



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

**JUN 19 2007**

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Richard E. Parks  
Phoenix Coal Corporation  
1215 Nebo Road, Suite A  
Madisonville, KY 42431

**SUBJ: Consent Agreement and Final Order**  
**Docket No. CWA-04-2007-5504(b)**

Dear Mr. Parks:

Enclosed please find the Consent Agreement and Final Order (CAFO), Docket No. CWA-04-2007-5504(b), which the U.S. Environmental Protection Agency (EPA) has executed. After the public comment period was over and after the EPA reviewed and resolved any comments on the CAFO, the Regional Administrator signed the Final Order. In accordance with the terms of the CAFO, the date he signed the Final Order is the effective date of the CAFO.

If you have any further comments or questions regarding this matter, please contact Stephanie Fulton of my staff at (404) 562-9413, or your attorney can contact Bonnie Sawyer, Associate Regional Counsel, at (404) 562-9539.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Welborn", with the word "For" written to the right of the signature.

Thomas C. Welborn, Chief  
Wetlands, Coastal and Watersheds Branch

Enclosure

cc: U.S. Corps of Engineers, Louisville District  
Kentucky EPPC, Division of Enforcement, Frankfort

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

2007 JUN 19 AM 11:20

HEARING CLERK

RECEIVED  
EPA REGION IV

IN THE MATTER OF: )  
)  
CRITTENDEN COUNTY COAL, INC. ) CONSENT AGREEMENT AND  
Crittenden County, Kentucky ) FINAL ORDER  
)  
RESPONDENT. ) Docket No.: CWA-04-2007-5504(b)  
\_\_\_\_\_ )

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding under Section 309(g)(1) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(1), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, published at 64 Fed. Reg. 40176 (July 23, 1999), codified at 40 Code of Federal Regulations (C.F.R.) Part 22 (Part 22).

2. The authority to take action under Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), is vested in the Administrator of the United States Environmental Protection Agency (EPA). The Administrator has delegated this authority to the Regional Administrator Region 4, who in turn has re-delegated this authority to the Director of the Water Management Division of EPA Region 4 (Complainant).

**II. Statutory and Regulatory Background**

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states "[w]henever, on the basis of any information available - the Administrator finds that any person has violated [section 301 of the CWA, 33 U.S.C. § 1311], . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)(B)]."

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states "[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful." Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (COE), to issue permits for the discharge of dredged or fill material into navigable waters.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a "discharge of pollutants" as "[a]ny addition of any pollutant to navigable waters from any point source . . ."

6. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged.”

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

### **III. Allegations**

10. Respondent, Crittenden County Coal, Inc., at all times relevant to this Consent Agreement and Final Order (CAFO), was the owner and operator of a tract of land located southwest of Kentucky Highway 923 and Highway 256, southwest of the City of Sturgis, Crittenden County, Kentucky, near 37° 29' 47.1794" north latitude and 88° 00' 29.9224" west longitude (the Site) (Exhibits A and B).

11. Crittenden County Coal, Inc., is a person within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. Commencing on or about January 25, 2005, to March 23, 2006, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into streams on the Site using earth moving machinery, during unauthorized activities associated with surface mining operations.

13. Respondent impacted approximately 2,280 linear feet of an unnamed tributary to Caney Branch that is approximately 2.5 miles from the Tradewater River, a navigable-in-fact water of the United States. The Tradewater River enters the Ohio River, a navigable-in-fact water of the United States, approximately 3.5 miles downstream of its intersection with Caney Branch.

14. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Site are “point sources” as defined under the CWA § 502(14).

15. Respondent’s placement of the dredged and/or fill material at the Site constitutes a “discharge of pollutants” as defined under the CWA § 502(12).

16. The discharged dredged and/or fill material, including earthen material deposited at the Site, are “pollutants” as defined under the CWA § 502(6).

17. At no time during the discharge of dredged and/or fill material at the Site from January 25, 2005, to March 23, 2006, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent. Each discharge by the Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

18. Each day the material discharged by the Respondent remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

#### **IV. Stipulations and Findings**

19. Complainant and Respondent have conferred for the purpose of settlement under 40 C.F.R. Part 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. Part 22.13(b), this Administrative CAFO will simultaneously commence and conclude this matter.

20. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and the factual allegations set out above.

21. Respondent hereby waives its right to contest the allegations set out above and its right to appeal the Final Order accompanying this Consent Agreement.

