

CIVIL CASE INFORMATION STATEMENT
CIVIL CASES
(Other than Domestic Relations)

In the Circuit Court of Kanawha County, West Virginia

I. CASE STYLE:

**HAROLD D. WARD, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,**

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

FILED
Cathy S. Garson, Clerk
Kanawha Co. Circuit Court

MAR 26 2020

CIVIL ACTION NO. 20-C-282
Judge: Tabit

**Days to
Answer**

Type of Service

30

Personal

**ERP Environmental Fund, Inc.
c/o Corporation Service Company
209 West Washington Street
Charleston, WV 25302**

*\$200.00 check
iss sum + 1 copy
ret to atty
rept 2/19/54
57938U*

Original and 2 copies of complaint furnished herewith. PLAINTIFF:
**HAROLD D. WARD, Director, Division of Mining and
Reclamation, West Virginia Department of Environmental Protection**
DEFENDANTS: **ERP ENVIRONMENTAL FUND, INC.**

CASE NUMBER:

II. TYPE OF CASE:

☐ General Civil

☐ Adoption

☐ Mass Litigation

(As defined in T.C.R. Rule XIX ©)

☐ Administrative Agency Appeal

☐ Civil Appeal from Magistrate

Court

☐ Asbestos

☐ Carpal Tunnel Syndrome

☐ Diet Drugs

☐ Environmental

☐ Industrial Hearing Loss

☐ Silicone Implants

☐ Other

☒ Miscellaneous Civil Petition

☐ Mental Hygiene

☐ Guardianship

☐ Medical Malpractice

☐ Habeas Corpus/Other Extraordinary Writ

☐ Other: _____

III. JURY DEMAND: ☐ Yes ☒ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): March 2020

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE? YES ☐ ☒ NO
IF YES, PLEASE SPECIFY:

☐ Wheelchair accessible hearing room and other facilities

☐ Interpreter or other auxiliary aid for the hearing impaired

☐ Reader or other auxiliary aid for the visually impaired

☐ Spokesperson or other auxiliary aid for the speech impaired

☐ Other: _____

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(304) 342-1110

Dated: March 26, 2020

Representing:

☒ Plaintiff

☐ Defendant

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
Cathy S. Clifton, Clerk
Kanawha County, West Virginia

MAR 26 2020

HAROLD D. WARD, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

CIVIL ACTION NO.

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COMPLAINT

HAROLD D. WARD, solely in his capacity as the Director of the Division of Mining and Reclamation and Deputy Secretary of the West Virginia Department of Environmental Protection (“DEP”), avers as follows:

INTRODUCTION

1. This is a civil action brought by DEP, against Defendant ERP Environmental Fund, Inc. (“ERP”) pursuant to Section 17 of the Surface Coal Mining and Reclamation Act, W. VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22, to compel compliance with, and enjoin continuing and ongoing violations of, both Acts on ERP-operated mine sites throughout the State.

2. Upon its formation in 2015, ERP acquired over 100 permits relating to dozens of mining sites and other property of Patriot Coal Corporation out of Patriot Coal’s Chapter 11 bankruptcy case in or about November 2015.

3. After its acquisition of the former Patriot Coal permits and mining sites, ERP engaged in active operation and reclamation of the acquired sites under a Reclamation

Agreement dated February 17, 2016 (as the same may have been amended in writing executed in accordance therewith prior hereto) among ERP Environmental Fund, Inc., Virginia Conservation Legacy Fund, Inc., and DEP.

4. From its inception, however, ERP operated on a shoe-string budget and with an under-experienced and under-manned staff that left it unable to comply, fully, with its obligations under the Reclamation Agreement and in almost continuous and ongoing violation of its permits, the Surface Coal Mining and Reclamation Act, the Water Pollution Control Act, and the applicable rules promulgated thereunder.

5. ERP recently advised DEP that it has no more available funds or liquid assets needed for continuing operations, laid off all of its employees, and has ceased operation.

6. ERP's cessation of operations will not only lead to an acceleration in its violations of applicable law but has also left dozens of former mining sites in various stages of land and water disturbance and incomplete reclamation that now threatens imminent and identifiable harm to the public health and safety on many of its mine sites.

7. This action seeks to compel ERP to comply with its legal obligations to reclaim and treat polluted water at the mine sites it effectively abandoned.

8. In furtherance thereof, DEP seeks

- a. A permanent injunction requiring ERP to abate existing violations, comply with the mining and water pollution laws in the future, and devote all its resources to reclaiming and treating polluted water at its former mine sites; and
- b. The appointment of a special receiver to take control of ERP's property and assets and operate its mine sites pursuant to and in accordance with

West Virginia law.

9. To address the imminent threats to the public health and safety, DEP also seeks by separate motion the immediate appointment of a receiver to take control of and temporary and preliminary injunctive relief essential to ensuring ERP's immediate compliance with the law.

JURISDICTION AND VENUE

10. This Court has jurisdiction over the subject matter of this action pursuant to Section 17 of the Surface Coal Mining and Reclamation Act, W. VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22, each of which authorize the director to bring a civil action against any person who violates the provisions of the Surface Coal Mining and Reclamation Act or the Water Pollution Control Act.

11. Venue is proper in the Circuit Court of Kanawha County, West Virginia, pursuant to Section 17 of the Surface Coal Mining and Reclamation Act, W. VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22.

PARTIES

12. Harold D. Ward is the Deputy Secretary of the West Virginia Department of Environmental Protection and the Director of DEP's Division of Mining and Reclamation.

13. The West Virginia Department of Environmental Protection is the State agency responsible for administering and enforcing the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act and the rules promulgated thereunder.

14. ERP Environmental Fund, Inc. is a corporation organized under the laws of the State of West Virginia and holds more than 100 DEP-issued mining and water pollution permits and is the operator of numerous former mining sites throughout the State of West Virginia.

APPLICABLE STATUTORY AND REGULATORY REQUIREMENTS

15. Given the undeniable threat of imminent and identifiable harm to the public health and safety from unregulated coal mining, the coal mining industry operates in a highly regulated environment both at the federal and state level.

16. The State of West Virginia is one of the states that has achieved primacy under the federal Surface Mining Control and Reclamation and Clean Water Acts and, with the approval of the federal government, has assumed the primary role in regulating surface coal mining and water pollution within the State of West Virginia.

The West Virginia Surface Coal Mining and Reclamation Act

17. Section 8 of the West Virginia Surface Coal Mining and Reclamation Act makes it unlawful for any person to engage in surface mining operations except in compliance with a permit issued by DEP. W. VA. CODE § 22-3-8.

18. Section 13 of the Surface Coal Mining and Reclamation Act establishes general environmental protection performance standards for surface mining operations. W. VA. CODE § 22-3-13.

19. Section 4 of the Surface Coal Mining and Reclamation Act authorizes the director broadly to enforce the Act and issue orders in connection therewith. W. VA. CODE § 22-3-4.

20. Whenever any person violates or fails or refuses to comply with any order of the director, the terms or conditions of any permit, or any provision of the Surface Coal Mining and Reclamation Act or the rules promulgated pursuant thereto, Section 17 of the Act authorizes the director to institute in this Court a civil action for relief, including the issuance of a permanent or temporary injunction, restraining order or any other appropriate order, to compel compliance with and enjoin violations, failures, or refusals thereof. W. VA. CODE § 22-3-17(j).

The West Virginia Water Pollution Control Act

21. Section 402(b) of the Federal Clean Water Act, 33 U.S.C. § 1342(b), provides that the United States Environmental Protection Agency may authorize a State to implement and administer an approved National Pollutant Discharge Elimination System (“NPDES”) program to regulate the discharges of pollutants into navigable waters within the State’s jurisdiction.

22. At all relevant times, EPA has authorized the State of West Virginia to administer a NPDES program under the West Virginia Pollution Control Act. 47 Fed. Reg. 22,373-01 (May 24, 1982).

23. Pursuant to the West Virginia Pollution Control Act, DEP is the State regulatory agency that administers the NPDES permitting program in West Virginia. W. VA. CODE §§ 22-1-5, 22-1-7, and 22-11-4.

24. Section 22 of the West Virginia Pollution Control Act authorizes the director to apply to the circuit courts of the State for an injunction to compel compliance with and enjoin violations of the Act, the rules of the director issued thereunder, or the terms and conditions of any NPDES permit or the effluent limitations thereunder. W. VA. CODE § 22-11-22.

GENERAL ALLEGATIONS

25. Pursuant to the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act, DEP issued to the Defendant over 100 mining and NPDES permits (the “Permits”).

26. At all relevant times since November 2015, the Defendant has operated, and managed, directed, and controlled environmental compliance at, its mining sites under the Permits.

27. Prior to the date hereof, DEP issued to the Defendant 160 notices of violations,

118 failure to abate cessation orders, and 41 orders to show cause relating the Defendant's failure to comply with the conditions of its Permits and the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act.

28. As of the date hereof, the Defendant has failed to abate any of the subject violations and cessation orders.

29. Prior hereto, the Defendant acknowledged and agreed that it is in material and ongoing violation of the terms and conditions of its Permits.

30. Prior hereto, the Defendant has represented that it has no available funds or other liquid assets and no management or employees with which to continue to operate its mine sites or abate those violations.

31. At the same time, the Defendant has represented that it has material real and personal property and other assets not needed in the operation of its permitted mining sites that, if sold and liquidated, would yield significant proceeds that, if made available, could provide funds for abating existing violations of the law and reclaiming and treating polluted water at its mine sites.

COUNT I
INJUNCTIVE RELIEF AGAINST ERP

32. ERP has violated and continues to violate the terms and provisions of the Permits, various orders of DEP, and the Surface Coal Mining and Reclamation Act and Water Pollution Control Act and the rules promulgated thereunder.

33. Injunctive action is both necessary and appropriate under the Surface Coal Mining and Reclamation Act and Water Pollution Control Act and the rules promulgated thereunder to address the Defendant's continuing and ongoing violations of the terms and conditions of its mining and NPDES Permits, the Surface Coal Mining and Reclamation Act and Water Pollution

Control Act and the rules promulgated thereunder.

34. Civil penalties and other legal remedies have proven and will prove inadequate inasmuch as, among other things, the Defendant does not have sufficient liquid assets or resources to pay for or perform reclamation and water treatment required under the Permits and the Surface Coal Mining and Reclamation Act and the Water Pollution Control Act.

35. ERP's continuing and ongoing violations and its failure to immediately reclaim and treat polluted water at its permitted sites threatens the very kind of irreparable harm to the public health and safety of the citizens and residents of the State of West Virginia that the legislature sought to address in enacting the Surface Coal Mining and Reclamation Act and Water Pollution Control Act.

36. The harm to public health and safety plainly outweighs any harm to ERP in requiring that it abate continuing and ongoing violations of, and otherwise comply with, its obligations under the Surface Coal Mining and Reclamation Act and Water Pollution Control Act.

37. Inasmuch as ERP is in continuing and ongoing violation of laws designed to protect the public health and safety, the equities weigh heavily in favor of granting injunctive relief.

COUNT II **APPOINTMENT OF RECEIVER**

38. Given its precarious financial condition, the Defendant has proven unable to abate its existing violations, comply with its legal obligations in the future, or address the threats to the public health and safety that its unreclaimed mine sites and untreated water pollution pose, and now, with no liquid assets available and having laid off all its management and employees, the Defendant has no ability to do so.

39. The Defendant does, however, own and control valuable property and assets that are either necessary to comply with the law or available for sale and liquidation to fund its operations to comply.

40. But the Defendant has proven unable over the past four years to secure or sell and liquidate those assets, with the effect that, for example, the Defendant has lost or had stolen equipment needed in its operations and have been unable to generate monies needed to fund its operations.

41. In addition, the Defendant has engaged in transactions, including the transfer of its property to insider and related third parties and the granting of liens to secure the obligations of insider and related third parties, that have had the effect of reducing the assets available for the Defendant's use in operating its business and complying with the law.

42. As a result of these actions and for other reasons, DEP lost faith in the management of the Defendant and its ability, without immediate and effective financial and operational supervision, to properly manage its properties, assets, operations and affairs and operate its business in compliance with its obligations under the Permits and applicable law.

43. It, thus, appears that the only available means to ensure ERP's compliance with its legal obligations and address its continuing and ongoing violations and the threat to the public health and safety is the appointment of a receiver to take control of the Defendant's properties, assets, and operations to manage the same in compliance with the law.

44. DEP understands that the surety company that has issued more than \$115 million in surety bonds to back ERP's obligations under its West Virginia mining Permits is prepared to provide the necessary funding to enable ERP to bring its operations into compliance with the Permits and the law, but only if a receiver is appointed to take control and assess of ERP's

properties, assets, and operations and develop a feasible plan therefor.

45. Civil penalties and other legal and equitable remedies, including injunctive relief, are inadequate inasmuch as the Defendant lacks the financial, operational, and managerial ability to abate the violations and perform its obligations under the Permits.

46. The State and its citizens and residents will suffer immediate and irreparable harm unless the Defendant's properties, assets, and operations are placed in the hands of a well-funded receiver.

47. The prompt and effective sale and liquidation of the Defendant's properties and assets is necessary to ensure funding to comply with the law and address the ongoing violations and threats posed by the Defendant's mine sites and operations.

48. Given the Defendant's limited funds, properties and assets available to comply with the law and the liens and interests of DEP and other parties therein, this suit involves the funds and property of the Defendant and the proper allocation thereof to ensure the Defendant's compliance with its legal obligations under the Permits and applicable law.

49. There is, in addition and particularly in light of the Defendant's inability to secure or, for more than four years, sell and liquidate its available properties and assets and prior transfers and encumbering of its assets, a danger of loss or misappropriation of the properties and assets of the Defendant absent the appointment of a receiver.

50. Continuing the Defendant in the management of its properties, assets, and operations without sufficient funds available therefor would countenance its continuing violation of the law.

RELIEF REQUESTED

WHEREFORE, Plaintiff, the West Virginia Department of Environmental Protection,

as necessary may state that this Court

enjoin and permanently enjoin the Defendant from violating the Surface Mining and Reclamation Act and the Water Pollution Control Act, the rules promulgated thereunder, any permit and order issued thereunder;

2. Order the Defendant to take all necessary steps to comply with the Surface Mining and Reclamation Act and the Water Pollution Control Act, the rules promulgated thereunder, and any permit and order issued thereunder;

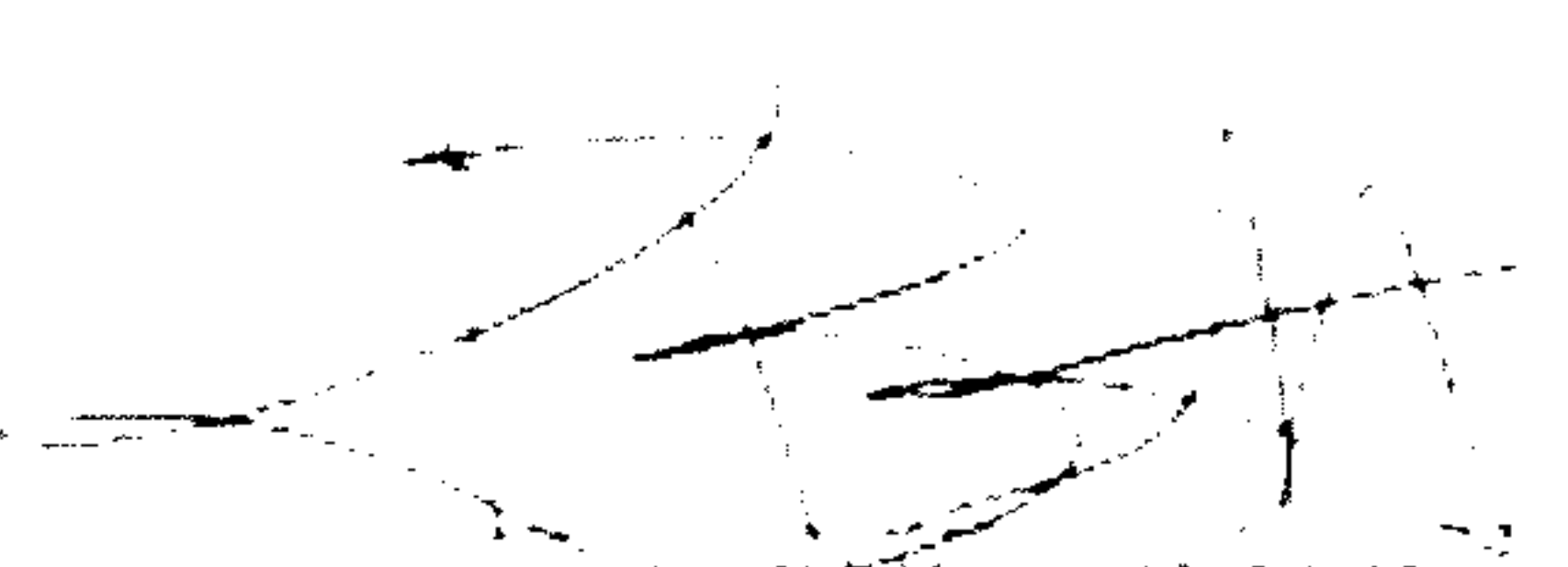
3. Appoint a receiver to take control of the properties, assets, and operations of the Defendant to operate the Defendant's mining sites and water discharge outlets in compliance with the permits and applicable law with funding provided by the Defendant's surety company, and sell or liquidate the Defendant's properties and assets not otherwise needed in connection with operations to provide additional funding to comply with the Permits and applicable law; and

4. Grant D/E/P such other and further relief as the Court may deem appropriate.

Dated: March 25, 2020

HAROLD D. WARD, Director, Division of Mining
and Reclamation, West Virginia Department of
Environmental Protection,

By Counsel



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**HAROLD D. WARD, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,**

V.

Defendant.

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MAR 26 2021

CIVIL ACTION NO. 20-C-282

Tabit

After years of operating on a shoe-string budget with a challenging organizational and management structure and accruing, in the process, hundreds of violations of the surface mining and water pollution laws, the Defendant has reached the end of the line. The Defendant is woefully insolvent, has no cash, has no operating cash flow, has laid off all its management and employees, and, but for DEP and the Defendant's surety bond issuer stepping in and providing limited emergency funding over the past few weeks, would not have been able to carry on even the very limited operations it has maintained up to now. Meanwhile, the violations and unabated enforcement orders have continued to mount and indeed accelerate. Just in the last month, DEP issued roughly forty orders to show cause relating to unabated cessation orders relating to dozens of outstanding and unabated violations of their permits and surface mining and water pollution control laws. And even more problematically the Defendant's cessation of operations has left the Defendant's many mining sites unmanned, unsecured, unmaintained, and in various stages of land and water disturbance and incomplete reclamation that, without immediate and decisive

action, will begin to threaten imminent and identifiable harm to the public's health and safety on many of its mine sites.

Of particular concern to DEP is the Defendant's Tygart River Mine complex in Marion County commonly referred to as the "Martinka" mine. The Martinka underground mine has been shuttered for years. But water naturally builds up in the mine. To avoid "artesianing"—the topping of water above the mine's natural "pool" that would result in uncontrolled, untreated and contaminated discharge of polluted water from the mine—the Martinka mine must be constantly pumped with the removed water treated for contaminants. The costs associated with the pumping and discharge have run nearly \$900,000 annually. As the Defendant's operating cash flow has deteriorated and now dried up completely, the Defendant has engaged in only intermittent and sporadic pumping and treatment of the Martinka "mine pool." Without consistent pumping and treatment, the water in the mine steadily rose at the rate of about one foot per week to levels that risked artesianing and sending contaminated water into the Tygart River, the source of drinking water for thousands of West Virginians. Faced with an immediate threat to the public health and safety, DEP (and the Defendant's surety bond issuer) stepped in with limited emergency funding to pump the mine pool down and treat the polluted water. But without further immediate action on the part of this Court particularly with the advent of spring, the situation will reverse and the water levels will rise, with the concomitant threat to the public health and safety.

The situation at Martinka represents the proverbial canary in the coal mine and signals the serious issues involved in the Defendant's cessation of operations. Without immediate funding and effective management oversight of its environmental liabilities and operations, any one or all of Defendant's mine sites in West Virginia could soon become the next Martinka,

placing the environment and the health and safety of many thousands of West Virginians at significant risk on a much broader scale. Indeed, DEP stands poised at the precipice of having to revoke the Defendant's permits, forfeiting the associated surety bonds, and transferring the responsibility for cleaning up the Defendant's mess to the State's Special Reclamation Fund, potentially bankrupting the Defendant's principal surety and administratively and financially overwhelming the Special Reclamation Fund, the State's principal backstop for all revoked and forfeited mine sites in West Virginia.

DEP has determined, however, after an initial review and investigation of the Defendant's assets and financial situation, that it need not take such a drastic and risky step at this point. The Defendant has significant assets, the effective, efficient, and well-managed liquidation of which may generate substantial proceeds that might be employed in bringing its operations into compliance with the law. DEP has also had extensive discussions with the Defendant's surety bond issuer. The surety stands ready to immediately provide substantial interim funding to address pressing environmental compliance issues while DEP and the surety explore a long-term solution.

But DEP and the surety have each independently determined that the Defendant's present organizational and management structure cannot ensure either the effective liquidation of the Defendant's assets, the proper management of the funds available, or the managerial or employee resources to bring it into compliance with the law. To put the matter bluntly, neither DEP nor the surety is willing to permit the Defendant to continue its operations and attempt environmental compliance under its current organizational and management structure. Each is willing, on the other hand, to fund and facilitate the Defendant's compliance with its environmental obligations under the supervision and control of a qualified and capable receiver.

DEP's administrative enforcement powers have proven, and in light of the Defendant's financial condition will continue to prove, incapable of addressing the Defendant's far-flung and ever-expanding failure to comply with the surface mining and water pollution control laws and regulations. Accordingly, DEP, pursuant to the enforcement powers granted to it by the West Virginia Surface Mining and Reclamation Act and Water Pollution Control Act, now seeks injunctive relief compelling Defendant to comply with and focus its resources on its remediation and reclamation obligations under the surface mining and water pollution laws for the protection of the environment and the health and safety of the people of West Virginia. Moreover, ancillary to exercising its enforcement powers through such injunctive relief, DEP also seeks the appointment of a special receiver under applicable West Virginia law, with extensive experience as a mining professional and substantial financial backing, to take control of the Defendant's assets, operations, and affairs and carry out the immediate and ongoing reclamation and remediation obligations in accordance with such injunctive relief. It is only with the appointment of a special receiver that the Defendant's operations can be appropriately funded and managed in compliance with the law.

DEP acknowledges the extraordinary nature of the relief it requests herein. The exigencies of this case, however, demand extraordinary relief and, DEP submits, these circumstances present a textbook situation for the application of such extraordinary relief. Thus, pursuant to the power granted by the West Virginia Surface Mining and Reclamation Act and the West Virginia Water Pollution Control Act, DEP requests that this Court (1) enter a temporary restraining order immediately, and without preliminary hearing, compelling the Defendant to bring its operations into compliance with all applicable environmental laws and regulations, (2) enter a preliminary injunction compelling the Defendant's ongoing compliance with the

applicable environmental laws and regulations pending entry of a final judgment in this action, after an evidentiary hearing to be held within, but not after, ten days of the entry of the temporary restraining order, and (3) appoint a special receiver immediately and without a preliminary hearing on a temporary basis and, after the further evidentiary hearing, pending entry of final judgment in this action to take control of the Defendant's assets, operations, and affairs to ensure the Defendant's compliance with the environmental laws for the benefit of all the Defendant's stakeholders.

FACTUAL BACKGROUND

The affidavit of Harold D. Ward, the Deputy Secretary and Acting Director of the Division of Mining and Reclamation of the West Virginia Department of Environmental Protection (the "Ward Affidavit"), filed concurrently herewith, sets forth in detail the pertinent and salient facts relating to this Motion. DEP incorporates the Ward Affidavit herein as though set forth in full.

ARGUMENT

Given the breadth and depth of the Defendant's violations of the environmental laws and regulations, the Defendant's failure to abate innumerable cessation orders DEP has issued, and the imminent and identifiable threats to the public health and safety resulting therefrom, the need for immediate injunctive relief, both on a temporary and preliminary basis, could not be plainer. Nor, under the facts and circumstances of this case, could it be made more apparent that the Defendant does not have either the financial, operational, managerial, or organizational ability to bring its own operations into compliance with the law. The Court should, therefore, enter a temporary order requiring the Defendant to bring its operations into compliance with the law and appointing a special receiver over the Defendant and set down this Motion for an evidentiary

hearing to consider entry of a preliminary injunction and appointment of a special receiver pending the entry of a final judgment in this action.

I. The issuance of an *ex parte* temporary restraining order is appropriate because there is substantial risk that immediate and irreparable injury, loss or damage will occur before a preliminary hearing may be convened.

West Virginia recognizes three species of “injunction” under its rules of civil procedure: the temporary restraining order, the preliminary injunction, and the permanent injunction. *Camden-Clark Memorial Hosp. Corp. v. Turner*, 212 W. Va. 752, 758, 575 S.E.2d 362, 368 (2002). “Under Rule 65(b) a temporary restraining order differs from a preliminary injunction, though both serve the same purpose of maintaining the status quo. A temporary restraining order is generally limited in duration to 10 days, whereas a preliminary injunction generally remains until a final determination on the merits of the action. A temporary restraining order may be obtained *ex parte*, but under Rule 65(a)(1) a preliminary injunction cannot be obtained without notice.” Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 1028 (2002). Unlike the preliminary injunction, an *ex parte* temporary restraining order is appropriate when “the circumstances show that ‘immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party’ can be heard.” *Camden-Clark Memorial Hosp.*, 212 W. Va. at 757, 575 S.E.2d at 367.

As set forth in detail in the Ward Affidavit, DEP has issued numerous notices of violation of the West Virginia surface mining laws and rules, numerous cessation orders, and numerous orders to show cause to Defendant, all outlining the many violations of West Virginia law that have occurred and are now continuing under its permits. These violations remain outstanding and unabated by Defendant. And the Defendant has failed to respond in any manner to DEP’s further orders with respect to those violations.

Courts have recognized that “an injunction is normally the proper remedy for violations of an environmental statute,” *United States v. Prod. Plated Plastics, Inc.*, 762 F. Supp. 722, 729 (W.D. Mich. 1991), particularly in situations such as this where the applicable statute expressly provides for injunctive relief, *see United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497-98 (2001) (“Once Congress, exercising its delegated powers has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.”). Indeed, both statutes involved in the instant case—the West Virginia Surface Coal Mining and Reclamation Act and Water Pollution Control Act—expressly authorize the Court to issue temporary injunctive relief. *See* W.VA. CODE §§ 22-3-17(j) & 22-11-22(a).

