement.}*

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

i. Primary Target Valuation. [typically 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 Systems.

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. [Operator] 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, including, but not limited to: Reagent; Polymer; Electrical; Sludge Removal; Labor, including benefits; Maintenance; Sampling; Overhead; and Miscellaneous. The individual item shall be tracked and reported for each general category.

b. [Operator] shall keep separate records for each of the following Treatment Systems:

c. [Operator] shall provide an annual accounting of the costs and expenses of annual treatment 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 on [date] and continuing through [date] of each year, or other fiscal year as [Operator] 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 [Operator] and by the President of [Operator] attesting to the completeness and accuracy of the records of the costs and expenses of annual treatment as reported in the Accounting.

d. [Operator]'s obligation to keep records and provide the Accounting shall continue for the period during which [Operator] is operating the Treatment Systems.

e. In the event of a dispute about the costs and expenses of treatment incurred by [Operator], [Operator] shall bear the burden of proving the accuracy and completeness of the Accounting and the records upon which the Accounting is based. A Special Report prepared under Generally Accepted Accounting Principles as to the treatment costs incurred by [Operator], prepared by an independent licensed public or certified public accountant, shall satisfy [Operator]'s burden of proof as to any of these matters.

5. Treatment Trust

a. [Operator] shall establish an irrevocable trust to be known as the [name of Operator] Treatment Trust by executing a Post-Mining Treatment Trust Agreement with [name of financial institution]. The [name of Trust] shall secure [Operator's] obligation to treat the [name of discharges covered by the COA], including its legal obligation to operate and maintain the Treatment Systems in perpetuity or until water treatment is no longer necessary. The [name of Trust] shall also secure the [Operator's] obligation to provide financial resources to the Department and the citizens of the Commonwealth sufficient to operate and maintain the Treatment Systems and to treat the mine drainage in perpetuity in the event [Operator] becomes unable or unwilling to meet these obligations. The [name of 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 [name of Trust] is attached as Exhibit F.

b. [Operator] shall establish within the [name of 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, [Operator] 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 [Operator's] obligation to treat or abate the [name of discharges covered by the COA], and [Operator] may subsequently petition the Department to terminate the [name of Trust]. Upon termination of the Trust following the posting of sufficient bonds to guarantee the [Operator's] obligation, the Department shall direct the Trustee to distribute any residuum, less final trust administration expenses of the Trustee, to the Settlor in accordance with Articles 4 and 12 of the Post-Mining Discharge Treatment Trust Agreement attached as Exhibit F.

6. Funding of the Primary Trust Account

a. Initial Payment to the Primary Trust Account: Upon its execution of this Consent Order and Agreement, [Operator] shall deposit an amount of \$ _____ into the Primary Trust Account. This sum constitutes the current present value of the amount necessary to fully fund the Treatment Trust, and includes the current present value of the future operation and maintenance of the Treatment System(s) and the current amount needed to finance anticipated and periodic capital expenditures for the Treatment System(s).

b. [Ongoing Payments to the Primary Trust Account:]

{This paragraph should be inserted only if a payment schedule for fully funding the trust has been negotiated with the operator. If the operator will deposit the amount necessary to fully fund the trust pursuant to paragraph 6.a, this paragraph should be deleted.}

c. [Surety Bonds as part of the Corpus of the Primary Trust Account: Upon its execution of this Consent Order and Agreement, [Operator] shall deliver to the Trustee a fully executed rider to the surety bond [describe surety bonds by surety company, amount, and instrument number] previously posted for [name of mine site] as described in Paragraph G. The rider shall be on a form prescribed and furnished by the Department.]

