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**PADEP Coal Remining and Reclamation XL Project**

**FINAL PROJECT AGREEMENT**

**Draft**

**April 6, 2000**

**Final Project Agreement**  
**PADEP Coal Remining and Reclamation XL Project**

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## I. Introduction to the Agreement

### A. Executive Summary

The Pennsylvania Department of Environmental Protection (“PADEP”) has proposed this XL Project to explore a new approach to writing coal remining permits. The approach would be based on compliance with best management practices (“BMPs”) instead of National Pollutant Discharge Elimination System (“NPDES”) numeric loadings based effluent limitations and would monitor performance based on in-stream water quality, instead of at individual preexisting discharge points. This XL project would provide for a test of this approach in up to eight watersheds with significant acid mine drainage (“AMD”) pollution. The project will collect data to compare in-stream concentration versus the loading from individual discharge points and provide for the evaluation of the performance of this alternate permitting strategy in PADEP’s efforts to address AMD.

### B. Purpose of the XL Program

This Final Project Agreement (“FPA”) states the intentions of the Project Signatories to carry out a pilot project as part of EPA’s “Project XL” which tests innovative approaches to environmental protection. Project XL is an EPA initiative to test the extent to which regulatory flexibility, and other innovative environmental approaches, can be implemented to achieve both superior environmental performance and reduced economic and administrative burdens. (See Federal Register: May 23, 1995 (Volume 60, Number 99 page 27282-27291).

### C. Purpose of this Final Project Agreement

This FPA is a joint statement of the Project Signatories’ plans and intentions with respect to the PADEP Coal Remining and Reclamation XL Project . This FPA outlines the details of how this project is expected to be implemented and how the superior environmental performance is to be measured and sets forth the regulatory flexibility that is necessary to implement this project.

The Project Signatories expect significant environmental benefits from the implementation of this project, including:

- the encouragement of the reclamation of scarred and abandoned mine land,
  - the reduction of acid mine drainage and improvement of in-stream water quality,
- the opportunity to test the effects of using best management practices in remining, and
- the emphasis on pollution prevention and watershed approaches in coal remining.

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This FPA sets forth the plans of the Project Signatories and represents the firm commitment of each signatory to support the XL process, to implement the necessary regulatory flexibility in a timely fashion and to follow the terms of this FPA. This FPA is not, however, intended to create legal rights or obligations and is not a contract, a final agency action or a regulatory action such as a permit or rule. This FPA does not give anyone a right to sue the Project Signatories for any alleged failure to implement its terms, either to compel implementation or to recover damages.

This FPA and materials relating to this project are available on the Project XL Web Site at [www.epa.gov/projectxl](http://www.epa.gov/projectxl).

#### **D. Project Signatories and Contacts**

The Project Signatories to this Final Project Agreement (FPA or Agreement) are EPA, Region III and the Pennsylvania Department of Environmental Protection. The Project contacts are:

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## **II. Description of the Project**

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The Pennsylvania Department of Environmental Protection (“PADEP”), together with the EPA Office of Water and the Interstate Mining Compact Commission (“IMCC”)-member states, have been exploring a new approach to writing coal remining permits. The permits would be based on compliance with best management practices (“BMPs”) instead of National Pollutant Discharge Elimination System (“NPDES”) numeric effluent limitations and would monitor performance based on in-stream water quality, instead of at individual discharge points. To do this, remining projects in up to 8 different watersheds will be selected throughout Pennsylvania to serve as pilot projects. The first three of these pilot projects will be ready to implement very soon. As many as 5 more pilot projects may be implemented within the next year. The initial pilot projects are:

1. Al Hamilton Surveyor Run and Ridge Road Operations, Surveyor Run Watershed, Clearfield County.
2. Amerikohl Rathmel Operation, Soldier Run Watershed, Butler County.
3. River Hill Mid Penn #1 Operation, Pine Run Watershed, Clearfield County.

Each of these watersheds has been severely degraded by acid mine drainage from abandoned mine discharges and is either currently listed on Pennsylvania’s Clean Water Act (“CWA”) Section 303(d) list<sup>1</sup> or has been identified as a water body which does not meet water quality criteria due to abandoned mine drainage. States are required to develop Total Maximum Daily Loads (“TMDL”) for impaired water bodies identified on their CWA Section 303 (d) lists. A TMDL defines the load that can be delivered to a stream from all sources within the watershed while still achieving federal and state water quality standards. The development and implementation of a TMDL for watersheds containing abandoned mine lands presents a unique challenge because in most cases there is no responsible party liable or available to control AMD from an abandoned mine. For each watershed, we expect that remining efforts will be an integral part of a water quality remediation plan following the development of TMDL limitations. Water quality improvements from remining will be achieved by implementing “BMPs” which are described in the recently drafted “Coal Remining – Best Management Practices Guidance Manual,” EPA, June 1999<sup>2</sup>.

