

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

64922

_____	)	
IN THE MATTER OF:	)	
	)	Docket No. CWA-04-01-1012
Martin County Coal Slurry Spill Site	)	EPA Docket No. 01-19-C
Martin County, Kentucky	)	
	)	
Martin County Coal Corporation	)	Order on Consent for Compliance
	)	
Respondent	)	
_____	)	

**ADMINISTRATIVE ORDER ON CONSENT**

**I. AUTHORITIES AND GENERAL PROVISIONS**

1. This Administrative Order on Consent ("Order") is entered into by the United States Environmental Protection Agency ("EPA") and Martin County Coal Corporation ("Respondent"). This Order requires Respondent to: 1) remove Waste Materials that have been discharged into waters of the United States and associated watershed areas; 2) restore the impacted waters and watersheds; 3) mitigate any temporary or permanent losses of waters of the United States; and 4) to reimburse response costs incurred by the EPA. These items will be done in connection with the release of Waste Materials into waters of the United States from an impoundment at Respondent's coal processing facility located in Martin County, Kentucky.
2. This Order is issued primarily under the authority vested in the Administrator of the EPA by Section 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. §§1251 et. seq., which has been delegated to Regional Administrators of Regions 3 and 4. The reimbursement portion of the agreement is entered into by EPA pursuant to the authority vested in the Administrator of EPA by 42 U.S.C. § 9622(h), which has also been redelegated to the Regional Administrators of Regions 3 and 4.
3. EPA has notified the Commonwealth of Kentucky and the State of West Virginia of this Order. EPA will provide both States with a copy of this executed Order.
4. EPA and Respondent agree that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent retains the right to controvert in any subsequent proceedings, other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions

of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees in any proceeding to implement or enforce this Order that it will not contest the validity of this Order, its terms, or the jurisdiction of EPA to issue it.

## II. PARTIES BOUND

5. This Order applies to and is binding upon EPA, and upon Respondent and Respondent's agents, successors, and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

## III. DEFINITIONS

7. Unless otherwise expressly provided herein, whenever terms listed below are used in this Order the following definitions shall apply:

a. "Administrative Order on Consent" (Order) shall mean this Agreement.

b. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

c. "Effective Date" shall be the effective date of this Order as provided in Section XXV paragraph 65.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the Agency.

e. "Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the EPA has incurred after October 11, 2000, in conducting response actions, reviewing or developing plans, reports and other items pursuant to this Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, and costs incurred pursuant to Paragraph 19.

f. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

g. "Paragraph" shall mean a portion of this Order identified by an arabic numeral.

h. "Parties" shall mean the United States Environmental Protection Agency, and the Respondent.

i. "Site" or "Discharge Area" shall mean the extent of the release of Waste Material at and from the Martin County Coal Corporation, encompassing surface water, associated wetlands (if any) and associated watershed areas of, Martin County, Kentucky and, all other areas within the areal extent and spread of the Waste Material.

j. "Waste Material" shall mean any pollutant, as that term is defined under Section 502(6) of the Clean Water Act, 33 U.S.C. § 1362(6), discharged into waters of the United States and adjacent areas.

k. "Work" shall mean any activities Respondent is required to perform under this Order, except those required by Paragraph 20 (Record Retention).

#### **IV. EPA's FINDINGS OF FACT**

8. For the purposes of this Order, EPA finds that:

a. Martin County Coal Corporation (MCCC) is a coal mining company with a coal processing facility in Martin County, Kentucky. The process consists of washing the coal to remove impurities. The waste water and waste materials are then stored in an impoundment. The impoundment does not have a NPDES discharge permit pursuant to either Federal or State law.

b. On Wednesday October 11, 2000, the coal slurry impoundment owned and operated by the MCCC had a sudden breach and millions of gallons of Waste Materials, including, coal mine fine refuse slurry, and sediments spilled from a point source into waters of the United States. The spilled Waste Material entered the Wolf Creek, Rockcastle Creek, and the Big Sandy River watersheds and has traveled downstream from the Site, into several tributaries including: Coldwater Fork, Rockcastle Creek, Tug Fork and the Big Sandy River.

c. EPA Region 4 was contacted by the National Response Center and responded immediately to the release along with the Commonwealth of Kentucky. The EPA On Scene Coordinator (OSC) was dispatched and he set up the Unified Command/Incident Command to coordinate the response as required by the NCP.

d. Several potable and industrial water supply intakes were affected or potentially affected as a result of the spill. MCCC has been providing alternative water supplies to the impacted communities as necessary since the discharge incurred.