{This paragraph should be utilized if any surety bonds posted for the mine site are to be made part of the Treatment Trust corpus. If no surety bonds will be made part of the trust corpus, a description of how any posted surety bonds will be handled should be included, e.g., that the bonds will be released in whole or in part upon the trust being fully funded, or the bonds will be forfeited. A description of how any collateral bonds will be handled may also need to be included.}

{If no surety bonds will be made part of the treatment trust and the surety bonds will be released upon

funding of the trust, then model paragraphs 7.b, 7.d, 7.e, 9.a, 9.d, 9.e, and 11.a may be deleted because they will be unnecessary.}

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 the Primary Trust Valuation does not include the value of surety bonds, then Distribution Payments shall be made according to paragraph 7.c. Otherwise, Distribution Payments shall be made according to Paragraph 7.d. and e.

c. 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 [Operator]. 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 C.

d. 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 [Operator] in the form of a surety bond reduction of the surety bond(s) identified in Paragraph 6.c. This amount is depicted graphically at Point 1 on Exhibit C. Such surety bond reduction shall be in an amount determined by the following formula:

$$BR = ((1 + RoR) (TR - B) + B) - (1.03(TV))$$

Where:

BR	=	surety bond reduction
B	=	surety bond amount
RoR	=	assumed net rate of return or effective rate of return
TV	=	Primary Target Valuation
TR	=	Primary Trust Valuation

e. In the year the final bond is released, if the Primary Trust Valuation after the final surety bond release remains greater than the newly calculated Primary Target Valuation, then an additional Distribution Payment shall be made under paragraph 7.c.

f. 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 C.

g. If the Primary Trust Valuation is less than the Primary Basis Valuation, then [*Operator*] 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 C. {*When a payment schedule is being utilized pursuant to paragraph 6.b, add the following sentence: "This provision does not apply until [*Operator*] has fulfilled its obligations to make ongoing payments under paragraph 6.b."*}

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 [*typically 110%*] percent or less than or equal to [*typically 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 [*typically 116%*] percent of the new Primary Basis Valuation. Exhibit D is a graphical depiction of the adjustment.

9. Distribution Payments for Adjustments to the Primary Target Valuation

a. If the Primary Trust Valuation does not include the value of pledged surety bonds, then Distribution Payments shall be made according to paragraph 9.c. Otherwise, Distribution Payments shall be made according to paragraph 9.d.

b. 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.

c. 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 [*Operator*]. 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

d. If the newly calculated Primary Target Valuation which has been adjusted under paragraph 8. above is based on reduced Actual Treatment Cost, and the Primary Trust Valuation is greater than the newly calculated Primary Target Valuation, than a distribution payment shall be made to [Operator] in the form of a surety bond reduction. Such bond reduction shall be in an amount determined by the following formula:

$$BR = ((1 + RoR) (TR - B) + B) - (1.03(TV))$$

Where:

BR	=	surety bond reduction
RoR	=	assumed net rate of return or effective rate of return
TV	=	Primary Target Valuation
TR	=	Primary Trust Valuation
B	=	surety bond amount

e. In the year the final surety bond is released, if the Primary Trust Valuation after the final surety bond release remains greater than the newly calculated Primary Target Valuation, then an additional Distribution Payment shall be made under Paragraph 9.c.

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. *{Note that paragraph 5.b establishes the two sub-accounts—Primary Trust Account and Capital Improvement Account. And paragraph 6 requires the operator to fund the trust with the fully-funded amount, which includes both the current present value of the future O&M and the current amount needed to finance anticipated periodic capital expenditures, i.e., the capital improvement account money. The total amount all goes into the Primary Trust Account because the trustee can commingle the funds for purposes of investment; the Capital Improvement Account is merely accounted for, tracked, and reported separately. So, there is no need to*

actually require an initial separate deposit of money into the Capital Improvement subaccount as long as the fully-funded amount is properly calculated.}

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 [%], {insert trust's net rate of return, typically 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 E. 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 E 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. The provisions of this Paragraph do not apply if the Primary Trust Valuation includes the value of surety bonds.

b. 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 E. 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 [Operator] any time a planned capital replacement is made as indicated on Exhibit E. 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 E, 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 E, 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 [*Operator's*] obligation to make a contribution payment under Paragraph 7.g. This amount is depicted graphically at Point 5 on Exhibit C. However, the amount of surplus funds transferred to the Primary Trust Account may exceed [*Operator's*] obligation under paragraph 7.g. 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 C.