For each watershed project, a set of BMPs will be designed that are expected to significantly improve water quality. BMPs could include removing remaining coal reserves, eliminating ponded

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<sup>1</sup> States were required under the Federal Water Pollution Control Act (“FWPCA or CWA”) to establish a prioritized list of those waters in the state that are impaired waters that do not meet water quality standards.

<sup>2</sup>“Coal Remining – Best Management Practices Guidance Manual,” EPA, June 1999. This document is available on the PADEP website at: [www.dep.state.pa.us/dep/deputate/minres/Districts/CMDP/main.htm](http://www.dep.state.pa.us/dep/deputate/minres/Districts/CMDP/main.htm).

water, regrading to reduce infiltration, applying alkaline material, special handling of acid forming rock strata, diversion seals or underdrains, and revegetation. Pennsylvania's past experience with Subchapter F mining permits demonstrates the effectiveness of BMP implementation on remining projects.

This project will not change conventional effluent limitations for discharges that are physically encountered by the mining operation, such as pit water discharges or discharges from sedimentation ponds. Implementation of BMPs will be substituted for numeric effluent limitations only on preexisting discharges that are not physically encountered by the remining operation. With respect to these preexisting discharges, the pilot projects will regulate the same chemical parameters as a conventional remining permit. However, monitoring will be based on in-stream concentration levels, rather than loading rates from individual discharge points.

### **III. Project XL Acceptance Criteria**

#### **A. Anticipated Superior Environmental Performance**

This pilot project is expected to provide superior environmental performance because it will encourage coal operators to undertake remining projects which otherwise would have been too risky or expensive because of the potential to incur liability for the treatment of preexisting acidic discharges. In return for this lessening of liability to the reminers, the reminers will implement more reclamation activities in the watershed than existing Pennsylvania regulations require. In the Surveyor Run pilot, the operator is also reclaiming a former coal preparation facility and refuse disposal area, which is adding acid loading to Surveyor Run. This additional reclamation is not required under current state or federal law. Remining (with reclamation to present-day standards) is an effective way to reclaim abandoned mine lands and improve water quality, at little or no cost to taxpayers. These pilots are designed to increase the number of remining operations providing reclamation and to enhance the degree of reclamation and AMD-abatement measures taken on remining operations.

The source of the water discharging from acid mine drainage seeps or point sources is water infiltrating from the surrounding land area or watershed. If one or more BMPs are applied to the watershed they should have a positive effect on the rates, quantities and loading of chemical, physical, biological, and other constituents which are discharged from point sources in the watershed. PADEP has an extensive body of scientific knowledge and experience in successfully remining and reclaiming abandoned mine lands to eliminate acid mine drainage.

A recent study by PADEP of 116 completed remining operations with 233 discharges or hydrologic units showed that approximately 47% of the projects resulted in statistically significant

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water quality improvements while less than 1% resulted in degraded water quality. Although the balance of the remining discharges may not have shown any statistically significant improvement in water quality, no degradation occurred and many other public safety and environmental improvements were implemented with the remining. These included removal of dangerous highwalls, pits and ponded water; sealing mine openings, and regrading and vegetating abandoned mine lands. Overall, remining on these 116 sites reduced acidity load by 15,918 lbs/day (61%), iron load by 517 lbs/day (35%), manganese load by 31 lbs/day (13%), and aluminum load by 302 lbs/day (43%). Of the 283 remining permits issued by PADEP as of December, 1999, only 5, or less than 2%, had ever incurred long-term treatment liability due to increased pollution loading.

The Project XL pilot projects are expected to yield results as good as or better than Pennsylvania's existing remining program, while allowing the program to expand into watersheds and undertake projects which otherwise would not have been attempted. Many potential remining projects are never undertaken due to fears of pollution liability, monitoring or treatment site constraints, or site conditions which make it infeasible to write permits with conventional numeric effluent limits. For example, in sites where the preexisting mine drainage discharges directly as subsurface baseflow into the groundwater, it may be difficult or impossible to monitor and develop a loading-based numeric effluent limit.

Initial pilot projects are limited to Clean Water Act § 303(d) watersheds where remining is anticipated to be one component of a TMDL-driven watershed restoration plan. The pilot projects should, at a minimum, result in equivalent environmental performance but are expected to demonstrate significant environmental improvement. The chief purpose of the projects, however, is to determine if superior environmental results can be obtained.

