March 1, 1999
Original: 1924
McGinley
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Sandusky
Wyatte

David C. Hogeman
Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street 5th FLOOR
Harrisburg, Pa. 17101-2301

Dear Mr. Hogeman;

The changes being considered to the Surface and Underground Coal Mining regulations in 25 Pa. Code, Chapter 86, that were published as proposed rulemaking at Pa. B, 941 (Feb.14,1998), should not be made. If retained as is, instead of being changed the regulations offer a second protection to use as to subsidence caused by underground coal mines.

Act 54 appears to be deficient and is not written to protect the surface property owners. It would not be in the citizen's interest to remove the only other protection we have.

Since the federal regulations do not provide any real protection against subsidence, it would be a disservice to surface property owners in underground mine areas to weaken our Pennsylvania regulations.

Sincerely,

Mr and Mrs Murray W. Williams

Mr. and Mrs. Murray W. Williams
280 Laurel Run Road
Waynesburg, Pa. 15370

LAUREL RUN ACRES 280 LAUREL RUN RD. WAYNESBURG, PA 15370

Original: 1924
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INTEROFFICE MEMORANDUM

Date: 02-Mar-1999 05:13pm EST
From: Freeman, Sharon
Freeman.Sharon@dep.state.pa.us
Dept:
Tel No:

TO: HOGEMAN DAVID (HOGEMAN.DAVID@A1.dep.state.pa.us@PMD
TO: MCCOMMONS MILTON (MCCOMMONS.MILTON@A1.dep.state.pa.us@

Subject: FW: Comments on Final Draft Chapter 86 Mining Regulations

Here's another...I ack'd.

-----Original Message-----
From: Bailey LeBret [mailto:caradv@juno.com]
Sent: Tuesday, March 02, 1999 3:31 PM
To: RegComments
Subject: Comments on Final Draft Chapter 86 Mining Regulations

March 2, 1999
>
>David C. Hogeman
>PADEP Bureau of Mining and Reclamation
>Rachel Carson State Office Building
>400 Market Street, 5th Floor
>Harrisburg, PA 17101-2301
>
>Re: Comments on Draft Final Chapter 86 Mining
>Regulations
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>Dear Mr. Hogeman:

>In the late spring of 1997 I presented testimony at the public "hearing" at the Armburst Offfice of PA DEP regarding the proposed changes to Chapter 86 of the PA Code, Title 25. I did so as a representative of a group of citizens organizations who jointly submitted written comments that were professionally prepared by Attorney Robert W. Thomson. It is indeed horrifying to see how thoroughly the PA DEP has disregarded those comments. At the time of my testimony, I commented for the record that it appeared that the Department had simply read the legal appeal to the Environmental Hearing Board that had been made by People United to Save Homes. It seemed that the Department had read the inadequacies that the People United to Save Homes appeal presented to the administrative law panel and simply rewrote the regulations to "dumb down" the law to the level of their prior practice of ignoring its requirements and simply substituting their very weak "policies and procedures" for enforcement of regulations. I hereby request that you revisit the comments submitted at that hearing on behalf of those groups before further weakening mining

regulations in Pennsylvania. I submit the following comments promulgated by the Raymond Proffitt Foundation as comments with which I agree and request that you consider them in your review.

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>that should be made clear to all parties involved, the
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>from prohibiting coal exploration on areas designated

>unsuitable for mining to allowing it should not be made.
>This is a major reversal in the regulation and it is
>entirely inappropriate. It may be reasonable to allow
>coal exploration on lands for which a petition has been
>filed and is pending, but once an area has been formally
>designated as unsuitable, no mining or coal exploration
>should be allowed. The proposed change should not be
>adopted.
>
>In conclusion, the proposed revisions to Chapter 86
>clearly were not made with the interests of the public
>and the protection of the environment in mind.
>The proposed changes undoubtedly will reduce the burden
>on the mine applicant, but at the expense of the
>environment and the general public. The people of the
>Commonwealth want and expect DEP to promote and protect
>their rights to clean land, air and water. The changes
>proposed for Chapter 86 are contrary to the goals of
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>
>
>Sincerely,
Cynthia A. Rossi
99 Zediker Station Road
Washington, PA 15301-3186

Phone - 724-222-9441

RFC-822-headers:
Received: from gatekeeper.pader.gov by PADER.GOV (PMDF V5.1-12 #D3533)
 with SMTP id <01J8CZWCNOJC9OGZ8W@PADER.GOV>; Tue, 2 Mar 1999 16:10:48 EDT
Received: by gatekeeper.pader.gov; (5.65v3.2/1.3/10May95) id AA10499; Tue,
 02 Mar 1999 16:16:36 -0500
Received: by erexecimcs01.pader.gov with Internet Mail Service (5.5.2448.0)
 id <GDL0NZCM>; Tue, 02 Mar 1999 16:13:38 -0500
X-Mailer: Internet Mail Service (5.5.2448.0)

Freeman, Sharon

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Sent: Tuesday, March 02, 1999 3:31 PM
To: RegComments
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March 2, l999
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>timeframe following receipt of a complete petition
>should be adequate. However, until the petition has
>been deemed to be administratively complete, a milestone
>that should be made clear to all parties involved, the
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>
>(Q) 86.129.(a) and (b). Coal exploration. The change
>from prohibiting coal exploration on areas designated
>unsuitable for mining to allowing it should not be made.
>This is a major reversal in the regulation and it is
>entirely inappropriate. It may be reasonable to allow
>coal exploration on lands for which a petition has been
>filed and is pending, but once an area has been formally
>designated as unsuitable, no mining or coal exploration
>should be allowed. The proposed change should not be
>adopted.
>

>In conclusion, the proposed revisions to Chapter 86
>clearly were not made with the interests of the public
>and the protection of the environment in mind.
>The proposed changes undoubtedly will reduce the burden
>on the mine applicant, but at the expense of the
>environment and the general public. The people of the
>Commonwealth want and expect DEP to promote and protect
>their rights to clean land, air and water. The changes
>proposed for Chapter 86 are contrary to the goals of
>environmental protection and, therefore, should not be
>adopted.
>
>
>Sincerely,
Cynthia A. Rossi
99 Zediker Station Road
Washington, PA 15301-3186

Phone - 724-222-9441

Raymond Proffitt Foundation
P.O. Box - 723
Langhorne, Pa. 19047-0723

22 February 1999

ORIGINAL: 1924
MCGINLEY
COPIES: Harris
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Legal

David C. Hogeman
PADEP Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101-2301

Re: Comments on Draft Final Chapter 86 Mining Regulations

Dear Mr. Hogeman:

This letter is to provide comments on the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as published in the Pennsylvania Bulletin on 30 January 1999 (Vol. 29, No. 5, p. 548).

Overall, the proposed revisions will weaken protections of the public and the environment, and for that reason should not be adopted as proposed.

(A) ***The Regulatory Basics Initiative***, which is the basis of the proposed changes, has as its focus "easing the regulatory burden". This should not be equated with "eliminating necessary regulations". Poorly defined regulations, inconsistent application of the regulations by DEP, inadequate enforcement – these are problems that should be corrected. The environmental protection requirements can be made less ambiguous without making them less effective. If the regulations were clearly defined and consistently applied, that would ease the burden on the regulated public. The goal should be to address the problems that evoked the regulations in the first place, not to eliminate the regulations themselves. For the Department of Environmental Protection to weaken environmental protection requirements in order to make it easier for mines to open and operate is simply irresponsible.