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

c. Surplus funds in the Capital Improvement Account or the Primary Trust Account may be used by [*Operator*] 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 [*Operator*] 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

{If needed, explain how real and personal property, (e.g., easements and right of ways), indispensable for continued treatment of the discharges will be handled in the event the Operator enters bankruptcy or ceases to exist. This may need to be done in order to ensure the treatment facilities and the real property on which the treatment system is situated will not be sold and will continue to be available to the Department and trustee at no charge. For example, title to the real property can be conveyed to the trust at the time the CO&A is executed. Personal property must take into account the continued use of the treatment system, which will need to be retained by the operator during its continued existence. The COA could convey the treatment system hardware to the trust in exchange for a \$1.00 and a license to continue to use the treatment system property for as long as the operator continues to treat the discharge.}

15. Public Liability Insurance

a. [Operator] shall maintain in effect public liability insurance coverage for the operation, maintenance, improvement and all other activities associated with the Treatment Systems and the real and personal property which is identified in the Post Mining Treatment Trust Agreement as part of the trust principal. [Operator] shall also provide fire damage insurance in the amount of \$ _____. *{Determine appropriate amount based on facilities in question; the fire insurance may not be necessary if the treatment facility poses little or no fire risk.}* The Trustee and the Commonwealth of Pennsylvania shall be listed as additional insureds on the policy.

b. In addition to the requirements of Paragraph 15.a. the public liability insurance shall be written on an occurrence basis and shall provide bodily injury and property damage coverage in the minimum amounts of \$500,000 per person and \$1,000,000 per occurrence. The insurance shall include a rider requiring the insurer to notify the Department thirty 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 [Operator] 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 [name of 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 [name of 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. [Operator]'s Continuing Obligation

Neither [Operator]'s agreement to fund the [name of Trust] nor the full or partial funding of the [name of Trust], nor the exhaustion of the [name of Trust] shall in any way limit [Operator]'s obligation to operate the Treatment Systems and to treat the discharge(s) covered by this Consent Order and Agreement in a manner which meets the effluent limitations described in Paragraph K above. Furthermore, exhaustion of the [name of Trust] shall not excuse [Operator] from [Operator]'s obligation to adequately treat or to abate the discharges.

18. Stipulated Civil Penalties

a. In the event [Operator] fails to comply in a timely manner with any term or provision of this Consent Order and Agreement, [Operator] 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
District Mining Office
[Address]

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

21. Liability of [*Operator*]

[*Operator*] 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. [*Operator*] 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

[Operator] Sites or any part thereof.

b. If [Operator] intends to transfer any legal or equitable interest in the [Operator] Sites which is affected by this Consent Order and Agreement, [Operator] 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 [address and phone number] and the District Mining Manager identified in ¶ 23 of such intent.

c. The Department in its sole discretion may agree to modify or terminate [Operator]'s duties and obligations under this Consent Order and Agreement upon transfer of the [Operator] Sites. [Operator] 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
District Mining Office
[Address]

24. Correspondence with [Operator]

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

[Title]
[Address]

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

Except for Paragraphs ___ and ___, 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 [Operator] 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 [Operator]. For purposes of this Paragraph, successor shall mean any corporation or entity: 1) [Operator] consolidates with or merges into or permits to merge with it and [Operator] is not the surviving corporation or entity; or 2) which acquires, by purchase or otherwise, all or substantially all of [Operator]'s properties or assets which include, but is not limited to, voting stock of [Operator]. Successor does not include any corporation or other entity to which [Operator] transfers or assigns all or substantially all of its financial or non-financial liabilities.

[Operator] 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 transmitted via electronic means.

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 [Operator] 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 [Operator]; that [Operator] consents to the entry of this Consent Order and Agreement as a final ORDER of the Department; and that [Operator] 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 [Operator]'s attorney certifies only that the agreement has been signed after consulting with counsel.