In the instant case, moreover, there is with each passing day these violations go unabated a significant risk that the risk of harm to the public health and the environment will only increase. Of most immediate concern is Martinka. Without consistent pumping and treatment of water, Martinka’s mine pool will continue to rise, threatening to artesian and send polluted water into the Tygart River and the public water supply. That threat is particularly acute at this time of the year as water levels rise at accelerated rates in spring. Yet the Defendant has no operational resources or ability to address that threat. Thus, even a short delay in addressing the issue would threaten injury, loss, and damage before a hearing might be had. And with no ability to address any other issues that may arise on any of its sites at any time given its cessation of operations, there is a substantial ongoing threat of further harm to the public health and safety.

This Court should accord DEP’s determination in that regard great weight. DEP, to which the environmental regulation of the State’s mining sites has been entrusted, is uniquely qualified to assess and determine the threat to public health and safety that mining presents. That

is, in fact, its statutory mandate and what it does on a daily basis. The West Virginia Legislature vested DEP with the authority to “administer and enforce the provisions of [the surface mining law] as it relates to surface mining to accomplish the purposes of [the law]” W. Va. Code § 22-3-2(c)(1), and “[t]o perform any and all acts necessary to carry out the purposes and requirements of [water pollution law],” W. Va. Code § 22-11-4(a)(1). In accordance with that authority, DEP oversees and implements the extensive permitting requirements under both laws. W. Va. Code §§ 22-3-9, 22-3-18, 22-3-19, & 22-3-21 (relating to the surface mining law); W. Va. Code §§ 22-11-4(a)(10), (12), (13), 22-11-8 & 22-11-11 (relating to the water pollution law). It evaluates and oversees the implementation of the complex and technical requirements regarding mining and reclamation. W. Va. Code §§ 22-3-10 & 22-3-23. It promulgates rules establishing and implements water quality standards. W. Va. Code § 22-11-7b. DEP employs mining supervisors and inspectors, W. Va. Code §§ 22-3-5 & 22-3-6, who conduct extensive, ongoing inspections of surface mining operations to ensure that operators comply with the applicable mining and water treatment requirements. W. Va. Code § 22-3-15. In the exercise of its powers over the thirty-plus years West Virginia has administered those laws, DEP (or its predecessor) has also overseen the reclamation of, and ongoing water treatment at, hundreds of mining sites in West Virginia.

As the United States Court of Appeals has noted, “traditional principles of equity” hold that “when the United States or a sovereign state sues in its capacity as protector of the public interest, a court may rest an injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public.” *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996); *see also Environmental Defense Fund v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983) (“Where the plaintiff is a sovereign and where the activity may endanger the public health, injunctive relief is proper, without resort to balancing [of harms].”). Indeed, as

Justice Holmes noted long ago, sovereigns are “somewhat more certainly entitled to specific relief than a private party might be.” *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

DEP submits that, given the risk of imminent and identifiable threat to public health and safety and the environment, it is essential that a temporary restraining order be entered so as to provide a bridge to more permanent relief after an evidentiary hearing on DEP’s request for preliminary injunction.

II. A preliminary injunction is both necessary and appropriate to ensure that Defendant abates its continuing and ongoing violations of applicable law.

By this motion, DEP also seeks preliminary injunctive relief pursuant to Section 17 of the West Virginia Surface Mining and Reclamation Act, W.VA. CODE § 22-3-17(j), and Section 22 of the Water Pollution Control Act, W. VA. CODE § 22-11-22. Specifically, Section 17(j) gives the director authority to “institute a civil action for relief, including permanent and temporary injunction, restraining order or any other appropriate order, in the circuit court of Kanawha County or any court of competent jurisdiction to compel compliance and enjoin such violations, failures or refusals” pertaining to any order and decision of the director. W. VA. CODE § 22-3-17(j). Similarly, the director may seek from the circuit courts of this State, a temporary or preliminary injunction compelling compliance with and enjoining violations of the Water Pollution Control Act. W. VA. CODE § 22-11-22(a).

The Supreme Court has also long held that a court of equity has jurisdiction to enter a preliminary injunction. *See, e.g.*, Syl. pt. 3, *Weatherholt v. Weatherholt*, 234 W. Va. 722, 769 S.E.2d 872 (2015) (citing syl. pt. 4, *Johnson v. Gould*, 60 W.Va. 84, 53 S.E. 798 (1906)).

Deciding whether to grant a preliminary injunction “calls for the exercise of sound judicial discretion in view of all the circumstances of the particular case; regard being had to the nature

of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.” Syl pt. 2, *Camden-Clark Mem’l Hosp. Corp. v. Turner*, 212 W. Va. 752, 575 S.E. 2d 362 (2002). In ruling upon a motion for injunctive relief, West Virginia courts use a balance of hardship test. *Jefferson County Bd. Of Educ. v. Jefferson County Educ. Ass’n*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990). Under this standard, the court must consider, in flexible interplay, the following four factors:

- (1) the likelihood of irreparable harm to the plaintiff without injunction;
- (2) the likelihood of harm to the defendant with an injunction;
- (3) the plaintiff’s likelihood of success on the merits; and
- (4) the public interest.

Camden-Clark Memorial Hosp. Corp., 212 W.Va. at 756, 575 S.E.2d at 366 (citing *Jefferson*, 183 W. Va. at 24, 393 S.E.2d at 662). In this case, DEP can demonstrate that all of the factors weigh heavily in favor of injunctive relief.

A. There is no dispute that the Defendant is in material and continuing default of its obligations under its permits and applicable law.

As noted, the Ward Affidavit outlines the Defendant’s many and mounting violations of West Virginia law that have occurred and are now continuing under its permits. These violations remain outstanding and unabated by Defendant. The Defendant has, in fact, acknowledged and agreed that it is in material default of its obligations under its permits and its reclamation agreement with DEP. And even if Defendant were not in agreement, it has failed to challenge any of the orders issued by DEP or the assessment of civil penalties per available administrative remedies. There is, therefore, no question regarding the Defendant’s ongoing and continuing violations of the law. Indeed, as the United States Supreme Court has noted, such violations,

standing alone, may merit the issuance of injunctive relief where, as here, the legislature has specified injunctive relief as the remedy for such violations. *See United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. at 497-98.

B. The Defendant's failure to comply with the environmental laws threatens immediate and irreparable harm to the public and the environment.

Both the surface mining and water pollution control acts were designed explicitly to address imminent and identifiable threats to the environment and the public health and safety. *See, e.g.*, W. VA. CODE § 22-3-2(a) (enumerating the wide-ranging adverse effects of unreclaimed surface-mining operations). West Virginia's history is, indeed, littered with catastrophic examples of the need to ensure proper controls and compliance with the mining laws. And, in this case, the situation at Martinka amply illustrates that the threats posed are more than simply theoretical; they are real, immediate, and irreparable. DEP submits that the existing and ongoing threats to the public health and safety and the environment that the legislature identified and acknowledged in enacting the surface mining and water pollution control acts warrant the issuance of an injunction requiring the Defendant to comply with applicable law pending a final judgment with respect to its acknowledged and ongoing violations of the law.

As noted above, DEP's determination in that regard may, standing alone, justify the issuance of injunctive relief. *See United States v. Marine Shale Processors*, 81 F.3d at 1359 ("when the United States or a sovereign state sues in its capacity as protector of the public interest, a court may rest an injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public.").

Moreover, courts have recognized that environmental harm "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also Nat'l*

Audubon Soc'y v. Dept. of Navy, 422 F.3d 174, 201 (4th Cir. 2005); *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineers*, 528 F. Supp. 2d 625, 631 (S.D. W. Va. 2007) (“because damage to the environment is often irreversible, this harm is frequently justification for a restraining order or an injunction”), *rev'd on other grounds*, 556 F.3d 177 (4th Cir. 2009); *United States v. Prod. Plated Plastics, Inc.*, 762 F. Supp. 722, 729 (W.D. Mich. 1991) (“an injunction is normally the proper remedy for violations of an environmental statute”).

C. The Defendant will suffer no cognizable harm from the issuance of a preliminary injunction compelling its compliance with applicable law.

In the face of a defendant's established violations of the law, the Court's role in entering an injunction is limited, particularly when it comes to balancing the harm to the enjoined party. As the Fourth Circuit Court of Appeals has stated, “[w]here the plaintiff is a sovereign and where the activity may endanger the public health, injunctive relief is proper, without resort to balancing [of harms].” *Environmental Defense Fund v. Lamphier*, 714 F.2d at 337-38. Even if the Court were to engage in a balancing of the harms, the “balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco*, 480 U.S. at 545. When a sovereign sues to enforce a law that authorizes injunctive relief with respect to a defendant's violations of the law, the balancing of equities weighs heavily in the sovereign's favor because legislature “has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in, or is about to engage in, any activity which the statute prohibits.” *Burlington N. R.R. Co. v. Bair*, 957 F.2d 599, 601-02 (8th Cir. 1992) (citing *Atchison, T. & S.F. Ry. v. Lennen*, 640 F.2d 255, 259, 261 (10th Cir. 1981)). In this context, the Court's responsibility is “crafting a remedy that is protective of public health, and this responsibility necessarily takes preeminence over all other

considerations.” *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1010, 1027 (N.D. Cal. 2002).

Indeed, the only harm that will befall the Defendant if injunctive relief is granted will be this Court’s directive to Defendant to comply with its existing legal obligations to abate violations and reclaim and remediate its mining sites. The “harm” then is something that Defendant is already legally required to do under its permits and West Virginia law. Indeed, the Defendant took on these obligations with full knowledge of the extent and expense of such endeavors when it acquired and took the transfer of its permits in 2015 and 2016. The Defendant must comply with the terms and conditions of its permits and West Virginia law even if it is financially painful to do so.

D. The public interest overwhelmingly favors compelling the Defendant to comply with the environmental laws and regulations governing its business.

Where, as in this case, a defendant indisputably has violated statutes, the question for a court considering whether to issue an injunction “is simply whether a particular means of enforcing the statute should be chosen over another permissible means To the extent the [court] considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.” *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 497-98 (2001) (internal citations and quotations omitted).

The State legislature enacted the surface mining and water pollution control laws in accordance with the federal surface mining and water pollution control laws to expand the State's protection of the public and the environment from the adverse effects of unregulated coal mining operations through effective control of those operations, while assuring coal production necessary to the nation's energy requirements and the state's economic well-being. *Curnutte v.*

Callaghan, 188 W. Va. 494, 496, 425 S.E.2d 170, 172 (1992). “It is remedial legislation that has as one of the primary purposes the protection of the public from the potentially destructive effects that mining may have on our lands, forests and waters.” *Antco, Inc. v. Dodge Fuel Corp.*, 209 W. Va. 644, 646, 550 S.E.2d 622, 624 (2001). The Defendant, with its eyes wide open, knowingly assumed the operation of former mine sites with enormous environmental issues and obligations associated with them. Indeed, it entered into an extensive reclamation agreement with DEP governing its reclamation and remediation obligations in connection with and pursuant to its agreement to take the transfer of its permits. Plainly, the equities of this case weigh in favor of the issuance of a preliminary injunction compelling the Defendant to comply with permits, laws, and regulations it knowingly assumed.

III. West Virginia law authorizes the Court to appoint a special receiver under the circumstances present here.

West Virginia law authorizes the Court to appoint a special receiver to ensure the Defendant’s compliance with the law. Specifically, West Virginia law states:

A court of equity may, in any proper case pending therein, in which funds or property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such funds or property, or of the rents, issues and profits thereof, or both.

W. VA. CODE § 53-6-1. To warrant the appointment of a special receiver under Section 53-6-1, the party seeking the appointment must show that (1) he has a clear right to the property itself, that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of the claim; and that (2) the possession of the property by the possessor was obtained in fraud, or that the property itself, or the income arising from it, is in

danger of loss from the neglect, waste, misconduct or insolvency of the possessor. *State ex. rel. Battle v. Hereford*, 148 W. Va. 97, 105, 133 S.E.2d 86, 91 (1963).¹

Both of those conditions are satisfied here.

A. DEP has liens and other interests in the Defendant's property.

As set forth in the Ward Affidavit, DEP has liens in the Defendant's property pursuant to a settlement agreement and deposit account control agreement executed by the parties in connection with Patriot Coal Corporation's bankruptcy case in 2015. Therein, the Defendant granted DEP a security interest in various of its assets, including the proceeds from Defendant's coal sales and other sources and the proceeds realized upon phased bond releases. Indeed, the agreements required the Defendant to deposit all such funds and proceeds into a deposit account over which DEP has had full and complete control and, accordingly, a possessory security interest in all of the Defendant's cash flow since 2015 or 2016. Thereafter and on at least two different occasions, the Defendant has granted DEP a security interest in other assets, including equipment, real property, and coal reserves. In granting DEP security interests in the foregoing, Defendant gave DEP a security interest in virtually all of Defendant's business operations, thus entitling DEP to seek the appointment of a special receiver under Section 53-6-1.

B. The Defendant's property is in danger of loss from neglect, waste, misconduct or insolvency.

In connection with its second bankruptcy filing in 2015, Patriot Coal Corporation divided its permits and mining sites in two. It transferred one set of permits and sites with substantial ongoing operations and reserves to Blackhawk Mining, a well-known mining company with a management steeped in the mining business. Just as it prepared to leave behind the remainder,

¹ Further, this Court has jurisdiction over this matter because a suit is pending before this Court involving the property or funds of a corporation, firm, or person.

the permits and mine sites that included Patriot's massive and most intractable legacy environmental obligations and liabilities, in a liquidating trust, the Defendant's principal stepped forward to assume those permits and the obligation to remediate and reclaim those mining sites.

From its birth in the fall of 2015 and after agreeing to assume hundreds of millions of dollars of environmental liabilities, the Defendant has faced persistent financial, organizational, and management challenges.

Prior to assuming those obligations and liabilities, the Defendant and its principal had, literally, no experience in owning or operating a coal company, mining coal, or reclaiming and remediating former mining sites. Its principal's prior occupation had been in the nursing home business. To reclaim and remediate the sites, the Defendant employed a former Patriot mining engineer with an undermanned staff and no prior experience as an executive officer of a coal company and no financial experience. To be clear, DEP does not take issue with this mining engineer's management. He did the best that he could do under the circumstances, even for longer than might have been expected. But the Defendant's finances and corporate structure imposed almost impossible burdens and, now, the Defendant's new reality requires different management capabilities than its now-former management possessed.

The Defendant started out with virtually no cash, equity, or assets; it proposed to commit only the limited proceeds from the mining of coal incidental to reclamation, the uncertain cash flow from a separate coal mining operation, the potential proceeds of settlements in connection with the Patriot bankruptcy, and the subsequent anticipated release of cash collateral and other financial assurance that Patriot had pledged to surety bond issuers or received from others to back its environmental obligations. Aside from the limited proceeds of incidental mining and the release of certain cash collateral, none of the other sources of cash flow ever materialized. The

other two sources supported the Defendant's operations, albeit only in fits and spurts, for the better part of four years. But those sources have completely dried up; the Defendant does not even have the ability to mine coal incidental to reclamation to generate cash.

To make matters worse, immediately after acquiring the Patriot permits, the Defendant's principal embarked on an acquisition binge. That acquisition binge, at a minimum, often diverted the attention of the Defendant's management from the operation of its own business, as it got pulled into the principal's other acquisitions or bids. The Defendant's principal largely disappeared from the scene at that time as he made bids for and acquired other mines and businesses and assets in other industries, including iron ore and steel-making, throughout the United States and beyond. At a minimum, he largely left his under-experienced, under-staffed management team to fend for themselves in a very difficult, if not virtually impossible, situation. DEP also believes that that acquisition binge and the resulting distractions may have adversely affected the Defendant's ability to liquidate assets that might have been used (and may yet be used) for reclamation and remediation.

To offset its intermittent cash flow crunches and almost constant shortage of funds, the Defendant incurred massive amounts of debt and encumber its limited assets. The Defendant has advised DEP that it amassed and currently owes more than \$15 million in debt to its vendors and suppliers. In turn, most of those vendors and suppliers, some of whom provide critical services that the Defendants require in order to comply with their environmental obligations, cut off the Defendant's credit and have declined to do business at all with the Defendant absent the payment of its arrearages. It has accrued liabilities associated with its former union employees, including large liabilities to its health care provider. To satisfy its obligations under a federal consent order, the Defendant granted liens in certain of its real property, property that might have been

otherwise liquidated and sold and devoted to environmental remediation, to environmental groups. A little over a year ago, the Defendant (or its predecessor by merger into the Defendant) transferred a massive and potentially valuable asset, the Hobet dragline, to a related company in connection with what appears to be an effort to encumber that asset to secure a \$4 million-plus debt its principal and other third parties owe to a law firm. More recently, and in fact as recently as only three months ago, the Defendant also granted liens in real property to the law firm. Thus, not only has the Defendant transferred and encumbered its assets rather than liquidating them and using them for reclamation and compliance, but it also diverted their value to pay the obligations of other persons and entities, including its principal.

These and likely other yet-to-be-discovered facts relating to the Defendant's operations over the years establish the depth and breadth of the Defendant's financial distress and the organizational and management issues that have impeded the Defendant's ability to continue to operate and manage its properties in compliance with the law and for the benefit of all its stakeholders. The Defendant has no currently available sources of cash with which to continue its operations. Parties with funds that might be used to ensure its ability to perform its principal function—the reclamation and remediation of its mining sites in compliance with the law—are unwilling to provide funds to the Defendant, given the foregoing circumstances and the resulting loss of confidence in the Defendant's ability to manage its finances, operations, and affairs. The situation is ever more acute in light of the resignation of Defendant's management and employee layoffs. Simply put, despite having assets with some substantial value and potential sources of funding, the Defendant simply cannot operate its business and assets in compliance with the law, a circumstance that will inevitably result in the complete loss of all the Defendant's properties and assets to the detriment of all the Defendant's stakeholders and the State of West Virginia.

It is, accordingly, essential that a special receiver be appointed to take control of the Defendant's assets and properties to ensure their proper and effective management and use, including securing and committing the same to the Defendant's legal obligations to comply with the law.

C. DEP provided notice to the Defendant of its request for a special receiver.

Section 53-6-1 provides, with respect to real estate, that "no such receiver shall be appointed of any real estate, or of the rents, issues and profits thereof, until reasonable notice of the application therefor has been given to the owner or tenant thereof." W. VA. CODE § 53-6-1. And while not explicitly provided for in the statute, it has generally been held that notice is required for the application for a special receiver of personal property. *Batson v. Findley*, 52 W. Va. 343, 43 S.E. 142 (1903). However, exceptions to the foregoing exist where notice would be unreasonable, would likely defeat the purpose for which a special receiver is necessary, or in cases of great emergency. *Baltimore Bargain House v. St. Clair*, 58 W. Va. 565, 52 S.E. 660 (1906). DEP submits that the facts and circumstances of the instant case warrant such immediate relief without notice. But that being said, the undersigned states that DEP has, in fact, provided notice of its application for the appointment of a special receiver to Defendant in advance of this filing.

IV. The Court has the power to appoint a special receiver to ensure compliance with its injunctive relief.

"[T]he appointment of a receiver is not a matter of right. The power to appoint is a discretionary one, to be exercised with great circumspection. The discretion is not arbitrary or absolute, but sound and judicial." *Id.* at 662. But, as courts in other jurisdictions have held, the appointment of a receiver to enforce the terms of an injunction is a matter within the discretion of the trial judge. *See Consolidated Rail Corp. v. Fore River Ry.*, 861 F.2d 322, 326 (1st

Cir.1988); *Van Oss v. Premier Petroleum Co.*, 113 Me. 180, 189, 93 A. 72, 75 (1915); *see also* *Department of Environmental Protection v. Emerson*, 563 A.2d 762 (Me. 1989) (appointing a receiver after the owner of a tire storage and disposal facility violated a preliminary injunction requiring him to comply with the waste management, fire protection, and water quality laws). When more traditional remedies such as further injunctive orders and contempt proceedings have not succeeded in obtaining compliance, “a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as receivership, to get the job done.” *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir.1976).

In fact, several state and federal courts have granted motions by environmental regulatory agencies to impose receiverships on environmental violators. *See, e.g., United States v. Government of Guam*, 2008 WL 732796 (D. Guam, Mar. 17, 2008) (appointing receiver to bring landfill into compliance with consent decree, court orders, and injunctions); *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1010 (N.D. Cal. 2002) (appointing receiver to ensure defendant’s compliance with federal safe drinking water act); *United States v. Acadia Woods Add. # 2 Sewer Co.*, 41 F. Supp. 2d 632 (W.D. La. 1999) (appointing receiver to run defendants’ sewage treatment plants to secure compliance with clean water act); *United States v. Alder Creek Water Co.*, 1984 WL 178394 (D. Or. Apr. 23, 1984) (appointing receiver in safe drinking water act case after defendant failed to comply with a court order to lessen the health risks posed by defendant’s water systems and to comply with the act’s reporting and monitoring requirements), *aff’d*, 823 F.2d 343 (9th Cir. 1987); *United States v. City of Detroit*, 476 F. Supp. 512 (E.D. Mich. 1979) (appointing administrator to run City’s wastewater treatment plant to obtain compliance with clean water act); *Town of Greenwich v. Dep’t of Transp.*, 1979 WL 30063 (D. Conn. Nov. 7, 1979) (appointing receiver to take control of Connecticut Department of

Transportation to close down power plant for violating clean air act regulations); *State ex rel. Celebrezze v. Gibbs*, 573 N.E.2d 62 (Ohio 1991) (appointing receiver to correct sewage treatment deficiencies at industrial park); *Emerson, supra* (appointing receiver to oversee operation of tire disposal facility and insure compliance with terms of preliminary injunction); *Ohio v. Chem-Dyne Corp.*, 1981 WL 5234 (Ohio App. Oct. 28, 1981) (appointing receiver to oversee removal of hazardous waste from defendants' property).

Those courts have recognized that appointing a receiver to ensure compliance with the environmental laws is particularly appropriate when

- there is a threat to public health and safety, *see, e.g., Alisal Water Corp.*, 326 F. Supp. 2d at 1027 (“the Court has the responsibility in this case of crafting a remedy that is protective of public health, and this responsibility necessarily takes preeminence over all other considerations.”); *Government of Guam*, 2008 WL 732796, at *2 (“A threat to public health may render legal remedies inadequate in environmental cases.”);
- the defendant has a history of noncompliance, *see, e.g., Alisal Water Corp.*, 326 F. Supp. 2d at 1022 n.7 (“The duration and extent of Defendants’ history of non-compliance leads the Court to conclude that the drastic remedy of a receivership is not only justified but also necessary.”); *City of Detroit*, 476 F. Supp. at 517–18; *Acadia Treatment Systems*, 41 F. Supp. 2d at 633;
- the defendant lacks the management and personnel necessary to bring itself into compliance, *see, e.g., Alisal Water Corp.*, 326 F. Supp. 2d at 1024 (“Defendants lack the managerial competence to operate compliant drinking water systems.”); *Government of Guam*, 2008 WL 732796, at * 10 (“The Government of Guam lacks the resources, experienced personnel, and necessary support to comply with the Consent Decree on its own.”); or
- the defendant lacks the financial resources to ensure compliance, *see, e.g., Alisal Water Corp.*, 326 F. Supp. 2d at 1014 (“Defendants lack the financial wherewithal to operate compliant drinking water systems. In light of these findings, the Court concludes that the usual remedies are inadequate and that some form of receivership is necessary to get the job done.”); *Acadia Treatment Systems*, 41 F. Supp. 2d at 634 (“[n]either the named defendants in this proceeding nor any subsidiary corporation or corporations or officers thereof have the financial ability to conduct the current business of defendants in an environmentally sound manner to protect the public health or to secure the necessary capital from a lending institution to do so.”).

Each of these circumstances is present in this case and merits the appointment of a special receiver to ensure the Defendant's compliance with the law and orders of this Court.

A. There is an immediate threat to the public health and safety.

As noted above, DEP has determined that the Defendant's cessation of operations poses an immediate threat to the public health and safety. Martinka amply demonstrates that threat, as DEP had demonstrated the severity of the threat by stepping in to provide funding to keep the pumps at Martinka operating and continue water treatment. And now with the Defendant having laid off all its management and employees, it simply has no ability to address any threat to the public health and safety.

B. The Defendant has not, and simply cannot, comply with the law.

DEP has issued hundreds of notices of violations and cessation orders and forty show cause orders. The Defendant has neither abated the violations nor responded to the show cause orders. The Defendant has, in fact, affirmatively acknowledged in writing that it is and remains in material default of its obligations and, moreover, that it lacks management, employees and available sources of funds with which to comply with the law in the future.

C. The Defendant lacks the management and employee resources to comply with the law.

Having run out of cash and having no sources of cash flow, the Defendant has laid off its entire staff. It laid off its reclamation personnel more than ninety days ago. In the past week, it laid off all employees who conducted water testing required under the surface mining laws. It has laid off its principal executive officer and the Defendant's manager. At this point, it appears that the Defendant has no management or employee resources with which to comply with its obligations under the surface mining and water pollution control laws.

D. The Defendant lacks the financial resources to comply with the law.

As noted, the Defendant has acknowledged its lack of financial resources with which to comply with the law.

Given the Defendant's inability to abate existing violations or comply with the law in the future, the equities of the situation presently before this Court counsel in favor of the appointment of a well-funded special receiver to ensure the Defendant's compliance with the law and orders of this Court compelling such compliance.

E. The appointment of Doss Special Receiver LLC as special receiver will ensure the Defendant's compliance with the law.

DEP seeks to have Doss Special Receiver LLC, a newly formed West Virginia limited liability company appointed as the special receiver in this matter. DEP submits that Doss Special Receiver has the resources to perform all of its obligations as the court-appointed special receiver.

First and foremost, Doss Special Receiver has the requisite skills to assess and manage the Defendant's operations and assets to ensure its compliance with the law. Doss Engineering, Inc. formed Doss Special Receiver for the purpose of acting as the special receiver in this case. Doss Engineering is the sole member and manager of Doss Special Receiver, and it and, in particular, its principal, R.B. (Barry) Doss, will perform the functions of the special receiver on behalf of Doss Special Receiver. Both Mr. Doss and Doss Engineering, whose office is located in Shrewsbury in Kanawha County, approximately thirty miles east of Charleston, are well known and well respected within the West Virginia mining industry. Mr. Doss is a professional engineer and surveyor, certified surface and underground mine foreman, and holds a master's degree in business administration. He has approximately forty years of experience in the coal mining industry, having held positions as diverse as equipment operator, permit engineer,

production engineer, engineering manager, mine manager, and engineering consultant. He formed Doss Engineering in 1999 to provide consulting, environmental, and engineering services to the mining, construction, and natural resource industries. In addition to Mr. Doss, Doss Engineering has a staff of seven full-time and one part-time employees with deep experience in all areas affecting the mining industry, including engineering, environmental and permitting technicians, watershed resource and environmental scientists, geologists, and environmental biologists. Doss Engineering has worked with coal companies, reclamation companies, mineral and landowners, law firms, and others with interests in coal in West Virginia and Central Appalachia. Both DEP and the Defendant's surety bond issuer have had long experience in dealing with Doss Engineering and Mr. Doss and have confidence in their ability to perform the functions of the special receiver. The Plaintiff also requests that the Court approve the compensation of the special receiver on the terms set forth in the proposed orders attached hereto as Exhibits A and B, which compensation the Plaintiff submits is appropriate and reasonable under the circumstances of this case.