(B) ***A questionable assumption*** built into the Regulatory Basics Initiative is that federal standards and protections are acceptable, or even adequate. In the case of mining, the responsibility for administering the regulatory program has been delegated to Pennsylvania, and along with it the responsibility for protection of our natural resources. The federal SMCRA program was meant to provide a minimum baseline level of environmental protection. The original intent was that states receiving primacy would adapt the federal standards to their own local needs and conditions, primarily by making them more stringent. Instead, interstate competition and other economic considerations

have fueled a "race to the bottom" in terms of preserving environmental quality. Efforts to reduce federal oversight are further weakening the standards, and DEP's apparent willingness to follow suit is discouraging. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean air and water in accordance with Article 1, Section 27 of the Pennsylvania Constitution. They do not aspire to have the worst environmental quality allowed by federal law.

(C) ***86.1. Definitions: Administratively complete application***: The existing definition of "Complete application" is better and should not be changed. The proposed change reduces environmental protections in that an application need only "address" each requirement, instead of needing to "demonstrate compliance with applicable statutes and regulations" as under the existing definition. More information and more thorough planning before a mine is opened, not less, are needed to ensure environmental protection. If any change is to be made in this regard, the application forms themselves should be changed to more closely parallel the prescribed regulations so that applicants can clearly understand what the requirements are and what information should be presented in order to comply.

(D) ***86.1. Definitions: Valid existing rights***: The existing definition should be retained. It can be difficult enough to understand these regulations without being forced to search for the referenced definition in the Code of Federal Regulations. Furthermore, the federal definition of VER is convoluted, is subject to legal interpretation, has been changed over the years, and still is not firmly resolved. The current definition at 86.1 is relatively clear and should not be changed. If any change is to be made, it should be done in clear language at 86.1 and not by reference to a federal regulation.

(E) ***Subchapter D. 86.101. Definitions: Fragile lands***: The word "significantly" should not be added. The proposed addition of this qualification will weaken environmental protections currently in place. How would "significantly" be defined, and by whom? Any damage to valuable or critical habitats may be significant. It would be a conflict of interest to allow an applicant to decide what level of damage, if any, is not significant. The DEP should make that determination, and only after all of the relevant information has been assembled and reviewed.

The last part of the existing definition, beginning with "and buffer zones adjacent to the boundaries of areas where surface mining operations are prohibited ... ", should be retained. It is unclear why this language is proposed for deletion. If it is removed, it will significantly reduce environmental protections. The purpose of buffer zones is to protect the adjacent area, so by their very nature these zones are critical, and thus should be retained in this definition.

(F) ***Subchapter D. 86.101. Definitions: Public park***: The existing sentence defining nonprofit organizations as local agencies in this

circumstance should not be deleted. In those instances where a nonprofit organization has designated lands for public recreational use, it is entirely appropriate that those lands should be treated as public parks. It is the park's public use, not its ownership, that is the significant factor. For the same reasons, the word "primarily" should not be added in an apparent attempt to distinguish some public recreational uses from others; all such uses should be fully and equally protected.

(G) ***Subchapter D. 86.101. Definitions: Surface mining operations***: The last part of the definition ("and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area") should not be deleted. To delete this section of the definition would significantly weaken existing environmental protections. Despite its title, the federal SMCRA has always regulated both surface coal mining and the surface effects of underground coal mining. Thus it is appropriate to maintain this section in the definition. Furthermore, no comparable language is proposed to replace it in the underground mine regulations, and so this would become an unregulated class of activities.

(H) ***86.102.(3). Areas where mining is prohibited or limited***: The phrase "on or eligible for inclusion" should be retained. To delete this phrase would significantly weaken existing protections of recognized historic resources. The term "eligible for inclusion" refers to specific resources that have been approved by the SHPO for listing on a State Register and/or have been formally nominated for listing on the National Register. In accordance with federal requirements under Section 106 of the National Historic Preservation Act, both listed and eligible resources must be protected in certain situations. The proposed deletion of the above phrase is an unacceptable reduction of current protections and should not be adopted.

(I) ***86.102.(9).ii and iii.*** The proposed changes reduce the protections of individuals whose dwellings are within 300 feet of proposed operations and thus should not be adopted. The proposed requirements lessen the burden on the mine applicant to gain the permission of existing landowners by expanding what is considered to be a valid waiver to include such things as a "lease, deed, or other conveyance" and the "constructive knowledge" of future owners. The existing language is adequate and should not be changed.

(J) ***86.103.e. Procedures.*** The proposed change from "may" to "will" reduces the protections currently afforded to public parks and National Register places, and thus should not be adopted. If proposed mining operations are adjacent to, or upstream from, a public park or National Register site, there is a good likelihood that adverse effects will result. If there is any doubt, the regulations should take the cautious approach. In every such instance, therefore, the applicant rightfully should be required to transmit a copy of the application to the appropriate agency and solicit their comments. It would be a conflict of interest to allow an applicant to decide whether the

mining operations will adversely affect these resources. The agency with jurisdiction should make that determination, and only after all of the relevant information about the proposed mining operation has been assembled and reviewed. The proposed change should not be adopted because it will weaken the existing protections of public parks and historic resources.

The proposed change in wording from "public park" to "publicly owned park" should not be made. As stated above in Comment F, ownership of a park is irrelevant. The important consideration in protecting the public's rights from adverse effects due to mining is whether the park is designated for public use, not who owns it. The existing language should remain unaltered.

(K) ***86.103.e(2). Procedures.*** Two qualifiers are proposed to be added. The first (i), to allow a 30-day extension, may be appropriate. The second (ii), to deem a lack of response an approval, is unjust and should not be adopted. A mine application is a technically complex set of documents which can be difficult even for mine engineers to process and understand. Federal, state, or local agencies with jurisdiction over parks may not have the staff or expertise readily available to review a mine application and make a well informed determination about the potential extent of impacts in a 30- or 60-day timeframe. The coordination with park representatives is an appropriate step in the review process, and it should not be short-circuited. The original 30-day comment period should be extended to 90 or 120 days. The lack of a response should not be deemed an approval in any case.

(L) ***86.121. Areas designated unsuitable for mining***: The proposed changes would appear to simply reformat the existing requirements, but in fact they weaken existing protections and thus should not be adopted. The following two statements should be retained in the regulations: "In considering the permit applications in designated areas, the Department will impose terms and conditions to preserve and protect the applicable values and uses of the area.", and "No permits for surface mining will be issued in areas designated unsuitable under this chapter.". Without those statements, the current protections afforded by the regulations will be lessened unnecessarily.

(M) ***86.123.(5). Procedures: petitions.*** The sentence beginning "A person having an interest which is or may be adversely affected must demonstrate an "injury in fact" ..." is an outrage and should not be added to the regulations. This sentence would shift the burden of proof onto the injured party, which is entirely inappropriate. If anyone is to be required to make a demonstration, it should be the mine applicant, not the victims of mining. Certainly the petitioner should provide as much information as possible to support his/her case, but the applicant should be required to demonstrate that the proposed mine operations will not adversely affect a petitioner's interest and to identify actions that will be taken to prevent or mitigate any potential adverse effects. The proposed sentence should not be adopted.