The beneficial water quality impacts of remining are documented in Hawkins (1994, 1995) and Smith and Dodge (1995). Studies on the effectiveness of remining as a mine drainage pollution abatement tool are summarized in Hawkins (1998). These studies are contained and referenced in Coal Mine Drainage Prediction and Pollution Prevention in Pennsylvania 1998<sup>3</sup>.

## **B. Cost Savings, Paperwork Reduction and Operational Flexibility**

This project will significantly reduce the expenditure of public monies for reclamation of abandoned mine lands by encouraging remining by private parties. Remining reclaims land to current standards. Through the extraction of remaining coal reserves and the reclamation and revegetation of the land through remining, remaining coal reserves are utilized, land is reclaimed at no public expense, and water quality can be improved. Further, the proposed project encourages

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<sup>3</sup>Coal Mine Drainage Prediction and Pollution Prevention in Pennsylvania is available on the PADEP website at: [www.dep.state.pa.us/dep/deputate/minres/Districts/CMDP/main.htm](http://www.dep.state.pa.us/dep/deputate/minres/Districts/CMDP/main.htm).

remining by shifting or reducing some of the risk which operators take when mining degraded land. This risk of incurring liability for water treatment, although slight, frequently discourages operators from remining areas which would otherwise be prime candidates for reclamation through remining. PADEP has shown that it is more cost effective to implement BMPs than risk the long term financial liability of treating an AMD discharge to meet numeric limits. If post mining treatment were required, it would make these operations economically infeasible. For example, the capital costs for treating AMD at the Amerikohl Rathmel site would be \$182,000, plus annual operating costs of \$108,000, for an estimated 50 years. However, the estimated cost of implementing the abatement plan, which describes the BMPs, is economically feasible based on the expected profit from the extraction of the coal in the remining. Moreover, the site will be left in as good, and hopefully better, condition through the implementation of BMPs.

In addition, the BMPs will have an overall benefit to the surrounding environment and enhance future land use and aesthetics, increase safety and provide employment to local residents. Some relatively minor cost savings and paperwork reduction will be gained through the BMP approach, which will only require quarterly, rather than monthly, monitoring of preexisting discharges after permit issuance.

### **C. Stakeholder Involvement and Support**

PADEP will sponsor an initial Project XL meeting for stakeholders in April 2000 to present the details of this proposed XL Project and to solicit participation by stakeholders in the development of the project. Both before and after permit issuance, all water quality data, the permit and supporting application materials, inspection reports, correspondence, and other associated materials will be maintained and made available for public inspection at the appropriate PADEP district mining office for each pilot watershed. In some cases, citizen watershed organizations have formed around efforts to remediate AMD-impacted streams. Such organizations and other stakeholders, will be invited to stakeholder meetings held by PA DEP to consider the best watersheds to become part of this pilot and possible BMPS to bring about water quality improvements.

In July 1999, the Mining and Reclamation Advisory Board (MRAB) met and toured the Amerikohl Soldier Run Site in order to learn more about this BMP approach to remining permits. The MRAB is made up of a cross section of entities, from coal mining companies to environmentalists, that are stakeholders in the remining of Pennsylvania's abandoned coal mine lands. Members of the MRAB will be invited to participate in this project as stakeholders. In late October 1999, a statewide press release was issued to publicize the BMP approach in coal remining permits.<sup>4</sup> A presentation on the XL Project will be made by PADEP at the April 27, 2000 MRAB

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<sup>4</sup>The Press release can be found at <http://www.dep.state.pa.us/dep/deputate/polycomm/pressrel/2000/BaumgardnerCoal010500.html>

meeting.

#### **D. Innovative Approach and Multi-media Pollution Prevention**

The project will be a test of an innovative approach to writing coal remining permits with an emphasis on BMPs as opposed to numeric effluent standards. The use of BMPs without numeric limits is an innovative approach that focuses on preventing pollution at the source(s) in the abandoned mine land areas of the watershed regardless of whether they will be disturbed during the remining. This testing will provide EPA's Office of Water with data and experience as it examines coal mining effluent limitations and the effect on overall water quality in degraded streams. This XL project will also allow PADEP, EPA and the reminers to gain more experience in how to implement BMPs, develop new ones and refine the application of existing BMPs as well as provide data on the most effective BMPs and information on possible improvements.