Second, Doss Special Receiver has a commitment of funding from the Defendant's surety. The funding commitment assures that the special receiver will have funding for an initial 90-day period to allow the special receiver to assess the Defendant's assets, liabilities, operations, and affairs to develop, if possible, a longer-term plan for ensuring the Defendant's compliance with the law. The funding is designed to allow the special receiver to address certain imminent issues relating to the Defendant's permitted sites, including Martinka. The Plaintiff also requests that the Court approve the funding facility on the terms set forth in the proposed orders attached hereto as Exhibits A and B, which funding the Plaintiff submits is appropriate and reasonable under the circumstances of this case.

In connection with the special receiver's appointment, DEP also seeks an order setting the receivership surety bond required under Section 53-6-1 at \$250,000. DEP submits that such a bond adequately secures the special receiver's faithful performance of his obligations under the terms of the receivership order.

V. The Court has the power in connection with the appointment of a special receiver to enjoin creditors and other parties from interfering with the special receiver's administration and activities.

As set forth in more detail the proposed forms of order attached hereto, DEP seeks to enjoin all persons from interfering with the operation of the receivership or disturbing the assets, liabilities, and operations of the receivership. The notion that a court may enjoin such actions has been settled for years. *See, e.g., Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883 (5th Cir. 2019) ("It is axiomatic that a district court has broad authority to issue blanket stays of litigation to preserve the property placed in receivership pursuant to SEC action.") (*quoting S.E.C. v. Stanford Int'l Bank, Ltd.*, 424 F.App'x 338, 340 (5th Cir. 2011)); *Davis v. Butters Lumber Co.*, 132 N.C. 233, 43 S.E. 650, 652 (1903) (noting, in 1903, that a receiver's right to enjoin a creditor from taking actions that "prevented or interfered with the collection of the assets of the bank which passed to him as receiver[] is well settled"). As the North Carolina Supreme Court noted in *Davis*:

It is the policy, and usually the rule, of the court to compel all claims to assets in the hands of the receiver to be litigated in the [receivership action]. This course prevents confusion and conflicts, and saves costs and expenses.

Id. at 653. As the Fifth Circuit noted:

Courts of Appeals have upheld orders enjoining broad classes of individuals from taking any action regarding receivership property. Such orders can serve as an important tool permitting a district court to prevent dissipation of property or assets subject to multiple claims in various locales, as well as preventing piecemeal resolution of issues that call for a uniform result.

Zacarias, 945 F.3d at 897, *quoting Schauss v. Metals Depository Corp.*, 757 F.2d 649, 653 (5th

Cir. 1985); *see also* *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543 (6th Cir. 2006) (“Once assets are placed in receivership, a district court’s equitable purpose demands that the court be able to exercise control over claims brought against those assets. The receivership court has a valid interest in both the value of the claims themselves and the costs of defending any suit as a drain on receivership assets.”); *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005) (“The purposes of a receivership are varied, but the purpose of imposing a stay of litigation is clear. A receiver must be given a chance to do the important job of marshaling and untangling a company’s assets without being forced into court by every investor or claimant.”). As one court succinctly put it, such a bar works to prevent the proverbial “race for receivership assets.” *Rupert v. Winter*, 2012 WL 13102348, at *9 (N.D. Tex. Jan. 24, 2012). In that regard, this type of injunction is, as the Second Circuit Court of Appeals noted, similar to the automatic stay of litigation issued in bankruptcy cases:

[T]he receivership accomplishes what a bankruptcy would. The receivership protects the assets of the estate, just as a stay would in bankruptcy. An anti-litigation injunction is simply one of the tools available to courts to help further the goals of the receivership. While such injunctions are to be used sparingly, there are situations in which they are entirely appropriate.

S.E.C. v. Byers, 609 F.3d 87, 92 (2d Cir. 2010).

To that end, courts that have appointed receivers to assume control over a defendant’s assets and operations have issued orders enjoining a wide array of parties from interfering in a wide array of ways with the receiver’s administration and activities. In *Davis*, for example, the court enjoined a creditor from suing to collect, attach, and garnish a debt owed by a bank in receivership. Similarly, a New York appeals court affirmed the entry of an injunction barring a mortgage creditor from proceeding with a foreclosure action to allow the receiver to sell a dissolving corporation’s assets, describing the court’s power to protect a receiver against actions brought without its consent as an “inherent power of the court.” *In re French*, 181 A.D. 719.

732, 168 N.Y.S. 988, 998 (App. Div. 1918); *see also SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980) (“The power of a district court to impose a receivership or grant other forms of ancillary relief does not in the first instance depend on a statutory grant of power from the securities laws. Rather, the authority derives from the inherent power of a court of equity to fashion effective relief.”). In *SEC v. Byers*, 609 F.3d 87, 89 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit affirmed a District Court order barring creditors and others from filing involuntary bankruptcy petitions with respect to property in a receivership, as part of the court’s “authority and discretion to enter anti-litigation orders.”

Notably, where a state court assumes *in rem* or *quasi in rem* jurisdiction over property, its bar against suits applies with equal force whether the barred suit is brought in state or federal court. *See Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456, 466 (1939) (“We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.”). “In such cases, [the Supreme Court] has said that the state or federal court having custody of such property has *exclusive* jurisdiction to proceed.” *Donovan v. City of Dallas*, 377 U.S. 408, 468 (1964), *citing Princess Lida*, 305 U.S. at 465-68; *see also SEC v. Wencke*, 622 F.2d at 1369 (“The power of the district court to issue a stay, effective against all persons, of all proceedings against the receivership entities rests as much on its control over the property placed in receivership as on its jurisdiction over the parties to the securities fraud action.”).

Thus, this Court, having taken control of the Defendant's property pursuant to the receivership order, may broadly enjoin the Defendant, those individuals and entities associated with the Defendant, as well as the Defendant's creditors and other parties in interest, from taking any action that interferes with the special receiver's control over the Defendant's property, business, and affairs.

WHEREFORE, DEP respectfully requests that this Court grant DEP's Emergency Motion and:

- (1) enter an order substantially in the form attached hereto as Exhibit A (a) requiring the Defendant on a temporary basis to take all necessary and appropriate actions to abate existing violations of its mining and water pollution control permits and bring its operations into immediate compliance with the permits and the federal Surface Mining Control and Reclamation Act and Clean Water Act and the state counterparts thereto and the rules promulgated thereunder and (b) appointing Doss Special Receiver LLC as special receiver on a temporary basis on the terms set forth therein, in each case pending the conduct of a hearing to consider the Plaintiff's motion for entry of a preliminary injunction;
- (2) after a hearing to consider the Plaintiff's motion for entry of a preliminary injunction, enter an order substantially in the form attached hereto as Exhibit B (a) requiring the Defendant on a preliminary basis to take all necessary and appropriate action abate existing violations of its mining and water pollution control permits and bring its operations into immediate compliance with the permits and the federal Surface Mining Control and Reclamation Act and Clean Water Act and the state counterparts thereto and the rules promulgated thereunder and (b) appointing Doss

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EXHIBIT A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**HAROLD D. WARD, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,**

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

CIVIL ACTION NO. _____

**TEMPORARY RESTRAINING ORDER AND ORDER
TEMPORARILY APPOINTING A SPECIAL RECEIVER FOR
DEFENDANT'S PROPERTY, ASSETS, AND OPERATIONS**

Upon consideration of (a) the emergency motion of the Plaintiff for entry of a preliminary injunction and order appointing a special receiver of the Defendant's property, assets, and operations and (b) the declaration of the Plaintiff in support thereof; and it appearing that (x) there exist imminent and identifiable threats to the public health and safety that require immediate and ongoing action to prevent such threats and (y) an exigent need for immediate and ongoing funding and competent management to ensure the Defendant's compliance with laws designed to prevent such threats that warrant and require immediate, preliminary relief; and it appearing that the Plaintiff has given the Defendant notice of its motion and the relief requested herein and that the Defendant has consented to or acquiesced in the relief requested, it is hereby ORDERED that:

1. This Court has personal jurisdiction over the Defendant, which holds mining and water pollution control permits issued by the Plaintiff and operates active coal mining sites within the State of West Virginia.

2. This Court has subject matter jurisdiction and venue over this action pursuant to and in accordance with W. Va. Code § 22-3-17(j).

3. This Court has the power to issue the temporary relief granted hereby pursuant to W. Va. Code § 22-3-17(j) and West Virginia Rule of Civil Procedure 65(a).

4. The Plaintiff's emergency motion, to the extent that it seeks entry of a temporary restraining order and the appointment of a special receiver on a temporary basis, is hereby granted.

Injunctive Relief

5. The Defendant shall be and hereby is enjoined from violating the terms and conditions of its mining and water pollution control permits and the West Virginia Surface Coal Mining and Reclamation Act and the West Virginia Water Pollution Control Act and the rules promulgated thereunder, pending the hearing to consider entry of a preliminary injunction and the preliminary appointment of a special receiver.

Appointment of a Receiver

6. Pending the hearing to consider entry of a preliminary injunction and the preliminary appointment of a special receiver, a Special Receiver is hereby appointed pursuant to W. Va. Code § 53-6-1 on a temporary basis, subject to the Court's oversight, supervision, and further approval, as needed, to (a) assume full operation, management, and control of the Defendant's assets and operations, (b) oversee, manage, and direct the acts, conduct, operations, assets, liabilities, and financial conditions of the Defendant, and (c) in consultation with the applicable environmental regulatory agencies, develop a plan and schedule for compliance with the Defendant's permits and take all necessary and appropriate action to bring the Defendant's operations into compliance with the Defendant's permits, the federal Surface Mining Control and

Reclamation Act and the federal Clean Water Act and the state counterparts thereto and the rules promulgated thereunder, and the orders of the applicable environmental regulatory agencies, all for the protection of the public and the environment and the preservation of the Defendant's business and assets for the benefit of all parties having an interest in the Defendant and its business, assets, and affairs.

7. The Plaintiff and the Special Receiver have advised the Court that (a) due to the number and current status of the permits the Defendant holds, it is impractical to abate all existing violations and commence or maintain reclamation work simultaneously on all of the Defendant's permitted sites and outfalls and (b) the Defendant holds several permits and property interests outside the State of West Virginia. The Special Receiver shall prioritize abatement and reclamation based upon criteria and input of the applicable regulatory authorities and Defendant's reclamation bond sureties taking into consideration such factors as site conditions, the need for public safety, environmental protection, efficient scheduling, cash flow and operational concerns. The Plaintiff and the Special Receiver shall take all reasonable steps necessary or appropriate to secure in states outside the State of West Virginia the same authorities and protections for the Special Receiver as are set forth in this Order.

8. Doss Special Receiver, LLC, a West Virginia limited liability company, is hereby appointed as the Special Receiver for the purposes set forth in the immediately preceding decretal paragraph. Doss Special Receiver, LLC is a wholly owned subsidiary of Doss Engineering, Inc., a West Virginia corporation, and Barry Doss is the sole manager of Doss Special Receiver, LLC. No individual or entity may succeed or replace Doss Special Receiver, LLC, Doss Engineering, Inc., or Barry Doss and no change in control of Doss Special Receiver, LLC may occur, in each case without the express written consent of the Plaintiff and a further

order of this Court. Without limiting the generality of the foregoing, Doss Special Receiver, LLC may retain and compensate Doss Engineering, Inc., either directly or on behalf of the receivership estate, to provide consulting and other services to the receivership estate.

9. The Special Receiver and its owner, manager, employees, agents, attorneys and other professionals hired by it with respect to performing its duties hereunder shall have no personal liability and shall have no claim asserted against them relating to the performance of the Special Receiver's duties under this Order, except for claims for actual damages (and not consequential damages) due to their gross negligence, gross or willful misconduct, malicious acts or the failure to comply with Orders of this Court. In any event, the liability of the Special Receiver or persons acting on its behalf shall be limited to the assets of Defendant's estate.

10. Without limiting the generality of the immediately preceding decretal paragraph, the Special Receiver and its owner, manager, employees, agents, attorneys and other professionals hired by it are not, and shall not be construed as or deemed to be, an agent, owner, operator, or controller of the Defendant or its operations for the purposes of the Surface Mining Control and Reclamation Act and the Clean Water Act and the state counterparts thereto and the rules and regulations thereunder, the applicant violator system, or any other applicable environmental law, solely on account of the performance of the Special Receiver's duties under this Order, and the Plaintiff shall work with federal and other state regulatory authorities as necessary to ensure that the Special Receiver and its owner, manager, employees, agents, attorneys and other professionals hired by it are not either held liable under such laws or rendered ineligible for permits in West Virginia or elsewhere as a result of their actions pursuant to this Order.

11. The Special Receiver shall be compensated on an hourly basis at the hourly rates set forth in Exhibit A hereto, which terms and conditions are hereby approved, and no additional orders or approvals by the Court or any other party shall be necessary with respect to such compensation or the payment thereof to the Special Receiver.

12. Within thirty days of the date hereof, the Special Receiver shall obtain a surety bond in the amount of \$250,000 pursuant to and in accordance with W. Va. Code § 53-6-1, a copy of which bond shall be filed with the Court.

13. The Special Receiver is hereby authorized to borrow money on the terms and subject to the conditions set forth in Exhibit B hereto, which terms and conditions are hereby approved (as so approved, the “Funding Facility”).

Creation of Receivership Estate

14. Immediately upon entry of this Order, a receivership estate shall be deemed created for the Defendant, which estate shall be under the sole and exclusive control, supervision, and management of the Special Receiver.

15. All of the Defendant’s real property, personal property, both tangible and intangible and including intellectual property, leases (whether as lessor or lessee) of real or personal property, permits, assets, books, records, fixtures, equipment, inventory, as-extracted assets, reserves, and any other real, personal, tangible, or intangible property of the Defendant of any kind or nature whatsoever, wherever located, shall be deemed immediately transferred to the Defendant’s receivership estate under the management, operation, and control of the Special Receiver without any further action on the part of the Defendant or the Special Receiver. Without limiting the generality of the foregoing, the assets transferred shall include all rights of

the Defendant in, to, or under any insurance policy and insurance proceeds, including any policy or proceeds applicable to any of the liabilities transferred to the receivership.

16. All persons, including the Defendant, all of its officers, directors, employees, stock or equity holders, any secured or unsecured creditors of the Defendant, and any other persons, are ordered to turn over to the Special Receiver all cash, keys, documents, deposits, payments received, books and records, equipment, software, and any other property of the Defendant, including water samples and the results of the testing thereof, in their possession, custody, or control or that come into their possession, custody, or control after the entry of this Order.

17. The banks and other financial institutions where the Defendant has account relationships are authorized and directed to comply with all instructions given by the Special Receiver in furtherance of the authority vested in him in this Order and any other Order entered in connection with this action.

18. Any person claiming to own property situated on the Defendant's property or used by the Defendant in connection with the operation of its business or property is enjoined from removing said property absent the actual written consent of the Special Receiver or upon further Order of the Court.

19. All existing claims, liens, and encumbrances against the Defendant or its properties or assets shall be deemed to constitute claims, liens, or encumbrances against the Defendant's receivership estate.

20. The Special Receiver shall have no liability or responsibility for the payment or discharge of any claims, liens, or encumbrances against the Defendant's receivership estate. The Special Receiver shall not be liable for any employee-related liabilities of the Defendant, other

than the amounts the Special Receiver may specifically agree in writing to pay. The Special Receiver, subject to the terms and conditions of this Order, shall be liable for any employee-related liabilities relating to any employees that the Special Receiver may hire.

21. No person shall file suit or take other legal or enforcement action against the Special Receiver without an Order of this Court permitting the suit or action.

22. Notwithstanding anything to the contrary herein, nothing shall (a) empower the Special Receiver or the Defendant to carry on any business or activity which the Defendant is not lawfully entitled to carry on or (b) exempt the Special Receiver or the Defendant from complying with statutory or regulatory provisions relating to the public health and safety or the environment.

23. Any and all costs, expenses, and liabilities of the receivership and the receivership estate created hereby, including, without limitation, the debts and liabilities incurred by the Special Receiver under the Funding Facility, the costs and expenses of the Special Receiver, the fees and expenses of any professionals retained by the Special Receiver, and the costs and expenses of the operation of the Defendant's business, shall constitute claims against the Defendant's receivership estate, shall be paid as a first-priority expense from the net proceeds of the operations or income of the Defendant and the sale of the Defendant's properties and assets, and shall be senior to any valid, enforceable, and unavoidable liens and security interests in any collateral that were properly perfected by the date hereof, it being understood that (a) the debts and liabilities under the Funding Facility shall be subordinate to any such valid, enforceable, unavoidable, and properly perfected liens and security interests, (b) nothing in this action or Order shall make the Plaintiff responsible for the payment of the costs, expenses, and liabilities of the receivership and the receivership estate created hereby, and (c) nothing in this (or any

other) paragraph shall affect the Special Receiver's right to payment of his compensation and expenses from the Funding Facility.

24. All persons having oral or written agreements with the Defendant for the supply of goods or services are hereby restrained pending the hearing to consider entry of a preliminary injunction and the preliminary appointment of a special receiver from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Special Receiver.

25. The Special Receiver shall be entitled to the continued use of the Defendant's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order shall be paid by the Special Receiver in accordance with the normal payment practices of the Defendant or such other practices as may be agreed upon by the supplier or service provider and the Special Receiver or as may be ordered by this Court.

Powers of the Receiver

26. The Special Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Defendant's assets, property, business, and affairs and, without in any way limiting the generality of the foregoing, the Special Receiver is hereby expressly empowered and authorized to do any of the following where the Special Receiver considers it necessary, appropriate, or desirable:

- a. To take possession of and exercise control over the Defendant's property and any and all proceeds, receipts and disbursements arising out of or from the Defendant's property;
- b. To receive, preserve and protect the Defendant's property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- c. To manage, operate and carry on the business of the Defendant, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the Defendant's business, or cease to perform any contracts of the Defendant;
- d. To negotiate and enter into financings, incur debt, or grant liens as necessary, desirable, or appropriate in the management of the Defendant's business, assets, or affairs, subject to Court approval;
- e. To retain, hire, or discharge employees on behalf of the receivership estate (none of whom are, or shall be deemed to be, employees of the Court or the Special Receiver) and to establish their wages, salaries, and benefits;
- f. To engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the Special Receiver's powers and duties, including without limitation those conferred by this Order, in each case subject to Court approval; provided, that, no such Court approval shall be required with respect to the Special Receiver's engagement of (1) Doss Engineering, Inc.; (2) accountants, legal counsel or such other persons in the normal and ordinary course of the receivership estate's business or operations, or (3) such other third-party contractors as may be deemed necessary by the Special Receiver to conduct the receivership estate's operations, including but not limited to, with respect to any and all reclamation activities;
- g. To purchase, lease, repair or replace machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Defendant or any part or parts thereof;
- h. To receive and collect all monies and accounts now owed or hereafter owing to the Defendant and to exercise all remedies of the Defendant in collecting such monies, including, without limitation, to enforce any security held by the Defendant;
- i. To settle, extend or compromise any indebtedness owing to or by the Defendant, subject to Court approval;
- j. To execute, assign, issue and endorse documents of whatever nature in respect of any of the Defendant's property, whether in the Special Receiver's name or in the name and on behalf of the Defendant, for any purpose pursuant to this Order;
- k. To undertake environmental or workers' health and safety assessments of the defendant's property and operations; To enter into consent orders, consent decrees, or other agreements with applicable environmental regulatory agencies with respect to the Defendant's environmental obligations, including the Defendant's environmental obligations under this Order;

- l. To cause the Defendant to perform any bonding and reclamation obligations so as to comply with applicable state and federal laws and regulations and effect the release of bonds for the benefit of the Defendant;
- m. To investigate, pursue, make, file, represent, defend against, and enter an appearance in any demand, lawsuit, action, claim, petition, filing, litigation, and proceeding, whether judicial or administrative, against any person for and on behalf of the Defendant, its interests, and its property;
- n. To initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Defendant, the Defendant's property or the Special Receiver, and to settle or compromise any such proceedings subject to Court approval;
- o. To direct the litigation strategy of the Defendant in any lawsuit, proceeding, action, administrative proceeding, or similar proceeding, including, without limitation, acting on behalf of and representing the Defendant's and its interests in any bankruptcy proceeding involving the Defendant;
- p. To market any or all of the Defendant's property, including advertising and soliciting offers in respect of the Defendant's property or any part or parts thereof and negotiating such terms and conditions of sale as the Special Receiver in its discretion may deem appropriate;
- q. To sell, convey, transfer, lease or assign the Defendant's property or any part or parts thereof outside the ordinary course of business,
 - i. Without the approval of this Court in respect of any transaction not exceeding \$50,000 up to an aggregate consideration for all such transactions does not exceed \$500,000; and
 - ii. With the approval of this Court;
- r. To apply for any order or orders necessary to convey the Defendant's property or any part or parts thereof to a purchaser or purchasers thereof free and clear of any liens or encumbrances affecting such property;
- s. To report to, meet with, and discuss with such affected persons as the Special Receiver deems appropriate all matters relating to the Defendant's property, assets, operations, and affairs and the receivership, and to share information, subject to such terms as to confidentiality as the Special Receiver deems advisable;
- t. To register a copy of this Order and any other Orders in respect of the Defendant's property against title to any of the Defendant's property;
- u. To apply for any permits, licenses, approvals, or permissions as may be required by any governmental authority and any renewals, modifications, extensions, or releases thereof for and on behalf of and in the name of the Defendant;

- v. To review all the Defendant's insurance policies, including workers' compensation, disability, general liability, and hazard insurance, and to cancel, renew, extend, retain, modify, purchase, or otherwise deal with such insurance, engage the agent of record therefor, and name the receivership estate as an additional insured or loss payee, as the Special Receiver deems appropriate for the Defendant and its properties' preservation and protection;
- w. To exercise any shareholder, partnership, joint venture or other rights which the Defendant may have;
- x. To exercise any and all rights, powers, duties, and privileges of the Defendant, including, without limitation, any attorney-client or other similar privilege;
- y. To file a petition in bankruptcy and prosecute a bankruptcy case and any related proceedings for the Defendant;
- z. To make any and all other significant decisions affecting the Defendant or its business, affairs, or properties in the exercise of its reasonable business judgment; and
- aa. To take any steps reasonably incidental to the exercise of these powers or the performance of its duties;

And in each case where the Special Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so to the exclusion of all other persons, including the Defendant and its officers, directors, agents, representatives, and employees, and without interference from any other person.

27. With respect to the exercise of the powers specified in the preceding decretal paragraph, the Special Receiver shall be vested, exclusively, with the standing and all authority of the board of directors, shareholders, members, managers and officers of the Defendant and shall exclusively have all the duties, powers, and authority thereof under its certificates or articles of incorporation, operating agreements, bylaws, and any other organizational documents with respect thereto.

28. The Special Receiver may defend against any lawsuit, action, claim, petition, filing, litigation, or proceeding brought against him in its capacity as a Special Receiver or

against or pertaining to the Defendant. Any and all costs and expenses, including attorneys' fees, arising from or incurred in connection with such legal actions or suits shall be paid as operating expenses of the receivership estate(s).

29. The Special Receiver shall not be responsible for the preparation and filing of any tax returns for the Defendant or its subsidiaries or affiliates (including any income, personal property, commercial activity, gross receipts, sales and use, or other tax returns) for any tax period ending prior to the date of the Special Receiver's appointment, it being understood that the Special Receiver shall be responsible for the preparation and filing of any tax returns for the Defendant for tax periods ending during the tenure of the Special Receiver.

30. The Special Receiver may recommend to the Court (a) that it be authorized to perform any other duties and responsibilities it reasonably believes may be necessary or appropriate to further the objectives of the receivership, including but not limited to leasing, selling, assigning, transferring or conveying the Defendant's property or any interest therein or performing any capital improvements thereto, or (b) such other or further relief as it may deem necessary or appropriate to further the objectives of the receivership.

31. The Special Receiver shall prepare and file with the Court on a monthly basis a report of the Special Receiver's actions taken pursuant to this Order and an accurate accounting of all monies collected, disbursements made, and expenses incurred. Copies of such reports and accountings shall be served on all counsel of record and unrepresented parties herein simultaneously with their filing.

32. All actions taken by the Special Receiver pursuant to the authorizations contained in this Order shall be valid, binding, and enforceable acts of the Defendant.

Injunctions Against Interference with Receivership

33. All persons, including but not limited to the Defendant and its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, are enjoined from in any way interfering with the operation of the receivership or in any way disturbing the assets, liabilities, and operations of the receivership, pending the hearing to consider entry of a preliminary injunction and the preliminary appointment of a special receiver.

34. The Defendant is hereby enjoined from taking any action with respect to the operation or management of its properties, assets, business, and affairs, except as requested by the Special Receiver, pending the hearing to consider entry of a preliminary injunction and the preliminary appointment of a special receiver.

35. All officers, directors, employees, attorneys, accountants, and equity interest holders of the Defendant (a) are directed to use their best efforts to ensure a smooth transition of the operation of the Defendant's business and assets to the Special Receiver, (b) are prohibited from interfering with the Special Receiver in the exercise of its rights, powers, duties, and privileges hereunder or taking any action inconsistent with the terms and provisions of this Order, (c) shall fully cooperate with the Special Receiver in carrying out its rights, privileges, and duties under this Order, including responding promptly to all reasonable requests for information or documentation and execution of documents, and (d) are barred from commencing a case under the Bankruptcy Code or other insolvency proceeding for or on behalf of the Defendant.

36. Any and all existing proceedings against or in respect of the Defendant or its property are hereby stayed and suspended pending the hearing to consider entry of a preliminary injunction and the preliminary appointment of a special receiver, *provided, however*, that nothing

in this Order shall (a) prevent any person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph or (b) affect any state or federal regulatory agency's police and regulatory authority in respect of the Defendant and the Defendant's assets and operations, including any action, suit or proceeding that is taken in respect of the Defendant by or before the regulatory agency, other than the enforcement of a payment order by the regulatory agency.