(N) ***86.124.(a).2. Procedures: initial processing, etc.*** The proposed new sentence "A frivolous petition is one in which the allegations of harm lack serious merit." is unnecessary and should not be adopted. The commonly accepted meaning of the word "frivolous" as used in the existing regulations does not need to be clarified by the proposed sentence. Furthermore, who would decide up front whether the allegations "lack serious merit"? This is what the petition process is set up to do: to review proposals and determine whether a designation of unsuitability is warranted.

(O) ***86.124.(c). Procedures: initial processing, etc. and 86.125. Procedures: hearing requirements.*** The forum for the hearing should not be changed from the EQB to the DEP as proposed. It is appropriate that the more disinterested EQB forum be used to hear the petitions. This proposed change in forum should not be adopted.

(P) ***86.124.(f). Procedures: initial processing, etc.*** It is appropriate to impose a deadline on the preparation of a recommendation on a petition. The 12-month timeframe following receipt of a complete petition should be adequate. However, until the petition has been deemed to be administratively complete, a milestone that should be made clear to all parties involved, the clock should not begin.

(Q) ***86.129.(a) and (b). Coal exploration.*** The change from prohibiting coal exploration on areas designated unsuitable for mining to allowing it should not be made. This is a major reversal in the regulation and it is entirely inappropriate. It may be reasonable to allow coal exploration on lands for which a petition has been filed and is pending, but once an area has been formally designated as unsuitable, no mining or coal exploration should be allowed. The proposed change should not be adopted.

In conclusion, the proposed revisions to Chapter 86 clearly were not made with the interests of the public and the protection of the environment in mind. The proposed changes undoubtedly will reduce the burden on the mine applicant, but at the expense of the environment and the general public. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean land, air and water. The changes proposed for Chapter 86 are contrary to the goals of environmental protection and, therefore, should not be adopted.

Sincerely,

Joseph W. Turner, Sec/Tres.

gateway@rayproffitt.org

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COVER PAGE

DATE: 3/1/99

TO: MS. HARRIS

FAX NO: 717-783-2664

FROM: Rod Fletcher

NUMBER OF PAGES INCLUDING COVER PAGE: 6

RE: Comments - Final Rule - Raymond Proffitt
25 Pa. Code Chapter 86

Comments: Identical letter submitted by - William and Susan Keane
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Commonwealth of Pennsylvania
Pennsylvania Historical and Museum Commission
Post Office Box 1026
Harrisburg, Pennsylvania 17108-1026

Executive Director

February 26, 1999

Original: 1924
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David C. Hogeman
Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street
5th Floor
Harrisburg, PA 17101-2301

Dear Mr. Hogeman:

The Pennsylvania Historical Museum Commission (PHMC) is providing the following comments on proposed changes to surface mining regulations as provided in the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as it was published in the *Pennsylvania Bulletin,* Vol. 25, No. 5 on January 30, 1999 and also posted on the Department of Environmental Protection's (DEP) web site. These changes were made to supposedly "provide clarity and to enhance the consistency with the language used in federal regulations." These changes accomplish neither of these tasks and, in fact, make some of the proposals conflict with federal regulations.

The change in §86.1 Definition of a Completed Application does much to cloud the issue of what is required for a completed application. The change only requires that someone submit completed forms addressing each requirement of DEP. This change significantly weakens requirements for obtaining mining permits. The Bureau of Historic Preservation (BHP) of the PHMC often receives "completed" Cultural Resource Notification forms for strip mine applications. However, these forms rarely are properly completed and usually omit relevant information about existing structures within the project boundaries. Removing existing language would result in Cultural Resource Notification forms being submitted and having to be accepted that do not provide sufficient information about existing cultural resources in a project area. The old definition is much better and clearly states that an applicant must provide an application that "demonstrates compliance with applicable statutes and regulations." The original definition of a completed application should be retained.

The change to Subchapter D, §86.101 Definition of Historic lands are generally acceptable. However, the examples provided are limited. It should be

stressed that they are only examples and not an inclusive list of Historic lands. Nevertheless, the following should be added to the list of examples to clarify that portion of the revised section: historic or cultural districts and paleontological sites.

The changes to Subchapter D, §86.101 Definition of Surface Mining Operation that delete references to surface impacts by underground mining are opposed by the PHMC. Underground mines do impact surface features and must be held accountable for those impacts. When they do impact the ground surface, they are surface mines. The Federal Surface Mining Control and Reclamation Act (SMCRA) has always been applied to regulate both surface strip mines and deep mines. Thus, inclusion in this definition is consistent with the Federal regulation. Eligible cultural and natural resources must be protected from such impacts, whether or not the mine is actually an underground mine. The old language should be retained.

The deletion of the words "on or eligible for inclusion" to the National Register of Historic Places in Subchapter D, §86.102.(3) is highly objectionable to the PHMC. This changes the phrase so it only includes sites on the National Register as being protected from mining. This change directly conflicts with Section 106 of the National Historic Preservation Act and federal regulations 36 CFR §800.2.(e) which clearly indicates any cultural resource "included in, ***or eligible for inclusion in***, the National Register (italics ours)" is subject to protection. Pennsylvania should continue to provide appropriate protection to all historic resources, not just those listed in the National Register of Historic Places.

Subchapter D, §86.103.(e) has been modified in several ways. The change in language from "may" to "will" impact a park or place on the National Register is ill advised. DEP is supposed to notify the responsible agency about such impacts. The change from "may" to "will" eliminates near misses to National Register sites that still may adversely impact the historical nature of the site. The BHP should be notified of any coal mining project that "may" impact these sites. The BHP needs to evaluate proposed activities to determine if there will be an actual impact to the historic site. This is not always evident from maps, which simply draw lines up to the boundaries of a historic property. The old language should be retained. Similarly, the deletion of the term "historic" at the end of the definition does not seem to serve any purpose and the word should be retained.

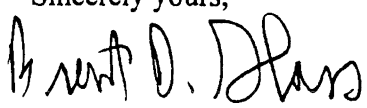
The changes in §86.123.(5) Procedures for Petitioning that make only people who can demonstrate an "injury in fact" means that any individual who has an interest in the prehistoric or historic sites in an area cannot petition to have an area declared a land unsuitable for mining unless they actually own the property. This is very shortsighted. There are many historic organizations and concerned citizens that are interested in the preservation of our cultural resources. However, they cannot possibly own every property in the state that is of cultural significance. Eliminating their ability to petition for a Lands Unsuitable

designation for a cultural resource will also eliminate their, and indirectly, the PHMC's, ability to preserve and protect Pennsylvania's cultural heritage. The PHMC objects to this change to the section and the old language should be retained.

There are changes to §86.129.(b) that delete the word "not" and the phrase concerning areas where a petition has been filed for a land unsuitable designation. These changes would essentially permit coal exploration (e.g., bulldozed roads and test bore holes, etc.) on sites already determined to be unsuitable or possibly unsuitable for mining. If a site has already been deemed unsuitable for mining because it is an important cultural resource or is undergoing such an evaluation, then permitting exploration for coal on these properties would directly impact cultural resources. This is unacceptable to the PHMC whose mission is to protect those cultural resources. The word and phrase should not be deleted and the old language retained in this section.