e. Since the discharge, EPA, the Commonwealth of Kentucky, and the Respondent have collected sediment and water quality samples at the Site. Sampling results have confirmed that the discharged Waste Material has entered the surface waters from a point source into the waters of the United States and adjacent areas.

f. As of January 10, 2001, activities conducted by MCCC have resulted in removal of Waste Material deposits attributable to the initial release of October 11, 2000 in the following locations:

- i. Approximately eight miles of streambed, banks, and floodplain areas in the Coldwater Fork watershed, from the North Portal to the Cain Property Cells along Kentucky State Road 908.
- ii. Approximately five miles of streambed, banks, and floodplain areas in the Wolf Creek watershed, from the confluence of Big Andy Branch and Panther Fork to the confluence of Carcass Branch with Wolf Creek.

#### **V. EPA's CONCLUSIONS OF LAW AND DETERMINATIONS**

9. Based on the Findings of Fact set forth above, and the Administrative Record supporting this action, EPA has determined that:

a. The release of the Waste Materials into the waters of the United States without a permit violated the Clean Water Act 33 U.S.C. §§ 1251 et. seq.

b. Martin County Coal Corporation ("Respondent") is a corporation organized under the laws of Kentucky with a place of business located at Route 40, Martin County, Kentucky. The Respondent is a "person" within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

c. Section 301 (a) of the Clean Water Act, 33 U.S.C. §1311 (a), makes unlawful the discharge of any pollutant by any person into the navigable waters of the United States, except in compliance with certain sections of the Clean Water Act including Section 402, 33 U.S.C. §1342, and Section 404, 33 U.S.C. §1344.

d. The impacted tributaries of the Wolf Creek, Rockcastle Creek, and Big Sandy River watersheds including: Coldwater Fork, Tug Fork, Rockcastle Creek, and the Big Sandy River are all "waters of the United States" and "navigable waters" within the meaning of the CWA and regulations promulgated thereunder.

e. The impoundment that was the point of discharge of Waste Material into waters of the U.S. constitutes a "point source" within the meaning of the definition set forth in Section 502(14) of the CWA, 33 U.S.C. §1362(14).

f. The Waste Material that was released from the impoundment constitutes a "pollutant" within the meaning of the definition set forth in Section 502(6) of the CWA, 33 U.S.C. §1362(6).

g. Under Sections 402 and 404, a permit is a legal prerequisite to discharge of the type described above. No CWA Section 402 or 404 permit authorizing the aforesaid release and discharges into the Site or Discharge Area has been issued by the EPA, the states or the U. S. Corps of Engineers (COE). These discharges therefore were in violation of Section 301(a) of the CWA.

h. The Work required by this Order is necessary to protect the public health, welfare, or the environment.

i. EPA alleges that it has incurred response costs at the Site pursuant to 42 U.S.C. § 9607.

## VI. ORDER

10. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record for this Site, it is hereby ordered and agreed that Respondent shall comply with the following provisions, including but not limited to all documents incorporated by reference into this Order, and perform the following actions:

### 11. Designation of On-Scene Representatives

a. Respondent shall perform the Work required by this Order itself or retain a lead contractor to perform the Work. Respondent shall notify EPA of Respondent's qualifications or the name and qualifications of such lead contractor within 10 days of the effective date of this Order. Respondent shall also notify EPA of the name and qualifications of the lead contractors retained to perform the Work under this Order at least 10 days prior to commencement of such Work. EPA retains the right to disapprove of the selection of the lead contractor retained by the Respondent, or of Respondent's choice of itself to do the Work. If EPA disapproves of the selected lead contractor, EPA will document its reasons to Respondent in writing, and Respondent shall retain a different lead contractor or notify EPA that it will perform the Work itself within 10 days following EPA's disapproval and shall notify EPA of that lead contractor's name and qualifications within 3 days of EPA's disapproval.

b. Within 3 days after the effective date of this Order, Respondent shall designate a Project Coordinator who shall be responsible for administration of all the Respondent's actions required by the Order. Respondent shall submit the designated coordinator's name, address, telephone number, and qualifications to EPA. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of any Project Coordinator named by Respondent. If EPA disapproves of a selected Project Coordinator it will document its reasons in writing and, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and

qualifications within 10 days following EPA's disapproval.

c. EPA has currently designated Art Smith of the EPA, Region 4 Emergency Response and Removal Branch as its On-Scene Representative (OSR) for purposes of implementing the work. At some point as the restoration process moves forward, EPA may designate Eric Somerville, Region 4, Wetlands Section as the OSR. Respondent shall direct all submissions required by this Order to the OSR at Room 216K, Romano L. Mazzoli Federal Building, 600 Martin Luther King, Jr. Place, Louisville, KY 40202. Copies of submissions should be sent to Eric Somerville at 61 Forsyth Street, Atlanta, Georgia 30303. EPA and Respondent shall have the right, subject to the preceding paragraph above, to change its designated OSR or Project Coordinator. Respondent shall notify EPA, 10 days before such a change is made. The initial notification may be orally made but it shall be promptly followed by a written notice.