FOR [Operator]:

**FOR THE COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT OF
ENVIRONMENTAL PROTECTION:**

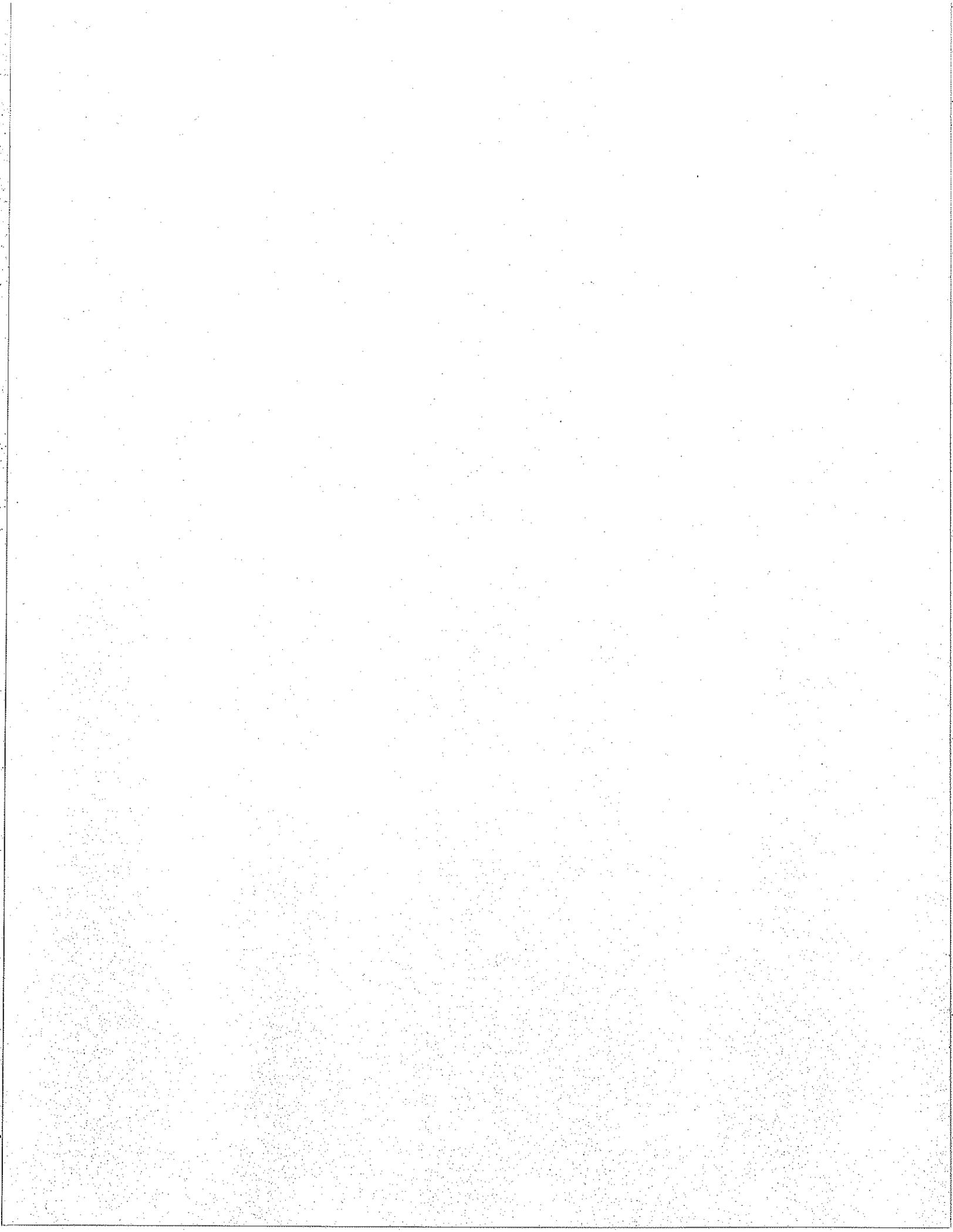
President or Vice President