BMPs are pollution prevention tools rather than end of pipe treatments. Practices such as preventing or diverting water from contacting acid forming rock materials, applying lime to the rock to neutralize its acid potential, or segregating and isolating acid producing rock strata during mining will stop water from picking up acidity and leaching iron, aluminum and manganese from the mine overburden. Reclaiming, regrading and revegetating the land can eliminate ponding water, reduce water infiltration and provide for water transpiration/respiration by plants. The goal of these BMPs is to reduce or eliminate the formation of acid mine drainage that would otherwise have to be collected and treated. Remining may be the only economically viable solution for reducing highly degraded or high volume abandoned mine discharges, since long term end of pipe treatment is usually not viable or is cost prohibitive.

In-stream water quality monitoring is the most effective way to measure the performance of AMD remediation activities within the watershed as the water quality impact of all remining, reclamation, and abatement activities are manifest at this point. The water quality baseline will use concentration, rather than loading data, because: 1) in-stream concentration data are more stable than load data, rendering a higher quality statistical summary; 2) concentration data are much easier and less costly to collect than load data; 3) pollution loads from individual discharges are manifested in the in-stream concentration; and 4) loading data, particularly in large streams, tend to be dominated by flow, which makes it difficult and impractical to monitor actual changes in in-stream quality. Accordingly, when using in-stream monitoring as a measure of environmental performance, concentration data are much more practical, and sensitive than loading data.

#### **E. Transferability of the Approach to Other Entities or Sectors**

Pennsylvania has over 2,400 miles of streams degraded by acid mine drainage and an estimated

\$15,000,000 public liability for the remediation of abandoned mine lands. There are significant reminable coal reserves in their abandoned mine lands throughout the bituminous and anthracite regions of Pennsylvania in AMD-degraded watershed's, where this pilot project could be directly transferred. In addition, as evidenced by the interest of the Interstate Mining Compact Commission ("IMCC") and as one component of EPA's current examination of coal mining effluent limitations, this project could be applicable to all of the Appalachian coal producing states with AMD problems.

In addition, PADEP's approach to using BMPS without numerical effluent limitations is an innovative approach that may have more widespread applications to other states with abandoned coal mines.

#### **F. Feasibility of the Project**

The Sponsor has the financial capability, personnel and senior management commitment necessary to implement and oversee the elements of this XL Project.

The Agencies, by signing this FPA, agree to support the project, subject to any public review procedures necessary to implement the legal mechanism for the project.

The proposed project watersheds are well-suited for the application of this alternative remining approach for the following reasons: 1) the affected stream segments are not currently meeting in-stream water quality standards; 2) remining, while employing the appropriate BMPs, is likely to result in an overall improvement to in-stream water quality and reduce the total daily load of mine drainage pollutants; 3) significant reminable coal reserves are present in the watershed; 4) there is significant acreage in the watersheds in need of surface reclamation; 5) there are numerous sources of mine drainage entering the watersheds, making monitoring at each individual discharge point less practical than in-stream performance monitoring. In some cases, the discharges are in a location that makes monitoring and establishment of numerical effluent limitations very impractical or impossible; and 6) there are multiple mining and reclamation activities ongoing in the watersheds, making it more practical to monitor the combined effect of these projects rather than focusing on the performance of individual projects.

#### **G. Monitoring, Reporting, Accountability, and Evaluation Methods to be Used**

EPA and PADEP intend to make all project information available to stakeholders in a form that is accessible and easy to understand.

The success of the pilot projects in maintaining compliance with environmental laws will be monitored and reported throughout the projects. In addition, each pilot project will be assessed in

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terms of: 1) the amount of abandoned mine lands which have been reclaimed, 2) water quality improvements which have been realized that would not have occurred under the conventional remining permit program, 3) determining the effect of the BMPs on pollution loads from preexisting discharges, and 4) determining the impact/effectiveness of the additional BMPs implemented that would not have been required under the conventional Pennsylvania remining program. This will allow a rigorous assessment of superior environmental performance.

Also, because implementation of the BMPs is such an important component of these operations, inspection frequencies on these sites will be increased appropriately to ensure the BMPs have been implemented. The actual inspection frequency will depend on the complexity of the BMPs. Periodic reports and updates regarding the activity on these pilot sites and water quality monitoring results will be submitted to EPA.

For each pilot site, environmental performance will be measured at one or more key in-stream monitoring points as well as at the preexisting pollutional discharge monitoring points. A pre-project water quality baseline of at least one year's duration will first be established at each of these points. During active mining, the principal in-stream water quality station will be monitored at least semi-monthly for the key mine drainage parameters (pH, acidity, alkalinity, specific conductance, iron, manganese, aluminum, and sulfates). Individual discharges will be monitored monthly for the same parameters as well as flow rate, so that pollution loading rates can be determined. A pre-project statistical baseline will be established for the in-stream and discharge monitoring points. Baselines for the 3 selected pilot projects are attached to this FPA in appendix 1.