Thank you for permitting the PHMC to comment on the Draft Final Rulemaking for Surface and Underground Mining. We are greatly concerned about many of the changes made in this document.

Sincerely yours,



Brent D. Glass

cc: Robert Biggi
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BDG/mm

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IUP

March 1, 1999

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Original: 1924
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Dear Mr. Hogeman:

I am writing you about the proposed changes to surface mining regulations as provided in the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as it was published in the Pennsylvania Bulletin, Vol. 25, No. 5 on January 30, 1999 and also posted on the Department of Environmental Protections' (DEP) web site. Since I understand that the Pennsylvania Historical and Museum Commission and the Audubon Society have written detailed comments about specific sections of the proposed regulations, I would instead address my comments to a more fundamental problem with the Pennsylvania Department of Environmental Protection's approach to the "protection" of cultural resources in surface mining permits.

These comments are based on my previous eight years of experience as a Regional Archaeologist for the PHMC Bureau of Historic Preservation. In my position I worked with the DEP to identify cultural resources in mining permits. The current set of proposed amendments to Pennsylvania's rules for Surface and Underground Mining do nothing to improve the DEP's approach to the protection of cultural resources and, in fact, will decrease the limited protections that exist now. Right now, the Pennsylvania DEP never requires that mining permits which are identified as having a high probability for containing significant prehistoric or historic archaeological sites by the State Historic Preservation Office (the PA BHP) be further investigated to identify or evaluate those sites. Therefore, the DEP has no procedure to identify National Register eligible properties in mining permits.

The PA DEP policy is that it is not its responsibility to protect cultural resources even in mining permits in which significant archaeological sites have been identified by the PA SHPO. Instead, the claim is that these sites are covered under a state law instead of the National Historic Preservation Act and that the PA SHPO must themselves conduct investigations. An example of this mismanagement in the protection of cultural resources is presented in the attached excerpt from the Pennsylvania Archaeological Council Newsletter. This report describes a case in which the DEP was alerted to the presence of a Woodland period site and possible burial mound by the PA SHPO and still issued the mining permit allowing the site to be destroyed. I would expect that the DEP's response to this case will be that this was an unfortunate oversight, and that they will work with the PA SHPO to correct the problem. In fact, this problem has occurred time and time again, since the Kimmel Mine problem in Armstrong County in the early 1980s. The Pennsylvania DEP has not yet found an approach to successfully protect these resources and to comply with the relevant Federal statues.

During the past 10 years, the PA DEP has made **no** attempt to improve its dismal record in the protection of cultural resources. Instead, it has used delaying tactics to subvert the intentions of the NHPA and the Surface Mining Control and Reclamation Act. During this same period, a number of other states, including Kentucky, Ohio, and Indiana, have found ways to fulfill their responsibility for the protection of Cultural Resources.

The responsibility for the protection of cultural resources in Pennsylvania does not solely rest with the PA DEP. Instead, as I understand Federal law and policy, it is the responsibility of the Office of Surface Mining. I was told, some years ago, that even though the new OSM regulations were not yet in place, that the PA DEP was required to follow the relevant Federal laws and that it signs an agreement each year stating that it will provide cultural resources with the same level of protection that OSM would provide. I understand that this agreement is required for the DEP's receipt of Federal funds. In spite of this agreement, the DEP actually provides almost no protection for cultural resources in surface mining permits.

What is the Office of Surface Mining doing to ensure that cultural resources in Pennsylvania are properly protected in surface mining permits? I intend to request that OSM not approve the proposed new amendments until the DEP has developed a plan to "identify, evaluate, and protect National Register eligible properties" in Mining Permits. I would also request that OSM take over direct supervision of all new mining permit applications in Pennsylvania until cultural resources are properly protected.

Sincerely,

B Mitchum Chiarulli

Beverly Mitchum Chiarulli, PhD
Assistant Professor
Indiana University of Pennsylvania

Cc: Pennsylvania Archaeological Council
Brenda Barrett
Director of OSM
Chuck Niquette
Betsy Merrit

MCCALL STRIP MINE, CLARION COUNTY, PA

This article documents a major problem that developed in response to a strip mine project in Western Pennsylvania. The Bureau for Historic Preservation (BHP) was notified by the Department of Environmental Protection (DEP) about a proposed strip mine on the McCall property in Clarion County on March 6, 1997. Unfortunately, there was no follow up on this project due to Beverly Chiarulli leaving the BHP and a lack of any recorded sites on the property. I was not given this project to check when I transferred to the BHP in November, 1997. Conversely, DEP did not send a notice to the BHP that they had approved the permit for this mine in 1997 or 1998, nor were any additional proposals received for this project (something that usually occurs as plans are revised or modified prior to permit approval)

Andrew Wyatt was contacted on August 10, 1998 by a Clarion County resident who indicated prehistoric artifacts had been recovered on the property that was to be strip mined. Wyatt contacted me on August 10, 1998 about this and faxed the file about the McCall project to me on August 11, 1998. I contacted the resident who had called about the project and he reiterated that amateurs had made collections on the property. He said he had not collected on the property, but gave me the names of other people who he thought had made collections. I contacted these people, but none would state that they had actually collected artifacts on the property. However, they all said there was a site there. My general impression of these conversations was that it was very likely these people had made collections on the property, but were wary of saying so to a person who worked for a state agency.

I also contacted Ken Burkett, Jr. and other SPA members from the region to see if they knew of anyone who made collections in the area of the McCall project. Burkett indicated there was a collection in the Clarion County Historical Society that consisted of a human jaw and some possible Hopewell artifacts that came from the McCall Farm. The collection was made early in this century. After learning about this, I contacted the DEP Mining office in Knox and made arrangements to meet with their permit officer, Lorraine Odenthal, who was in charge of overseeing the McCall project permit.

A meeting between Odenthal and myself took place on August 20, 1998. At that time I told her there was a problem with the McCall strip mine project and that human burials might be present. I indicated it was likely that the mining company would have to have to hire someone to conduct a Phase I archaeological survey of the property. However, I had to do more research to see if I could confirm that the collections actually came from that specific property. Odenthal was concerned about the possibility that human remains were present in the project area and wanted to be notified of any additional information that I might uncover. It was also at this meeting that Odenthal indicated a DEP memo which made it the responsibility of the BHP to do any

archaeological work on strip mine projects based on Act 70 legislation. I told her that the BHP considered all strip mining permits to be Federal projects subject to Federal regulations because DEP administered strip mine permits under a MOA with the Federal Office of Surface Mining (OSM). I also indicated that half of DEP's mining budget was Federal money, as was half of my funding. This makes the project a Federal project. She indicated this dispute would have to be worked out at a higher level.

I made additional calls to Ken Burkett and other collectors in early September, 1998 to see if I could confirm information about a site or sites on the McCall property. After talking to these people, I made arrangements to visit the McCall project property on September 24, 1998. I also made arrangements to visit the Clarion County Historical Society on that date to check on the collection Burkett had mentioned.

My visit to the Clarion County Historical Society failed to provide any useful information about the collection Ken had mentioned. They did not have a record of it under the name Burkett had provided. The curator was not able to locate the collection at that time. Burkett, who volunteers at the Clarion County Historical Society, indicated there is a collection that he has personally examined and he would locate it for me if I really needed to see it. Fortunately, additional information I obtained indicates any collection made on the McCall farm during the early portion of this century was not from the farm where the McCall mine project was to be located. The McCall's only obtained this property within the last 30 years. It was owned by the Latchaw family or their descendants prior to this. The collection in the Clarion County Historical Society came from the original McCall farm located south of and out of the proposed mine area.