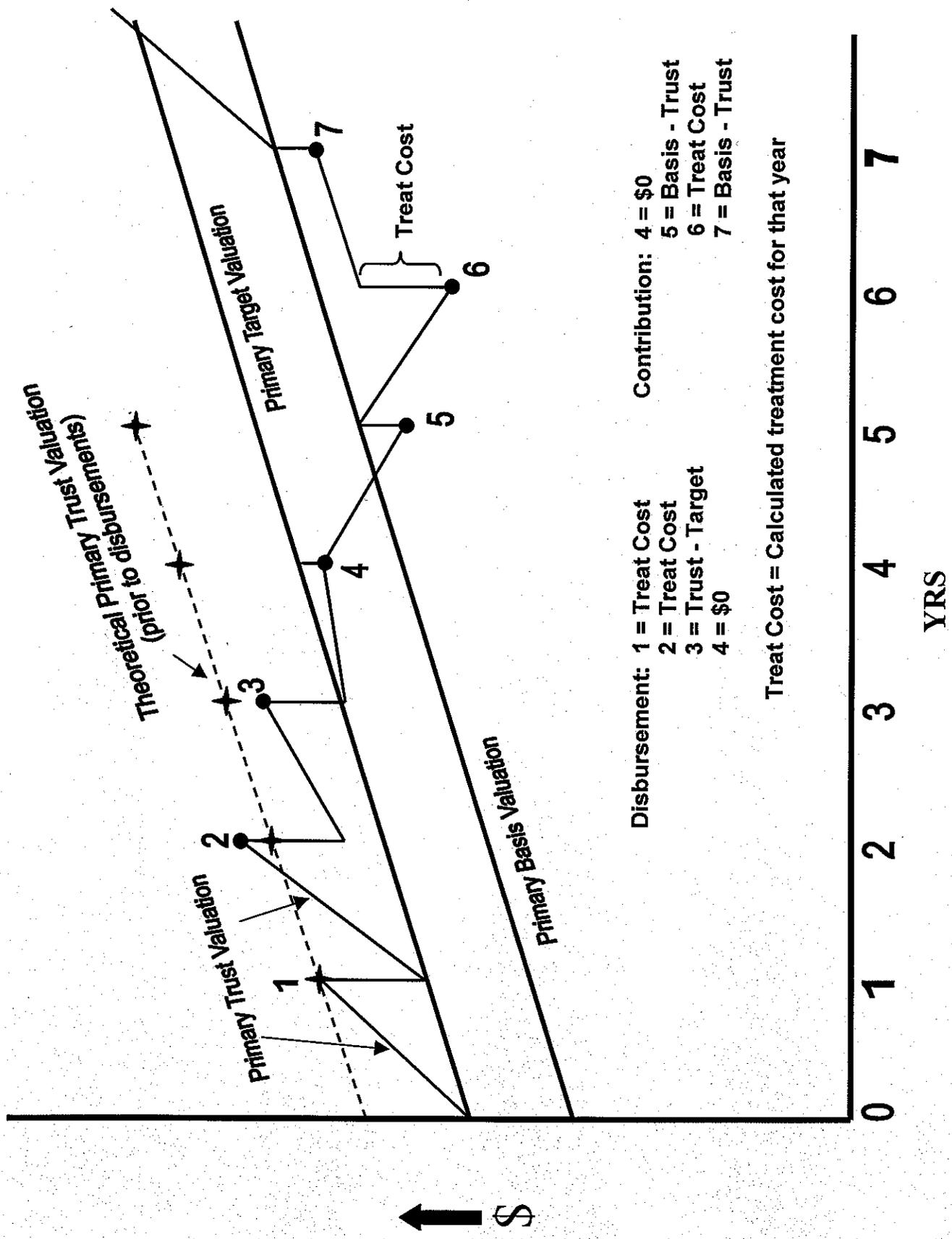
District Mining Manager

Secretary or Treasurer

Assistant Counsel
[Southwest] Region OCC

Attorney for [Operator]





