



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

SEP 12 2008

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

Mr. Hiram Mahon  
Martin County Coal Corporation  
P.O. Box 5002  
Inez, Kentucky 41224

**SUBJ: Martin County Coal Corporation Consent Agreement and Final Orders and Order on Consent for Compliance**  
**Docket Nos. CWA-04-2008-5501, CWA-04-2008-5502, CWA-04-2008-5503, and CWA-04-2008-5767**

Dear Mr. Mahon:

Enclosed please find three (3) Consent Agreement and Final Orders (CAFO), Docket Nos. CWA-04-2008-5501, CWA-04-2008-5502, and CWA-04-2008-5503, 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 CAFOs, the Regional Administrator signed the Final Orders. In accordance with the terms of the CAFOs, the date the CAFOs were filed with the Regional Hearing Clerk is the effective date of the CAFOs. Also enclosed is an executed copy of the above-referenced Order on Consent for Compliance, Docket No. CWA-04-2008-5767. The EPA has retained the original copies for our enforcement files.

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 Paul Schwartz, Attorney-Advisor, at (404) 562-9576.

Sincerely,

A handwritten signature in black ink, appearing to read "T. C. Welborn".

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

Enclosures

cc: Lee Anne Devine, U.S. Corps of Engineers, Louisville District  
Mark W. Johnson, Office of Surface Mining, Lexington  
Alan Grant, Kentucky Division of Water, Frankfort  
Carl E. Campbell, Kentucky Department of Natural Resources, Frankfort  
Joe L. Blackburn, Kentucky Department of Natural Resources, Frankfort

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
MARTIN COUNTY COAL CORPORATION, )  
INEZ, KENTUCKY, )  
)  
RESPONDENT. )  
\_\_\_\_\_ )

CONSENT AGREEMENT AND  
FINAL PENALTY ORDER

Docket No.: CWA-04-2008-5503

REARMS CLERK

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**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 redelegated 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 “All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce...” and “tributaries” of such waters and wetlands adjacent to” such waters or their tributaries.

### **III. Allegations**

9. The term “Discharge Area” means the jurisdictional waters that have been impacted either through filling or dredging as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area includes unnamed tributaries of Kitnarrow Branch and Brushy Fork, located near Kentucky Highway 194, approximately 2.1 miles northwest of the east shore of U.S. Army Corps of Engineers’ (COE) Dewey Lake, in Martin County, Kentucky, and centered near 37° 41’ 34” north latitude and 82° 33’ 13” west longitude (Discharge Area). The Discharge Area is indicated on the enclosed Exhibits A and B and includes locations that were proposed for discharge under Kentucky Department of Natural Resources (DNR) Permit Number 880-0018.

10. The term “Site” means the parcel or parcels of land on which the Discharge Area is located.

11. Respondent, Martin County Coal Corporation, at all times relevant to this Consent Agreement and Final Order, was the owner and operator of the Site.

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

13. Commencing on or about May 19, 2003, to May 13, 2004, 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 resulting from surface coal mining activities associated with Kentucky DNR No. 880-0018.

14. Respondent impacted approximately 3,162 linear feet of an unnamed tributary of Kitnarrow Branch which is tributary to Brushy Fork, and an unnamed tributary to Brushy Fork. Brushy Fork is tributary to John’s Creek, which has been impounded to form Dewey Lake. John’s Creek, which flows out of Dewey Lake, is tributary to Levisa Fork, a Section 10 water of the United States that is used or susceptible to use in interstate commerce.

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

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

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

18. At no time during the discharge of dredged and/or fill material at the Discharge Area on or about May 19, 2003, to March 13, 2004, 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).

19. 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**

20. 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 Consent Agreement and Final Penalty Order will simultaneously commence and conclude this matter.

21. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and neither admits nor denies the factual allegations set out above.

22. Respondent hereby waives its right to appeal the Final Order accompanying this Consent Agreement.

23. 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.

24. 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 understands 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.

25. 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.

26. 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

27. 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 ninety thousand dollars (\$90,000) is an appropriate civil penalty to settle this action.

28. Respondent shall submit payment of the penalty specified in the preceding paragraph within thirty (30) days of the effective date of this CAFO via a cashier's or certified check, 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 Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

29. 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:

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 Section  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

30. 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.

31. 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.

32. 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**

33. 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

34. Except as provided in Paragraph 35, 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.

35. 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.

36. 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.

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

38. 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.

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

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

For Complainant:

Paul Schwartz  
Attorney Advisor  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303  
(404) 562-9576

For Respondent:

Mr. Hiram Mahon  
Martin County Coal Corporation  
P.O. Box 5002  
Inez, Kentucky 41224

41. 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.