The visit to the project site was more productive. The area is located on top of a bluff above the Allegheny River in the southeastern section of Clarion County. The bluff forms the western side of the project area. There is a high knoll on the top of this bluff, the highest point along this section of the bluff that overlooks the river. Below this section of the bluff along the Allegheny River and out of the project area is 36Cll, the Parkers Landing Petroglyphs. These are a mix of prehistoric Native American and historic Euroamerican rock carvings suggesting the area was sacred or important to prehistoric groups. To the north is a bluff or high terrace that overlooks a narrow entrenched valley for an unnamed tributary of the Allegheny River. To the east and south are flat fields. All of the project area

was in waist-deep grass or hay when I visited the site, except for a small section that was forested on the western side. The trees were growing on an area previously disturbed by a small strip mine that had been excavated early in the century. I was accompanied by the land owner and a representative from the mining company.

I walked the project area in spite of the tall grass which limited visibility. I found a noticeable feature on top of the knoll that was about 0.5 m tall and 20 m in diameter (Figure 1). It was a small mound located on the highest point of the area, suggesting it was a prehistoric burial mound. I also asked the land owner if people had collected artifacts on his land. He confirmed that they had done so, but could not point out the exact locations where they found artifacts. This information confirmed there was an unrecorded site on the property.

After the field visit was made, I sent my recommendations to the BHP office in Harrisburg and a letter, dated September 28, 1998, was sent to Milestone Crushed, Inc., the mining company, and copied to Odenthal, stating that a possible burial mound was found on the property and a previously unrecorded prehistoric site was located within the project boundaries. It was recommended that a Phase I archaeological survey be conducted by the mining company prior to DEP issuing a permit for the project.

On December 2, 1998 the BHP received formal notification from DEP (there had been some phone conversations about this project during October and November) that they did not believe a mound was on the property because test drill logs indicted bedrock at only two feet below the surface. They also questioned who would be responsible for any archaeological work within the project area. The BHP did not agree with DEP's comments and indicated their response was not satisfactory.

The BHP then contacted DEP to arrange a meeting on December 18, 1998 with David Hess, Executive Deputy Secretary for Policy and Communications, and other DEP representatives to discuss the McCall mine project. At this meeting, Brenda Barrett, Kurt Carr, and I presented data and photographs documenting what I had found. The DEP representatives agreed that the well log data was irrelevant and the feature I found really did appear to be a prehistoric burial mound. There also was a discussion about who was responsible for doing archaeological work in the project area. Barrett indicated the BHP did not have responsibility for the work and eventually, DEP agreed in respect to this project. One of the DEP representatives contacted Odenthal to have the permit held until further investigations could be made. It was then discovered that Odenthal had already issued the mining permit because she did not believe a mound was present. She also ignored data about a previously unrecorded site to issue the permit. Odenthal indicated the mining company had already started work on the project! She was told to have work on the mine halted if they had not destroyed the mound. Later that afternoon, the BHP was notified the mound had been destroyed by the mining operation. Arrangements were made to visit the site on December 21, 1998 to check on the damage.

James Herbstritt and I visited the McCall project on December 21, 1998 to evaluate damage to possible cultural remains. It was found that most facilities for the mine had already been constructed and removal of limestone that capped the coal seam had commenced. The area where the possible burial mound was located was totally destroyed (Figure 2) Also, the mine has already damaged as much of the probable prehistoric habitation site locations as it is going to damage (there still are some undisturbed areas). There is little point in halting work now. The mining company followed permit procedures, it was DEP that ignored BHP recommendations.

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March 1, 1999

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Harrisburg, PA 17101-2301

Dear Mr Hogeman:

I am writing you about the proposed changes to surface mining regulations as provided in the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as it was published in the Pennsylvania Bulletin, Vol. 25, No. 5 on January 30, 1999 and also posted on the Department of Environmental Protections' (DEP) web site. Since I understand that the Pennsylvania Historical and Museum Commission and the Audubon Society have written detailed comments about specific sections of the proposed regulations, I would instead address my comments to a more fundamental problem with the Pennsylvania Department of Environmental Protection's approach to the "protection" of cultural resources in surface mining permits.

These comments are based on my previous eight years of experience as a Regional Archaeologist for the PHMC Bureau of Historic Preservation. In my position I worked with the DEP to identify cultural resources in mining permits. The current set of proposed amendments to Pennsylvania's rules for Surface and Underground Mining do nothing to improve the DEP's approach to the protection of cultural resources and, in fact, will decrease the limited protections that exist now. Right now, the Pennsylvania DEP never requires that mining permits which are identified as having a high probability for containing significant prehistoric or historic archaeological sites by the State Historic Preservation Office (the PA BHP) be further investigated to identify or evaluate those sites. Therefore, the DEP has no procedure to identify National Register eligible properties in mining permits.

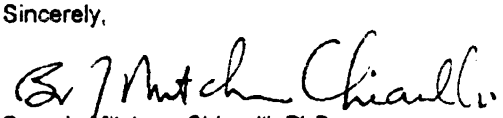
The PA DEP policy is that it is not its responsibility to protect cultural resources even in mining permits in which significant archaeological sites have been identified by the PA SHPO. Instead, the claim is that these sites are covered under a state law instead of the National Historic Preservation Act and that the PA SHPO must themselves conduct investigations. An example of this mismanagement in the protection of cultural resources is presented in the attached excerpt from the Pennsylvania Archaeological Council Newsletter. This report describes a case in which the DEP was alerted to the presence of a Woodland period site and possible burial mound by the PA SHPO and still issued the mining permit allowing the site to be destroyed. I would expect that the DEP's response to this case will be that this was an unfortunate oversight, and that they will work with the PA SHPO to correct the problem. In fact, this problem has occurred time and time again, since the Kimmel Mine problem in Armstrong County in the early 1980s. The Pennsylvania DEP has not yet found an approach to successfully protect these resources and to comply with the relevant Federal statues.

During the past 10 years, the PA DEP has made no attempt to improve its dismal record in the protection of cultural resources. Instead, it has used delaying tactics to subvert the intentions of the NHPA and the Surface Mining Control and Reclamation Act. During this same period, a

The responsibility for the protection of cultural resources in Pennsylvania does not solely rest with the PA DEP. Instead, as I understand Federal law and policy, it is the responsibility of the Office of Surface Mining. I was told, some years ago, that even though the new OSM regulations were not yet in place, that the PA DEP was required to follow the relevant Federal laws and that it signs an agreement each year stating that it will provide cultural resources with the same level of protection that OSM would provide. I understand that this agreement is required for the DEP's receipt of Federal funds. In spite of this agreement, the DEP actually provides almost no protection for cultural resources in surface mining permits.

What is the Office of Surface Mining doing to ensure that cultural resources in Pennsylvania are properly protected in surface mining permits? I intend to request that OSM not approve the proposed new amendments until the DEP has developed a plan to "identify, evaluate, and protect National Register eligible properties" in Mining Permits. I would also request that OSM take over direct supervision of all new mining permit applications in Pennsylvania until cultural resources are properly protected.