22. Respondent consents to the assessment of and agrees to pay the administrative penalty as set forth in this CAFO and consents to the other conditions set forth in this CAFO.

23. By signing this CAFO, Respondent certifies that the information it has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

24. EPA reserves the right to assess and collect any and all civil penalties for any violation described in this Consent Agreement to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to EPA.

25. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of the CWA.

V. Payment

26. Under Section 309(g)(2)(b) of the CWA, 33 U.S.C. § 1319(g)(2)(b), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors, EPA has determined that ONE HUNDRED THOUSAND DOLLARS (\$100,000) plus Interest is an appropriate civil penalty to settle this action. Respondent shall submit quarterly payments of TWELVE THOUSAND, NINE HUNDRED, THIRTY-NINE DOLLARS AND SIXTY-THREE CENTS (\$12,939.63) over a two year period in accordance with the following schedule:

Payment Due Date	Payment Due
July 30, 2007	\$12,939.63
October 30, 2007	\$12,939.63
January 30, 2008	\$12,939.63
April 30, 2008	\$12,939.63
July 30, 2008	\$12,939.63
October 30, 2008	\$12,939.63
January 30, 2009	\$12,939.63
April 30, 2009	\$12,939.63

Payment of the remaining balance of the penalty may be made prior to the schedule listed above. To pay early, Respondent shall contact EPA sixty (60) days prior to making the final payment to determine the remaining balance owed on the penalty.

27. Payment shall be made via a cashier's or certified checks, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CAFO. Such payment shall be tendered to:

U.S. Environmental Protection Agency  
Cincinnati Accounting Operations  
Mellon Lockbox 371099M  
Pittsburgh, PA 15251-7099

28. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

*Matthew A. [Signature]*  
6/12/07

Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Stephanie Fulton  
U.S. Environmental Protection Agency - Region 4  
Wetlands Regulatory Section  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

29. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

30. Under 40 C.F.R. § 13 and 31 U.S.C. § 3717 et seq., if EPA does not receive payment of the penalty assessed by this CAFO in full by its due date, interest shall accrue on the unpaid balance from the due date through the date of payment at an annual rate equal to the rate of the current value of funds to the United States Treasury as prescribed and published by the Secretary of the Treasury. If all or part of the payment is overdue, EPA will assess a late-payment handling charge of \$15.00, with an additional delinquent notice charge of \$15.00 for each subsequent thirty (30) day period. EPA will also assess on a monthly basis an up to six per cent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date.

31. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by the Respondent to pay the penalty assessed by the CAFO in full by its due date may subject the Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

## **VI. General Provisions**

32. This CAFO shall not relieve Respondent of its obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed

herein, compliance with this CAFO shall not be a defense to any actions subsequently commenced under federal laws and regulations administered by the EPA.

33. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of United States to seek any other remedies or sanctions available by virtue of Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any federal or state statute, regulation or permit.

34. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent of all claims for civil penalties under the CWA with respect to only those violations alleged in this CAFO. Except as otherwise set forth in this document, compliance with this CAFO shall resolve the allegations of violations contained in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent, or other liability resulting from violations that were not alleged in this CAFO. Other than as expressed in this document, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

35. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

36. This CAFO applies to and is binding upon Respondent and any officers, directors, employees, agents, successors and assigns of the Respondent.

37. Any change in the legal status of Respondent including, but not limited to, any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CAFO.

38. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this CAFO.

39. In accordance with 40 C.F.R. Part 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Bonnie Sawyer  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303  
(404) 562-9539

For Respondent:

Brett Wilson  
President  
Phoenix Coal Corporation  
1215 Nebo Road, Suite A  
Madisonville, Kentucky 42431

40. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

41. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

42. This CAFO in no way affects the rights of the Complainant as against any person or entity not a party to this CAFO.

#### **VII. Release by Respondent**

43. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the Site or this CAFO, including but not limited to, any claim that there has been a taking of Respondent's property without compensation.

#### **VIII. Effective Date**

44. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.