Following initiation of the project, monitoring of the principal in-stream monitoring point(s) will continue on a semi-monthly basis. Individual discharges will continue to be monitored quarterly. Water quality performance will be reviewed with each quarterly site inspection. Annually, and at the conclusion of each project, water quality data from before, during and after mining will be statistically analyzed to determine whether or not there were any statistically significant changes in water quality – both at the in-stream monitoring point and for individual discharge loadings. PADEP believes that monitoring at in-stream monitoring points will provide a better indication of the overall health of the streams and effects of remining on the watershed than monitoring several individual discharge points, which may not be capturing all the pollution loading inputs to the stream.

The main goal of this project is not just to demonstrate that water quality improvements can be affected by remining (this has already been demonstrated in PADEP studies), but rather that implementation of a BMP-based remining permit can further encourage remining in places that otherwise would not have been worth the operator's expense or risk of undertaking a remining project or where a conventional numerical effluent limitation is infeasible. Although water-quality performance will be evaluated, the overall success of the project will also be evaluated based on the

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following criteria: Acreage of abandoned mine lands remined and reclaimed that would not have been remined under the conventional Pennsylvania Remining Regulations Subchapter F program (Subchapter F), additional reclamation or remediation projects done in the watersheds as a result of pilot projects, effects on in-stream water quality, effects on pollution loads from preexisting discharges and additional BMPs implemented that would not have been required under conventional Subchapter F program.

Project Information and Progress Reports for this project will also be posted on the PADEP web site at <http://www.dep.state.pa.us/dep/deputate/minres/Districts/homepage.htm>.

#### **H. Avoidance of Shifting the Risk Burden to Other Areas or Media**

As stated above, there will be no transfer of pollution from one media to another in this project but rather a prevention of degradation by reducing or eliminating the contact of water with the acid forming rock overburden or by taking measures to produce alkaline waters.

Information is available on the percentage of minority and low income populations in the areas around the proposed mining sites. The areas generally have a low population and little if any minority population. Both counties where the sites are located have a higher percentage of below poverty population than the state or Region III average

#### **IV. Description of the Requested Flexibility and the Implementing Mechanisms**

##### **A. Requested Flexibility**

In 1987, Congress amended the Clean Water Act (CWA) in an effort to encourage remining. Section 301(p), known as the Rahall Amendment, grants remining operations an exception to the effluent limitation permitting requirements for iron, manganese and pH for preexisting discharges from abandoned mine lands mined before 1977. Instead, the permit may set site-specific numeric effluent limitations representing best available technology (BAT) on a case-by-case basis for these parameters. These limits are to be set using best professional judgement, but may not exceed the baseline discharge level. In other words, a permit may not allow the levels of acidity, iron and manganese discharged to exceed what was discharged from the preexisting discharges in the remining area before the remining. Also, the applicant must demonstrate the potential for improved water quality from the remining operation. In addition, no discharge from, or affected by, the remining operation may exceed state water quality standards.

PADEP, as the Project XL sponsor, is requesting regulatory relief from the above NPDES

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permitting requirements and effluent limitations. Under this project, PADEP would continue to apply current effluent limitations/permitting requirements to preexisting discharges that are co-mingled with discharges from active remining operations. However, PADEP is seeking relief from imposing numeric effluent limitations on preexisting discharges before and after active remining operations (i.e., when the preexisting discharges are not yet, or are no longer, co-mingled with discharges from the active remining operations). Under this XL Project, the permit would include only non-numeric effluent limitations in the form of specific BMPs, as well as in stream monitoring requirements. Each of the proposed remining watersheds has been severely degraded by acid mine drainage from abandoned mines or has been identified as a water body that does not meet water quality criteria due to abandoned mine drainage. PADEP has indicated that the potential liability and costs to a reminer of requiring that preexisting discharges meet numeric effluent limits would, at these particular sites, be such a great disincentive that remining would probably not occur.

As part of this XL Project, PADEP would not require preexisting discharges to meet numeric effluent limitations. In return the reminers will implement more reclamation activities in the watershed than existing Pennsylvania regulations require. These pollution prevention activities that are applied on a watershed scale are a more cost effective remedy than long term end of pipe treatment of point-source discharges, as might be necessary to meet numeric effluent limitations. Moreover, they will provide the superior environmental performance of a sustainable remedy to the mine scarred sites. If environmentally responsible remining were encouraged, society and the environment stand to gain by reclaiming these lands for little if any cost to the taxpayer. The signatories of this FPA believe this XL Project is consistent with the purposes and intent of the CWA because it provides for the prevention, reduction or elimination of pollution to surface and ground water.