## VII. WORK TO BE PERFORMED

12. Respondent shall perform, the following actions:

a. Contain the release of Waste Materials into the Wolf Creek and Coldwater Fork: Take appropriate steps to limit additional coal slurry from being released into the environment from the impoundment or from the mine works located beneath or otherwise hydraulically connected to the impoundment. Employ appropriate measures including, but not limited to, berming, diking, booms with silt curtains, rock dams, sediment basins, sediment traps, rip rap, solidification of coal slurry and pumping techniques, to limit to the maximum extent practical additional releases of coal slurry into areas outside of the Wolf Creek and Coldwater Fork watersheds.

b. Stream Assessment and Cleanup Survey (SACS) Team:

i. Respondent shall be a member of the SACS Team and will carry out the Work as directed by the OSR after recommendations by the SACS Team. The OSR will serve as the head of the SACS Team. The purpose of the SACS Team is to provide input into the Work to be performed to allow the OSR to make determinations regarding the Work.

ii. The SACS Team consists of the following personnel: an EPA staff person, EPA's Scientific Support Coordinator (or equivalent), Qualified members of EPA's Environmental Response Team (ERT), (these may be contractors that are experts in stream cleanup and restoration,) Representative(s) from the Commonwealth of Kentucky, Representative(s) from the State of West Virginia, and Representative(s) from Respondent. Respondent agrees to provide necessary on-Site office space for the SACS Team and the OSR.

iii. The SACS Team may send multiple teams into the field to assess predesignated areas for cleanup/mitigation/restoration. Each team should consist of at least one State, one MCCC, and one Federal person. The teams will evaluate the options for each area that

was assessed. The Scientific Support Coordinator (SSC) will lead the discussion within the SACS Team. The SACS Team will make its recommendation and the OSR will make the determinations on the removal and restoration for that area.

c. Assessment/Cleanup Criteria: Respondent shall restore the Site so that there are no permanent losses to the waters of the United States. Pursuant to the preceding paragraph, Respondent as a member of the SACS Team, shall evaluate conditions in the affected watersheds for purposes of developing cleanup options and criteria. These assessments shall include physical inspection of affected banks, and streambeds of the of all impacted tributaries of Wolf Creek, Rockcastle Creek, and Big Sandy River watersheds. As part of the assessment the Respondent shall acquire a thorough understanding of the mechanisms of mobilization and deposition of the Waste Material in the surface water bodies and adjacent riparian areas affected by the spill. This knowledge shall be developed in part on identification of locations and depths of the Waste Material in these watersheds and the changes in these parameters over time, as determined by field measurements. Based on the results of these assessments, final cleanup criteria will be developed and will be based on an estimate of ecological risks to aquatic species in each of the watersheds due to Waste Material migration, as established in the assessment. At a minimum, this study shall include (a) an evaluation of the impacts to habitats due to the release and (b) prediction of future impacts to aquatic species upon re-suspension and deposition of Waste Material. The final cleanup criteria shall be determined by the OSR after recommendations from the SACS Team. The areas to be assessed include:

- i. Wolf Creek, Rockcastle Creek, and Big Sandy River watersheds, including all impacted tributaries.

d. Removal and Restoration: Based on the SACS Team's recommendations and determination by the EPA OSR, Respondent shall perform the following tasks:

- i. Remove the Waste Material that has been released from the impoundment and deposited on the ground outside of the two portals. Based on the recommendations of the SACS Team the OSR will make the determination on the amount of Waste Material that should be removed.
- ii. Remove discharged Waste Material from the stream/river beds, banks, floodplains and adjacent wetlands and riparian zones of the Wolf Creek, the Rockcastle Creek and the Big Sandy watersheds (and their associated tributaries), Tug Fork and the Big Sandy River, to original grade or to levels recommended as appropriate by the SACS Team as determined appropriate by the EPA OSR, and the removal should not widen or deepen the stream channel below bank full elevation. In areas where Waste Material remains in place at the direction of the SACS Team, the material should be stabilized in place using appropriate means (e.g. by using a vegetative cover).