**AGREED AND CONSENTED TO:**

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

Gail Mitchell, for  
James D. Giattina, Director  
Water Management Division  
U.S. EPA Region 4

Date: 6/14/07

For RESPONDENT, CRITTENDEN COUNTY COAL, INC.:

Brett Wilson  
Brett Wilson, President

Date: 2/14/07

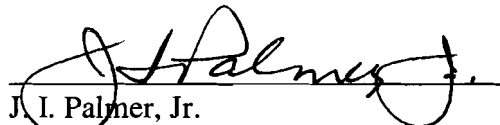
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
)  
CRITTENDEN COUNTY COAL INC. ) CONSENT AGREEMENT AND  
Crittenden County, Kentucky ) FINAL ORDER  
)  
RESPONDENT. ) Docket No.: CWA-04-2007-5504(b)  
\_\_\_\_\_ )

**FINAL ORDER**

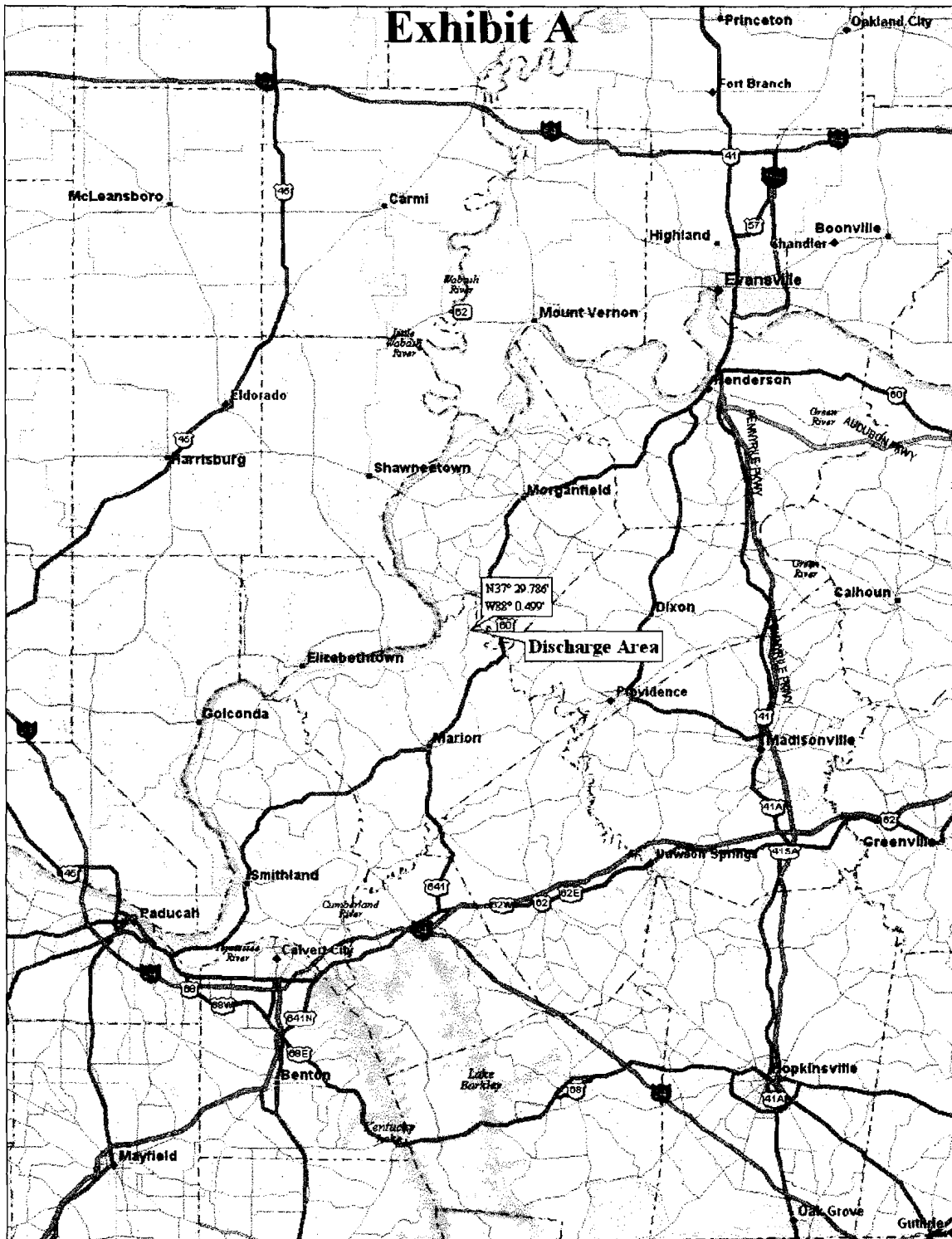
In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

  
\_\_\_\_\_  
J. I. Palmer, Jr.  
Regional Administrator  
U.S. EPA, Region 4

Date: JUN 15 2007

# Exhibit A



DE LORME

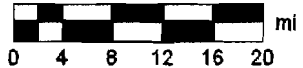
Data use subject to license.