37. No person shall file suit or take other legal or enforcement action against the Defendant or the Defendant's property, including the commencement of an involuntary case under the Bankruptcy Code or other insolvency proceeding against the Defendant or the Defendant's property, except (a) any action taken by a state or federal regulatory agency pursuant to its police and regulatory authority in respect of the Defendant and the Defendant's assets and operations, including any action, suit or proceeding that is taken in respect of the Defendant by or before the regulatory agency, other than the enforcement of a payment order by the regulatory agency with respect to payment obligations incurred prior to the Special Receiver's appointment, (b) with the written consent of the Special Receiver, or (c) in accordance with an Order of this Court permitting the suit or action.

38. The exercise of all rights and remedies against the Defendant, the Special Receiver, or the Defendant's property, including, without limitation, the exercise of setoff rights and the creation, perfection or enforcement of a lien, are hereby stayed and suspended except with the written consent of the Special Receiver or an Order of this Court permitting the exercise of such rights and remedies.

39. Nothing in this Order shall be interpreted to alter, diminish or enlarge the rights or obligations of any person who has issued surety bonds on behalf of the Defendant (a “Surety”) or the rights of any beneficiary of surety bonds issued on behalf of the Defendant as to any third party, including any Surety or governmental authority, nor shall anything in this Order be deemed to enjoin any Surety or governmental authority from asserting any rights, claims, or defenses against any third party, including any Surety or governmental authority. For the avoidance of doubt, any Surety and governmental authority shall retain any and all rights afforded to it under the Surface Mining Coal and Reclamation Act and the Water Pollution Control Act, the state counterparts thereto, and the rules and regulations promulgated thereunder.

Termination of Receivership Order

40. The Special Receiver may apply to the Court to terminate this Order in the event that
- a. All or substantially all of the Defendant’s mining permits shall have been revoked pursuant to final orders of the regulatory agencies that issued those permits; or
 - b. The Special Receiver determines that it lacks the ability to comply with its obligations under this Order, including for a lack of sufficient funding; or
 - c. The Special Receiver is unable to reach agreements with appropriate regulatory authorities or any Surety as to the prioritization of reclamation and compliance efforts; or
 - d. Is unable to ensure it has the necessary authority and protections to manage or dispose of liabilities, obligations or properties arising from operations or properties outside of West Virginia; or

- e. A case under the Bankruptcy Code or other insolvency proceeding is commenced and has not been dismissed or suspended within sixty days thereafter.

In any of these events, the Special Receiver shall be entitled to an order terminating this Order upon at least ten (10) days' notice to all parties in interest in the receivership. If the Court terminates this Order then the Special Receiver shall cooperate with the Defendant or any successor receiver in an orderly transfer of estate property.

Scope of this Order

41. To the fullest extent permissible by law given this Court's *in rem* jurisdiction over the Defendant's property, assets, operations, and affairs, this Order is intended to and shall (a) apply to all persons without regard to their residence or domicile or contacts within the State of West Virginia and to all federal, state, and local governmental authorities having jurisdiction and power over the Defendant's property, assets, operations, and affairs and (b) be given Full Faith and Credit in accordance with the Constitution of the United States.

Retention of Jurisdiction

42. This Court shall retain jurisdiction with respect to all matters arising from or related to the receivership estate, the Special Receiver, the management and operation of the Defendant's business, properties, and affairs, and the implementation of this Order.

Expiration of Order; Further Proceedings on Plaintiff's Motion for Preliminary Relief

43. This Order, including the injunctions and the appointment of the Special Receiver provided herein, shall continue in full force and effect pending the closing of the hearing to consider the Plaintiff's motion for entry of a preliminary injunction and the preliminary appointment of a special receiver.

44. The Court shall conduct a video or telephonic hearing to consider the Plaintiff's motion for entry of a preliminary injunction and the preliminary appointment of a special receiver on _____, 2020, at __:__.m.

45. Counsel for the Plaintiff is directed to serve a copy of this Order and its motion upon the Defendant and all known creditors, employees, equity interest holders, regulatory agencies, owners and controllers, and other parties interest of the Defendant within three business days from the entry of this Order. Service thereof shall constitute adequate notice of the hearing and the relief requested in the Plaintiff's motion. The costs and expenses associated with such service shall constitute an expense of the receivership estate and be reimbursed, upon the submission of an appropriate invoice therefor, by the Special Receiver.

46. Responses, if any, to the relief requested in the Plaintiff's motion shall be filed with the Court and served upon (a) the Plaintiff, c/o Bailey & Glasser, LLP, 209 Capitol Street, Charleston, West Virginia 25301, Attn: Kevin W. Barrett, kbarrett@baileyglasser.com (b) the Special Receiver, c/o Jackson Kelly PLLC, 500 Lee Street East, Suite 1600, Charleston, WV 25301, Attn: Robert G. McLusky, rmclusky@jacksonkelly.com, and (c) Indemnity National Insurance Company, c/o Barth & Thompson, 202 Berkeley Street, Charleston, WV 25302, Attn: Stephen L. Thompson, sthompson@barththompson.com, in each case so that it is received by _____, 2020.

47. Parties who wish to appear at the video or telephonic hearing are directed to contact Mr. Barrett at (304) 345-6555 or by email at kbarrett@baileyglasser.com.

Dated: March __, 2020

Circuit Court Judge

EXHIBIT A
COMPENSATION OF SPECIAL RECEIVER

- For the work contemplated by the Order, Doss Special Receiver, LLC will bill and be paid on an hourly basis at Mr. Doss' customary rate (less a 15% discount) as shown on the attached rate sheet for Doss Engineering, Inc.:
 - Provided that the Special Receiver shall be paid for a minimum of 60 hours work per month regardless how many hours are expended, but not more than 120 hours per month.
- The Special Receiver shall be entitled to use the services of Doss Engineering, Inc. at the rates in the attached term sheet (less a 10% discount).
- Upon entry of the Order, the Special Receiver shall be entitled to a lump sum payment of \$18,500 to cover the initial costs of professional services (including Mr. Doss') and of procuring additional insurance.
- In the event that the Order is terminated, the Special Receiver withdraws as Receiver or the Surety elects to stop funding the Special Receiver then upon the presentation of a final bill the Surety shall pay the Special Receiver within 10 days.

Doss Engineering, Inc.
Professional Engineering Services

RATE & FEE SCHEDULE
As of January 1, 2020

Confidential

Principal / Professional Engineer	\$150.00	/ hour
Litigation & Due Diligence Support	Quoted on Request	
Senior Mining Engineer / Project Manager	\$90.00	/ hour
Senior Geologist	\$85.00	/ hour
Staff Engineer	\$75.00	/ hour
Senior Aquatic Biologist / Taxonomist	\$75.00	/ hour
Staff Geologist	\$65.00	/ hour
Staff Biologist	\$65.00	/ hour
Engineering / Environmental Technician		
Auto-Cad	\$60.00	/ hour
Permitting / Office	\$50.00	/ hour
Field	\$40.00	/ hour
Laboratory	\$30.00	/ hour
Clerical / Administrative	\$37.50	/ hour
2-man Survey Crew	\$85.00	/ hour
2-man GPS Survey Crew	\$120.00	/ hour
UAV / Drone Pilot	\$75.00	/ hour
Mileage	\$0.75	/ mile
Misc. Materials, Other Direct Expenses	Cost + 10%	
Travel	At Cost	
Payment Terms:	Net 30 days from receipt of invoice	

Rates are effective January 1, 2020, but are subject to change without notice.

**EXHIBIT
FUNDING FACILITY TERM SHEET**

**ERP ENVIRONMENTAL FUND, INC.
\$ 1,000,000 Senior Secured Receivership Delayed Draw Term Loan Facility
Summary of Terms and Conditions**

THIS SUMMARY OF TERMS AND CONDITIONS (THE “**TERM SHEET**”) DOES NOT CONSTITUTE A LEGALLY BINDING OBLIGATION OR COMMITMENT, UNLESS AND UNTIL IT IS FULLY EXECUTED AND DELIVERED BY ALL PARTIES HERETO AND ALL CONDITIONS PRECEDENT SET FORTH BELOW HAVE BEEN SATISFIED OR WAIVED. *The terms outlined below in this Term Sheet are the terms and conditions for a senior secured receivership delayed draw term loan credit facility to be made available to ERP Environmental Group, Inc. This Term Sheet; a credit agreement containing substantially the terms and subject the conditions set forth in the Term Sheet, if any; the Temporary Order, the Preliminary Order, and any other order entered by the Court in connection with this Term Sheet (collectively, the “**Orders**”), shall constitute the exclusive and definitive documentation and agreement among the parties (the “**Receivership Facility Documents**”).*

Borrower:	ERP Environmental Fund, Inc., (“ Borrower ”), by and through Doss Special Receiver, LLC, as its proposed Special Receiver (the “ Receiver ”) in a proceeding (the “ Receivership ”) to be filed in the Circuit Court of Kanawha County, West Virginia (the “ Court ”). The date of the commencement of the Receivership will be referred to as the “ Receivership Date .”
Lender:	Indemnity National Insurance Company, a Mississippi corporation (“ Lender ”).
Funding Facility:	A maximum amount of \$1,000,000 in the aggregate, as follows: A senior secured U.S. dollar denominated delayed draw term loan facility in an aggregate principal amount of up to \$1,000,000 (the “ Receivership Facility ” and the loans made thereunder, the “ Receivership Loans ”). The Receivership Loans may be drawn in multiple installments, with up to \$325,000 of Receivership Loans available upon entry of the Temporary Order.
Security and Priority:	The obligations of the Borrower under the Receivership Facility shall have the priority afforded to them pursuant to the Orders and shall be secured by a perfected security interest and lien on all real and personal property of the Borrower, whether now owned or hereafter acquired (the “ Collateral ”), without any requirement for the execution, delivery, recording or filing of any security agreement, mortgage, deed of trust, financing statement or similar document, instrument or agreement covering such Collateral.

	Upon entry of the Preliminary Order (as defined below), the Lender's lien on the Collateral shall be superior to and shall prime any and all pre-existing liens and security interests in the Collateral. The Lender shall be deemed to have consented to the release of its liens such that the Receiver can effectuate the sale of the property of the Borrower, subject to the terms of Orders, <i>provided</i>, that the proceeds of such sale(s) shall only be used for those purposes identified in the Orders, subject to a budget to be negotiated by the Lender and the Receiver. The Receiver, on behalf of the Borrower, shall execute and deliver to Lender all such mortgages, security agreements, deeds of trust or other documents and instruments as may be reasonably required by the Lender to evidence and secure the Receivership Facility. The Lender shall be solely responsible for all costs associated with the preparation and filing of any requested financing documents.
Purpose:	Amounts that may be made available under the Receivership Facility shall be used by the Receiver to fund the costs of administering the Receivership and for the general operating expenses of the Borrower in complying with the specific tasks identified in the applicable Orders. All expenditures from the Receivership Loans, other than the initial Receivership Loan of \$325,000, shall be subject to a budget to be prepared by the Receiver and approved by the Lender (the " Budget ") subject to permitted variances to be agreed upon by the Receiver and the Lender.
Interest:	The Receivership Loans shall bear interest at the rate of two percent (2%) per annum. All interest shall be computed on the basis of a year consisting of 360 days and shall be calculated based on the daily principal amount outstanding for such period. All interest shall be payable in kind and shall be paid in full on the Termination Date (as defined below).
Maturity:	The Receivership Facility shall mature upon the " Termination Date ," which, with respect to the Receivership Facility, shall be the earliest of (a) the date that is twenty-four (24) months after the Receivership Date and (b) the acceleration of the Receivership Loans and the termination of the Receivership Facility in accordance with the Receivership Facility Documents.
Conditions Precedent to Initial Credit Extension:	The obligation of the Lender to make the initial Receivership Loan is subject to the satisfaction (or waiver by the Lender) of the following conditions: (a) The Receivership Date shall have occurred on or before March 27, 2020; and (b) A temporary order creating the Receivership estate, appointing Doss Special Receiver, LLC as Receiver, and approving the Receivership Facility and this Term Sheet (the "Temporary Order"), shall have been entered by the Court, in form and substance acceptable to Lender, within seven (7) days of the Receivership Date.

Conditions Precedent to Subsequent Credit Extensions:	The obligation of the Lender to make any Receivership Loans after the initial Receivership Loan is subject to the satisfaction (or waiver by the Lender) of the following conditions: (a) Each of the Receivership Facility Documents shall continue to be in full force and effect and no Event of Default (as defined below) shall have occurred and be continuing; (b) A preliminary order reaffirming the Temporary Order and granting certain other relief, including, but not limited to, the priming liens identified herein (the “Preliminary Order”), shall have been entered by the Court, in form and substance acceptable to Lender; (c) The Borrower / Receiver shall have complied in all material respects with all agreements and covenants required to be performed or complied with by it under the Receivership Facility Documents; (d) The Receiver shall have provided the Lender with a Budget and, if applicable, the Borrower shall have been conducting its business in accordance with the Budget; (e) A request for borrowing shall have been made by the Receiver; (f) The Orders shall be in full force and effect and shall not have been vacated, revised, or modified or stayed in any respect; and (g) The making of such advance shall not violate any requirement of law and shall not be enjoined temporarily, preliminarily or permanently.
Events of Default:	The occurrence of any of the following events, unless waived by the Lender in writing, shall constitute an “Event of Default” and collectively “Events of Default”: (a) The failure of Borrower to pay principal or interest at the Termination Date or as otherwise set forth in the Receivership Facility Documents; (b) The Receiver shall fail to observe or to perform any other covenant, obligation, condition or agreement contained in the Receivership Facility Documents; (c) The Receiver shall make any expenditure of the proceeds of the Receivership Loans or the Collateral that is in excess, subject to any permitted variances, of the amounts permitted by the Budget; (d) The Receivership is dismissed or terminated; (e) A voluntary or involuntary petition in bankruptcy, or other state or federal law proceeding for the rearrangement of debts, is filed by or against the Borrower; (f) Doss Special Receiver, LLC resigns or is terminated as the Receiver (or Barry Doss ceases to be the manager of Doss Special Receiver, LLC) and is not replaced by a substitute receiver (or manager) satisfactory to the Lender within thirty (30) days of such resignation or termination; (g) Without the express written consent of Lender, any surety bond issued by the Lender in favor of the Borrower is forfeited by the obligee; (h) The applicable Order shall not be in force and shall have been vacated, revised, or modified or stayed in any respect; and

	(i) The Court approves any alternative financing which, without the written consent of the Lender, primes the liens and security interests granted to the Lender pursuant to this Term Sheet. Any Event of Default shall be deemed not to be continuing if the events, acts or conditions that gave rise to such Event of Default have been remedied or cured or have ceased to exist. Upon the occurrence of an Event of Default, the Lender may (x) declare (i) the termination, reduction or restriction of any further commitment to the extent any such commitment remains, (ii) all obligations to be immediately due and payable without presentment, demand, protest, or other notice of any kind, all of which are expressly waived by the Borrower, and (iii) the termination of the Receivership Facility; and (y) and upon the giving of five (5) calendar days' notice to the Borrower, exercise all other rights and remedies provided for in the Receivership Facility Documents and applicable law, including, but not limited, the exercise of any and all rights in the Collateral. In the event that the Receivership Facility is terminated for any reason other than as identified in (b) above, and the Borrower does not have sufficient cash on hand to pay the outstanding fees and expenses of the Receiver, the Lender shall pay any unpaid amount to the Receiver within ten (10) days of such request by the Receiver.
Reporting:	The Receiver shall promptly provide the Lender with all information reasonably requested by the Lender in connection with the Borrower and the Receivership Facility, including, but not limited to, budgets, budget variances, accounts receivable and payable statements, general ledgers, etc.
Governing Law:	This Term Sheet shall be governed by the laws of the state of New York without regard to its conflict of law principles.

ERP ENVIRONMENTAL FUND, INC.

 By its Special Receiver, Doss Engineering, LLC,
 By its Manager, R. Barry Doss

INDEMNITY NATIONAL INSURANCE COMPANY

 Thomas Elkins, President

EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**HAROLD D. WARD, Director, Division of
Mining and Reclamation, West Virginia
Department of Environmental Protection,**

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

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CIVIL ACTION NO.

**PRELIMINARY INJUNCTION AND ORDER PRELIMINARILY
APPOINTING A SPECIAL RECEIVER FOR DEFENDANT'S
PROPERTY, ASSETS, AND OPERATIONS**

Upon consideration of (a) the emergency motion of the Plaintiff for entry of a preliminary injunction and order appointing a special receiver of the Defendant's property, assets, and operations and (b) the declaration of the Plaintiff in support thereof; and upon the record of the evidentiary hearing held before the Court to consider the Plaintiff's emergency motion; and it appearing that (x) there exist imminent and identifiable threats to the public health and safety that require immediate and ongoing action to prevent such threats and (y) an exigent need for immediate and ongoing funding and competent management to ensure the Defendant's compliance with laws designed to prevent such threats that warrant and require immediate, preliminary relief; and this Court having entered an Order granting the Plaintiff's request for a temporary restraining order and temporarily appointing a special receiver (the "Temporary Order"); and it appearing that the Defendant has consented to the relief requested and granted herein, it is hereby ORDERED that:

1. This Court has personal jurisdiction over the Defendant, which holds mining and water pollution control permits issued by the Plaintiff and operates active coal mining sites within the State of West Virginia.

2. This Court has subject matter jurisdiction and venue over this action pursuant to and in accordance with W. Va. Code § 22-3-17(j).

3. This Court has the power to issue the preliminary relief granted hereby pursuant to W. Va. Code § 22-3-17(j) and West Virginia Rule of Civil Procedure 65(a).

4. The Plaintiff's emergency motion, to the extent that it seeks entry of a preliminary injunction and the appointment of a special receiver on a preliminary basis, is hereby granted.

Injunctive Relief

5. The Defendant shall be and hereby is enjoined from violating the terms and conditions of its mining and water pollution control permits and the West Virginia Surface Coal Mining and Reclamation Act and the West Virginia Water Pollution Control Act and the rules promulgated thereunder, pending the entry of a final judgment in this action.

Appointment of a Receiver

6. Pending the entry of a final judgment in this action, a Special Receiver is hereby appointed pursuant to W. Va. Code § 53-6-1 on a preliminary basis, subject to the Court's oversight, supervision, and further approval, as needed, to (a) assume full operation, management, and control of the Defendant's assets and operations, (b) oversee, manage, and direct the acts, conduct, operations, assets, liabilities, and financial conditions of the Defendant, and (c) in consultation with the applicable environmental regulatory agencies, develop a plan and schedule for compliance with the Defendant's permits and take all necessary and appropriate action to bring the Defendant's operations into compliance with the Defendant's permits, the

federal Surface Mining Control and Reclamation Act and the federal Clean Water Act and the state counterparts thereto and the rules promulgated thereunder, and the orders of the applicable environmental regulatory agencies, all for the protection of the public and the environment and the preservation of the Defendant's business and assets for the benefit of all parties having an interest in the Defendant and its business, assets, and affairs.

7. The Plaintiff and the Special Receiver have advised the Court that (a) due to the number and current status of the permits the Defendant holds, it is impractical to abate all existing violations and commence or maintain reclamation work simultaneously on all of the Defendant's permitted sites and outfalls and (b) the Defendant holds several permits and property interests outside the State of West Virginia. The Special Receiver shall prioritize abatement and reclamation based upon criteria and input of the applicable regulatory authorities and Defendant's reclamation bond sureties taking into consideration such factors as site conditions, the need for public safety, environmental protection, efficient scheduling, cash flow and operational concerns. The Plaintiff and the Special Receiver shall take all reasonable steps necessary or appropriate to secure in states outside the State of West Virginia the same authorities and protections for the Special Receiver as are set forth in this Order.

8. Doss Special Receiver, LLC, a West Virginia limited liability company, is hereby appointed as the Special Receiver for the purposes set forth in the immediately preceding decretal paragraph. Doss Special Receiver, LLC is a wholly owned subsidiary of Doss Engineering, Inc., a West Virginia corporation, and Barry Doss is the sole manager of Doss Special Receiver, LLC. No individual or entity may succeed or replace Doss Special Receiver, LLC, Doss Engineering, Inc., or Barry Doss and no change in control of Doss Special Receiver, LLC may occur, in each case without the express written consent of the Plaintiff and a further

order of this Court. Without limiting the generality of the foregoing, Doss Special Receiver, LLC may retain and compensate Doss Engineering, Inc., either directly or on behalf of the receivership estate, to provide consulting and other services to the receivership estate.

9. The Special Receiver and its owner, manager, employees, agents, attorneys and other professionals hired by it with respect to performing its duties hereunder shall have no personal liability and shall have no claim asserted against them relating to the performance of the Special Receiver's duties under this Order, except for claims for actual damages (and not consequential damages) due to their gross negligence, gross or willful misconduct, malicious acts or the failure to comply with Orders of this Court. In any event, the liability of the Special Receiver or persons acting on its behalf shall be limited to the assets of Defendant's estate.

10. Without limiting the generality of the immediately preceding decretal paragraph, the Special Receiver and its owner, manager, employees, agents, attorneys and other professionals hired by it are not, and shall not be construed as or deemed to be, an agent, owner, operator, or controller of the Defendant or its operations for the purposes of the Surface Mining Control and Reclamation Act and the Clean Water Act and the state counterparts thereto and the rules and regulations thereunder, the applicant violator system, or any other applicable environmental law, solely on account of the performance of the Special Receiver's duties under this Order, and the Plaintiff shall work with federal and other state regulatory authorities as necessary to ensure that the Special Receiver and its owner, manager, employees, agents, attorneys and other professionals hired by it are not either held liable under such laws or rendered ineligible for permits in West Virginia or elsewhere as a result of their actions pursuant to this Order.

11. The Special Receiver shall be compensated on an hourly basis at the hourly rates set forth in Exhibit A hereto, which terms and conditions are hereby approved, and no additional orders or approvals by the Court or any other party shall be necessary with respect to such compensation or the payment thereof to the Special Receiver.

12. Within thirty days of the date hereof, the Special Receiver shall obtain a surety bond in the amount of \$250,000 pursuant to and in accordance with W. Va. Code § 53-6-1, a copy of which bond shall be filed with the Court.

13. The Special Receiver is hereby authorized to borrow money on the terms and subject to the conditions set forth in Exhibit B hereto, which terms and conditions are hereby approved (as so approved, the “Funding Facility”).

Creation of Receivership Estate

14. Immediately upon entry of this Order, a receivership estate shall be deemed created for the Defendant, which estate shall be under the sole and exclusive control, supervision, and management of the Special Receiver.

15. All of the Defendant’s real property, personal property, both tangible and intangible and including intellectual property, leases (whether as lessor or lessee) of real or personal property, permits, assets, books, records, fixtures, equipment, inventory, as-extracted assets, reserves, and any other real, personal, tangible, or intangible property of the Defendant of any kind or nature whatsoever, wherever located, shall be deemed immediately transferred to the Defendant’s receivership estate under the management, operation, and control of the Special Receiver without any further action on the part of the Defendant or the Special Receiver. Without limiting the generality of the foregoing, the assets transferred shall include all rights of

the Defendant in, to, or under any insurance policy and insurance proceeds, including any policy or proceeds applicable to any of the liabilities transferred to the receivership.

16. All persons, including the Defendant, all of its officers, directors, employees, stock or equity holders, any secured or unsecured creditors of the Defendant, and any other persons, are ordered to turn over to the Special Receiver all cash, keys, documents, deposits, payments received, books and records, equipment, software, and any other property of the Defendant, including water samples and the results of the testing thereof, in their possession, custody, or control or that come into their possession, custody, or control after the entry of this Order.

17. The banks and other financial institutions where the Defendant has account relationships are authorized and directed to comply with all instructions given by the Special Receiver in furtherance of the authority vested in him in this Order and any other Order entered in connection with this action.

18. Any person claiming to own property situated on the Defendant's property or used by the Defendant in connection with the operation of its business or property is enjoined from removing said property absent the actual written consent of the Special Receiver or upon further Order of the Court.

19. All existing claims, liens, and encumbrances against the Defendant or its properties or assets shall be deemed to constitute claims, liens, or encumbrances against the Defendant's receivership estate.

20. The Special Receiver shall have no liability or responsibility for the payment or discharge of any claims, liens, or encumbrances against the Defendant's receivership estate. The Special Receiver shall not be liable for any employee-related liabilities of the Defendant, other

than the amounts the Special Receiver may specifically agree in writing to pay. The Special Receiver, subject to the terms and conditions of this Order, shall be liable for any employee-related liabilities relating to any employees that the Special Receiver may hire.

21. No person shall file suit or take other legal or enforcement action against the Special Receiver without an Order of this Court permitting the suit or action.

22. Notwithstanding anything to the contrary herein, nothing shall (a) empower the Special Receiver or the Defendant to carry on any business or activity which the Defendant is not lawfully entitled to carry on or (b) exempt the Special Receiver or the Defendant from complying with statutory or regulatory provisions relating to the public health and safety or the environment.

23. Any and all costs, expenses, and liabilities of the receivership and the receivership estate created hereby, including, without limitation, the debts and liabilities incurred by the Special Receiver under the Funding Facility, the costs and expenses of the Special Receiver, the fees and expenses of any professionals retained by the Special Receiver, and the costs and expenses of the operation of the Defendant's business, shall constitute claims against the Defendant's receivership estate, shall be paid as a first-priority expense from the net proceeds of the operations or income of the Defendant and the sale of the Defendant's properties and assets, and shall be senior to any valid, enforceable, and unavoidable liens and security interests in any collateral that were properly perfected by the date hereof, it being understood that (a) the debts and liabilities under the Funding Facility shall be subordinate to any such valid, enforceable, unavoidable, and properly perfected liens and security interests, (b) nothing in this action or Order shall make the Plaintiff responsible for the payment of the costs, expenses, and liabilities of the receivership and the receivership estate created hereby, and (c) nothing in this (or any

other) paragraph shall affect the Special Receiver's right to payment of his compensation and expenses from the Funding Facility.

24. All persons having oral or written agreements with the Defendant for the supply of goods or services are hereby restrained pending further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Special Receiver.

25. The Special Receiver shall be entitled to the continued use of the Defendant's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order shall be paid by the Special Receiver in accordance with the normal payment practices of the Defendant or such other practices as may be agreed upon by the supplier or service provider and the Special Receiver or as may be ordered by this Court.