Sincerely,



Beverly Mitchum Chiarulli, PhD
Assistant Professor
Indiana University of Pennsylvania

Cc: Pennsylvania Archaeological Council
Brenda Barrett
Director of OSM
Chuck Niquette
Betsy Merrit

MCCALL STRIP MINE, CLARION COUNTY, PA

This article documents a major problem that developed in response to a strip mine project in Western Pennsylvania. The Bureau for Historic Preservation (BHP) was notified by the Department of Environmental Protection (DEP) about a proposed strip mine on the McCall property in Clarion County on March 6, 1997. Unfortunately, there was no follow up on this project due to Beverly Chiarulli leaving the BHP and a lack of any recorded sites on the property. I was not given this project to check when I transferred to the BHP in November, 1997. Conversely, DEP did not send a notice to the BHP that they had approved the permit for this mine in 1997 or 1998, nor were any additional proposals received for this project (something that usually occurs as plans are revised or modified prior to permit approval)

Andrew Wyatt was contacted on August 10, 1998 by a Clarion County resident who indicated prehistoric artifacts had been recovered on the property that was to be strip mined. Wyatt contacted me on August 10, 1998 about this and faxed the file about the McCall project to me on August 11, 1998. I contacted the resident who had called about the project and he reiterated that amateurs had made collections on the property. He said he had not collected on the property, but gave me the names of other people who he thought had made collections. I contacted these people, but none would state that they had actually collected artifacts on the property. However, they all said there was a site there. My general impression of these conversations was that it was very likely these people had made collections on the property, but were wary of saying so to a person who worked for a state agency.

I also contacted Ken Burkett, Jr. and other SPA members from the region to see if they knew of anyone who made collections in the area of the McCall project. Burkett indicated there was a collection in the Clarion County Historical Society that consisted of a human jaw and some possible Hopewell artifacts that came from the McCall Farm. The collection was made early in this century. After learning about this, I contacted the DEP Mining office in Knox and made arrangements to meet with their permit officer, Lorraine Odenthal, who was in charge of overseeing the McCall project permit.

A meeting between Odenthal and myself took place on August 20, 1998. At that time I told her there was a problem with the McCall strip mine project and that human burials might be present. I indicated it was likely that the mining company would have to have to hire someone to conduct a Phase I archaeological survey of the property. However, I had to do more research to see if I could confirm that the collections actually came from that specific property. Odenthal was concerned about the possibility that human remains were present in the project area and wanted to be notified of any additional information that I might uncover. It was also at this meeting that Odenthal indicated a DEP memo which made it the responsibility of the BHP to do any archaeological work on strip mine projects based on Act 70 legislation. I told her that the BHP considered all strip mining permits to be Federal projects subject to Federal regulations because DEP administered strip mine permits under a MOA with the Federal Office of Surface Mining (OSM). I also indicated that half of DEP's mining budget was Federal money, as was half of my funding. This makes the project a Federal project. She indicated this dispute would have to be worked out at a higher level.

I made additional calls to Ken Burkett and other collectors in early September, 1998 to see if I could confirm information about a site or sites on the McCall property. After talking to these people, I made arrangements to visit the McCall project property on September 24, 1998. I also made arrangements to visit the Clarion County Historical Society on that date to check on the collection Burkett had mentioned.

My visit to the Clarion County Historical Society failed to provide any useful information about the collection Ken had mentioned. They did not have a record of it under the name Burkett had provided. The curator was not able to locate the collection at that time. Burkett, who volunteers at the Clarion County Historical Society, indicated there is a collection that he has personally examined and he would locate it for me if I really needed to see it. Fortunately, additional information I obtained indicates any collection made on the McCall farm during the early portion of this century was not from the farm where the McCall mine project was to be located. The McCall's only obtained this property within the last 30 years. It was owned by the Latchaw family or their descendants prior to this. The collection in the Clarion County Historical Society came from the original McCall farm located south of and out of the proposed mine area.

The visit to the project site was more productive. The area is located on top of a bluff above the Allegheny River in the southeastern section of Clarion County. The bluff forms the western side of the project area. There is a high knoll on the top of this bluff, the highest point along this section of the bluff that overlooks the river. Below this section of the bluff along the Allegheny River and out of the project area is 36Cl1, the Parkers Landing Petroglyphs. These are a mix of prehistoric Native American and historic Euroamerican rock carvings suggesting the area was sacred or important to prehistoric groups. To the north is a bluff or high terrace that overlooks a narrow entrenched valley for an unnamed tributary of the Allegheny River. To the east and south are flat fields. All of the project area

was in waist-deep grass or hay when I visited the site, except for a small section that was forested on the western side. The trees were growing on an area previously disturbed by a small strip mine that had been excavated early in the century. I was accompanied by the land owner and a representative from the mining company.
I walked the project area in spite of the tall grass which limited visibility. I found a noticeable feature on top of the knoll that was about 0.5 m tall and 20 m in diameter (Figure 1). It was a small mound located on the highest point of the area, suggesting it was a prehistoric burial mound. I also asked the land owner if people had collected artifacts on his land. He confirmed that they had done so, but could not point out the exact locations where they found artifacts. This information confirmed there was an unrecorded site on the property.
After the field visit was made, I sent my recommendations to the BHP office in Harrisburg and a letter, dated September 28, 1998, was sent to Milestone Crushed, Inc., the mining company, and copied to Odenthal, stating that a possible burial mound was found on the property and a previously unrecorded prehistoric site was located within the project boundaries. It was recommended that a Phase I archaeological survey be conducted by the mining company prior to DEP issuing a permit for the project.
On December 2, 1998 the BHP received formal notification from DEP (there had been some phone conversations about this project during October and November) that they did not believe a mound was on the property because test drill logs indicted bedrock at only two feet below the surface. They also questioned who would be responsible for any archaeological work within the project area. The BHP did not agree with DEP's comments and indicated their response was not satisfactory.

The BHP then contacted DEP to arrange a meeting on December 18, 1998 with David Hess, Executive Deputy Secretary for Policy and Communications, and other DEP representatives to discuss the McCall mine project. At this meeting, Brenda Barrett, Kurt Carr, and I presented data and photographs documenting what I had found. The DEP representatives agreed that the well log data was irrelevant and the feature I found really did appear to be a prehistoric burial mound. There also was a discussion about who was responsible for doing archaeological work in the project area. Barrett indicated the BHP did not have responsibility for the work and eventually, DEP agreed in respect to this project. One of the DEP representatives contacted Odenthal to have the permit held until further investigations could be made. It was then discovered that Odenthal had already issued the mining permit because she did not believe a mound was present. She also ignored data about a previously unrecorded site to issue the permit. Odenthal indicated the mining company had already started work on the project! She was told to have work on the mine halted if they had not destroyed the mound. Later that afternoon, the BHP was notified the mound had been destroyed by the mining operation. Arrangements were made to visit the site on December 21, 1998 to check on the damage.

James Herbstritt and I visited the McCall project on December 21, 1998 to evaluate damage to possible cultural remains. It was found that most facilities for the mine had already been constructed and removal of limestone that capped the coal seam had commenced. The area where the possible burial mound was located was totally destroyed (Figure 2). Also, the mine has already damaged as much of the probable prehistoric habitation site locations as it is going to damage (there still are some undisturbed areas). There is little point in halting work now. The mining company followed permit procedures, it was DEP that ignored BHP recommendations.