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[www.delorme.com](http://www.delorme.com)

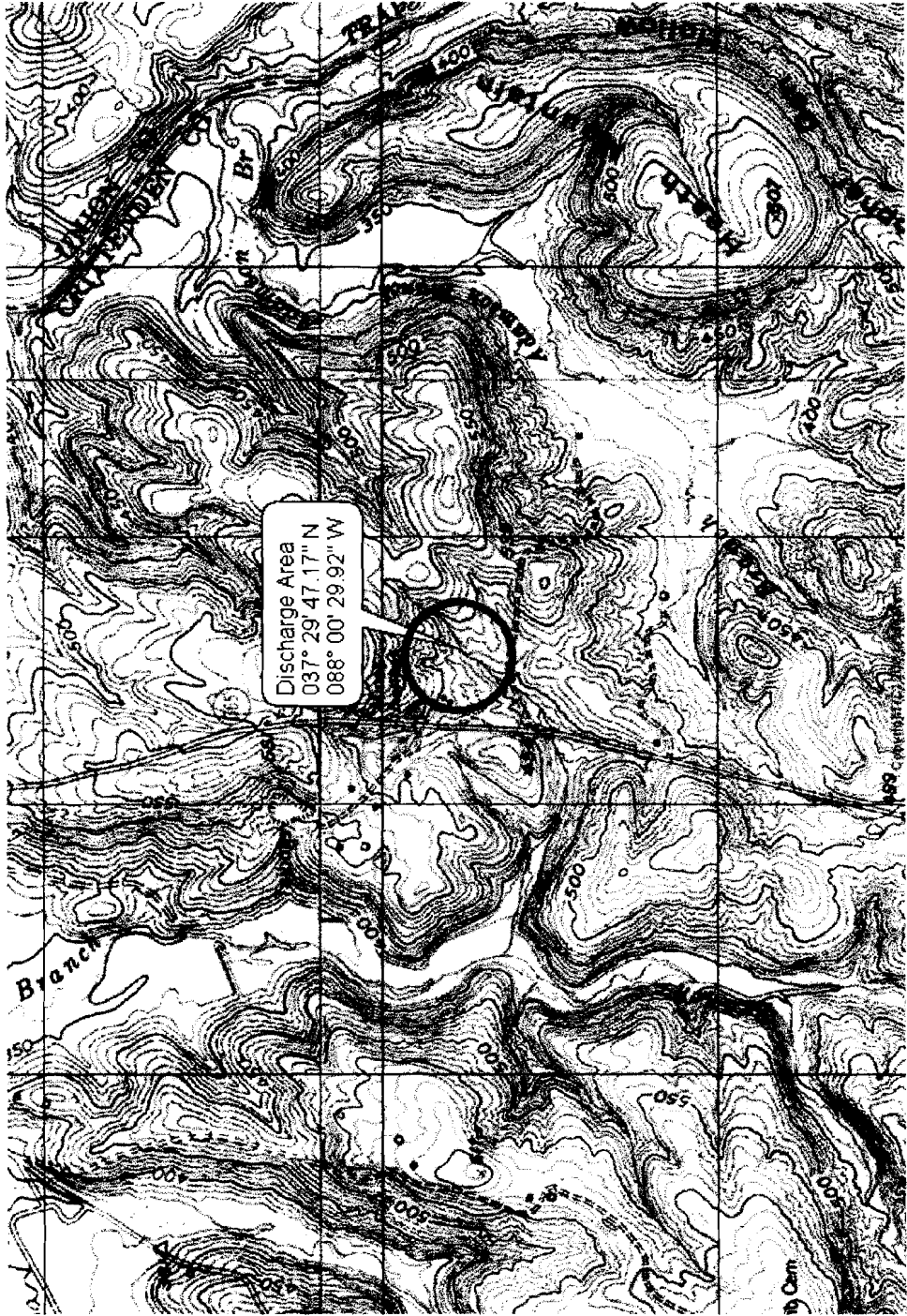


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**EXHIBIT B**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
CRITTENDEN COUNTY COAL, INC. ) CONSENT AGREEMENT AND  
Crittenden County, Kentucky ) FINAL PENALTY ORDER  
)  
RESPONDENT. ) Docket No.: CWA-04-2007-5504(b)  
\_\_\_\_\_)

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the attached **CONSENT AGREEMENT AND FINAL PENALTY ORDER** in the matter of Crittenden County Coal, Inc., Docket No. CWA-04-2007-5504(b) (filed with the Regional Hearing Clerk on JUN 19 2007, 2007) was served on JUN 19 2007, 2007, in the manner specified to each of the persons listed below.