This FPA outlines an approach to allow the participating mining companies to commit to implement best management practices as a permit condition in lieu of traditional numeric effluent limits. The remining permit would include only non-numeric effluent limitations in the form of specific BMPs, as well as requiring monitoring of in-stream concentrations rather than individual discharge points. PADEP will use best professional judgement to select the appropriate BMPs to be applied in each of the remining areas, and possibly other areas of the watersheds. PADEP and EPA expect that this will result in an overall improvement to water quality from the remining operations. If, after remining and the implementation of the BMPs, the in-stream concentrations show statistically significant degradation of water quality, then PADEP will require the remining company to implement additional BMPs. If the company fails to implement the required BMPs then they will have to meet conventional remining effluent limitations.

This XL Project is seen as a way for the sponsor and stakeholders to test and obtain data on the effectiveness of using BMPs without numeric limits to address in-stream water quality in up to eight AMD degraded watersheds. The flexibility being provided for this testing for these eight sites

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should not be seen as a precedent for this approach or as EPA's endorsement of this approach in areas or sites outside the scope of this XL Project.

#### B. Legal Implementation Mechanism

PADEP intends to use its existing permitting authority to implement this XL Project. Stakeholders, including EPA, have been and will continue to be involved in the development of this XL Project. The legal implementation mechanism used to implement this project will allow for the participation of stakeholders and will offer full public notice and comment. PADEP, as the permitting authority, has already issued a permit including the requirement to implement BMPs in lieu of meeting numeric effluent standards for one of the sites (mining has not yet commenced at this site).

### V. Project Schedule and Reporting

#### A. Schedule

[Placeholder: add schedule here]

#### B. Reporting and Evaluation

[Placeholder: add text here - refer to Appendix A and B of the FPA guidance]

### VI. Legal Basis for the Project

#### A. Authority to Enter Into the Agreement

By signing this Agreement, EPA, PADEP **[placeholder: add reminding companies if they want to sign the FPA]** acknowledge and agree that they have the respective authorities, discretion and resources to enter into this Agreement and to implement all applicable provisions of this Project, as described in this Agreement.

#### B. Legal Effect of the Agreement



This Agreement in itself does not create or modify legal rights and obligations, is not a contract or a regulatory action such as a permit or rule, and is not legally binding or enforceable against any Project Signatory. Rather, it expresses the plans and intentions of the Project Signatories without making those plans and intentions binding requirements. This applies to the provisions of this Agreement that concern procedural as well as substantive matters. Thus, for example, the Agreement establishes procedures that the Project Signatories intend to follow with respect to dispute resolution and termination (see Sections VII.E and VII.A). However, while the Project Signatories fully intend to adhere to these procedures, they are not legally obligated to do so.

This Agreement is not a “final agency action” by EPA or PADEP, because it does not create or modify legal rights or obligations and is not legally enforceable. This Agreement itself is not subject to judicial review or enforcement. Nothing any Project Signatory does or does not do that deviates from a provision of this Agreement, or that is alleged to deviate from a provision of this Agreement, can serve as the sole basis for any claim for damages, compensation or other relief against any Project Signatory.

### **C. Other Laws or Regulations That May Apply**

Except as provided in Section IV. B., the legal implementing mechanisms section, the Project Signatories do not intend that this Final Project Agreement will modify any existing or future laws or regulations.

### **D. Retention of Rights to Other Legal Remedies**

Except as provided in Section IV. B., the legal implementing mechanisms section, nothing in this Agreement affects or limits EPA’s or PADEP’s legal rights. These rights include legal, equitable, civil, criminal or administrative claims or other relief regarding the enforcement of present or future applicable federal and state laws, rules, regulations or permits with respect to the project sites/pilot sites.

## **VII. FPA Implementation Issues**

### **A. Withdrawal From or Termination of the FPA**

Because this FPA is not legally enforceable, no Project Signatory may be legally compelled to continue with the PADEP Coal Remining and Reclamation XL Project. However, it is the desire of the Project Signatories for the FPA to remain in effect and be implemented as fully as possible, and it is not their intent to terminate or withdraw from the FPA unless there is a compelling reason

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to do so.