iii. Remove physical and mechanical devices and structures that were employed to contain and remove the Waste Material based on recommendations by the SACS Team as determined appropriate by the EPA OSR.

iv. Restore the contour of the stream banks and flood plain areas impacted by the Waste Material, to their natural state or levels recommended as appropriate by the SACS Team as determined appropriate by the EPA OSR.

v. Restore the aquatic and hydraulic functions of the streams through appropriate in-stream aquatic enhancement structures and flow management structures recommended as appropriate by the SACS Team as determined appropriate by the EPA OSR.

vi. Replant the riparian zone starting at bank full elevation and extending as far up the stream bank as recommended by the SACS Team as determined appropriate by the OSR, for any disturbed areas along the impacted streams and rivers.

vii. Consistent with the information developed pursuant to paragraph 12(b)(iii), above, and with applicable law and guidance, the Respondent shall develop a compensatory mitigation plan to provide mitigation to the extent recommended as appropriate by the SACS Team as determined appropriate by the OSR, for both temporal and permanent losses to waters of the United States resulting from the discharge of waste material, restoration activities, and fill remaining in place. This plan should be completed, and submitted to EPA within 12 months of the completion of removal/restoration activities described above. No compensatory mitigation or compensation shall be required under this provision which is inconsistent with or duplicative of any other mitigation or compensation required by any governmental agency or entity regarding damage to natural resources within the Discharge Area that has been agreed to by the Respondent and the governmental agency or entity within 12 months following completion of the removal/restoration required pursuant to Section VII of this Order. This alternative mitigation shall be submitted to EPA for review and approval for the sole purpose of determining its suitability as a substitute for compensatory mitigation within 30 days of agreement by those parties.

e. Section 404 Permit: Having met the requirements for applicability of Nationwide Permit 32, within 30 days of the effective date of this Order, Respondent will submit a copy of this executed Order and apply to the Army Corps of Engineers for a Nationwide 32 permit for any structure, work or discharge of dredged or fill material remaining in place, or undertaken for mitigation, restoration, or environmental benefit in jurisdictional waters of the United States.

f. Water Supplies: Provide resources to ensure that downstream water plants have treatment alternatives for providing water to their customers. This requirement shall remain in



effect until the SACS Team recommends, and it is determined by the OSR, to be no longer necessary.

- g. Permits: Respondent shall apply for all permits as required by law.

13. Work Plan and Implementation

a. Within 10 days after the effective date of this Order, Respondent shall meet with EPA and the States to discuss the issues associated with implementation of the work to be performed. EPA will notify Respondent and the States within 5 days of the effective date of this Order regarding the time and place for such a meeting.

b. Within 30 days after the effective date of this Order, Respondent shall submit to EPA for approval a draft Work Plan for performing the Work. The draft Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Order.

c. EPA may approve, disapprove, require revisions to, or modify the Work Plan. If EPA requires revisions, or disapproves the Work Plan, EPA will document its reasons for disapproval in writing. Respondent shall then submit a revised Work Plan within 20 days of receipt of EPA's notification of the required revisions. Respondent shall implement the Work Plan as finally approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work Plan, the schedule, and any subsequent modifications shall be fully enforceable under this Order.

14. Health and Safety Plan. Within 30 days after the effective date of this Order, the Respondent shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-site Work under this Order.

15. Quality Assurance and Sampling

a. All sampling and analyses performed pursuant to this Order shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control (QA/QC), data validation, and chain of custody procedures. Respondent shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall follow the following documents, as appropriate, as guidance for QA/QC and sampling: "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures," OSWER Directive Number 9360.4-01; dated January 1990;"Compendium of ERT Procedures," OSWER Directives Numbered 9360.4-04 through 9360.4-08.

b. Upon request by EPA, Respondent shall have a laboratory analyze samples submitted by EPA for quality-assurance monitoring. Respondent shall provide to EPA the quality assurance/quality control procedures followed by all sampling teams and laboratories performing

data collection and/or analysis.

c. Upon request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples of any samples collected by Respondent while performing work under this Order. Respondent shall when practical notify EPA not less than 2 days in advance of any sample collection activity beyond normally scheduled sampling. EPA shall have the right to take any additional samples that it deems necessary.