By hand-delivery:

Bonnie Sawyer  
Associate Regional Counsel  
U.S. EPA, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303

Stephanie Fulton  
Wetlands Regulatory Section  
U.S. EPA, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303

By certified mail,  
return receipt requested:

Richard E. Parks  
Regulatory Compliance Manager  
Phoenix Coal Corporation  
1215 Nebo Road, Suite A  
Madisonville, Kentucky 42431



Ms. Patricia A. Bullock  
Regional Hearing Clerk  
61 Forsyth Street, SW  
Atlanta, GA 30303  
(404) 562-9511

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM  
=====

**TO BE COMPLETE BY ORIGINATING OFFICE:**

(attach a copy of the final order and transmittal letter to Defendant/Respondent)

This form was originated by: Stephanie Fulton 07/07/07  
[Name] [Date]  
in the Wetlands Regulatory Section at 404-562-9413  
[Office] [Telephone Number]

- |  |  |
|--|--|
| <input type="checkbox"/> Non-SF Judicial Order/Consent Decree.<br>USAO COLLECTS. | <input checked="" type="checkbox"/> Administrative Order/Consent Agreement.<br>FMS COLLECTS PAYMENT. |
| <input type="checkbox"/> SF Judicial Order/Consent Decree.<br>FMS COLLECTS.      | <input type="checkbox"/> Other Receivables   |
| <input type="checkbox"/> This is an original debt.                               | <input type="checkbox"/> This is a modification.   |

PAYEE: Crittenden County Coal, Inc.  
[Name of person and/or Company/Municipality making the Payment]

The Total Dollar Amount of Receivable: \$103,517.06  
[If in installments, attach schedule of amounts and respective due dates]

The Case Docket Number: CWA-04-2007-5504 (b)

The Site-Specific Superfund (SF) Account Number: \_\_\_\_\_

The Designated Regional/Headquarters Program Office: Wetlands Regulatory Section

=====

**TO BE COMPLETED BY LOCAL FINANCIAL MANAGEMENT SECTION:**

The IFMS Accounts Receivable Control Number is: \_\_\_\_\_ Dafa

If you have any questions call: \_\_\_\_\_ in the Financial Management Section,

Telephone Number: \_\_\_\_\_ COMMERCIAL

=====

**DISTRIBUTION:**

**A. JUDICIAL ORDERS:** Copies of this form with an attached copy of the front page of the FINAL JUDICIAL ORDER should be mailed to:

- |  |   |
|--|---|
| 1. Debt Tracking Officer<br>Environmental Enforcement Section<br>Department of Justice/RH 1647<br>P.O. BOX 7611, Benjamin Franklin Station<br>Washington, DC 20044 | 2. Originating Office (ORC)<br>3. Designated Program Office |
|--|---|

**B. ADMINISTRATIVE ORDERS:** Copies of this form with an attached copy of the front page of the ADMINISTRATIVE ORDER should be sent to:

- |                           |                              |
|---------------------------|------------------------------|
| 1. Originating Office     | 2. Designated Program Office |
| 3. Regional Hearing Clerk | 4. Regional Counsel          |

EPA ACCOUNTS RECEIVABLE CONTROL NUMBER FORM  
PROGRAM SPECIFIC INFORMATION

---

Case Docket Control Number: CWA-04-2007-5504(b)

Total Amount Due: \$103,517.06

---

Full payment due 30 days after issuance date of

Installment payments to be paid:

Amount Due:	Date Due:
\$ <u>12,939.63</u>	<u>July 30, 2007</u>
\$ <u>12,939.63</u>	<u>October 30, 2007</u>
\$ <u>12,939.63</u>	<u>January 30, 2008</u>
\$ <u>12,939.63</u>	<u>April 30, 2008</u>
\$ <u>12,939.63</u>	<u>July 30, 2008</u>
\$ <u>12,939.63</u>	<u>October 30, 2008</u>
\$ <u>12,939.63</u>	<u>January 30, 2009</u>
\$ <u>12,939.63</u>	<u>April 30, 2009</u>