**SAMPLE PLAN FOR THE DISCOVERY**

**OF ELECTRONICALLY STORED INFORMATION**

**Disclaimer**

This example is not endorsed by the Environmental Hearing Board as appropriate in all cases, and variations should be considered based on individual cases and facts. As noted in an explanatory comment in the Pennsylvania Rules of Civil Procedure, “As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination of disputes.” What is appropriate for one case is not necessarily appropriate for another. This example is provided only for the convenience of parties to EHB proceedings.

**Bracketed provisions are for discussion among the Parties regarding inclusion and scope.**

**COMMONWEALTH OF PENNSYLVANIA**

**ENVIRONMENTAL HEARING BOARD**

**APPELLANT :**

 **:**

 **v. : EHB Docket No. \_\_\_\_**

 **:**

**COMMONWEALTH OF :**

**PENNSYLVANIA, DEPARTMENT OF :**

**ENVIRONMENTAL PROTECTION :**

**and PERMITTEE [or INTERVENOR] :**

**PLAN CONCERNING THE DISCOVERY OF**

**ELECTRONICALLY STORED INFORMATION**

Pursuant to Paragraph 12 of the Environmental Hearing Board's (Board) PreHearing Order No. 1, Appellant, Permittee [or Intervenor] and the Department of Environmental Protection (Department) jointly submit this plan (Plan) concerning the discovery of electronically stored information (ESI), and state as follows:

1. **General Provisions**.

(a) On (date), pursuant to Paragraph 11 of Pre-Hearing Order No. 1, the Department, Appellant [and Permittee [or Intervenor]] (collectively, “the Parties”), through their respective counsel, conferred to discuss the discovery of ESI.

(b) Discovery of ESI is of such a nature that an ESI plan is required forthis Action.

(c) Accordingly, pursuant to Paragraph 12 of Pre-Hearing Order No. 1, the Parties have developed a Plan for the discovery of ESI, described below.

(d) The Parties recognize that this Plan is based on facts and circumstances as they are currently known to each Party, that the electronic discovery process is iterative, and that additions and modifications to Plan may become necessary as more information becomes known to the Parties.

2. **Purposes.** The purposes of this Plan are:

(a) to prepare for the preservation, collection, production and use of ESI in the Action;

(b) to promote the just, speedy and inexpensive determination of the Action in accordance with 25 Pa. Code § 1021.4 and ensure that discovery complies with the proportionality standard at Subsection (B) of the 2012 Explanatory Comment preceding Rule 4009.1 of the Pa. R. Civ. P.;

(c) to provide a framework for cooperation between counsel with respect to the discovery of ESI; and,

(d) to identify any areas of disagreement between the Parties regarding:

(i) the proper scope of electronic discovery in the Action, or;

(ii) the manner in which ESI is to be preserved, collected, produced, and used in the Action.

3. **Definitions**.

*Action:* The instant litigation, referred to in the caption of this Plan.

*Active Data:* Information residing on the direct access storage media (disk

drives or servers) that is readily visible to the operating system and/or application

software with which it was created. It is immediately accessible to users without

restoration or reconstruction.

*Document:* A collection of pages or files produced manually or by a software application, constituting a logical single communication of information, and consisting of one or more records. For example, an email and attachments to it together constitute one “document.”

*Document-Level PDF File:* File in Portable Document Format (PDF) in which all components of a document are included in a single file. (For instance, a document-level PDF of an email would ordinarily include the attachments to the email.)

*Electronically Stored Information* or *ESI*: Information recorded in a form that requires a computer or other electronic device to process it (as opposed to stored in hard copy, such as on paper), regardless of the media or whether it is in the original format in which it was created.

*Email String:* A series of emails linked together by email replies or forwards.

*File:* A collection of related data or information stored as a unit under a specified name on storage medium.

*Metadata:* A generic term that can refer to (1) the structural information of a file that contains data about the file, as opposed to describing the content of a file; (2) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted or otherwise manipulated by a user of such system; or (3) information embedded in a Native File that is not ordinarily viewable or printable

from the application that generated, edited, or modified the Native File.

*Native Format:* File structure of an electronic record defined by the original creating application. Ordinarily, this is the format in which the files are maintained in the ordinary course of business.

*Personal Computer (PC)*: Computer based on a microprocessor and designed to be used by one person at a time.