43. 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**


44. 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**

45. 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:

  
\_\_\_\_\_  
James D. Giattina, Director  
Water Management Division  
U.S. EPA Region 4

Date: SEP 11 2008

For RESPONDENT, MARTIN COUNTY COAL CORPORATION:

  
\_\_\_\_\_  
Hiram Mahon, President

Date: 4-30-08



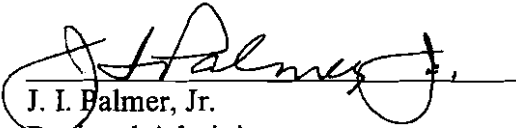
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
)  
MARTIN COUNTY COAL CORPORATION ) CONSENT AGREEMENT AND  
) FINAL PENALTY ORDER  
)  
RESPONDENT. ) Docket No.: CWA-04-2007-5503  
\_\_\_\_\_ )

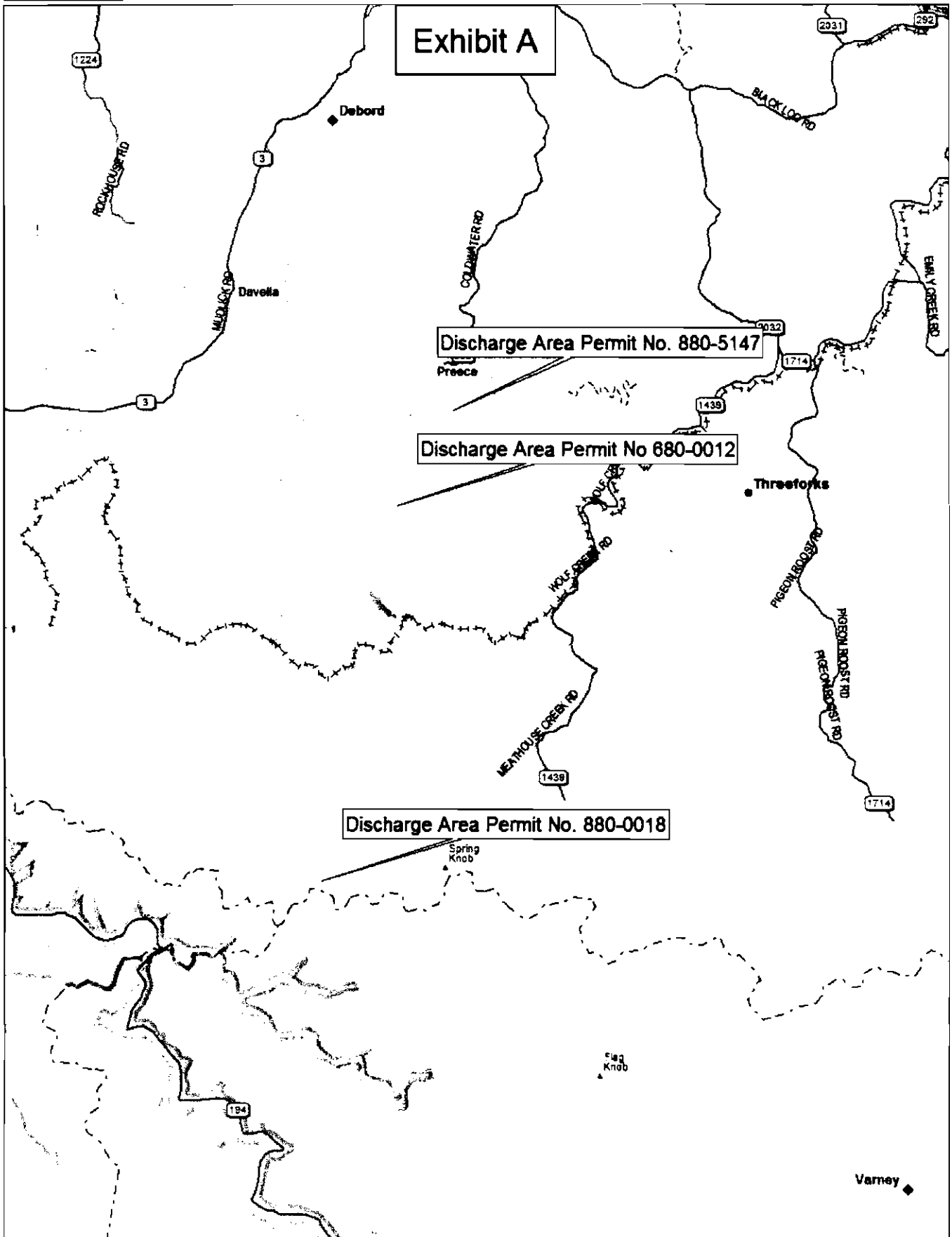
**FINAL ORDER**

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: SEP 11 2008



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Exhibit B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
)  
MARTIN COUNTY COAL )  
CORPORATION ) CONSENT AGREEMENT AND  
Martin County, Kentucky ) FINAL PENALTY ORDER  
)  
RESPONDENT. ) Docket No.: CWA-04-2008-5503  
\_\_\_\_\_ )


**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 Martin County Coal Corporation, Docket No. CWA-08-5503 (filed with the Regional Hearing Clerk on 9/12, 2008) was served on 9/12, 2008, in the manner specified to each of the persons listed below.

By hand-delivery: Paul Schwartz  
Attorney-Advisor  
U.S. EPA, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303

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

By certified mail,  
return receipt requested: Mr. Hiram Mahon  
Martin County Coal Corporation  
P.O. Box 5002  
Inez, Kentucky 41224

  
Ms. Patricia A. Bullock  
Regional Hearing Clerk  
U.S. EPA, Region 4  
61 Forsyth Street, SW  
Atlanta, GA 30303  
(404) 562-9511