#### 16. Reporting

a. Respondent shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order monthly after the date of receipt of EPA's approval of the Work Plan until termination of this Order, unless otherwise directed by the OSR. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

17. Final Report. Within 60 days after completion of all Removal/Restoration required under this Order, the Respondent shall submit for EPA review and approval a Final Report summarizing the actions taken to comply with this Order. The Final Report shall include a listing of an estimate of the quantities and types of materials removed, a discussion of removal/restoration and disposal options considered for those materials, a listing of the ultimate destination of those materials, a summary of the analytical results of all sampling and analyses performed, and accompanying appendices containing a statement of all costs incurred by the Respondent for all Work. The Final Report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

#### VIII. SITE ACCESS

18. Respondent shall use its best efforts to provide, and/or obtain access to the Site and off-Site areas to which access is necessary to implement this Order, and provide access to all records and documentation related to the conditions at the Site and the actions conducted pursuant to this Order. Such access shall be provided to EPA employees, contractors, agents, consultants, designees, representatives, and State of West Virginia and the Commonwealth of Kentucky representatives. Such access provided and/or obtained by Respondent shall permit these individuals to move freely on-Site and at appropriate off-Site areas in order to conduct actions

which EPA determines to be necessary.

19. Where action under this Order is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements in a timely fashion and in accordance with the needs of the SACS Team. Respondent shall immediately notify EPA if after using its best efforts it is unable to obtain such agreements. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all reasonable costs and attorneys' fees incurred by the United States in obtaining such access. If there arises a situation where EPA is required by law to pay for access, EPA will follow the requirements set forth in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), 42 U.S.C. § 4654.

20. Record Retention, Documentation, Availability of Information.

a. Respondent shall preserve all documents and information relating to the Work performed under this Order, or relating to the waste material found on or released from the Site, for three years following completion of the Work required by this Order. At the end of this three year-period and 30 days before any document or information is destroyed, Respondent shall notify EPA that such documents and information are available to EPA for inspection, and upon request, shall provide the originals or copies of such documents and information to EPA to the extent that they are not subject to any privilege. In addition, Respondent shall provide documents and information retained under this Section at any time before expiration of the three year-period at the written request of EPA to the extent that they are not subject to any privilege.

b. Respondent may assert a business confidentiality claim pursuant to 40 CFR § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Order. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 CFR Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Respondent.

21. Compliance With Other Laws Respondent shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations.

**IX. AUTHORITY OF THE EPA ON-SCENE REPRESENTATIVE**

22. The Respondent agrees that the EPA On-Scene Representative shall be responsible for overseeing the Respondent's implementation of this Order. The OSR shall have the authority to reasonably halt, conduct, or direct any Work required by this Order. Absence of the OSR from the Site shall not be cause for stoppage of Work unless specifically directed by the OSR.

## **X. REIMBURSEMENT OF COSTS**

23. Respondent specifically denies the applicability of 42 U.S.C. § 9607. However as the United States has incurred response costs, and for the purpose of assisting the Respondent with the removal/restoration process, Respondent agrees, consistent with, 42 U.S.C. § 9604 and 9622, to reimburse the United States for its Costs within 30 days of the receipt of a statement identifying such costs with appropriate documentation of those expenses that includes a (SCORPIO Report). Costs are defined in Paragraph 7(e) of this Order. Respondent shall, within 30 days of receipt of a bill, remit a cashier's or certified check for the amount of the bill.

All payments for Costs shall be sent to the following address:

U.S. Environmental Protection Agency  
Region 4  
Region 4 Accounting  
P.O. Box 100142  
Atlanta, Georgia 30384  
ATTENTION: Collection Officer

24. Respondent shall simultaneously transmit a copy of the check to Wilda Cobb, Associate Regional Counsel, EPA 61 Forsyth Street, Atlanta, Georgia. Payments shall be designated as "Oversight Costs - "Martin County Coal Slurry Spill Site" and shall reference the payor's name and address, the EPA site identification number A41X, and the EPA docket number of this Order.

25. In the event that the payment for Costs are not made within 30 days of the Respondent's receipt of the bill, Respondent shall pay interest on the unpaid balance. Interest is established at the rate specified for interest at the statutory rate.

26. Respondent may dispute all or part of a bill for Costs submitted under this Order, if Respondent alleges that EPA has made an accounting error.

27. If any dispute over Costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested Costs into the Fund as specified above on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested Costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the OSR. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within 30 days after the dispute is resolved.

## **XI. DISPUTE RESOLUTION**

28. In the event that a disagreement arises under any of the terms or obligations created by this

Order, the parties to this Order shall attempt to resolve, expeditiously and informally, any disagreements.