*Quasi-Native Format:* A reasonably useable electronic form other than the form in which the file was maintained and used. For instance, in quasi-native format production, an IBM AS400 database might be produced as an ASCII, comma-delimited file with associated file and field structural information, or emails from a Microsoft Exchange server might be produced as .PST, .EML, or .MSG files.

*Record:* Information recorded in any form, including ESI.

*Server:* Any central computer on a network that contains ESI or applications shared by multiple users of the network on their client computers. A computer that provides information to client machines.

*Subject Matter of the Action:* (e.g. “The Compliance Order dated \_\_\_\_\_\_ and the Amended Compliance Order dated\_\_\_\_\_, regarding Appellant’s failure to submit a reclamation plan and sequence that addresses the timeline for reclamation required to bring both the mining permit and NPDES permit into compliance with the EHB Adjudication and how the hydrologic balance will be restored in the surrounding area to abate the public nuisance caused by Appellant’s lowering of the groundwater.”)

4. **Duration**. This Plan applies from the date of the Board Order pursuant to Paragraph 13 of Pre-Hearing Order No. 1 (with any modifications to the Plan ordered by the Board) until the earliest of any of the following:

(a) the Parties agree or the Board orders otherwise;

(b) in the case of an individual Party, the Party ceases to be a party to the Action or any appeal;

(c) the Action settles and all settlement terms are fulfilled; or

(d) the Action is adjudicated and any appeals are finally resolved or, in the absence of an appeal, the time for bringing an appeal has expired.

[5. **Identification of custodians.** Within 14 days of the Board issuing an order governing electronic discovery in this Action, and prior to any formal discovery requests involving ESI, each Party shall identify to the others up to [\_\_\_\_] of its most significant ESI custodians and significant shared data sources in light of the claims and defenses raised in the Action. For each identified ESI custodian, the Party will provide an explanation of the custodian’s role in the dispute. For each shared data source, the Party will provide an explanation for why it believes that the shared data source is significant to the litigation.]

6. **Preservation.**

(a) Subject to the limits set by this Plan, each Party shall take reasonable and good faith steps to identify and preserve ESI that is admissible and/or reasonably calculated to lead to the discovery of admissible evidence relating to the Subject Matter of the Action.

(b) The duty to preserve is to be interpreted broadly to accomplish the goal of maintaining the integrity of ESI that is admissible and/or that could potentially lead to the discovery of admissible evidence. Except as provided in this Plan, the duty to preserve includes the duty to take reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, overwriting, shredding, incineration, wiping, relocation, migration, theft or mutation of ESI, as well as to prevent any action that would make the ESI incomplete or inaccessible.

(c) It is acknowledged that ESI subject to the duty to preserve may include ESI that is not producible (for example, on the basis of privilege) or that is not admissible in evidence.

(d) The Parties may not raise allegations of spoliation against a Party who preserves ESI in compliance with this Plan.

(e) Absent a showing of good cause by the requesting Party, the Parties shall not be required to modify, on a going-forward basis, the procedures used by them in the ordinary course of business to back up and archive data; provided, however, that the Parties shall preserve the non-duplicative discoverable information currently in their possession, custody or control.

(f) For purposes of this Action, the Parties agree that they need not preserve ESI unless it meets *each* of the following criteria:

(i) *Type of file—*The ESI is one of the following types of active data files:

(1) word processing files;

(2) email;

(3) spreadsheets;

(4) presentations;

(5) PDF (portable document format) files;

(6) text files;

(7) images;

(8) Meeting notices unless it is related solely to the logistics of scheduling a meeting that has already occurred and does not contain details of the meeting.

(ii) *Date—*The ESI was sent or last modified on or after (date) through (date).

(iii) *Storage location—*The ESI is stored on or in one or more of the following:

(1) a personal computer hard drive;

(2) a server (including email servers and servers in the “cloud” including but not limited to Newforma Info Exchange, iCloud, Dropbox and shared servers);

(3) any removable storage media (including, but not limited to, external hard drives, optical storage media (DVDs,CDs, etc.), and thumb drives);

(4) a camera or video camera

7. **Collection**.

(a) The Parties have conferred regarding the collection of ESI, including who will determine what ESI needs to be collected, who will collect the ESI, and who will determine which of the ESI relates to the Subject Matter of the Action. The Parties have agreed that:

(i) In response to a request for production of documents, counsel will confer with and instruct custodians to conduct a reasonably diligent search of the ESI in their possession, custody, or control to identify which of the ESI potentially relates to the Subject Matter of this Action. The custodian or other agent of the Party shall then provide copies of that ESI to the Party’s counsel.