Powers of the Receiver

26. The Special Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Defendant's assets, property, business, and affairs and, without in any way limiting the generality of the foregoing, the Special Receiver is hereby expressly empowered and authorized to do any of the following where the Special Receiver considers it necessary, appropriate, or desirable:

- a. To take possession of and exercise control over the Defendant's property and any and all proceeds, receipts and disbursements arising out of or from the Defendant's property;
- b. To receive, preserve and protect the Defendant's property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- c. To manage, operate and carry on the business of the Defendant, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the Defendant's business, or cease to perform any contracts of the Defendant;
- d. To negotiate and enter into financings, incur debt, or grant liens as necessary, desirable, or appropriate in the management of the Defendant's business, assets, or affairs, subject to Court approval;
- e. To retain, hire, or discharge employees on behalf of the receivership estate (none of whom are, or shall be deemed to be, employees of the Court or the Special Receiver) and to establish their wages, salaries, and benefits;
- f. To engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the Special Receiver's powers and duties, including without limitation those conferred by this Order, in each case subject to Court approval; provided, that, no such Court approval shall be required with respect to the Special Receiver's engagement of (1) Doss Engineering, Inc.; (2) accountants, legal counsel or such other persons in the normal and ordinary course of the receivership estate's business or operations, or (3) such other third-party contractors as may be deemed necessary by the Special Receiver to conduct the receivership estate's operations, including but not limited to, with respect to any and all reclamation activities;
- g. To purchase, lease, repair or replace machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Defendant or any part or parts thereof;
- h. To receive and collect all monies and accounts now owed or hereafter owing to the Defendant and to exercise all remedies of the Defendant in collecting such monies, including, without limitation, to enforce any security held by the Defendant;
- i. To settle, extend or compromise any indebtedness owing to or by the Defendant, subject to Court approval;
- j. To execute, assign, issue and endorse documents of whatever nature in respect of any of the Defendant's property, whether in the Special Receiver's name or in the name and on behalf of the Defendant, for any purpose pursuant to this Order;
- k. To undertake environmental or workers' health and safety assessments of the defendant's property and operations; To enter into consent orders, consent decrees, or other agreements with applicable environmental regulatory agencies with respect to the Defendant's environmental obligations, including the Defendant's environmental obligations under this Order;

- l. To cause the Defendant to perform any bonding and reclamation obligations so as to comply with applicable state and federal laws and regulations and effect the release of bonds for the benefit of the Defendant;
- m. To investigate, pursue, make, file, represent, defend against, and enter an appearance in any demand, lawsuit, action, claim, petition, filing, litigation, and proceeding, whether judicial or administrative, against any person for and on behalf of the Defendant, its interests, and its property;
- n. To initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Defendant, the Defendant's property or the Special Receiver, and to settle or compromise any such proceedings subject to Court approval;
- o. To direct the litigation strategy of the Defendant in any lawsuit, proceeding, action, administrative proceeding, or similar proceeding, including, without limitation, acting on behalf of and representing the Defendant's and its interests in any bankruptcy proceeding involving the Defendant;
- p. To market any or all of the Defendant's property, including advertising and soliciting offers in respect of the Defendant's property or any part or parts thereof and negotiating such terms and conditions of sale as the Special Receiver in its discretion may deem appropriate;
- q. To sell, convey, transfer, lease or assign the Defendant's property or any part or parts thereof outside the ordinary course of business,
 - i. Without the approval of this Court in respect of any transaction not exceeding \$50,000 up to an aggregate consideration for all such transactions does not exceed \$500,000; and
 - ii. With the approval of this Court;
- r. To apply for any order or orders necessary to convey the Defendant's property or any part or parts thereof to a purchaser or purchasers thereof free and clear of any liens or encumbrances affecting such property;
- s. To report to, meet with, and discuss with such affected persons as the Special Receiver deems appropriate all matters relating to the Defendant's property, assets, operations, and affairs and the receivership, and to share information, subject to such terms as to confidentiality as the Special Receiver deems advisable;
- t. To register a copy of this Order and any other Orders in respect of the Defendant's property against title to any of the Defendant's property;
- u. To apply for any permits, licenses, approvals, or permissions as may be required by any governmental authority and any renewals, modifications, extensions, or releases thereof for and on behalf of and in the name of the Defendant;

- v. To review all the Defendant's insurance policies, including workers' compensation, disability, general liability, and hazard insurance, and to cancel, renew, extend, retain, modify, purchase, or otherwise deal with such insurance, engage the agent of record therefor, and name the receivership estate as an additional insured or loss payee, as the Special Receiver deems appropriate for the Defendant and its properties' preservation and protection;
- w. To exercise any shareholder, partnership, joint venture or other rights which the Defendant may have;
- x. To exercise any and all rights, powers, duties, and privileges of the Defendant, including, without limitation, any attorney-client or other similar privilege;
- y. To file a petition in bankruptcy and prosecute a bankruptcy case and any related proceedings for the Defendant;
- z. To make any and all other significant decisions affecting the Defendant or its business, affairs, or properties in the exercise of its reasonable business judgment; and
- aa. To take any steps reasonably incidental to the exercise of these powers or the performance of its duties;

And in each case where the Special Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so to the exclusion of all other persons, including the Defendant and its officers, directors, agents, representatives, and employees, and without interference from any other person.

27. With respect to the exercise of the powers specified in the preceding decretal paragraph, the Special Receiver shall be vested, exclusively, with the standing and all authority of the board of directors, shareholders, members, managers and officers of the Defendant and shall exclusively have all the duties, powers, and authority thereof under its certificates or articles of incorporation, operating agreements, bylaws, and any other organizational documents with respect thereto.

28. The Special Receiver may defend against any lawsuit, action, claim, petition, filing, litigation, or proceeding brought against him in its capacity as a Special Receiver or

against or pertaining to the Defendant. Any and all costs and expenses, including attorneys' fees, arising from or incurred in connection with such legal actions or suits shall be paid as operating expenses of the receivership estate(s).

29. The Special Receiver shall not be responsible for the preparation and filing of any tax returns for the Defendant or its subsidiaries or affiliates (including any income, personal property, commercial activity, gross receipts, sales and use, or other tax returns) for any tax period ending prior to the date of the Special Receiver's appointment, it being understood that the Special Receiver shall be responsible for the preparation and filing of any tax returns for the Defendant for tax periods ending during the tenure of the Special Receiver.

30. The Special Receiver may recommend to the Court (a) that it be authorized to perform any other duties and responsibilities it reasonably believes may be necessary or appropriate to further the objectives of the receivership, including but not limited to leasing, selling, assigning, transferring or conveying the Defendant's property or any interest therein or performing any capital improvements thereto, or (b) such other or further relief as it may deem necessary or appropriate to further the objectives of the receivership.

31. The Special Receiver shall prepare and file with the Court on a monthly basis a report of the Special Receiver's actions taken pursuant to this Order and an accurate accounting of all monies collected, disbursements made, and expenses incurred. Copies of such reports and accountings shall be served on all counsel of record and unrepresented parties herein simultaneously with their filing.

32. All actions taken by the Special Receiver pursuant to the authorizations contained in this Order shall be valid, binding, and enforceable acts of the Defendant.

Injunctions Against Interference with Receivership

33. All persons, including but not limited to the Defendant and its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, are enjoined from in any way interfering with the operation of the receivership or in any way disturbing the assets, liabilities, and operations of the receivership, pending further Order of this Court.

34. The Defendant is hereby enjoined from taking any action with respect to the operation or management of its properties, assets, business, and affairs, except as requested by the Special Receiver, pending further Order of this Court.

35. All officers, directors, employees, attorneys, accountants, and equity interest holders of the Defendant (a) are directed to use their best efforts to ensure a smooth transition of the operation of the Defendant's business and assets to the Special Receiver, (b) are prohibited from interfering with the Special Receiver in the exercise of its rights, powers, duties, and privileges hereunder or taking any action inconsistent with the terms and provisions of this Order, (c) shall fully cooperate with the Special Receiver in carrying out its rights, privileges, and duties under this Order, including responding promptly to all reasonable requests for information or documentation and execution of documents, and (d) are barred from commencing a case under the Bankruptcy Code or other insolvency proceeding for or on behalf of the Defendant.

36. Any and all existing proceedings against or in respect of the Defendant or its property are hereby stayed and suspended pending further Order of this Court, *provided*, *however*, that nothing in this Order shall (a) prevent any person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such

proceeding is not commenced before the expiration of the stay provided by this paragraph or (b) affect any state or federal regulatory agency's police and regulatory authority in respect of the Defendant and the Defendant's assets and operations, including any action, suit or proceeding that is taken in respect of the Defendant by or before the regulatory agency, other than the enforcement of a payment order by the regulatory agency.

37. No person shall file suit or take other legal or enforcement action against the Defendant or the Defendant's property, including the commencement of an involuntary case under the Bankruptcy Code or other insolvency proceeding against the Defendant or the Defendant's property, except (a) any action taken by a state or federal regulatory agency pursuant to its police and regulatory authority in respect of the Defendant and the Defendant's assets and operations, including any action, suit or proceeding that is taken in respect of the Defendant by or before the regulatory agency, other than the enforcement of a payment order by the regulatory agency with respect to payment obligations incurred prior to the Special Receiver's appointment, (b) with the written consent of the Special Receiver, or (c) in accordance with an Order of this Court permitting the suit or action.

38. The exercise of all rights and remedies against the Defendant, the Special Receiver, or the Defendant's property, including, without limitation, the exercise of setoff rights and the creation, perfection or enforcement of a lien, are hereby stayed and suspended except with the written consent of the Special Receiver or an Order of this Court permitting the exercise of such rights and remedies.

39. Nothing in this Order shall be interpreted to alter, diminish or enlarge the rights or obligations of any person who has issued surety bonds on behalf of the Defendant (a "Surety") or the rights of any beneficiary of surety bonds issued on behalf of the Defendant as to any third

party, including any Surety or governmental authority, nor shall anything in this Order be deemed to enjoin any Surety or governmental authority from asserting any rights, claims, or defenses against any third party, including any Surety or governmental authority. For the avoidance of doubt, any Surety and governmental authority shall retain any and all rights afforded to it under the Surface Mining Coal and Reclamation Act and the Water Pollution Control Act, the state counterparts thereto, and the rules and regulations promulgated thereunder.

Termination of Receivership Order

40. The Special Receiver may apply to the Court to terminate this Order in the event that

- a. All or substantially all of the Defendant's mining permits shall have been revoked pursuant to final orders of the regulatory agencies that issued those permits; or
- b. The Special Receiver determines that it lacks the ability to comply with its obligations under this Order, including for a lack of sufficient funding; or
- c. The Special Receiver is unable to reach agreements with appropriate regulatory authorities or any Surety as to the prioritization of reclamation and compliance efforts; or
- d. Is unable to ensure it has the necessary authority and protections to manage or dispose of liabilities, obligations or properties arising from operations or properties outside of West Virginia; or
- e. A case under the Bankruptcy Code or other insolvency proceeding is commenced and has not been dismissed or suspended within sixty days thereafter.

In any of these events, the Special Receiver shall be entitled to an order terminating this Order upon at least ten (10) days' notice to all parties in interest in the receivership. If the Court terminates this Order then the Special Receiver shall cooperate with the Defendant or any successor receiver in an orderly transfer of estate property.

Scope of this Order

41. To the fullest extent permissible by law given this Court's *in rem* jurisdiction over the Defendant's property, assets, operations, and affairs, this Order is intended to and shall (a) apply to all persons without regard to their residence or domicile or contacts within the State of West Virginia and to all federal, state, and local governmental authorities having jurisdiction and power over the Defendant's property, assets, operations, and affairs and (b) be given Full Faith and Credit in accordance with the Constitution of the United States.

Retention of Jurisdiction

42. This Court shall retain jurisdiction with respect to all matters arising from or related to the receivership estate, the Special Receiver, the management and operation of the Defendant's business, properties, and affairs, and the implementation of this Order.

Notice of Entry of Order

43. Counsel for the Plaintiff is directed to serve a copy of this Order upon the Defendant and all known creditors, employees, equity interest holders, regulatory agencies, owners and controllers, and other parties interest of the Defendant within five business days from the entry of this Order. The costs and expenses associated with such service shall constitute an expense of the receivership estate and be reimbursed, upon the submission of an appropriate invoice therefor, by the Special Receiver.

44. This Order supersedes and replaces the Temporary Order previously entered by the Court, but shall not be deemed to affect the rights of any person under the Temporary Order for any acts or actions undertaken pursuant thereto prior to the date hereof.

Dated: March __, 2020

Circuit Court Judge

EXHIBIT A
COMPENSATION OF SPECIAL RECEIVER

- For the work contemplated by the Order, Doss Special Receiver, LLC will bill and be paid on an hourly basis at Mr. Doss' customary rate (less a 15% discount) as shown on the attached rate sheet for Doss Engineering, Inc.:
 - Provided that the Special Receiver shall be paid for a minimum of 60 hours work per month regardless how many hours are expended, but not more than 120 hours per month.
- The Special Receiver shall be entitled to use the services of Doss Engineering, Inc. at the rates in the attached term sheet (less a 10% discount).
- Upon entry of the Order, the Special Receiver shall be entitled to a lump sum payment of \$18,500 to cover the initial costs of professional services (including Mr. Doss') and of procuring additional insurance.
- In the event that the Order is terminated, the Special Receiver withdraws as Receiver or the Surety elects to stop funding the Special Receiver then upon the presentation of a final bill the Surety shall pay the Special Receiver within 10 days.

Doss Engineering, Inc.
Professional Engineering Services

RATE & FEE SCHEDULE
As of January 1, 2020

Confidential

Principal / Professional Engineer	\$150.00	/ hour
Litigation & Due Diligence Support	Quoted on Request	
Senior Mining Engineer / Project Manager	\$90.00	/ hour
Senior Geologist	\$85.00	/ hour
Staff Engineer	\$75.00	/ hour
Senior Aquatic Biologist / Taxonomist	\$75.00	/ hour
Staff Geologist	\$65.00	/ hour
Staff Biologist	\$65.00	/ hour
Engineering / Environmental Technician		
Auto-Cad	\$60.00	/ hour
Permitting / Office	\$50.00	/ hour
Field	\$40.00	/ hour
Laboratory	\$30.00	/ hour
Clerical / Administrative	\$37.50	/ hour
2-man Survey Crew	\$85.00	/ hour
2-man GPS Survey Crew	\$120.00	/ hour
UAV / Drone Pilot	\$75.00	/ hour
Mileage	\$0.75	/ mile
Misc. Materials, Other Direct Expenses	Cost + 10%	
Travel	At Cost	
Payment Terms:	Net 30 days from receipt of invoice	

Rates are effective January 1, 2020, but are subject to change without notice.

**EXHIBIT
FUNDING FACILITY TERM SHEET**

**ERP ENVIRONMENTAL FUND, INC.
\$ 1,000,000 Senior Secured Receivership Delayed Draw Term Loan Facility
Summary of Terms and Conditions**

THIS SUMMARY OF TERMS AND CONDITIONS (THE “**TERM SHEET**”) DOES NOT CONSTITUTE A LEGALLY BINDING OBLIGATION OR COMMITMENT, UNLESS AND UNTIL IT IS FULLY EXECUTED AND DELIVERED BY ALL PARTIES HERETO AND ALL CONDITIONS PRECEDENT SET FORTH BELOW HAVE BEEN SATISFIED OR WAIVED. *The terms outlined below in this Term Sheet are the terms and conditions for a senior secured receivership delayed draw term loan credit facility to be made available to ERP Environmental Group, Inc. This Term Sheet; a credit agreement containing substantially the terms and subject the conditions set forth in the Term Sheet, if any; the Temporary Order, the Preliminary Order, and any other order entered by the Court in connection with this Term Sheet (collectively, the “**Orders**”), shall constitute the exclusive and definitive documentation and agreement among the parties (the “**Receivership Facility Documents**”).*

Borrower:	ERP Environmental Fund, Inc., (“ Borrower ”), by and through Doss Special Receiver, LLC, as its proposed Special Receiver (the “ Receiver ”) in a proceeding (the “ Receivership ”) to be filed in the Circuit Court of Kanawha County, West Virginia (the “ Court ”). The date of the commencement of the Receivership will be referred to as the “ Receivership Date .”
Lender:	Indemnity National Insurance Company, a Mississippi corporation (“ Lender ”).
Funding Facility:	A maximum amount of \$1,000,000 in the aggregate, as follows: A senior secured U.S. dollar denominated delayed draw term loan facility in an aggregate principal amount of up to \$1,000,000 (the “ Receivership Facility ” and the loans made thereunder, the “ Receivership Loans ”). The Receivership Loans may be drawn in multiple installments, with up to \$325,000 of Receivership Loans available upon entry of the Temporary Order.
Security and Priority:	The obligations of the Borrower under the Receivership Facility shall have the priority afforded to them pursuant to the Orders and shall be secured by a perfected security interest and lien on all real and personal property of the Borrower, whether now owned or hereafter acquired (the “ Collateral ”), without any requirement for the execution, delivery, recording or filing of any security agreement, mortgage, deed of trust, financing statement or similar document, instrument or agreement covering such Collateral.

	Upon entry of the Preliminary Order (as defined below), the Lender's lien on the Collateral shall be superior to and shall prime any and all pre-existing liens and security interests in the Collateral. The Lender shall be deemed to have consented to the release of its liens such that the Receiver can effectuate the sale of the property of the Borrower, subject to the terms of Orders, <i>provided</i>, that the proceeds of such sale(s) shall only be used for those purposes identified in the Orders, subject to a budget to be negotiated by the Lender and the Receiver. The Receiver, on behalf of the Borrower, shall execute and deliver to Lender all such mortgages, security agreements, deeds of trust or other documents and instruments as may be reasonably required by the Lender to evidence and secure the Receivership Facility. The Lender shall be solely responsible for all costs associated with the preparation and filing of any requested financing documents.
Purpose:	Amounts that may be made available under the Receivership Facility shall be used by the Receiver to fund the costs of administering the Receivership and for the general operating expenses of the Borrower in complying with the specific tasks identified in the applicable Orders. All expenditures from the Receivership Loans, other than the initial Receivership Loan of \$325,000, shall be subject to a budget to be prepared by the Receiver and approved by the Lender (the " Budget ") subject to permitted variances to be agreed upon by the Receiver and the Lender.
Interest:	The Receivership Loans shall bear interest at the rate of two percent (2%) per annum. All interest shall be computed on the basis of a year consisting of 360 days and shall be calculated based on the daily principal amount outstanding for such period. All interest shall be payable in kind and shall be paid in full on the Termination Date (as defined below).
Maturity:	The Receivership Facility shall mature upon the " Termination Date ," which, with respect to the Receivership Facility, shall be the earliest of (a) the date that is twenty-four (24) months after the Receivership Date and (b) the acceleration of the Receivership Loans and the termination of the Receivership Facility in accordance with the Receivership Facility Documents.
Conditions Precedent to Initial Credit Extension:	The obligation of the Lender to make the initial Receivership Loan is subject to the satisfaction (or waiver by the Lender) of the following conditions: (a) The Receivership Date shall have occurred on or before March 27, 2020; and (b) A temporary order creating the Receivership estate, appointing Doss Special Receiver, LLC as Receiver, and approving the Receivership Facility and this Term Sheet (the "Temporary Order"), shall have been entered by the Court, in form and substance acceptable to Lender, within seven (7) days of the Receivership Date.

Conditions Precedent to Subsequent Credit Extensions:	The obligation of the Lender to make any Receivership Loans after the initial Receivership Loan is subject to the satisfaction (or waiver by the Lender) of the following conditions: (a) Each of the Receivership Facility Documents shall continue to be in full force and effect and no Event of Default (as defined below) shall have occurred and be continuing; (b) A preliminary order reaffirming the Temporary Order and granting certain other relief, including, but not limited to, the priming liens identified herein (the “Preliminary Order”), shall have been entered by the Court, in form and substance acceptable to Lender; (c) The Borrower / Receiver shall have complied in all material respects with all agreements and covenants required to be performed or complied with by it under the Receivership Facility Documents; (d) The Receiver shall have provided the Lender with a Budget and, if applicable, the Borrower shall have been conducting its business in accordance with the Budget; (e) A request for borrowing shall have been made by the Receiver; (f) The Orders shall be in full force and effect and shall not have been vacated, revised, or modified or stayed in any respect; and (g) The making of such advance shall not violate any requirement of law and shall not be enjoined temporarily, preliminarily or permanently.
Events of Default:	The occurrence of any of the following events, unless waived by the Lender in writing, shall constitute an “Event of Default” and collectively “Events of Default”: (a) The failure of Borrower to pay principal or interest at the Termination Date or as otherwise set forth in the Receivership Facility Documents; (b) The Receiver shall fail to observe or to perform any other covenant, obligation, condition or agreement contained in the Receivership Facility Documents; (c) The Receiver shall make any expenditure of the proceeds of the Receivership Loans or the Collateral that is in excess, subject to any permitted variances, of the amounts permitted by the Budget; (d) The Receivership is dismissed or terminated; (e) A voluntary or involuntary petition in bankruptcy, or other state or federal law proceeding for the rearrangement of debts, is filed by or against the Borrower; (f) Doss Special Receiver, LLC resigns or is terminated as the Receiver (or Barry Doss ceases to be the manager of Doss Special Receiver, LLC) and is not replaced by a substitute receiver (or manager) satisfactory to the Lender within thirty (30) days of such resignation or termination; (g) Without the express written consent of Lender, any surety bond issued by the Lender in favor of the Borrower is forfeited by the obligee; (h) The applicable Order shall not be in force and shall have been vacated, revised, or modified or stayed in any respect; and

	(i) The Court approves any alternative financing which, without the written consent of the Lender, primes the liens and security interests granted to the Lender pursuant to this Term Sheet. Any Event of Default shall be deemed not to be continuing if the events, acts or conditions that gave rise to such Event of Default have been remedied or cured or have ceased to exist. Upon the occurrence of an Event of Default, the Lender may (x) declare (i) the termination, reduction or restriction of any further commitment to the extent any such commitment remains, (ii) all obligations to be immediately due and payable without presentment, demand, protest, or other notice of any kind, all of which are expressly waived by the Borrower, and (iii) the termination of the Receivership Facility; and (y) and upon the giving of five (5) calendar days' notice to the Borrower, exercise all other rights and remedies provided for in the Receivership Facility Documents and applicable law, including, but not limited, the exercise of any and all rights in the Collateral. In the event that the Receivership Facility is terminated for any reason other than as identified in (b) above, and the Borrower does not have sufficient cash on hand to pay the outstanding fees and expenses of the Receiver, the Lender shall pay any unpaid amount to the Receiver within ten (10) days of such request by the Receiver.
Reporting:	The Receiver shall promptly provide the Lender with all information reasonably requested by the Lender in connection with the Borrower and the Receivership Facility, including, but not limited to, budgets, budget variances, accounts receivable and payable statements, general ledgers, etc.
Governing Law:	This Term Sheet shall be governed by the laws of the state of New York without regard to its conflict of law principles.

ERP ENVIRONMENTAL FUND, INC.

 By its Special Receiver, Doss Engineering, LLC,
 By its Manager, R. Barry Doss

INDEMNITY NATIONAL INSURANCE COMPANY

 Thomas Elkins, President

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HAROLD D. WARD, Acting Director, Division
of Mining and Reclamation, West Virginia
Department of Environmental Protection,

Plaintiff,

v.

ERP ENVIRONMENTAL FUND, INC.,

Defendant.

FILED
Clerk of the Circuit Court
Kanawha County, West Virginia
MAR 26 2020

CIVIL ACTION NO. 20-cv-282
Tabet

**AFFIDAVIT OF HAROLD D. WARD IN SUPPORT OF PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND
TEMPORARY AND PRELIMINARY APPOINTMENT OF A SPECIAL RECEIVER**

COUNTY OF KANAWHA)
) ss:
STATE OF WEST VIRGINIA)

HAROLD D. WARD, being duly sworn, deposes and says:

1. I am the Director of the Division of Mining and Reclamation and Deputy Secretary of the West Virginia Department of Environmental Protection ("DEP").
2. Unless otherwise stated herein, I have personal knowledge of the facts stated herein.

ERP Permits, Violations, and DEP Orders

3. ERP Environmental Fund, Inc. ("ERP"), the Defendant herein, holds more than 100 DEP-issued permits to mine coal and conduct other activities at numerous mine sites in West Virginia.
4. Upon information and belief, ERP also holds permits to mine coal in other States, including Kentucky, Illinois, and Tennessee.

5. As of the date hereof, DEP has issued 160 notices of violations of various conditions associated with ERP's West Virginia mining permits, many of which have not yet been abated.

6. In an attempt to address those unabated violations, DEP has issued 118 failure to abate cessation orders, none of which ERP has taken appropriate action to abate.

7. In a further attempt to address those unabated violations, DEP has issued forty-one orders to show cause why the related permits should not be revoked.

8. Despite DEP's administrative actions to enforce the West Virginia Surface Coal Mining and Reclamation and Water Pollution Control Act, ERP remains in violation of the same.

9. In fact, ERP recently acknowledged and agreed that it is in material default of its obligations under its permits and its reclamation agreement with DEP and does not have any sources of cash or other assets available for the reclamation and water treatment required under its permits, the reclamation agreement, or applicable law. A copy of the term sheet in which ERP acknowledges the same is attached hereto as Exhibit A.

10. In addition, upon information and belief and in view of its lack of cash and other assets, ERP has, as of March 19, laid off all of its employees and ceased operating all together.

11. Since the beginning of February, ERP had been performing only limited essential activities with emergency and limited outside funding to address imminent threats to the public health and safety at ERP's "Martinka" mine.

12. In view of ERP's complete cessation operations, I would expect that ERP will continue to accrue violations and that the underlying causes of certain of its existing violations will materially worsen, particularly as spring approaches and precipitation increases the amount of water flowing onto and through ERP's mine sites. ERP's mine sites stand in varying stages of

land disturbance and substantial land reclamation and water treatment obligations exist on those sites.

13. Without immediate and decisive action to resume even the most basic permit and site maintenance, many of ERP's mine sites can be expected to begin to threaten imminent and identifiable harm to the environment and the public health and safety.

ERP's Martinka Mine

14. Of particular concern to DEP is ERP's Tygart River Mine complex in Marion County that DEP commonly refers to as the "Martinka" mine.

15. The Martinka mine has been closed for years, but requires constant remediation to prevent imminent harm to the public health and safety.

16. Both surface and groundwater flows work to influence the volume of water that can inundate a mine void. The water that flows into a mine void contains many natural elements, but when water accumulates in the voids, water can exhibit highly elevated levels of certain elements. This is the case at Martkina and absent effective treatment the water can be extremely harmful to humans and the environment.

17. A mine void has a natural "pool." As water fills the mine, the potential for the mine to become fully inundated increases as does the potential, depending on the chemical characteristics exhibited by the coal seam and surrounding strata, for polluted discharges from the mine. When this occurs, the mine has the potential to artesian or discharge through other uncontrolled points.