The Project Signatories agree that appropriate grounds to seek withdrawal from the FPA could include, but are not limited to:

1. Substantial failure by any party to the Agreement to: a) comply with the provisions of the implementing mechanisms for this Project, or b) to act in accordance with the provisions of this Agreement;
2. Substantial failure of any party to the Agreement to disclose material facts during development of this Agreement;
3. Substantial failure of the XL Project to provide superior environmental performance consistent with the provisions of this Agreement;
4. Enactment or promulgation of any environmental, health or safety law or regulation after execution of the Agreement, which renders the Project legally, technically or economically impracticable; and/or
5. Decision by US EPA or PADEP to reject the transfer of the Project to a new owner or operator of a pilot site.

In addition, US EPA and PADEP do not intend to withdraw from the Agreement unless actions by the remaining companies constitute a substantial failure to act consistently with intentions expressed in this Agreement and its implementing mechanisms. The decision to withdraw will take the failure's nature and duration into account. The relevant remaining companies will be given notice and a reasonable opportunity to remedy any "substantial failure" before EPA's or PADEP's withdrawal. If there is a disagreement between the Project Signatories over whether a "substantial failure" exists, the Project Signatories will use the dispute resolution mechanism set forth in Section VII.E of this Agreement. US EPA and PADEP retain their discretion to use existing enforcement authorities, including withdrawal or termination of this Project, as appropriate. The remaining companies retain any existing rights or abilities to defend themselves against any enforcement actions, in accordance with applicable procedures.

#### **B. Procedures for Withdrawal or Termination of the FPA**

The Project Signatories agree that the following procedures will be used to withdraw from or terminate the Project before expiration of the Project term. They also agree that the implementing mechanism(s) will provide for withdrawal or termination consistent with these procedures.

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1. Any Project Signatory that wants to terminate or withdraw from the Project is expected to provide written notice to the other parties at least sixty (60) days before the withdrawal or termination.
2. If requested by any Project Signatory during the sixty (60) day period noted above, the dispute resolution proceedings described in this Agreement may be initiated to resolve any dispute relating to the intended withdrawal or termination. If, following any dispute resolution or informal discussion, a Project Signatory still desires to withdraw or terminate, that Project Signatory will provide written notice of final withdrawal or termination to the other Project Signatories.

If any agency withdraws or terminates its participation in the Agreement, the remaining agencies will consult with the Sponsor(s) to determine whether the Agreement should be continued in modified form, consistent with applicable federal or state law, or whether it should be terminated.

3. The procedures described in this Section apply only to the decision to withdraw or terminate participation in this Agreement. Procedures to be used in modifying or rescinding any legal implementing mechanisms will be governed by the terms of those legal mechanisms and applicable law.

### **C. Modification of the FPA**

This Agreement may be modified by mutual agreement of all of the Project Signatories at any time during the duration of the Project. Any substantial modification will be subject to notice and comment in the Federal Register and must follow the XL acceptance criteria. PADEP will also provide notice to stakeholders to solicit, and incorporate to the extent feasible, their input on any proposed modifications prior to publication or notice of availability in the Federal Register. The Project Signatories recognize that modifications to this Agreement may also necessitate modification of the legal implementing mechanisms or may require the development of new implementation mechanisms.

### **D. Duration of the Agreement**

This Agreement will be in effect for no longer than 10 years from the date of the signing of the FPA, unless it is terminated earlier or extended by agreement of all Parties. (If the FPA is extended, the comments and input of stakeholders will be sought and a Federal Register Notice will be published.) Any Project Signatory may terminate its participation in this Project at any time in accordance with the procedures set forth in Sections VII G of this FPA.

## **E. Dispute Resolution**

Any dispute which arises under or with respect to this Agreement will be subject to informal negotiations between the Project Signatories to the Agreement. The period of informal negotiations will not exceed twenty (20) calendar days from the time the dispute is first documented, unless that period is extended by a written agreement of the parties to the dispute. The dispute will be considered documented when one party sends a written Notice of Dispute to the other parties.

In the event that the parties cannot resolve a dispute through informal negotiations, the parties may invoke non-binding mediation by setting forth the nature of the dispute with a proposal for resolution to the Regional Administrator for EPA Region III. Prior to the issuance of an opinion, the Regional Administrator may request an additional, informal mediation hearing. If so requested, the Regional Administrator will attempt to resolve the dispute by issuing a written opinion that will be non-binding and does not constitute final EPA action. If this effort is not successful, the parties still have the option to terminate or withdraw from the Agreement, as set forth in Section VII A,B.