(ii) Counsel for the Parties need not collect ESI from the custodians simply to ensure that the ESI is preserved prior to production.

(iii) Counsel for the Parties will assume the obligation for the collection of ESI from shared data sources.

**8. Discovery Requests and Responses**

(a) **Specificity for ESI Requests.** Discovery requests that require a search or production of ESI may be separate from other requests, and shall be as clear as possible and limited with respect to the scope and dates included. Responses and objections to such discovery shall disclose the scope and limits of the production.

(b) **Phased Discovery**.

(i) Initial ESI requests shall be limited to the custodians and significant shared data sources identified in response to Paragraph 5, above.

(ii) The Parties reserve the right to petition the Board to allow additional ESI discovery (regarding email, ESI other than email, or both) if, based on the productions in response to those requests, good cause exists to expand the scope of ESI discovery and the other Parties are unwilling to agree to the requested expansion.

(c) **On-Site Inspection.** On-site inspection of electronic media will not be permitted absent a demonstration by the requesting Party of specific need and good cause.

9. **Form of Production.**

(a) **Time for Production.** The Parties will respond to requests for production of ESI within **30 days** of service of the request for production, and will make their best efforts to produce ESI within [45 or 60] days of service.

(b) **One Copy.** A Party need not produce the same ESI in more than one format.

(c) **Metadata**. ESI productions need not include metadata, except the following where it exists (the Parties need not create metadata if it does not already exist):

(i) From (Sender/Author)

(ii) Date/Time Sent for emails

(iii) Recipients (all "to”s for emails)

(iv) CC’s for emails

(v) BCC's for emails

(vi) Document Title (Subject Line for emails)

(d) **Text-Searchable Records**. No Party has an obligation to make its production text-searchable; however, if records already exist in text-searchable format independent of this litigation, then such records shall be produced in texts earchable format at no cost to the receiving Party.

(e) **Format for production**. ESI produced by the Parties to this Action shall be produced in native or quasi-native format, except as follows:

(i) **Redactions**—shall be produced in PDF format.

(ii) **Spreadsheets**— If only a portion of a spreadsheet is likely to be relevant in the Action, and the producing Party so requests, the Parties shall cooperate to determine if the relevant portion can be separated from the rest of the spreadsheet and produced in lieu of the entire spreadsheet.

(f) **Duplicates.** The Parties have conferred regarding whether to produce duplicates of ESI when duplicates exist and have agreed that deduplication is not required.

[(g) **Custodian ID**.

(i) The ESI shall be produced in a manner that shows which ESI was obtained from which custodians.]

10. **Privilege, Privacy, and Confidentiality Issues**.

(a) **Privilege Log.**

(i) If, in responding to a request for production of ESI, a Party refuses to produce ESI on the basis that the ESI is privileged, that Party shall prepare a privilege log so that the requesting Party may assess the claims of privilege. The privilege log shall include the following information concerning the ESI withheld: (1) an identification, with reasonable particularity, of the ESI withheld; and (2) the privilege which justifies withholding the ESI.

(ii) For purposes of preparing the privilege log, the following shall be listed separately:

(1) each email that is withheld from an email string; and,

(2) each attachment that is withheld from an email or email string.

(iii) When redactions are made, the producing Party shall note the privilege asserted with respect to the redaction, either next to the redaction or in the privilege log.

(iv)Parties are not required to include in their privilege logs ESI generated after (date).

(v) Parties are not required to include in their privilege logs [any other ESI for which the parties agree in writing need not be included].

(vi) If so requested with respect to specific ESI after production of the privilege log, the responding Party shall explain the basis for why it was justified to withhold the ESI it did based on the asserted privilege(s).

(b) **Pre-Production Review.** Each of the Parties shall take reasonable pre-production efforts to protect privileged material.

(c) **Inadvertent Disclosure.** Inadvertent disclosure of privileged ESI does not constitute a waiver of privilege with respect to that ESI. Promptly after receiving notice of the inadvertent production of such ESI or ESI that appears on its face to be privileged information, the Party which received it shall (1) return the ESI or certify that it has been deleted; and (2) destroy or delete any copies of the ESI or notes concerning it in that Party’s possession. In the event of a dispute over whether the ESI inadvertently produced is privileged, the Party receiving the ESI shall promptly after receiving a request for its return notify the producing Party of the dispute and may thereafter retain the document until the claim of privilege is resolved. The receiving Party will not use or distribute the document until the claim of privilege is resolved, except to the extent that the use or distribution of the document is necessary to resolve the claim of privilege.