18. To avoid artesianing or discharge through other unauthorized point sources, the pool level requires constant monitoring and maintenance of the pool elevation. The pumped water requires treatment for contaminants before it discharges into tributaries of the Tygart

River. ERP has advised DEP that the costs associated with the pumping and treatment of water at Martinka has run nearly \$900,000 annually.

19. As ERP's operating cash flow has deteriorated and now dried up completely, it began to engage in only intermittent and sporadic pumping and treatment of the Martinka mine pool. In addition, ERP only sporadically performed normal and routine maintenance of the pumps. As a result, the Martinka mine pool has risen at rates as fast as one foot per week and has reached elevations that have come to within four to six feet of what DEP has determined to be critical pool elevation that would result in the uncontrolled artesianing of the mine water. These flows would bypass the designed capture and treatment system associated with the site. This would result in contaminated water discharging into the receiving stream that is the source of drinking water for thousands of West Virginians within a matter of weeks if not days.

20. ERP has communicated to DEP that it does not have the resources to maintain the dewatering and treatment required at the Martinka operation.

21. Given the exigent circumstances, DEP stepped in and agree to provide limited funds to repair and replace the pumps and continue to pump and treat water at the Martinka mine in the short-term, but ERP remains in desperate need for funds to continue to pump and treat water at the Martinka mine.

ERP's Acquisition of the Permits

22. Except for one permit first issued to ERP in or about 2019, ERP acquired the permits it holds in connection with Patriot Coal Corporation's second Chapter 11 bankruptcy case in 2015.

23. In connection with that case, Patriot proposed to sell its valuable mining assets in West Virginia to Blackhawk Mining, LLC, a well-known and established coal mining company that already operated several mines in West Virginia.

24. Patriot initially proposed to close its other mining sites in West Virginia and transfer the mines and the associated permits to transfer a liquidating trust or other similar entity that would be obligated to reclaim and remediate the shuttered mine sites.

25. At the time, DEP estimated that the costs of reclaiming and remediating Patriot's "abandoned" sites in excess of \$230 million.

26. In addition, DEP was aware of a federal consent order requiring Patriot to treat selenium-laced water at various of its mine sites in southern West Virginia with estimated treatment costs running, at that time, in the hundreds of millions of dollars.

27. Inasmuch as Patriot proposed to "fund" the liquidating trust with only limited unliquidated and illiquid assets, DEP (and various agencies of the United States) opposed Patriot's proposed plan and embarked on extensive litigation to oppose bankruptcy court approval of the plan in the bankruptcy case.

28. During that time, however, an individual named Tom Clarke and his affiliated entity, Virginia Conservation Legacy Fund ("VCLF"), appeared on the scene in the summer of 2015.

29. Mr. Clarke and VCLF proposed to take transfer of Patriot's troubled mining sites and Patriot's proposed funding sources and complete the required reclamation and remediation.

30. Patriot executives, even though they expressed skepticism of the proposal in a meeting with me, quickly latched onto Mr. Clarke's proposal and incorporated it into Patriot's bankruptcy plan.

31. I met with Mr. Clarke several times over the summer and fall of 2015 and conducted and caused an investigation of Mr. Clarke and VCLF.

32. During those meetings and investigation, I learned that Mr. Clarke and VCLF had no experience in the operation or reclamation and remediation of coal mines; instead, Mr. Clarke had been an executive of a nursing home business and VCLF had only recently acquired the Natural Bridge tourist attraction in Virginia, and Mr. Clarke's only "coal mining experience" appeared to involve an unpaid consulting assignment monitoring compliance issues for Southern Coal Company. *See, e.g.,* https://www.roanoke.com/news/local/jim-justice-gets-helping-hand-from-botetourt-conservationist/article_0993fee9-e083-54cb-a364-b09c72fedea7.html.

33. Concerned about Mr. Clarke's lack of experience in the industry and the adequacy of the funding for his proposed acquisition, DEP continued to oppose Patriot's bankruptcy plan and the proposed transfer of Patriot's troubled mine sites to VCLF.

Settlement Agreement with Patriot

34. In the end, however, and after extensive litigation and negotiations, DEP entered into a settlement agreement in the bankruptcy case with Patriot, VCLF, and Blackhawk. A copy of the settlement agreement, dated as of October 27, 2015, is attached hereto as Exhibit B.

35. Pursuant to the settlement agreement,

- a. Patriot agreed to post an additional "pool bond" in West Virginia in the amount of \$12.5 million to fund the reclamation and remediation of its former mine sites should VCLF fail to complete them (Ex. B at § 1);
- b. Blackhawk agreed to provide \$7 million worth of reclamation work on the West Virginia sites (Ex. B. at § 2); and

- c. VCLF agreed to fund and grant DEP security interests in various sources of cash and a “collateralized reclamation account” (Ex. B. at § 5)

36. The bankruptcy court in Patriot’s bankruptcy case approved Patriot’s plan on October 9, 2015 and Patriot consummated its bankruptcy plan on October 26, 2015; in connection therewith, VCLF consummated its acquisition of Patriot permits, an acquisition ultimately by ERP as VCLF’s recently organized subsidiary, the following day.

Reclamation and Collateral Agreements with ERP

37. In furtherance of the settlement agreement, DEP entered into a detailed reclamation agreement and a collateral and deposit account control agreement (the “collateral agreement”) with VCLF and ERP on February 17, 2016. Copies of the reclamation agreement and collateral agreement are attached hereto as Exhibits C and D, respectively.

38. Pursuant to the collateral agreement, ERP and VCLF granted DEP a fully perfected security interest in and to substantially all its cash and cash flow, including

- a. The amount of any proceeds received by them upon phased bond releases in accordance with the settlement agreement;
- b. The net proceeds of the sale of any coal mined at any of the sites on which ERP holds a DEP-issued permit;
- c. Certain cash flow generated from the operation of another VCLF-acquired operating mine in northern West Virginia; and
- d. The proceeds of certain claim settlements.

39. In furtherance thereof, the reclamation agreement established detailed parameters relating to the use of those funds, including the prioritizing of ERP’s reclamation and remediation activities (Ex. C at § 3), a detailed budgeting and accounting process and the process

for the release of funds from the collateralized reclamation account (Ex. C at § 5), which was then and has remained under DEP's complete control.

ERP's Management Issues

40. With no mining experience himself, upon ERP's acquisition of the Patriot permits and sites, Mr. Clarke hired a former Patriot mining engineer, Matt Cook, to oversee ERP's reclamation and remediation activities as ERP's president.

41. Over the years, DEP has developed a good working relationship with Mr. Cook, and Mr. Cook has, in my opinion, generally performed well and as best as he could in accordance with the reclamation agreement, subject to the massive funding and other challenges he has faced as detailed below.

42. But, upon information and belief, Mr. Cook is a mining engineer and does not have a financial or accounting background.

43. Although DEP has occasionally had communications with others in Mr. Clarke's organization who appear to have some financial or accounting background, those individuals have appeared to me to play no consistent role in the financial or accounting affairs of ERP.

44. And while Mr. Clarke appears to have some financial and accounting background and experience, Mr. Clarke has played virtually no role in ERP's relationship with DEP since ERP acquired the Patriot permits and sites.

45. Instead, upon information and belief, Mr. Clarke embarked almost immediately after the Patriot transaction on an acquisition binge that seems to have diverted his and his management's attention from ERP's operations and management.

46. DEP has direct knowledge of two of Mr. Clarke's first two acquisitions, the purchase of two coal mines from Cleveland Cliffs, including one in West Virginia known as the

Pinnacle Mine, and the purchase of assets out of the Walter Energy bankruptcy in Alabama that included the Maple-Eagle mine in West Virginia.

47. But, upon information and belief, Mr. Clarke also almost immediately embarked on an entire series of unrelated acquisitions, including an iron ore mine in Minnesota, at least one steel mill, a coal mine in Canada, a gold mine in California, and many others.

48. Since completing the acquisition of the Patriot permits and mines, Mr. Clarke also pursued other mining acquisitions—of Alpha Natural Resources in 2016, of the Oxford mine and then the Kemmerer mine out of Westmoreland Coal in 2019, and of Blackjewel's Wyoming mines in 2019.

49. Over the years and as evidenced in ERP's regular budgeting and accounting under the reclamation agreement, ERP has suffered from variously insufficient, intermittent and sporadic funding.

50. By the middle of 2018, ERP's sources of funding, other than the limited proceeds of intermittent coal sales generated by its mining of coal incidental to reclamation, had largely dried up and ERP requested that DEP permit it to access the \$1 million in funds in the collateralized reclamation account that the parties had previously earmarked for water treatment to provide for ongoing reclamation at the former Patriot sites.

51. DEP agreed to permit ERP access to those funds on the terms and subject to the conditions set forth in a binding term sheet dated as of October 11, 2018. A copy of the term sheet is attached hereto as Exhibit E.

52. Pursuant to the term sheet, ERP agreed to grant DEP liens in certain real and personal property and deposit the net proceeds of all asset sales into the collateralized reclamation account. *See* Ex. E at §§ 3 & 4.

53. ERP never did, however, sell assets as contemplated in the term sheet.

54. Instead, upon information and belief and based upon documentation ERP provided to DEP's attorneys, ERP repeatedly encumbered some of those assets to secure other debts.

55. DEP only recently learned and received documentation showing that an ERP-related entity that subsequently merged into ERP had granted two mortgages and a deed of trust in certain of its real property to secure promissory notes that entity, as well as Mr. Clarke and two other individual ERP insiders, issued to a law firm totaling \$4.2 million; that deed of trust now allegedly encumbers real property owned by ERP. Copies of the filed mortgages and deed of trust are attached hereto as Exhibits F, G, and H.

56. DEP only recently learned and received documentation suggesting that ERP may have transferred its massive Hobet dragline equipment, putatively worth millions of dollars, to another Clarke-VCLF related entity which then granted the same law firm a security interest in the dragline apparently to secure the same debts. A copy of the related UCC filing is attached hereto as Exhibit I.

57. DEP also only recently learned that certain environmental groups received a judgment against ERP in 2019 and had registered that judgment in various West Virginia counties in the fall of 2019 to obtain judgment liens against ERP's real property in those counties, and that ERP entered into a forbearance agreement with those environmental groups in December 2019 agreeing, among other things, to pay the environmental groups 22.5% of the net proceeds realized by ERP from the sale of any real or personal property, even property to which the judgment lien did not extend. A copy of the forbearance agreement, which contains recitals as to the entry and registration of the judgment, is attached hereto as Exhibit J.

58. By late 2019 or early 2020, not only had ERP encumbered much of its valuable property but it had also completely run out of funds.

59. As it had done at various points since its inception in the fall of 2015, ERP again requested access to the \$12.5 million cash bond DEP had held since Patriot deposited those funds with the State Treasurer's Office in October 2015 pursuant to DEP's settlement agreement with Patriot and VCLF.

60. DEP denied that request yet again, but initiated discussions with ERP's surety bond issuer, Indemnity National Insurance Company.

61. Indemnity issued more than \$115 million in surety bonds to back ERP's obligations under its West Virginia permits.

62. If ERP remains in widespread default of its obligations under its permits as it is now, DEP would have to continue with its efforts to revoke all of ERP's remaining permits, forfeit, ultimately, the full \$115-plus million in surety bonds backing those permits, and transfer all of ERP's permits to the State's Special Reclamation Fund, which would thereupon assume responsibility for reclaiming and remediating all of ERP's mining sites in accordance with the terms of its permits.

63. DEP is concerned that forfeiting \$115 million in surety bonds at more or less the same time could be problematic.

64. In addition, transferring more than 100 permits to the Special Reclamation Fund would overwhelm the fund both financially and administratively, with the result that the actual reclamation and remediation of the ERP mining sites could be delayed.

65. Faced with those prospects, DEP and Indemnity began exploring alternatives for securing the reclamation and remediation of the ERP mining sites.

66. Indemnity has advised DEP that it is prepared to provide interim funding for approximately ninety days while exploring a longer-term fix.

67. To that end, Indemnity has already provided \$350,000 in funding to ERP within the past six weeks to allow ERP to meet certain basic environmental obligations in West Virginia and keep its staff employed. *See* Ex. A at § 4.

68. But ERP has exhausted that limited funding on its limited operations in just four weeks, requiring Indemnity to provide additional emergency funding to ERP.

69. Over the past two weeks, Indemnity has repeatedly advised ERP that it was unwilling to extend it further funding except on an extremely limited basis principally to address imminent threats to the public health and safety.

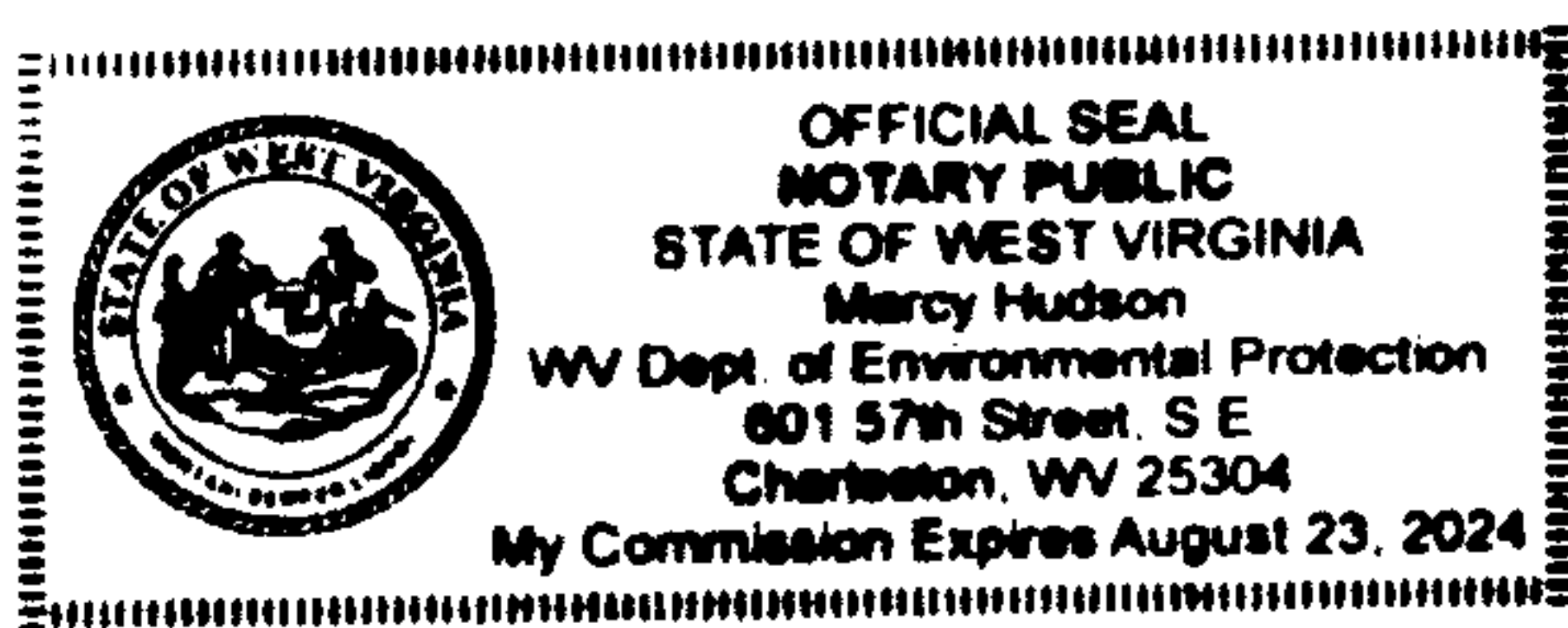
70. At the same time, Indemnity advised DEP that it would fund a special receiver charged with overseeing ERP's operations, assets, and affairs so that the special receiver might maintain certain priority sites and determine whether it is possible to develop an effective strategic business plan for maintaining its permits, reclaiming and remediating ERP's mining sites and obtaining bond release all in accordance with the surface mining and clean water laws applicable to its operations.

71. On March 17, 2020, I instructed DEP's lawyers to advise Mr. Cook that DEP would file this action and seek immediate injunctive relief against ERP and the appointment of a special receiver to ensure ERP's compliance therewith and, upon information and belief, they did so.

72. Upon information and belief, on that call, Mr. Cook advised that ERP agreed in principal with the appointment of a receiver.

73. In summary, DEP submits that

- a. The immediate entry of injunctive relief is necessary to compel ERP's compliance with the surface mining and water pollution laws applicable to its business operations:
- b. the appointment of a special receiver to assume control of ERP's assets, operations, and affairs is essential to ensuring ERP's compliance with the surface mining and water pollution laws applicable to its business operations.



Harold D. Ward
HAROLD D. WARD, Director of the
Division of Mining and Reclamation and
Deputy Secretary of the West Virginia
Department of Environmental Protection

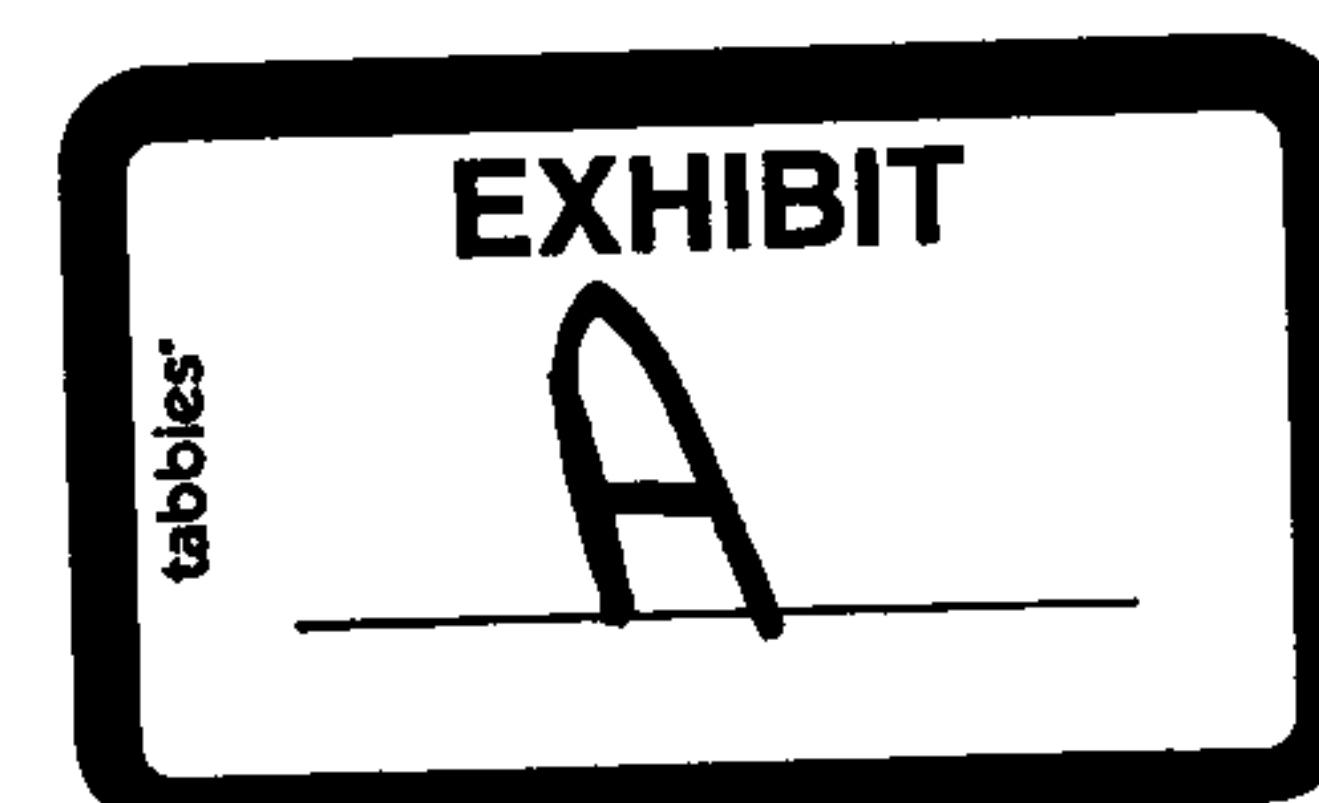
Subscribed and sworn to before me
this 25th day of March 2020

Marcy Hudson
Notary Public

WVDEP-INIC-ERP Environmental Fund Short-Term Funding Binding Term Sheet

The following sets forth the terms of an agreement (the “**Term Sheet**”) among the West Virginia Department of Environmental Protection (“**DEP**”), ERP Environmental Fund, Inc. (“**ERP**”), Virginia Conservation Legacy Fund, Inc. (“**VCLF**”) and certain other persons or entities within the ownership and control of ERP that are signatories hereto (collectively, the “**Clarke Parties**”), and Indemnity National Insurance Company (“**INIC**”), with respect to short-term funding for ERP’s ongoing reclamation and water treatment obligations on the West Virginia mining permits identified on **Exhibit A** (the “**Permits**”) and the mining sites relating thereto.

1. **Existence of Material Defaults.** VCLF and ERP acknowledge and agree that they have been and continue to be in material default on their obligations under the Reclamation Agreement dated February 17, 2016 among ERP, VCLF, and DEP (as the same may have been amended in writing executed in accordance therewith prior hereto, the “**Reclamation Agreement**”) and the Permits.
2. **Representations and Warranties.** VCLF and ERP represent and warrant that they have no sources of cash or other assets available to them for the continuing operation of their business and affairs and the reclamation and water treatment required under the Permits, the Reclamation Agreement, and applicable state and federal law, including any cash or other assets available for contribution to them from their members or their members’ insiders or affiliates, including any of the Clarke Parties, other than the proceeds of the prospective sales of assets.
3. **Negotiations Toward a Resolution.** INIC and DEP have agreed to enter into good faith negotiations concerning the provision for ongoing reclamation and water treatment on the Permits and the mining sites relating thereto in light of ERP’s inability to fund or provide for the same. ERP and the Clarke Parties agree to cooperate fully with those negotiations and acknowledge the possibility that a negotiated resolution may involve the transfer of ERP’s assets and the Permits or the responsibility therefor to a new entity and/or the initiation of a receivership or other similar proceeding. INIC acknowledges the possibility that a negotiated resolution will involve the need for additional funding by INIC. DEP acknowledges the possibility that a negotiated resolution may require certain concessions with respect to certain outstanding surety bonds issued by INIC. Execution of this Term Sheet shall not obligate DEP and INIC to enter into any such resolution or a long-term agreement concerning provision for ongoing reclamation and water treatment on the Permits, and neither DEP or INIC shall be obligated to provide any further funding of same, except as expressly set forth in this Term Sheet.
4. **Provision of Funding.**
 - a. Upon the execution of this Term Sheet by ERP, DEP, and INIC, INIC will fund to ERP \$350,000 in cash (the “**Funding**”). Such Funding, net of the Initial Funding (as defined below), will be paid and deposited directly into the “**Collateralized Reclamation Account**” (as defined in the Reclamation Agreement) covered by the Collateral and Deposit Account Control Agreement, dated February 17, 2016, with



The Huntington National Bank, and will be disbursed therefrom only directly to the vendor or, with respect to approved payroll expenses, to ERP and only at the written instructions of DEP.

- b. Pending the negotiation and implementation of a broader resolution, and as contemplated herein and in accordance with the conditions hereof, ERP may use the Funding on an as-needed basis on at least two Business Days' notice from ERP to DEP and INIC to pay for or fund (1) certain ongoing environmental obligations under the Permits in the State of West Virginia as set forth in lines 12 through 33 of the budget attached hereto as **Exhibit B**, specifically, the pumping and treatment of water from ERP's Martinka mine complex in Marion County, West Virginia, certain chemical treatment costs, certain water pumping costs, certain water sampling costs, and other actual costs and expenses incurred in administering the environmental obligations associated with Permits in West Virginia, including the provision of payroll associated with administering the environmental obligations (the "**Environmental Costs**") and (2) such other costs and expenses set forth in lines 35 through 50 of Exhibit B (the "**Other Expenses**"). ERP represents that Exhibit B hereto sets forth in detail its best estimate of the Environmental Costs it anticipates for the period covered in the budget on a weekly basis. INIC and ERP acknowledge and agree that DEP may release the Funding from the Collateralized Reclamation Account on an as-needed basis up to the amounts set forth in the budget in Exhibit B on a weekly basis, subject to (i) written verification from ERP to DEP and INIC of documented out-of-pocket, unaffiliated third-party costs and expenses for Environmental Costs and (ii) DEP's and INIC's prior written approval of such costs and expenses. DEP and INIC shall consult prior to approving the disbursement of any funds.
- c. VCLF and ERP acknowledge and agree that (a) the Environmental Costs constitute part of their ongoing environmental obligations in the State of West Virginia and (b) the Funding may be utilized solely for its documented and approved out-of-pocket, unaffiliated third-party expenses for the Environmental Costs and the Other Expenses. For the avoidance of doubt, the Funding may not be used to pay any of ERP's administrative expenses, holding costs, overhead, or the salaries or wages of any of its employees, other than those directly employed in administering the environmental obligations associated with the Permits in West Virginia and other States.

The parties acknowledge and agree that INIC prepaid directly to ERP the sum of \$132,000 of the Funding on February 5, 2020 (the "**Initial Funding**") to fund ERP's payroll on February 6, 2020 and the purchase of chemicals necessary for short-term water treatment, as set forth in Exhibit B hereto.

5. **Assets.** As a condition to the release of any funds (other than the Initial Funding), ERP shall
 - a. within ten days of the execution of this Term Sheet provide to DEP and INIC a complete inventory of, and make available title reports (including real property descriptions) to, all of its assets;

- b. within ten days of the execution of this Term Sheet a complete statement of all liens, claims, and encumbrances against its assets, together with any and all documentation relating thereto;
- c. within ten days of the execution of this Term Sheet provide to DEP and INIC documentation for all outstanding out-of-pocket, unaffiliated third-party expenses for pumping and treating water from ERP's Martinka mine complex and the other Permits since October 2015;
- d. within ten days of execution of this Term Sheet provide to DEP and INIC a listing of all employees of ERP and VCLF and identify which of these employees are responsible for tasks related to water sampling and treatment in the State of West Virginia;
- e. not sell, lease, or otherwise transfer any ownership interest of ERP or VCLF in any asset without the prior written consent of DEP and INIC such consent not to be unreasonably withheld; and
- f. immediately grant and provide DEP and INIC access to all VCLF and ERP files and records, including, but not limited to, those files and records pertaining to the Permits and ERP's environmental obligations.

All such inventories and accountings shall be subject to the approval of DEP and INIC.