29. If the Respondent objects to any EPA action, order or determination taken pursuant to this Order, including billings for Costs, the Respondent shall notify EPA in writing of its objections within 30 days of receipt of notice of such action, unless the objections have been informally resolved. For purposes of this Order EPA action, order or determination will include those actions taken by or on behalf of EPA or any of its employees, agents or designees including the OSR.

30. EPA and Respondent shall within 15 days from EPA's receipt of the Respondent's written objections attempt to resolve the dispute through formal negotiations (Negotiation Period). The Negotiation Period may be extended at the sole discretion of EPA although such extensions shall not be unreasonably withheld. EPA's decision regarding an extension of the Negotiation Period shall not constitute an EPA action subject to dispute resolution or a final agency action giving rise to judicial review.

31. Any agreement reached by the parties pursuant to this section shall be in writing, signed by both parties, and shall upon the signature by both parties be incorporated into and become an enforceable element of this Order. If the parties are unable to reach an agreement within the Negotiation Period, the EPA Deputy Regional Administrator (DRA) of Region 4 will issue a written decision on the dispute to the Respondent after the Respondent and EPA shall have had an opportunity to present their respective positions to the DRA and the DRA shall act as an objective mediator of any dispute. The decision of EPA shall be incorporated into and become an enforceable element of this Order upon Respondent's receipt of the EPA decision regarding the dispute. Respondent's obligations under this Order shall not be tolled by submission of any objection for dispute resolution under this section.

32. Following resolution of the dispute, as provided by this section, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. No EPA decision made pursuant to this section shall constitute a final agency action giving rise to judicial review prior to a judicial action brought by the United States.

## **XII. FORCE MAJEURE**

33. Respondent agrees to perform all requirements under the this Order within the time limits established in the Work Plan, unless the performance is delayed by a force majeure. For purposes of this Order, a force majeure is defined as any event arising from causes beyond the control of Respondent including the ability of the Respondent to get permits or certifications after using its best efforts, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, that delays or prevents performance of any obligation under this Order despite Respondent's best efforts to fulfill the obligation. Force majeure does not include financial inability to complete the work or increased cost of performance.

34. Respondent shall notify EPA's OSR or OSR representative orally within 48 hours after the event, and in writing within 3 days after Respondent becomes or should have become aware of events which constitute a force majeure. Such notice shall: identify the event causing the delay or anticipated delay; estimate the anticipated length of delay, including necessary demobilization and re-mobilization; state the measures taken or to be taken to minimize the delay; and estimate the timetable for implementation of the measures. Respondent shall take all reasonable measures to avoid and minimize the delay. Failure to comply with the notice provision of this Section shall waive any claim of force majeure by the Respondent.

35. If EPA determines a delay in performance of a requirement under this Order is or was attributable to a force majeure, the time period for performance of that requirement shall be extended as deemed necessary by EPA. Such an extension shall not alter Respondent's obligation to perform or complete other tasks required by the Order which are not directly affected by the force majeure.

36. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 37 and 38 for failure to comply with the requirements of this Order specified below, unless excused under Section XII (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Order or any work plan or other plan approved under this Order identified below in accordance with all applicable requirements of law, this Order, the SOW, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

**XIII. STIPULATED PENALTIES**

**37. Stipulated Penalty Amounts - Work and Cost Payments.**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with the work schedule set forth in the EPA approved Work Plan.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500.00	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 1000.00	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 1500.00	31 <sup>st</sup> day and beyond

**38. Stipulated Penalty Amounts - Reports.**

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports or other written documents pursuant to Paragraphs 12(d)(vii), 13, 14, 15, 16, and 17:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500.00	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 1000.00	15 <sup>th</sup> through 30 <sup>th</sup> day

\$ 1500.00

31<sup>st</sup> day and beyond

39. Following EPA's determination that Respondent has failed to comply with a requirement of this Order, EPA may give Respondent written notification of the failure and describe the noncompliance. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a substantially deficient submission under Section VII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and (2) with respect to a decision by the EPA Region 4 Deputy Regional Administrator (DRA) level or higher, under Paragraph 31 of Section XI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute; and (3) if Respondent fails to comply with the final decision of EPA after Dispute Resolution then stipulated penalties will continue to accrue, but will be capped at a maximum \$50,000. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Order. If the dispute is resolved by agreement or by a decision of EPA, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order.

40. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XI (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check and, indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #A41X, the EPA Docket Number, and the name and address of the party making payment. Payments and Copies of check paid pursuant to this Section, and any accompanying transmittal letter, shall be sent to EPA as provided in Paragraph 23.