## **F. Transfer of Project Benefits and Responsibilities to a New Owner**

The parties expect that the implementing mechanisms will allow for a transfer of the remaining companies' benefits and responsibilities under the Project to any future owner or operator of a pilot site upon request of the remaining companies and the new owner or operator, provided that the following conditions are met:

1. The remaining companies will provide written notice of any such proposed transfer to the EPA and PADEP at least ninety (90) days before the effective date of the transfer. The notice is expected to include identification of the proposed new owner or operator, a description of its financial and technical capability to assume the obligations associated with the Project, and a statement of the new owner or operator's intention to take over the responsibilities in the XL Project of the existing owner or operator.
2. Within forty-five (45) days of receipt of the written notice, the Project Signatories expect that EPA and PADEP, in consultation with stakeholders, will determine whether: a) the new owner or operator has demonstrated adequate capability to meet EPA's requirements for carrying out the XL Project; b) is willing to take over the responsibilities in the XL Project of the existing owner or operator; and c) is otherwise an appropriate Project XL partner. Other relevant factors, including the new owner or operator's record of compliance with Federal, State and local environmental requirements, may be considered as well.

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It will be necessary to modify the Agreement to reflect the new owner or operator and it may also be necessary for PADEP, to amend the implementing mechanisms (subject to applicable public notice and comment) to transfer the legal rights and obligations of the remaining companies under this Project to the proposed new owner or operator.

## **G. Project Completion or Termination**

### **1. Project Completion**

The parties intend that there be an orderly return to compliance upon completion, withdrawal from, or termination of the Project. EPA will conduct an evaluation of the project before a decision is made that the project has been completed. If, after an evaluation, the Project is terminated because the term has ended, **[Placeholder: the remainers?]** will return to compliance with all applicable requirements by the end of the Project term, unless the Project is amended or modified in accordance with Section VII C. of this Agreement (Amendments or Modifications). **[Placeholder: PADEP and/or the remainers is/are]** expected to anticipate and plan for all activities to return to compliance sufficiently in advance of the end of the Project term. **[Placeholder: PADEP and/or the remainers]** may request a meeting with EPA, and **[Placeholder: local authority]** to discuss the timing and nature of any actions that **[Placeholder: PADEP and/or the remainers]** will be required to take. The parties should meet within thirty days of receipt of the written request for such a discussion. At and following such a meeting, the parties should discuss in reasonable, good faith, which of the requirements deferred under this Project will apply after termination of the Project.

### **2. Early Withdrawal, Termination or Project Failure**

In the event of a withdrawal or termination not based on the end of the Project term and where the **[placeholder: PADEP and/or the remaining company?]** has made efforts in good faith, the parties to the Agreement will determine an interim compliance period to provide sufficient time for **[placeholder: the remaining company?]** to return to compliance with any regulations deferred under the Project. The interim compliance period will extend from the date on which EPA, PADEP, **[placeholder: local authority or the remaining company?]** provides written notice of final withdrawal or termination of the Project, in accordance with Section VII A and B of this Agreement. By the end of the interim compliance period, **[placeholder: the remaining company?]** will comply with the applicable deferred standards set forth in 25 PA Code 87.207 (bituminous) or 88.507 (anthracite). During the interim compliance period, PADEP may issue an order, permit, or other legally enforceable mechanism establishing a schedule for the remaining company to return to compliance with otherwise applicable regulations as soon as practicable. This schedule cannot extend beyond **[State # of]** months from the date of withdrawal or termination. The remaining

company intends to be in compliance with all applicable Federal, State, and local requirements as soon as is practicable, as will be set forth in the new schedule.

#### **H. Periodic Review**

The Parties will confer, on a periodic basis to assess progress in implementing the XL Project. Unless it is agreed otherwise, a Periodic Performance Review Conference by the Project Signatories will take place at least every six months. The six month status reports may take the place of the conference, if agreed to by the Project Signatories. Not later than thirty (30) days following the conference, EPA will post a summary of the minutes and/or status reports to the PADEP Web Page and will provide identified and local stakeholders with a copy of the summary minutes. Any additional comments of stakeholders will be reported to EPA, PADEP and the remaining companies.

#### **I. Effective Date**

This FPA is effective on the date it is dated and signed by EPA's Regional Administrator for Region III.

**PADEP Coal Remining and Reclamation XL Project Signatories:**

\_\_\_\_\_  
Bradley Campbell, Regional Administrator, U.S. EPA

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
[Placeholder EPA Regional or HQ OW?]

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
[Placeholder James M. Sief, Secretary to sign?]  
Pennsylvania Department of Environmental Resources (PADEP)

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Robert C. Dolence, Deputy Secretary  
Mineral Resources Management, PADEP

\_\_\_\_\_  
Date Signed

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