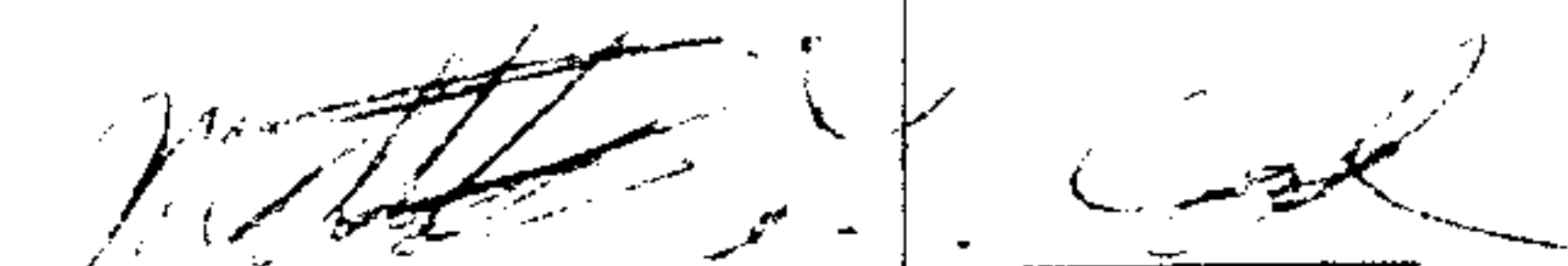
6. **Liens.** ERP hereby grants to the State of West Virginia and to INIC liens of equal priority upon all of its assets including, without limitation, accounts, deposit accounts, money, letter of credit rights, general intangibles, intellectual property, leases, real property, mineral rights, equipment, machinery, furniture, fixtures, inventory, as-extracted collateral, and proceeds of the same. Such liens shall secure all liabilities of ERP to DEP and INIC, respectively, related to the Permits. Immediately upon the execution of this Term Sheet, ERP shall provide DEP and INIC with detailed property descriptions of its real property interests and equipment to enable DEP and INIC to perfect liens previously granted and granted hereby. ERP shall cooperate with DEP and INIC in all respects in perfecting those liens as soon as is practicable after the execution of this Term Sheet. DEP and INIC shall grant releases of property from such liens to permit the sale of land and other assets, subject to their rights of consent with respect to any such sale under Section 5.e. above.
7. **Access to Documents and Information.** ERP shall (a) cooperate with and promptly respond to all requests of DEP and INIC for information and documents and (b) provide DEP and INIC or their representatives and agents full and complete access to its offices, books, and records upon reasonable notice therefor.
8. **Individual Signatories.** Thomas M. Clarke, Ana M. Clarke and Matthew Cook (the "**Individual Signatories**") are signatories to this agreement solely for the purpose of acknowledging the duties, rights and defaults of ERP and VCLF and to evidence the willingness of the Individual Signatories to cooperate in the resolution of material defaults identified herein. The execution of this agreement by the Individual Signatories does not impact their personal liability for such material defaults beyond that which may exist externally to this Agreement.
9. **No Release of Obligation.** Nothing set forth herein shall constitute or be deemed to (a) release, limit, alter, or otherwise affect any obligation or liability of VCLF or ERP (or any

other entity or person) under the Settlement Agreement dated October 27, 2015 among DEP and VCLF (the predecessor of ERP) and others (the "**Settlement Agreement**"), the Reclamation Agreement, the Permits, or any applicable state or federal law or rule, or any agreement with INIC, (b) release, limit, alter, or otherwise affect any obligation, liability, rights, or defenses of INIC under the surety bonds it issued relating to the Permits and applicable state and federal law, or (c) limit, impair, or affect (i) the rights or regulatory and enforcement authority of DEP with respect to the Reclamation Agreement, the Permits, or any applicable state or federal law or rule, including, without limitation, the right to revoke any or all of the Permits and forfeit any surety bonds or other collateral (including the "**Additional Cash Bond Account**" as defined in the Settlement Agreement) posted in connection therewith, or to pursue administrative, civil, or criminal actions to accomplish compliance with environmental laws, or (ii) any existing and outstanding enforcement actions or proceedings. Notwithstanding the parties' entry into this Term Sheet, ERP and the Clarke Parties acknowledge and agree that its or their respective obligations and liabilities under the Settlement Agreement, the Reclamation Agreement, the Permits, and any applicable state or federal law or rule remain outstanding and in full force and effect.

10. **Breach of Agreement.** ERP's or the Clarke Parties' breach of this Term Sheet shall constitute a Default under Section 8.a. of the Reclamation Agreement and entitle DEP to exercise all the rights set forth in Section 8.b. of the Reclamation Agreement.
11. **Conditions and Execution.** This Term Sheet constitutes the entire understanding of the parties relating to the subject matter hereof and any changes to this understanding must be in writing signed by all parties. Further, the heretofore referenced Settlement Agreement and Reclamation Agreement are hereby affirmed and are not in any way altered hereby. This Term Sheet is subject to the execution and delivery of this Term Sheet and any other documents contemplated hereby by each of the parties hereto. This Term Sheet may be executed and delivered in counterparts and by facsimile or email communication and the communication thereof shall be deemed to constitute an original signature of this Term Sheet.

Dated: February 19, 2020

ERP Environmental Fund, Inc.

By: 
 Name: Matthew Cool
 Its: President

West Virginia Department of Environmental
Protection

By: _____
 Name: _____
 Its: _____

other entity or person) under the Settlement Agreement dated October 27, 2015 among DEP and VCLF (the predecessor of ERP) and others (the "**Settlement Agreement**"), the Reclamation Agreement, the Permits, or any applicable state or federal law or rule, or any agreement with INIC, (b) release, limit, alter, or otherwise affect any obligation, liability, rights, or defenses of INIC under the surety bonds it issued relating to the Permits and applicable state and federal law, or (c) limit, impair, or affect (i) the rights or regulatory and enforcement authority of DEP with respect to the Reclamation Agreement, the Permits, or any applicable state or federal law or rule, including, without limitation, the right to revoke any or all of the Permits and forfeit any surety bonds or other collateral (including the "**Additional Cash Bond Account**" as defined in the Settlement Agreement) posted in connection therewith, or to pursue administrative, civil, or criminal actions to accomplish compliance with environmental laws, or (ii) any existing and outstanding enforcement actions or proceedings. Notwithstanding the parties' entry into this Term Sheet, ERP and the Clarke Parties acknowledge and agree that its or their respective obligations and liabilities under the Settlement Agreement, the Reclamation Agreement, the Permits, and any applicable state or federal law or rule remain outstanding and in full force and effect.

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Dated: February 19, 2020

ERP Environmental Fund, Inc.

By: _____

Name:

Its:

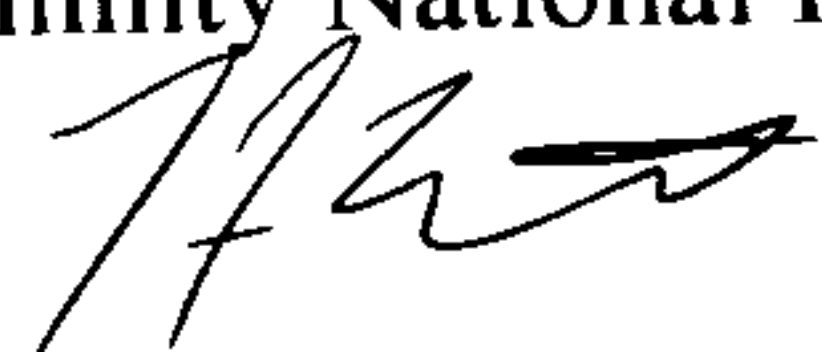
West Virginia Department of Environmental Protection

By: Harold D. Ward

Name: Harold D. Ward

Its: Dep. Sec. / Dir. DMR

Indemnity National Insurance Company



By: _____
Name: **Thomas F. Elkins**
Its: **President**

ACKNOWLEDGED AND AGREED TO:

Virginia Conservation Legacy Fund, Inc.

By: _____
Name: _____
Its: _____

VCLF Holdings LLC.

By: _____
Name: _____
Its: _____

VCLF Land Trust, Inc.

By: _____
Name: _____
Its: _____

Thomas M. Clarke

Ana Clarke

Matt Cook

Matt Cook

Indemnity National Insurance Company

By: _____
Name:
Its:

ACKNOWLEDGED AND AGREED TO:

Virginia Conservation Legacy Fund, Inc.

By: _____
Name:
Its:

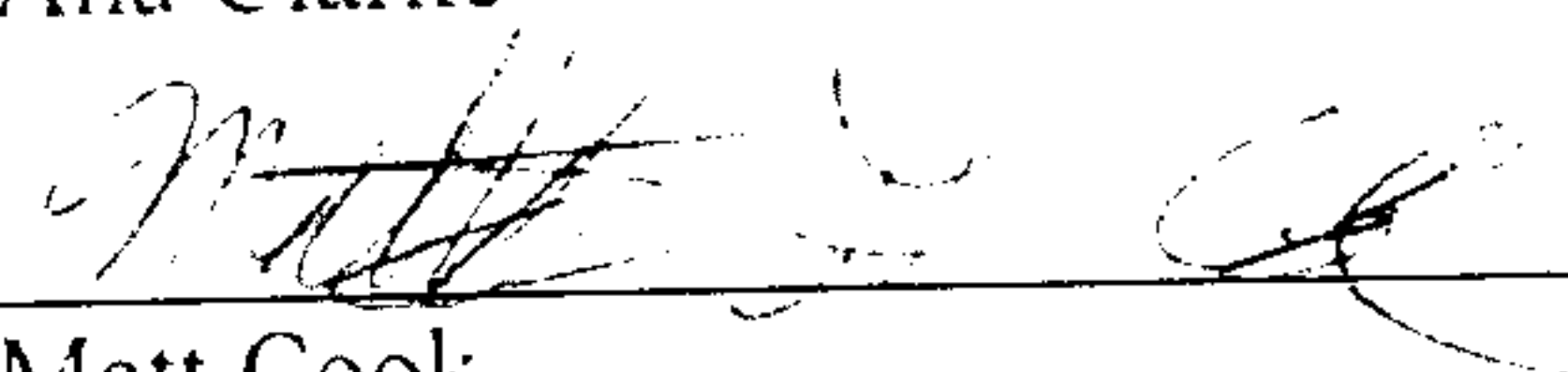
VCLF Holdings LLC.

By: _____
Name:
Its:

VCLF Land Trust, Inc.

By: _____
Name:
Its:

Thomas M. Clarke

~~Ana Clarke~~


Matt Cook

EXHIBIT A

Exhibit A Permits

NAME	DESCRIPTION	COMPANY	DEPARTMENT	ID CODE
Remington				
General		410	2576	P9999
Stockburg 1	Weatherby Plant and Refuse, U-80-83	410	2576	P0001
Stockburg 2	Ruger, U-64-83	410	2576	P0002
~~Dwkins~~	~~U-3001-01~~	410	2576	P0003
Closed KE				
General		410	2960	P9999
~~Essex 1~~	~~S-3001-89~~	410	2960	P0004
Mulra	U-3019-01	410	2960	P0005
Essex	U-3009-03	410	2960	P0006
Closed Catenary				
General		410	2424	P9999
Witcher	O-28-85, H541	410	2424	P0007
Shrewsbury Refuse	R-56	410	2424	P0008
Kelly's Creek No 6	S-47-79	410	2424	P0009
Kelly's Creek No 6 Surface	S-87-43	410	2424	P0010
~~Pond Gap~~	~~U-6-111~~	410	2424	P0011
Morris Fork Plant	O-58-82	410	2424	P0012
Belcher Refuse	O-80-82	410	2424	P0013
~~Morris Fork HR~~	~~O-59-82~~	410	2424	P0014
No. 77a Mine	U-87-83	410	2424	P0015
B-Mile No. 1	S-124-80	410	2424	P0016
B-Mile No 2	S-100-82	410	2424	P0017
Carver	S-72-83	410	2424	P0018
Mountain View				
General		410	0658	P9999
Cut23	S-268-76	410	0658	P0019
Cut21	S-38-76	410	0658	P0020
Cut24	S-103-80	410	0658	P0021
Robin6	O-31-82	410	0658	P0022
Cut22	S-218-75, S-38-80	410	0658	P0023
~~Cut30~~	~~S-6015-86~~	410	0658	P0024
White Oak Refuse	R-753	410	0658	P0025
Cut26	S-193-77, O-21-82	410	0658	P0026
White Oak HR	H170	410	0658	P0027
Morris Fork - Youngs Branch	S-141-75, H897	410	0658	P0028
Tygart River				
General		410	0985	P9999
Treatment Plant		410	0985	P0029
Tygart River Mine	EM-125	410	0985	P0030
Sand Bank Refuse	R-756	410	0985	P0031
Powell Refuse	R-747	410	0985	P0032
Levee Road Refuse	O-1001-87	410	0985	P0033
Grassy Run Pump Site		410	0985	P0034
Midland Trail Point Lick				
General		410	2585	P9999
Preparation Plant	P-574	410	2585	P0035
~~Surface Impoundment~~	~~O-3015-93~~	410	2585	P0036
Campbell Creek No 6	U-3026-93	410	2585	P0037
Campbell Creek No 7	U-3036-04	410	2585	P0038
Campbell Creek Haulroads	H-42	410	2585	P0039
Catenary Paint Creek				
General		410	2305	P9999
Samples Mine	S-3024-90	410	2305	P0040
Mine Extension	S-3004-95	410	2305	P0041
South Extension	S-3017-95	410	2305	P0042
White Oak Extension	S-3010-00	410	2305	P0043
T-Extension	S-3030-07	410	2305	P0044
N-Extension	S-3004-08	410	2305	P0045
Stanley Heritage	S-3035-93	410	2305	P0046
Kayford South	S-3008-00	410	2305	P0047
Pinebree Flats	S-3015-07	410	2305	P0048
Samples Haulroad	O-3002-05	410	2305	P0049
Wildcat Surface	S-3006-00	410	2305	P0050

Pine Ridge				
General		410	0833	P9999
Preparation Plant	O-14-83	410	0833	P0051
Refuse Impoundment	O-69-83	410	0833	P0052
Big Mountain 16	U-5033-91	410	0833	P0053
Lower Dorothy	U-5005-06	410	0833	P0054
Board Camp	U-5023-08	410	0833	P0055
~~White's Fork~~	U-5020-09	410	0833	P0056
White's Branch	U-5002-00	410	0833	P0057
~~Chestnut Hollow~~	S-6013-89	410	0833	P0058
William's Mountain	S-5029-95	410	0833	P0059
Robin Hood Plant and Refuse	O-76-82	410	0833	P0060
Big Mountain 8	D-65-82	410	0833	P0061
Big Laurel HR	O-28-82	410	0833	P0062
Big Mountain HR	H-6	410	0833	P0063

Colony Bay				
General		410	1580	P9999
Shop Knob	S-87-80	410	1580	P0064
Central	S-5022-94	410	1580	P0065
South	S-7-81	410	1580	P0066
Jasper Workman MA	H-224	410	1580	P0067
Colony Bay HR	H-534	410	1580	P0068

Eastern				
General		410	1727	P9999
Koppenston Refuse	O-19-83	410	1727	P0069
Hillside No. 3	U-5049-92	410	1727	P0070
No. A and AA	EM-120	410	1727	P0071
Peachtree Refuse	O-5-82	410	1727	P0072
Eagle No. 1 and No. 2	U-4005-91	410	1727	P0073
Eagle No. 3	U-18-83	410	1727	P0074
~~Black Walnut No. 3~~	U-5046-05	410	1727	P0075
Beckley Complex	U-127-83	410	1727	P0076

Corridor G				
Quak Fork Surface Mine	S-5005-81			S500118
Camp Creek South Deep Mine	U-5009-01			
Hewitt Creek No. 1 Surface Mine	S-5027-99			
Horse Creek Haulroad	H-120			
Little Coal River Haulroad	H-291			
~~Julian Apple~~	~~L-732~~			
Ancillary Area	O-5010-87			
Slippery Gut Impoundment	O-6-81			
Beth Station Preparation Plant	P-495			
Coarse Refuse Fill	R-405			
Little Horse Creek Dry Refuse Fill	S-106-77			
Bragg Fork Surface Mine/Impoundment	S-128-76			
Big Horse Creek Surface Mine	S-32-85			
Towers Surface Mine	S-38-82			
Westridge No. 3 Surface Mine	S-5002-03			
Surface Mine No. 45	S-5002-07			
~~Surface Mine No. 44~~	~~S-5093-86~~			
Surface Mine No. 42	S-5003-07			
Westridge Surface Mine	S-5003-96			
Westridge South No. 1 Surface Mine	S-5004-04			
Surface Mine No. 22	S-5008-06			
Westridge No. 2 Surface Mine	S-5011-01			
Sugarfree Surface Mine	S-5016-92			
Northridge Surface Mine	S-5020-95			
~~Ballard/Chilton Contour~~	~~S-5022-02~~			
~~Boone Block Surface Mine~~	~~S-5024-97~~			
Stanley Fork surface Mine	S-5026-89			
Chestnut Oak Surface Mine	S-5033-08			
Ballard Fork Surface Mine	S-5080-88			
Sandlick Surface Mine	S-5012-12			
~~Almarva S Deep Mine~~	~~U-5005-99~~			
Camp Creek No. 1 Deep Mine	U-5008-94			
Chilton No. 1 Mine	U-5036-08			

Logan County				
East Ruffner	S-5079-85			
Guyan Surface Mine	S-5007-01			
North Rum	S-5006-05			
Ruffner A Point	S-75-85			
Ruffner Southwest	S-5001-90			
Northwest Ruffner	S-5005-93			
Winifrede Mine	U-5026-92			
~~Preparation Plant~~	~~P-610~~			
White Oak Impoundment	D-110-83			

EXHIBIT B

	A	B	C	D	E	F	G	H	I	J	K	L
1	ERP Environmental Fund, Inc.											
2	Short-Term Funding Term Sheet											
3	Exhibt B--Budget											
4												
5	Week ending			7-Feb		14-Feb		21-Feb		28-Feb		Total
6												
7	Starting balance			\$ 1,566		\$ 88,337		\$ 3,137		\$ 79,308		
8												
9	INIC Funding			\$ 132,000		\$ -		\$ 218,000		\$ -		\$ 350,000
10	Other income			\$ 105,137		\$ 2,622		\$ -		\$ -		\$ 107,760
11												
12	Expenses--WV											
13	Martinka											
14	Power					\$ 13,820						\$ 13,820
15	PSD Fee											\$ -
16	Chemicals			\$ 17,542						\$ 17,000		\$ 34,542
17	Service					\$ 2,518						
18	New Pump & install											
19	Fuel for pumps			\$ 12,822						\$ 7,000		\$ 19,822
20												
21	Employees											
22	Payroll			\$ 102,341		\$ 4,732		\$ 98,000				\$ 205,072
23	Workers Comp					\$ 42,000						\$ 42,000
24	Healthcare					\$ 8,141						\$ 8,141
25	Insurance Other							\$ 10,584				\$ 10,584
26												
27	Security (Dragline)			\$ 1,458		\$ 1,458		\$ 1,458		\$ 1,458		\$ 5,832
28												
29	Operating Fees											
30	Groundwater							\$ 8,800				\$ 8,800
31	OSM Payments							\$ 3,200				\$ 3,200
32												
33	WV Total			\$ 134,163		\$ 72,668		\$ 122,042		\$ 25,458		\$ 354,330
34												
35	Administrative											
36	Internet					\$ 2,117						\$ 2,117
37	Network Serv					\$ 3,487				\$ 570		\$ 4,057
38	Phones			\$ 2,954						\$ 2,954		\$ 5,907
39	Misc			\$ 1,250						\$ 1,250		\$ 2,500
40												
41	UMWA Contract											
42												
43	Other States											
44	Payroll			\$ 12,000				\$ 12,000				\$ 24,000
45	Healthcare					\$ 1,551		\$ 2,600				\$ 4,151
46	Workers Comp					\$ 8,000						\$ 8,000
47	Power (IL/TN)							\$ 5,186				\$ 5,186
48	Caustic (TN)									\$ 12,000		\$ 12,000
49												
50	Other States Total			\$ 12,000		\$ 9,551		\$ 19,786		\$ 12,000		\$ 53,337
51												
52	Ending Balance			\$ 88,337		\$ 3,137		\$ 79,308		\$ 37,077		\$ 37,077

SETTLEMENT AGREEMENT

THIS AGREEMENT (as may be amended or modified from time to time, this “Settlement Agreement”)¹ is made and entered into as of October 27, 2015, by and among Patriot Coal Corporation, on behalf of itself and its debtor-affiliates (collectively, the “Patriot Debtors”), the West Virginia Department of Environmental Protection (“DEP”), Blackhawk Mining, LLC (“Blackhawk”), and Virginia Conservation Legacy Fund, Inc. (together with any direct or indirect subsidiary thereof created pursuant to the Plan, including without limitation ERP Federal and ERP Settlement (each as defined below) “VCLF” and, together with the Patriot Debtors, DEP, and Blackhawk, the “Parties”).

WHEREAS on May 12, 2015 (the “Petition Date”), the Patriot Debtors each filed voluntary petitions for relief under chapter 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”) with the United States Bankruptcy Court for the Eastern District of Virginia (the “Bankruptcy Court”), which were jointly administered under case number 15-32450 (KLP) (collectively, the “Chapter 11 Cases”);

WHEREAS, on October 5, 2015, the Patriot Debtors, Blackhawk, VCLF, and DEP entered into that certain Term Sheet, which was attached as Exhibit U to the Plan Supplement [Docket No. 1593]; (the “Term Sheet”);

WHEREAS, the Term Sheet contemplated certain releases of and other terms applicable to the New Money Lender Entities;²

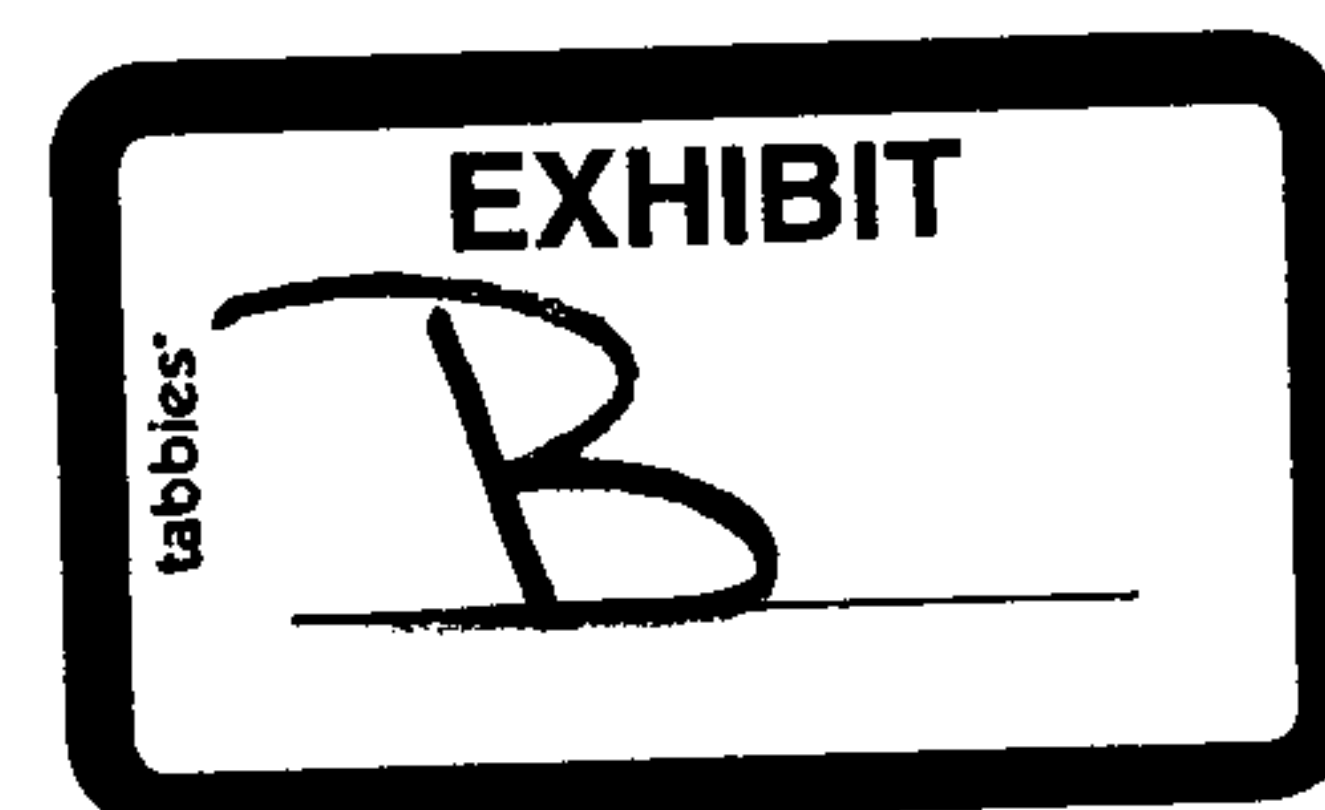
WHEREAS, on October 9, 2015, the Bankruptcy Court entered an order [Docket No. 1615] confirming the *Debtors’ Fourth Amended Joint Plan of Reorganization Pursuant to Chapter 11 of Bankruptcy Code* [Docket No. 1579] (the “Plan”);

WHEREAS, the Patriot Debtors entered into that certain asset purchase agreement, dated as of June 22, 2015, with Blackhawk (as amended, supplemented, or modified from time to time, the “Blackhawk APA” and the transaction contemplated by the Blackhawk APA, the “Blackhawk Transaction”) providing for the sale of certain of their assets;

WHEREAS, the Patriot Debtors entered into that certain asset purchase agreement, dated as of August 16, 2015, with VCLF pursuant to which VCLF would acquire the assets (excluding the Patriot Debtors’ receivables) not proposed to be acquired in the Blackhawk Transaction and agree to assume certain liabilities excluded from the Blackhawk Transaction, all as specified, and subject to the terms and conditions, therein (as amended, supplemented, or modified from time to

¹ Capitalized terms used but not defined herein shall have the meaning ascribed them in the Plan (as defined herein).

² As used herein, “New Money Lender Entities” means, collectively, the following in any and all capacities, including, without limitation, as Holders of Claims and/or Interests: (a) the Combined Company 1.5 Lien Term Loan Agent; (b) the DIP Lenders, (c) the Combined Company 1.5 Lien Term Loan Lenders; and (d) with respect to each of the foregoing Entities in clauses (a) through (c), all such Entities’ respective current and former affiliates and all such Entities’ and such affiliates’ respective current and former attorneys, financial advisors, consultants, representatives, advisors, accountants, investment bankers, investment advisors, actuaries, professionals, members (including ex officio members), officers, directors, employees, partners, subsidiaries, principals, agents, managers, administrators, trustees, managed funds, special purpose vehicles, accounts, investors, fund managers and representatives, and successors and assigns of each of the foregoing in any and all capacities.



time, the “VCLF APA” and the transaction contemplated by the VCLF APA, the “VCLF Transaction”);

NOW THEREFORE, in consideration of the foregoing and of the mutual covenants hereinafter set forth, the Parties hereto agree as follows:

1. **Funding of the Additional Cash Bond Account.** On or before the Effective Date of the Plan, the Patriot Debtors will deposit \$12.5 million with the West Virginia State Treasurer’s Office, or in another acceptable collateralized deposit account for the benefit of DEP (the “Additional Cash Bond Account”). Such funds, together with any additional funds deposited into the Additional Cash Bond Account in accordance with this Settlement Agreement, shall be held as additional cash bond for the ongoing obligations of the Patriot Debtors, VCLF, and the Liquidating Trust (but not Blackhawk or its affiliates) solely to meet their environmental obligations in the State of West Virginia, including their obligations to reclaim mines and to treat water, and shall not be available to or for the use of the Patriot Debtors, VCLF, or the Liquidating Trust.