41. The payment of penalties shall not alter in any way Respondent's obligations to complete performance of the Work required under this Order.

42. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as interest. Respondent shall pay interest on the unpaid balance, which shall begin to accrue on the date of demand made. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based. Provided, however, that EPA shall not seek civil penalties pursuant to the statutes it enforces for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order. A willful violation does not include the refusal of Respondent to comply with a final EPA decision after dispute resolution until a court of competent jurisdiction has resolved that dispute. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

#### **XIV. COVENANT NOT TO SUE**

43. Except as otherwise specifically provided in this Order, upon issuance of the EPA notice referred to in Section XXIII - Notice of Completion, EPA covenants not to sue Respondent or to take administrative action against Respondent pursuant to the Clean Water Act for any failure to perform response work pursuant to this Order.

44. Except as otherwise specifically provided in this Order, in consideration and upon Respondent's payment of all the response costs specified in Section X of this Order, EPA covenants not to sue or to take administrative action against Respondent under 42 U.S.C. § 9607(a) for recovery of Costs. This covenant not to sue shall take effect upon the receipt by EPA of all of the payments required by Section X Reimbursement of Costs.

45. These covenants not to sue are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Order. These covenants not to sue extend only to the Respondent and do not extend to any other person.

#### **XV. RESERVATIONS OF RIGHTS BY EPA**

46. Nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of Waste Materials on, at, or from the Site. Nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order.

47. The covenant not to sue set forth in Section XIV above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Order;
- b. liability for costs or penalties not included within the definition of Costs;
- c. liability for performance of response action other than the Work specifically performed under this Order;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; and
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site.

48. This Administrative Order on Consent does not constitute a waiver, suspension or



modification of the terms and conditions of the CWA or any regulations promulgated thereunder. Issuance of or compliance with this Order does not exempt Respondent from responsibility to comply with all requirements of the CWA, regulations promulgated thereunder, and any legal order or part issued thereunder. Issuance of this Agreement is not an election by the EPA to forego any Administrative, Civil or Criminal enforcement actions otherwise authorized under the CWA. This Order is not and shall not be construed to be a permit under the CWA or regulations promulgated thereunder.

**XVI. COVENANT NOT TO SUE BY RESPONDENT**

49. Respondent, including corporate subsidiaries, parents, and affiliates, agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Costs, or this Order, including, but not limited to, any direct or indirect claim from or against EPA, based on, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law, or any claims arising out of response activities at the Site. This does not prevent Respondent from invoking Dispute Resolution pursuant to Section XI of this Order.

50. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

**XVII. OTHER CLAIMS**

51. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Order.

52. Except as expressly provided in Section XIV (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Order, for any liability such person may have under the Clean Water Act, other statutes, or the common law, including but not limited to any claims of the United States for costs, damages and interest under, 42 U.S.C. §§ 9606 and 9607.

53. Respondent agrees that no action or decision by EPA pursuant to this Order shall give rise to any right to judicial review, except as set forth in, 42 U.S.C. § 9613(h).

**XVIII. CONTRIBUTION PROTECTION**

54. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by, 42 U.S.C. §§ 9613(f)(2) and 9622, for "matters addressed" in this Order. For purposes of this paragraph the "matters addressed" in this Order are the Costs. Nothing in this Order precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Order for

indemnification, contribution, or cost recovery.

### **XIX. INDEMNIFICATION**

55. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, state on scene representative, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent acts of Respondent, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Order. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent acts of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Order. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Order. Neither Respondent nor any such contractor shall be considered an agent of the United States.

56. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

57. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

### **XX. INSURANCE**

58. At least 15 days prior to commencing any on-Site work under this Order, Respondent shall secure, and shall maintain for the duration of this Order, comprehensive general liability insurance and automobile insurance with limits of 10 million dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need provide only that portion of the insurance described above which is not maintained by such contractor or subcontractor.

### **XXI. MODIFICATIONS**

59. Modifications to any plan or schedule or Scope of Work may be made in writing by the OSR

or at the OSR's oral direction after a recommendation by the SACS Team or field SACS Team. If the OSR makes an oral modification, it shall be made to the MCCC's Project Coordinator, and be memorialized in writing within 3 days thereafter; provided, however, that the effective date of the modification shall be the date of the OSR's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

60. If Respondent seeks permission to deviate from any approved Work Plan or schedule or Scope of Work, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis.

61. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any other writing submitted by Respondent shall relieve Respondent of its obligation to obtain such formal approval as may be required by this Order, and to comply with all requirements of this Order, unless it is formally modified.

## **XXII. ADDITIONAL ACTIONS**

62. EPA may determine that additional actions not included in an approved plan are necessary to protect public health, welfare, or the environment. EPA will take recommendations of the SACS Team or field SACS Team into consideration when making its determination, and EPA will then notify Respondent of that determination. Unless otherwise stated by EPA, within 30 days of receipt of notice from EPA that additional actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a Work Plan for the additional Work. The plan shall conform to the applicable requirements of Section VII of this Order. Upon EPA's approval of the plan pursuant to Section 2.1 - Work Plan and Implementation, Respondent shall implement the plan for additional Work in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSR's authority to make oral modifications to any plan or schedule pursuant to Section XXI -Modifications.

## **XXIII. NOTICE OF COMPLETION**

63. When EPA determines, after EPA's review of the Final Report, that all actions have been fully performed in accordance with this Order, with the exception of any continuing obligations required by the States, including permitting, EPA will provide notice to the Respondent. If EPA determines that any Work has not been completed in accordance with this Order, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Order.

## **XXIV. SEVERABILITY**

64. If a court issues an order that invalidates any provision of this Order or finds that Respondent has sufficient cause not to comply with one or more provisions of this Order, Respondent shall

remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

**XXV. EFFECTIVE DATE**

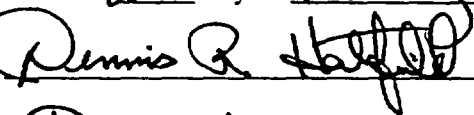
65. This Order shall be effective 3 days after the Order is signed by both of the Regional Administrators of EPA, Regions 3 and 4.

**XXVI. APPLICABILITY**

66. The terms of this agreed order only apply to and are binding upon the parties hereto. Nothing in this agreed order constitutes an admission of fault or liability and no third parties have standing to use this agreed order to establish liability, fault or any other matter in any administrative, judicial or other proceeding.

The undersigned representative of Respondent certifies that they are fully authorized to enter into the terms and conditions of this Order and to bind the party they represent to this document.

Agreed this 20<sup>th</sup> day of February, 2001

By: 

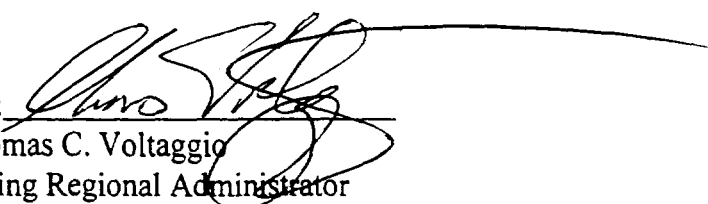
Title President

It is so ORDERED and Agreed this 6<sup>th</sup> day of March, 2001

BY: 

A. Stanley Meiburg  
Acting Regional Administrator  
Region 4  
United States Environmental Protection Agency

EFFECTIVE DATE: March 9th, 2001

BY: 

Thomas C. Voltaggio  
Acting Regional Administrator  
Region III  
United States Environmental Protection Agency



10 11 0021

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

March 7, 2001

By Facsimile and Overnight Mail

Mr. Shane Harvey, Esq.  
Massey Coal Services, Inc.  
315 70<sup>th</sup> Street SE  
Charleston, WV 25301

SUBJ: Administrative Order on Consent  
Docket No. CWA 04-01-1012  
EPA Docket No. 01-19-C

Dear Mr. Harvey:

Enclosed please find the above referenced Administrative Order on Consent (Order), which has been signed by both EPA Regions 3 and 4. Pursuant to Paragraph 65 of the Order, it becomes effective 3 days from the date it as been signed by the Administrators, therefore, the effective date is March 9, 2001. EPA plans to hold a public meeting on March 13<sup>th</sup> to respond to the public's concerns and questions. As soon as we have a time and place for the meeting we will contact you.

If you have any further comments or questions regarding this matter, please contact Wilda Cobb at (404) 562-9530 or Philip Mancusi-Ungaro at (404) 562-9519.

Sincerely,

*Wilda Cobb by phone*

Wilda Cobb  
Associate Regional Counsel

*Philip G. Mancusi-Ungaro*

Philip G. Mancusi-Ungaro  
Associate Regional Counsel

Enclosure

cc: General Bickford, Kentucky  
Armando Benincasa, West Virginia  
Army Corps of Engineers, Huntington District  
Region 3