The McCall Mine debacle may have some benefits. Both the BHP and DEP agree that better tracking methods need to be developed for these projects and that better communication between the agencies is needed. However there still is the unresolved issue about who is responsible for archaeological work on strip mine projects. BHP is opposed to DEP's view that strip mine projects are covered by Act 70. This is a very important issue for PAC and the BHP encourages PAC members to voice their views to DEP.

submitted by Mark A. McConaughy

DEPT OF ENV PROT Fax:717-783-4675

** Receive Journal **

Feb 26 '99 - Mar 2 '99

Mar 3 '99 7:31

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DEPT OF ENV PROT Fax:717-783-4675

** Transmit Journal **

Feb 25 '99 - Mar 2 '99

Mar 3 '99 7:30

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Pennsylvania Department of Environmental Protection

3913 Washington Road
McMurray, PA 15317
February 24, 1999

McMurray District Office 724-941-7100

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

Mr. William T. Hopwood
Washington Trust Building
Room 412
Washington, PA 15301

Dear Mr. Hopwood:

I will forward your comments dated February 22, 1999, concerning proposed changes regarding underground mining to Mr. Roderick Fletcher, Director, Bureau of Mining and Reclamation. The Bureau of Mining and Reclamation can be contacted at the following address:

Rachel Carson State Office Building
5th Floor
P. O. Box 8461
Harrisburg, PA 17105-8461

Sincerely,

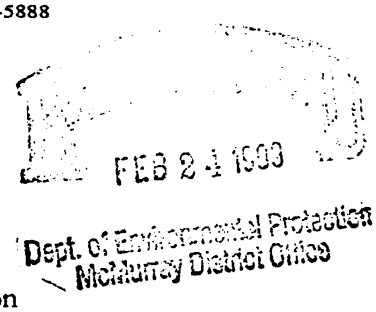
Wm. S. Plassio

William S. Plassio
District Mining Manager
District Mining Operations

WSP/klf: a

bc: Rod Fletcher w/enclosure

W.T. HOPWOOD
WASHINGTON TRUST BUILDING
ROOM 412
WASHINGTON, PA 15301
TEL.: 724-225-8655
FAX: 724-228-5888



February 22, 1999

Mr. William S. Plassio
Department of Environmental Protection
District Mining Manager
3913 Washington Road
McMurray, PA 15317

Dear Mr. Plassio:

I wish to present some general comments regarding the proposed changes that DEP is considering regarding underground mining.

I strongly disagree with the proposed changes that DEP is considering, especially dealing with surface impacts caused by underground mining.

Common sense will tell you if you have been able to observe any of the conditions brought about by high extraction mining, that the surface is impacted fairly frequently. As such, surface impacts need to be recognized and addressed. This is in line with DEP duties.

We need more and better regulations and better enforcement to protect the environment and property values.

Sincerely,

William T. Hopwood

WTH:br
File

WILLIAM and SUSAN KEANE
1903 Hampstead Drive Pittsburgh, PA 15235 (412) 241-1366
Email: bill.keane@sierraclub.org

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

February 23, 1999

David C. Hogeman
PADEP Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101-2301

Re: Comments on Draft Final Chapter 86 Mining Regulations

Dear Mr. Hogeman:

This letter is to provide comments on the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as published in the Pennsylvania Bulletin on 30 January 1999 (Vol. 29, No. 5, p. 548).

Overall, the proposed revisions will weaken protections of the public and the environment, and for that reason should not be adopted as proposed.

(A) The Regulatory Basics Initiative, which is the basis of the proposed changes, has as its focus "easing the regulatory burden". This should not be equated with "eliminating necessary regulations". Poorly defined regulations, inconsistent application of the regulations by DEP, inadequate enforcement -- these are problems that should be corrected. The environmental protection requirements can be made less ambiguous without making them less effective. If the regulations were clearly defined and consistently applied, that would ease the burden on the regulated public. The goal should be to address the problems that evoked the regulations in the first place, not to eliminate the regulations themselves. For the Department of Environmental Protection to weaken environmental protection requirements in order to make it easier for mines to open and operate is simply irresponsible.

B) A questionable assumption built into the Regulatory Basics Initiative is that federal standards and protections are acceptable, or even adequate. In the case of mining, the responsibility for administering the regulatory program has been delegated to Pennsylvania, and along with it the responsibility for protection of our natural resources. The federal SMCRA program was meant to provide a minimum baseline level of environmental protection. The original intent was that states receiving primacy would adapt the federal standards to their own local needs and conditions,

primarily by making them more stringent. Instead, interstate competition and other economic considerations have fueled a "race to the bottom" in terms of preserving environmental quality. Efforts to reduce federal oversight are further weakening the standards, and DEP's apparent willingness to follow suit is discouraging. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean air and water in accordance with Article 1, Section 27 of the Pennsylvania Constitution. They do not aspire to have the worst environmental quality allowed by federal law.

(C) 86.1. Definitions: Administratively complete application: The existing definition of "Complete application" is better and should not be changed. The proposed change reduces environmental protections in that an application need only "address" each requirement, instead of needing to "demonstrate compliance with applicable statutes and regulations" as under the existing definition. More information and more thorough planning before a mine is opened, not less, are needed to ensure environmental protection. If any change is to be made in this regard, the application forms themselves should be changed to more closely parallel the prescribed regulations so that applicants can clearly understand what the requirements are and what information should be presented in order to comply.

(D) 86.1. Definitions: Valid existing rights: The existing definition should be retained. It can be difficult enough to understand these regulations without being forced to search for the referenced definition in the Code of Federal Regulations. Furthermore, the federal definition of VER is convoluted, is subject to legal interpretation, has been changed over the years, and still is not firmly resolved. The current definition at 86.1 is relatively clear and should not be changed. If any change is to be made, it should be done in clear language at 86.1 and not by reference to a federal regulation.

(E) Subchapter D. 86.101. Definitions: Fragile lands: The word "significantly" should not be added. The proposed addition of this qualification will weaken environmental protections currently in place. How would "significantly" be defined, and by whom? Any damage to valuable or critical habitats may be significant. It would be a conflict of interest to allow an applicant to decide what level of damage, if any, is not significant. The DEP should make that determination, and only after all of the relevant information has been assembled and reviewed.

The last part of the existing definition, beginning with "and buffer zones adjacent to the boundaries of areas where surface mining operations are prohibited ... ", should be retained. It is unclear why this language is proposed for deletion. If it is removed, it will significantly reduce environmental protections. The purpose of buffer zones is to protect the adjacent area, so by their very nature these zones are critical, and thus should be retained in this definition.

(F) Subchapter D. 86.101. Definitions: Public park: The existing sentence defining nonprofit organizations as local agencies in this circumstance should not be deleted. In those instances where a nonprofit organization has designated lands for public recreational use, it is entirely appropriate that those lands should be treated as public parks. It is the park's public use, not its ownership, that is the significant factor. For the same reasons, the word "primarily" should not be added in an apparent attempt to distinguish some public recreational uses from others; all such uses should be fully and equally protected.