2. **Blackhawk Reclamation Services Agreement.** Prior to the Effective Date, Blackhawk will enter into the Reclamation Services Agreement (the “Blackhawk Reclamation Services Agreement”) attached hereto as Exhibit 1.

3. **VCLF Reclamation Agreement.** VCLF and DEP will negotiate in good faith and use reasonable best efforts to enter into a reclamation agreement (the “VCLF Reclamation Agreement”) pursuant to which, among other things, the parties thereto will establish a detailed reclamation schedule with respect to the West Virginia permits to be assigned to VCLF and provide for the creation and funding of a water trust fund on a permit by permit basis in accordance with applicable West Virginia laws and rules. The VCLF Reclamation Agreement will provide that VCLF and its assignees may continue to mine coal incidental to reclamation as authorized in accordance with the VCLF Reclamation Agreement.

4. **Consent Order.** As soon as reasonably possible after the execution of the VCLF Reclamation Agreement and the Blackhawk Reclamation Services Agreement, each of the Patriot Debtors, VCLF, and Blackhawk agree to enter into a consent order with DEP (the “Consent Order”), which shall embody the terms of this Settlement Agreement, the VCLF Reclamation Agreement and the Blackhawk Reclamation Services Agreement, which Consent Order shall be in a form acceptable to each of the Parties. Notwithstanding anything foregoing to the contrary, neither (i) the omission of the New Money Lender Entities from the Consent Order nor (ii) the failure of the Parties to enter into the Consent Order, shall affect (a) either the release of the New Money Lender Entities set forth in Section 8(a) and 8(d) of this Settlement Agreement or any other provision of this Settlement Agreement intended to benefit the New Money Lender Entities or (b) any other provision of this Settlement Agreement.

5. **The Collateral Agreement and Other VCLF Matters.**

(a) VCLF and DEP will negotiate in good faith and use reasonable best efforts to enter into an agreement (the “Collateral Agreement”) within 30 days after the Effective Date, the materials terms of which shall be as described in Section 5(b) hereof.

(b) The Collateral Agreement shall provide that:

(i) VCLF shall establish, and pledge to DEP, a segregated deposit account (the "Collateralized Reclamation Account").

(ii) All amounts distributed by ERP Federal Mining Complex, LLC ("ERP Federal") on account of the 22.5% of ERP Federal's Free Cash Flow (Implied) (as defined in the ERP Proposed Business Plan dated September 26, 2015 (the "Business Plan")) allocable to VCLF shall be pledged to DEP and deposited into the Collateralized Reclamation Account.

(iii) All amounts distributed by ERP Settlement, LLC ("ERP Settlement") on account of the 10% of ERP Settlement's Claims Settlements (as defined in the Business Plan) allocable to VCLF shall be pledged to DEP and deposited into the Collateralized Reclamation Account.

(iv) The full amount of any proceeds received by VCLF upon phased bond releases in accordance with Section 7 hereof shall be deposited into the Collateralized Reclamation Account.

(v) Unless and until (x) VCLF, ERP Federal or ERP Settlement defaults under this Settlement Agreement, the VCLF Reclamation Agreement, or the Consent Order or (y) DEP shall issue a failure to abate cessation order with respect to any permit held by VCLF or any of its direct or indirect subsidiaries, DEP agrees that VCLF may use all amounts in the Collateralized Reclamation Account in the performance of its reclamation and water treatment obligations only within the State of West Virginia and only in accordance with the VCLF Reclamation Agreement.

(vi) Upon (x) a default by VCLF, ERP Federal or ERP Settlement under this Settlement Agreement, the VCLF Reclamation Agreement, or the Consent Order or (y) DEP shall issue a failure to abate cessation order with respect to any permit held by VCLF or any of its direct or indirect subsidiaries, all amounts held in the Collateralized Reclamation Account shall be paid into the Additional Cash Bond Account and held in accordance with the terms and conditions set forth in Section 1 hereof, and DEP shall be entitled to execute upon its collateral pledge of the VCLF's 22.5% share of ERP Federal's Free Cash Flow (Implied) and 10% share of ERP Settlement's Claims Settlements and any other amounts held in or payable into the Collateralized Reclamation Account.

(c) VCLF and ERP Federal agree that beginning in 2017, ERP Federal shall fund its asset retirement obligations at the Federal mine complex on a straight-line basis over the earlier of (x) six years and (y) the anticipated remaining life of the operations of the Federal mine complex, and the amounts necessary to fund such obligations shall be deducted from ERP Federal's Free Cash Flow (Implied).

6. If the VCLF APA is not consummated and a transaction is instead consummated using the Liquidating Trust, then Patriot, the Liquidating Trust and DEP will enter into the agreements mutually acceptable to DEP, Patriot, and the Liquidating Trust, which shall be

substantially similar to the agreements contemplated in Sections 2, 3, and 5 hereof that would be entered into by VCLF, ERP Federal, and/or ERP Settlement.

7. Maintenance of Reclamation Bonds and Phased Bond Releases.

(a) At all times hereafter, VCLF (including specifically any VCLF direct or indirect subsidiary named on a permit held in the State of West Virginia) shall maintain reclamation bonds with respect to each of the permits held in the State of West Virginia in the full amount required by law and shall fully perform its reclamation and water treatment obligations in accordance with the terms of its permits, the VCLF Reclamation Agreement, any associated reclamation plans, and applicable law.

(b) At all times from and after the date of this Settlement Agreement, DEP will provide for phased bond releases in accordance with all applicable law and rules, taking into account the terms of any water trust fund established with respect to the permits.

8. DEP Release.

(a) As of the Effective Date and subject to the timely deposit of the initial \$12.5 million into the Additional Cash Bond Account in accordance with Section 1 hereof, DEP immediately, unconditionally and irrevocably releases the New Money Lender Entities from any and all claims, interests, obligations, debts, rights, suits, damages, causes of action, remedies, and liabilities whatsoever, including any derivative claims asserted or which could be asserted, whether known or unknown, foreseen or unforeseen, existing or arising, in law, equity or otherwise, that DEP would have been legally entitled to assert or due to DEP or over which DEP has jurisdiction with respect to their investments in the Patriot Debtors or their conduct in connection with the Patriot Debtors, in each case arising prior to the Effective Date. For avoidance of doubt, such release will be and hereby is effective without regard to performance of the obligations in this Settlement Agreement other than the deposit of the initial \$12.5 million into the Additional Cash Bond Account.

(b) Subject to the performance of the obligations of the Patriot Debtors in this Settlement Agreement, DEP will unconditionally and irrevocably release the Patriot Debtors and each of the Patriot Debtors' officers, directors and advisors from any and all claims, interests, obligations, debts, rights, suits, damages, causes of action, remedies, and liabilities whatsoever, including any derivative claims asserted or which could be asserted, whether known or unknown, foreseen or unforeseen, existing or arising, in law, equity or otherwise, that DEP would have been legally entitled to assert or due to DEP or over which DEP has jurisdiction with respect to the Patriot Debtors, in each case arising prior to the Effective Date.

(c) Subject to the performance of the obligations of the Patriot Debtors in this Settlement Agreement, DEP waives its rights pursuant to W.Va. Code § 22-3-18(c) and agrees not to Permit Block (as defined herein) any of the Patriot Debtors' current and former partners, members, officers, directors, principals, employees, agents, and investors ("Protected Patriot Parties") for any conduct or activities relating to the Patriot Debtors

prior to the Effective Date. For purposes of this Section 8(c), “Permit Block” shall mean any action or inaction by DEP or any of its employees or agents to list or link any of the Protected Patriot Parties on the Applicant Violator System or to otherwise deny, block or prevent the processing or issuance of any application for a permit or any modification of an existing permit pursuant to the West Virginia Surface Coal Mining and Reclamation Act (“SMCRA”) on the grounds that any Protected Patriot Party is a violator or owner, operator, affiliate, controller or presumed controllers or other party having control over or responsibility for any violator with respect to any actual or alleged violations of SMCRA conditions attributable to mining or reclamation operations occurring at or in connection with any of the Patriot Debtors’ facilities or operations at any time on or prior to the Effective Date. DEP further agrees to unconditionally and irrevocably release the Protected Patriot Parties from all liability for unpaid fees, civil fines or penalties, or abatement obligations with respect to such violations or conditions, and fully and completely waives any rights it might have against the Protected Patriot Parties to seek a mandatory or prohibitory injunction under 30 U.S.C. § 1271(c) or W.Va. Code § 22-3-17(j) to make any member of the Protected Patriot Parties individually liable to abate a violation otherwise attributable to mining or reclamation operations occurring at or in connection with any of the Patriot Debtors’ facilities or operations at any time on or prior to the Effective Date.

(d) As of the Effective Date and subject to the timely deposit of the initial \$12.5 million into the Additional Cash Bond Account in accordance with Section 1 hereof, DEP waives its rights pursuant to W.Va. Code § 22-3-18(c) and agrees not to Permit Block (as defined herein) any of the New Money Lender Entities for any conduct or activities relating to the Patriot Debtors prior to the Effective Date. For purposes of this Section 8(d), “Permit Block” shall mean any action or inaction by DEP or any of its employees or agents to list or link any of the New Money Lender Entities on the Applicant Violator System or to otherwise deny, block or prevent the processing or issuance of any application for a permit or any modification of an existing permit pursuant to the West Virginia SMCRA on the grounds that any New Money Lender Entities is a violator or owner, operator, affiliate, controller or presumed controllers or other party having control over or responsibility for any violator with respect to any actual or alleged violations of SMCRA conditions attributable to mining or reclamation operations occurring at or in connection with any of the Patriot Debtors’ facilities or operations at any time on or prior to the Effective Date. Without in any way limiting the release in Section 8(a), DEP further hereby unconditionally and irrevocably releases the New Money Lender Entities from all liability for unpaid fees, civil fines or penalties, or abatement obligations with respect to such violations or conditions, and fully and completely waives any rights it might have against the New Money Lender Entities to seek a mandatory or prohibitory injunction under 30 U.S.C. § 1271(c) or W.Va. Code § 22-3-17(j) to make any member of the New Money Lender Entities individually liable to abate a violation otherwise attributable to mining or reclamation operations occurring at or in connection with any of the Patriot Debtors’ facilities or operations at any time on or prior to the Effective Date.

9. **Blackhawk Price Match.** To the extent VCLF seeks to use unaffiliated third-party contractors to perform any additional reclamation work under its reclamation plan or

permits over and above that contemplated by this Agreement, Blackhawk shall have a right to match the lowest bid from any third-party contractor for any construction, excavation, and grading work to be contracted by VCLF.

10. **No Abandonment.** The Patriot Debtors will not abandon, pursuant to section 554 of the Bankruptcy Code, any of their West Virginia mining complexes or any related property or permit either prior to the Effective Date or in connection with the consummation of the Plan.

11. **VCLF Acknowledgement.** VCLF acknowledges that as of and after the Effective Date:

(a) It shall be deemed as an operator or owner and controller under the West Virginia Surface Coal Mining and Reclamation Act with respect to all the West Virginia permits transferred or to be transferred to it; and

(b) Each of its entities to which permits are to be transferred must comply with all applicable laws with respect to such permit transfers.

12. **Obligations under the Modified Consent Decree.**

(a) VCLF agrees to assume obligations under: (i) the Order in *Ohio Valley Environmental Coalition, Inc. et al. v. Hobet Mining, LLC*, Civil Action No. 3:09-cv-1167 (S.D.W. Va.) dated September 1, 2010, as amended on October 8, 2010; (ii) the Modified Consent Decree in *Ohio Valley Environmental Coalition, Inc. et al. v. Hobet Mining, LLC*, Civil Action No. 3:09-cv-1167; and the Modified Consent Decree in *Ohio Valley Environmental Coalition, et al. v. Patriot Coal Corp., et al.*, Civil Action No. 3:11-cv-00115 (S.D.W. Va.), entered on January 9, 2013, and as subsequently modified by addenda filed on September 5, 2014; (iii) the settlement and consent order (including subsequent modifications) entered in *Mandirola v. Hobet Mining, LLC and Catenary Coal Co., LLC*, Case Nos. 07-C-03 & 10-C-96 (W. Va. Cir. Ct. Boone County); and (iv) the settlement and consent order (including subsequent modifications) entered in *Mandirola v. Apogee Coal Co., LLC*, Case No. 10-C-144 (W. Va. Cir. Ct. Logan County) (collectively, the “Consent Decrees”); VCLF covenants to sign and become a party to the Consent Decrees through a Joint Motion to Substitute or similar pleading.

(b) Subject to the substitution of VCLF for the Patriot Debtors under the Consent Decrees, DEP agrees to release the Patriot Debtors from their obligations under the state Consent Decrees and, to the extent allowed by law or rule, to reasonably cooperate in the Patriot Debtors’ efforts to obtain a release from the federal Consent Decrees.

(c) DEP agrees, to the extent allowed by law or rule, not to oppose the Patriot Debtors, Blackhawk, VCLF, or the Liquidating Trust in their efforts to modify the Consent Decrees with respect to the extension of the selenium compliance schedule by four years, and shall, to the extent allowed by law or rule, reasonably cooperate in all efforts to manage selenium discharges in a cost efficient manner.

13. **Conditions Precedent to Effectiveness of this Settlement Agreement.** This Settlement Agreement and the compromises and settlements and other terms and provisions reflected herein will be null and void and of no further force and effect in the event that:

- (a) The Effective Date does not occur;
- (b) The \$12.5 million is not deposited in the Additional Cash Bond Account in accordance with Section 1 hereof; or
- (c) The Blackhawk Reclamation Services Agreement is not entered into.

14. **Third Party Beneficiaries.** The Parties acknowledge and agree that the New Money Lender Entities are intended to be and hereby are acknowledged to be third party beneficiaries of this Settlement Agreement. Without limiting the generality of the foregoing, the New Money Lender Entities are intended to be and are the beneficiaries of the release set forth in Section 8(a) and (d), Section 16, Section 17, this Section 14, and any other provision of this Settlement Agreement which would benefit the New Money Lender Entities. All other Parties acknowledge and agree that the New Money Lender Entities have no duty of performance under this Settlement Agreement to any other Party. Notwithstanding anything to the contrary herein, subject to the occurrence of the Effective Date and the timely deposit of the initial \$12.5 million into the Additional Cash Bond Account in accordance with Section 1 hereof, all of the provisions of this Settlement Agreement expressly or impliedly inuring to the benefit of the New Money Lender Entities shall survive the expiration, termination or the superseding of this Settlement Agreement, in each case for any reason, and shall remain fully effective for the benefit of the New Money Lender Entities and fully enforceable by the New Money Lender Entities against each other Party notwithstanding such expiration, termination or superseding cause.

15. **Successors and Assigns.** The provisions of this Settlement Agreement shall be binding on the Parties and their successors and assigns, including any trustee appointed under chapter 11 of the Bankruptcy Code, and shall inure to the benefit of the Parties and their successors and assigns.

16. **Entire Agreement.** This Settlement Agreement constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof, and there are no representations, understandings, or agreements relative hereto which are not fully expressed herein. This Settlement Agreement may not be modified, altered, or amended in whole or in part except by a written instrument executed by all Parties. No modification, alteration or amendment of this Settlement Agreement, in whole or in part, shall impair, diminish or affect the release of the New Money Lender Entities set forth in Section 8(a) and 8(d) of this Settlement Agreement or any other provision of this Settlement Agreement expressly or impliedly intended to benefit the New Money Lender Entities.

17. **Governing Law.** This Settlement Agreement shall be governed by and construed under the laws of the State of West Virginia without regard for the conflicts of laws provisions thereof.

18. In Personam Jurisdiction and Venue for Disputes Relating to the New Money Lender Entities. Any dispute relating to the release of the New Money Lender Entities set forth in Section 8(a) and/or Section 8(d) shall be exclusively enforceable by, against and among the Parties and the New Money Lender Entities in the Bankruptcy Court or another federal court with competent jurisdiction within the Eastern District of Virginia, at the election of the New Money Lender Entities. Each Party to this Settlement Agreement hereby waives any right to file a motion, stipulate or consent, based on any grounds, to transfer jurisdiction of any action relating to such a dispute involving the New Money Lender Entities from such courts.

19. Authority and Validity. Each Party represents, warrants, and acknowledges, as of the Effective Date, that (a) it has all the requisite authority to execute and deliver this Settlement Agreement and the other documents and instruments contemplated hereby to which it is contemplated to be a party and perform its obligations under this Settlement Agreement and the other documents and instruments contemplated hereby to which it is contemplated to be a party, and to consummate the transactions contemplated herein and therein; (b) the execution, delivery and performance by it of this Settlement Agreement and the other documents and instruments contemplated hereby to which it is contemplated to be a party and the consummation of the transactions contemplated herein and therein have been duly authorized by all necessary action and no other action or proceeding is necessary to authorize and approve this Settlement Agreement or the other documents and instruments contemplated hereby to which it is contemplated to be a party or any of the transactions contemplated herein or therein; (c) this Settlement Agreement has been duly executed and delivered by it and constitutes a legal, valid and binding agreement by it, enforceable against it in accordance with the terms of this Settlement Agreement; and (d) the execution, delivery and performance by it (when such performance is due) of this Settlement Agreement does not and shall not (i) violate any provision of law, rule or regulation applicable to it, or (ii) conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any material contractual obligation to which it is a party.

20. No Reliance. Each Party represents and warrants that in entering into this Settlement Agreement it is relying on its own judgment, belief and knowledge and, as applicable, on that of any attorney it has retained to represent it in this matter. In entering into this Settlement Agreement, no Party is relying on any representation or statement made by any other Party or any person representing such other Party.

21. Modification or Amendment. This Settlement Agreement may be modified or amended only by written agreement executed by each of the Parties and, with regards to any provision impacting the New Money Lender Entities, the written consent of the New Money Lender Entities.

22. Further Assurances. From and after the Effective Date, each of the Parties agrees to use their respective commercially reasonable efforts to execute or cause to be executed and deliver or cause to be delivered all such agreements, instruments and documents and take or cause to be taken all such further actions as may reasonably be necessary from time to time to carry out the intent and purpose of this Settlement Agreement, and to consummate the transactions contemplated hereby and thereby.

23. **Third-Party Beneficiaries.** Except as otherwise explicitly set forth herein, nothing in this Settlement Agreement is intended to benefit or create any right or cause of action in or on behalf of any person other than the New Money Lender Entities and the Parties hereto (and their affiliated persons and entities who are intended to be beneficiaries of the releases and settlements set forth herein).

24. **Construction.** This Settlement Agreement has been drafted through a cooperative effort of all Parties, and none of the Parties shall be considered the drafter of this Settlement Agreement so as to give rise to any presumption of convention regarding construction of this document. All terms of this Settlement Agreement were negotiated at arms-length, and this Settlement Agreement was prepared and executed without fraud, duress, undue influence or coercion of any kind exerted by any of the Parties upon the other.

25. **Headings.** Titles and headings in this Settlement Agreement are inserted for convenience of reference only and are not intended to affect the interpretation or construction of the Settlement Agreement.

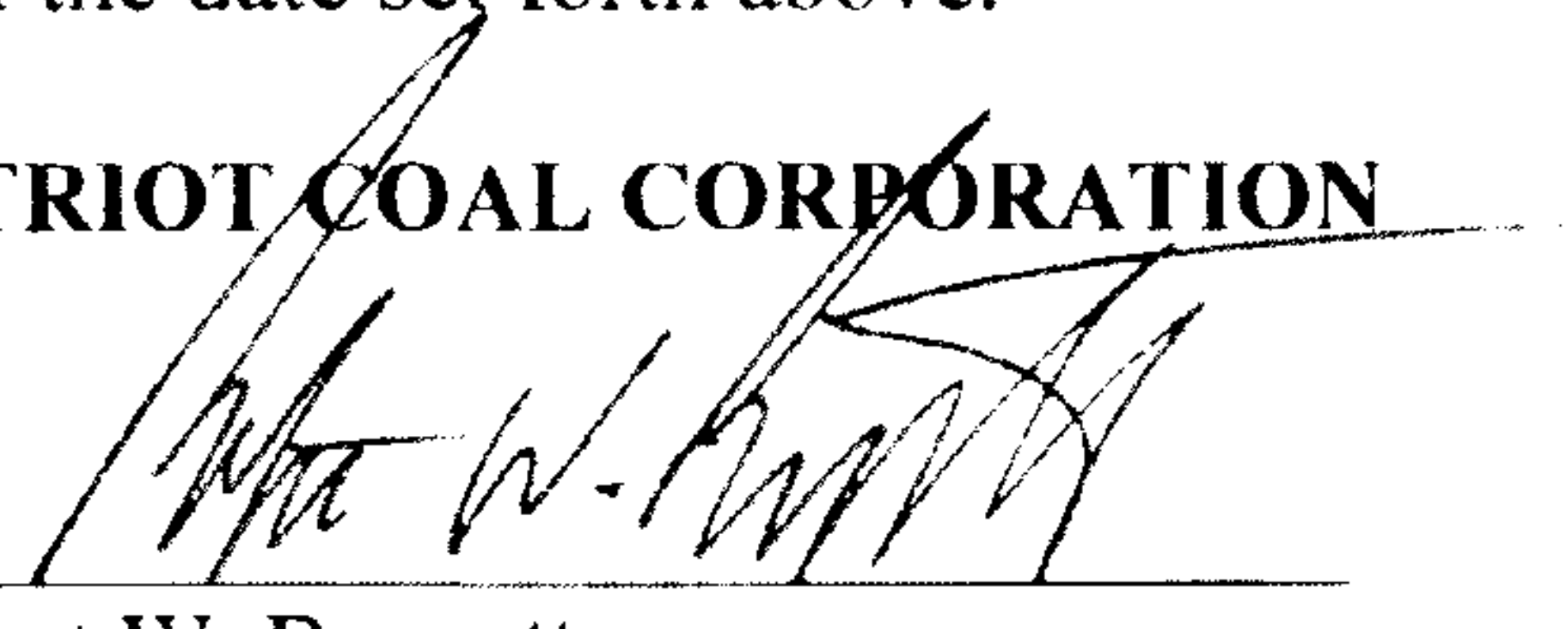
26. **Execution in Counterpart.** This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. All signatures of the Parties to this Settlement Agreement may be transmitted by facsimile or by electronic mail, and such transmission will, for all purposes, be deemed to be the original signature of such party whose signature it reproduces, and will be binding upon such party.

27. **Severability.** If any provision of this Settlement Agreement is determined to be prohibited or unenforceable by reason of any applicable law of a jurisdiction, then such provision shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions thereof, and any such prohibition or unenforceability in such jurisdiction shall not invalidate or render unenforceable such provisions in any other jurisdiction.

[Signature page follows]

IN WITNESS WHEREOF, the Parties hereto have executed this Settlement Agreement as of the date set forth above.

PATRIOT COAL CORPORATION

By: 

Robert W. Bennett

Its President and Chief Executive Officer

BLACKHAWK MINING LLC

By: _____

Name: _____

Title: _____

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: _____

Randy Huffman

Its Secretary

VIRGINIA CONSERVATION LEGACY FUND, INC.

By: _____

Name: Thomas M. Clarke

Title: President and CEO

Blackhawk Mining, LLC

By: 
John M. Potter
Its Chief Executive Officer

[Signature Page for Settlement Agreement]

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PATRIOT COAL CORPORATION

By: _____
Robert W. Bennett
Its President and Chief Executive Officer

BLACKHAWK MINING LLC

By: _____
Name: _____
Title: _____

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Randy Huffman
Its Secretary

VIRGINIA CONSERVATION LEGACY FUND, INC.

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Its President and Chief Executive Officer

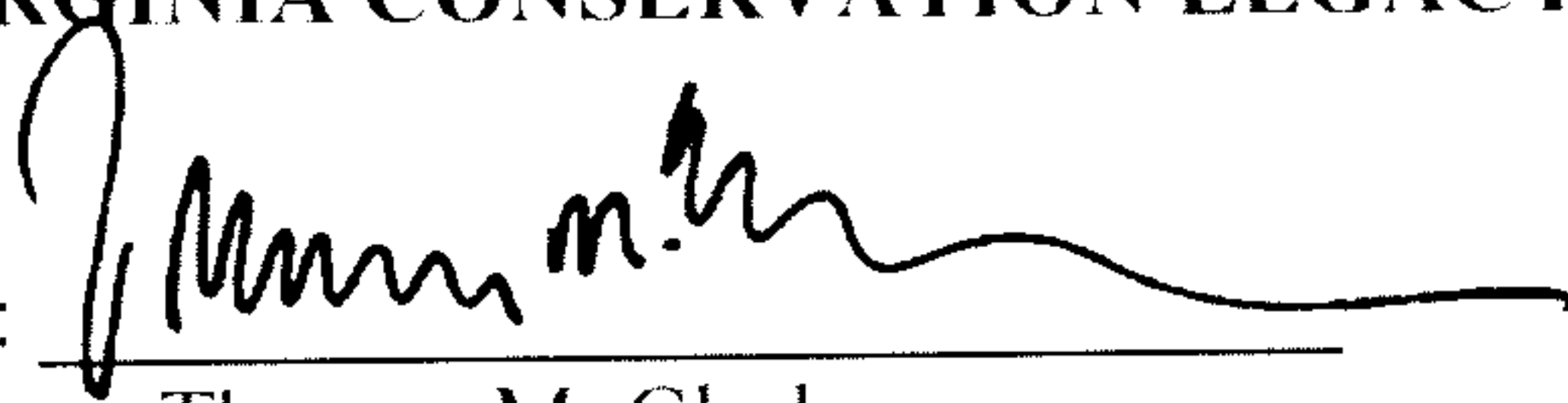
BLACKHAWK MINING LLC

By: _____
Name: _____
Title: _____

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

By: _____
Randy Huffman
Its Secretary

VIRGINIA CONSERVATION LEGACY FUND, INC.

By:  _____
Name: Thomas M. Clarke
Title: President and CEO