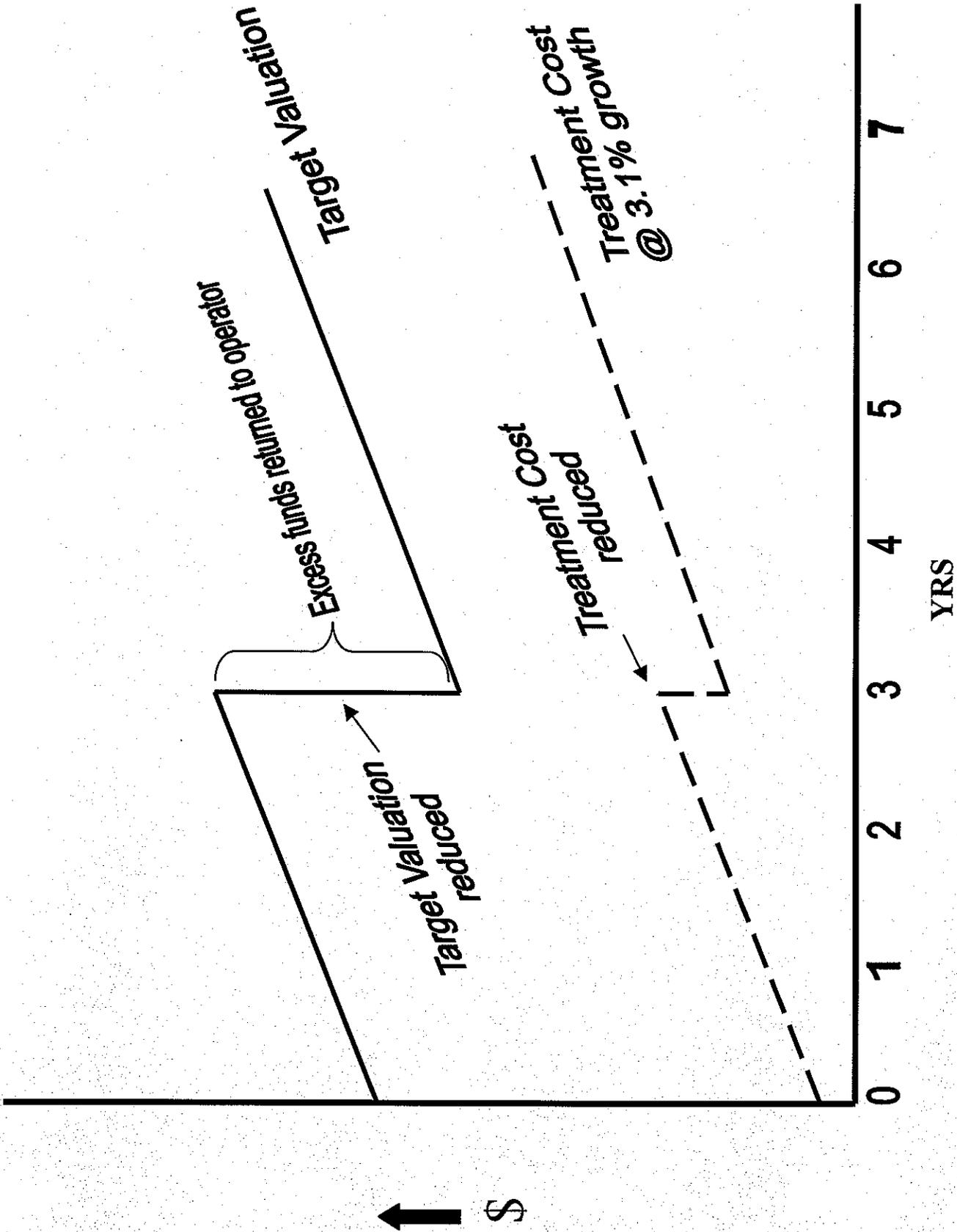


Exhibit D