11. **Authenticity and Best Evidence**.

(a) Subject to Paragraph 10(c), each of the Parties agrees:

(i) that the ESI it produces in response to a request for production in this Action, and the ESI produced to it by another Party in response to a request for production in this Action, is authentic for purposes of Rule 901 of the Pennsylvania Rules of Evidence and Rule 4014(a) of the Pennsylvania Rules of Civil Procedure.

(ii) that it is acceptable to admit the ESI produced instead of the original ESI for purposes of Rule 1003 of the Pennsylvania Rules of Evidence.

(b) The Parties have conferred regarding the need for procedures to ensure the authenticity and integrity of producible ESI during the discovery process. Without prejudice to each Party’s right to object in good faith to a ESI’s authenticity or integrity, the Parties have agreed to leave the procedures required to ensure the authenticity and integrity of each Party’s producible ESI to the

discretion of the producing Parties.

(c) Notwithstanding any other provision of this Plan, any Party may object in writing to the authenticity of producible ESI or to the integrity of ESI, provided such objection is made in good faith and a reasonable time before the hearing in the Action. Where an objection is made, the Parties may exercise their usual rights of discovery with respect to the facts relevant to the objection.

12. **Costs of Production**.

(a) The Parties have conferred regarding the possibility of reaching an agreement on the allocation or sharing of the reasonable costs required to comply with this Plan, and the Parties agree that:

(i) For sources of ESI that are reasonably accessible to the responding Party in the ordinary course of business, the reasonable costs of retrieving and reviewing that ESI will be borne by the responding Party unless the discovery is disproportionate.

(ii) For sources of ESI that are not reasonably accessible, or where the requested discovery is disproportionate, the producing Party may petition the Board to shift some or all of the costs of retrieving and reviewing the ESI to the receiving Party.

13. **Discovery Disputes**. Any motion filed with the Board by any of the Parties concerning a discovery dispute involving ESI must be accompanied by a signed certificate in accordance with Section 1021.93(b) of the Board’s Rules of Practice and Procedure, 25 Pa. Code § 1021.93(b).

14. **Modifications**.

(a) The Parties recognize that, as additional information becomes available throughout the Action, it may become apparent that: (a) it is impracticable or impossible for a Party to comply with the terms of the Plan, or do so in a time-efficient or cost-efficient manner; or (b) further steps, beyond those set out in this Plan, are required in order for a Party to obtain access to relevant ESI in the Action. Each Party agrees to notify the other Parties promptly when it knows that it will not comply with any term of the Plan or when it concludes that another Party should take further steps beyond those set out in this Plan. The Parties agree to negotiate in good faith with respect to any amendments to the Plan requested by a Party on this basis, and to seek the assistance of the Board in appropriate cases to resolve disputes between the Parties.

(b) This Plan may be modified at any time, provided the amendment is recorded in writing, whether by separate agreement, exchange of correspondence, or by written confirmation of the amendment.

15. **Testing for Viruses.** While each Party will make its best efforts to ensure the exchange of virus-free ESI, it is the obligation of the Party receiving ESI to test for computer viruses.

16. **Entire Agreement.** This Plan shall constitute the entire integrated agreement of the Parties. No prior or contemporaneous communications or prior drafts shall be relevant or admissible for purposes of determining the meaning or extent of any provisions herein.

WHEREFORE, the Parties respectfully request that the Board, pursuant to Paragraph 13 of Pre-Hearing Order No. 1, issue an order governing the discovery of ESI that is consistent with the Plan set forth above.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

Appellant :

 :

v. : EHB Docket No. \_\_\_\_

 :

DEPARTMENT OF :

ENVIRONMENTAL PROTECTION :

And Permittee [or Intervenor] :

**ORDER**

AND NOW, this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_\_, upon consideration of the Plan Concerning the Discovery of Electronically Stored Information (Electronic Discovery Plan) filed by the Parties, the filing is approved as the Electronic Discovery Plan for this case and all parties shall comply with its provisions.

**ENVIRONMENTAL HEARING BOARD**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge

DATED:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**cc: For the Commonwealth of PA, DEP:**

**For Appellant:**

**For Permittee [or Intervenor]:**