(G) Subchapter D. 86.101. Definitions: Surface mining operations: The last part of the definition ("and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area") should not be deleted. To delete this section of the definition would significantly weaken existing environmental protections. Despite its title, the federal SMCRA has always regulated both surface coal mining and the surface effects of underground coal mining. Thus it is appropriate to maintain this section in the definition. Furthermore, no comparable language is proposed to replace it in the underground mine regulations, and so this would become an unregulated class of activities.

(H) 86.102.(3). Areas where mining is prohibited or limited: The phrase "on or eligible for inclusion" should be retained. To delete this phrase would significantly weaken existing protections of recognized historic resources. The term "eligible for inclusion" refers to specific resources that have been approved by the SHPO for listing on a State Register and/or have been formally nominated for listing on the National Register. In accordance with federal requirements under Section 106 of the National Historic Preservation Act, both listed and eligible resources must be protected in certain situations. The proposed deletion of the above phrase is an unacceptable reduction of current protections and should not be adopted.

(I) 86.102.(9).ii and iii. The proposed changes reduce the protections of individuals whose dwellings are within 300 feet of proposed operations and thus should not be adopted. The proposed requirements lessen the burden on the mine applicant to gain the permission of existing landowners by expanding what is considered to be a valid waiver to include such things as a "lease, deed, or other conveyance" and the "constructive knowledge" of future owners. The existing language is adequate and should not be changed.

(J) 86.103.e. Procedures. The proposed change from "may" to "will" reduces the protections currently afforded to public parks and National Register places, and thus should not be adopted. If proposed mining operations are adjacent to, or upstream from, a public park or National Register site, there is a good likelihood that adverse effects will result. If there is any doubt, the regulations should take the cautious approach. In every such instance, therefore, the applicant rightfully should be required to transmit a copy of the application to the appropriate agency and solicit their comments. It would be a conflict of interest to allow an applicant to decide whether the mining operations will adversely affect these resources. The agency with jurisdiction should make that determination, and only after all of the relevant information about the proposed mining operation has been assembled and reviewed. The proposed change should not be adopted because it will weaken the existing protections of public parks and historic resources.

The proposed change in wording from "public park" to "publicly owned park" should not be made. As stated above in Comment F, ownership of a park is irrelevant. The important consideration in protecting the public's rights from adverse effects due to mining is whether the park is designated for public use, not who owns it. The existing language should remain unaltered.

(K) 86.103.e(2). Procedures. Two qualifiers are proposed to be added. The first (i), to allow a 30-day extension, may be appropriate. The second (ii), to deem a lack of response an approval, is unjust and should not be adopted. A mine application is a technically complex set of documents which can be difficult even for mine engineers to process and understand. Federal, state, or local agencies with jurisdiction over parks may not have the staff or expertise readily available to review a mine application and make a well informed determination about the potential extent of impacts in a 30- or 60-day timeframe. The coordination with park representatives is an appropriate step in the review process, and it should not be short-circuited. The original 30-day

comment period should be extended to 90 or 120 days. The lack of a response should not be deemed an approval in any case.

(L) 86.121. Areas designated unsuitable for mining: The proposed changes would appear to simply reformat the existing requirements, but in fact they weaken existing protections and thus should not be adopted. The following two statements should be retained in the regulations: "In considering the permit applications in designated areas, the Department will impose terms and conditions to preserve and protect the applicable values and uses of the area.", and "No permits for surface mining will be issued in areas designated unsuitable under this chapter.". Without those statements, the current protections afforded by the regulations will be lessened unnecessarily.

(M) 86.123.(5). Procedures: petitions. The sentence beginning "A person having an interest which is or may be adversely affected must demonstrate an "injury in fact" ..." is an outrage and should not be added to the regulations. This sentence would shift the burden of proof onto the injured party, which is entirely inappropriate. If anyone is to be required to make a demonstration, it should be the mine applicant, not the victims of mining. Certainly the petitioner should provide as much information as possible to support his/her case, but the applicant should be required to demonstrate that the proposed mine operations will not adversely affect a petitioner's interest and to identify actions that will be taken to prevent or mitigate any potential adverse effects. The proposed sentence should not be adopted.

(N) 86.124.(a).2. Procedures: initial processing, etc. The proposed new sentence "A frivolous petition is one in which the allegations of harm lack serious merit." is unnecessary and should not be adopted. The commonly accepted meaning of the word "frivolous" as used in the existing regulations does not need to be clarified by the proposed sentence. Furthermore, who would decide up front whether the allegations "lack serious merit"? This is what the petition process is set up to do: to review proposals and determine whether a designation of unsuitability is warranted.

(O) 86.124.(c). Procedures: initial processing, etc. and 86.125. Procedures: hearing requirements. The forum for the hearing should not be changed from the EQB to the DEP as proposed. It is appropriate that the more disinterested EQB forum be used to hear the petitions. This proposed change in forum should not be adopted.

(P) 86.124.(f). Procedures: initial processing, etc. It is appropriate to impose a deadline on the preparation of a recommendation on a petition. The 12-month timeframe following receipt of a complete petition should be adequate. However, until the petition has been deemed to be administratively complete, a milestone that should be made clear to all parties involved, the clock should not begin.

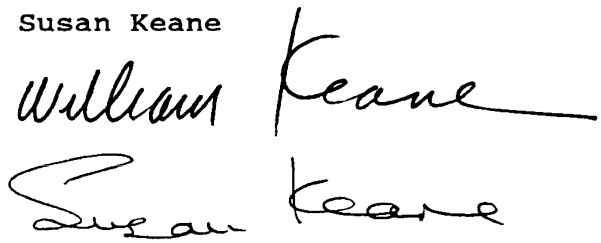
(Q) 86.129.(a) and (b). Coal exploration. The change from prohibiting coal exploration on areas designated unsuitable for mining to allowing it should not be made. This is a major reversal in the regulation and it is entirely inappropriate. It may be reasonable to allow coal exploration on lands for which a petition has been filed and is pending, but once an area has been formally designated as unsuitable, no mining or coal exploration should be allowed. The proposed change should not be adopted.

In conclusion, the proposed revisions to Chapter 86 clearly were not made with the interests of the public and the protection of the environment in mind. The proposed changes undoubtedly will reduce the burden on the mine applicant, but at the expense of the environment and the general public. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean land, air and water. The changes proposed for Chapter 86 are contrary to the goals of environmental protection and, therefore, should not be adopted.

Sincerely,

William Keane

Susan Keane



Raymond Proffitt Foundation

P.O. Box - 723
Langhorne, Pa. 19047-0723

22 February 1999

David C. Hogeman
PADEP Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101-2301

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

Re: Comments on Draft Final Chapter 86 Mining Regulations

Dear Mr. Hogeman:

This letter is to provide comments on the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as published in the Pennsylvania Bulletin on 30 January 1999 (Vol. 29, No. 5, p. 548).

Overall, the proposed revisions will weaken protections of the public and the environment, and for that reason should not be adopted as proposed.

(A) ***The Regulatory Basics Initiative***, which is the basis of the proposed changes, has as its focus "easing the regulatory burden". This should not be equated with "eliminating necessary regulations". Poorly defined regulations, inconsistent application of the regulations by DEP, inadequate enforcement -- these are problems that should be corrected. The environmental protection requirements can be made less ambiguous without making them less effective. If the regulations were clearly defined and consistently applied, that would ease the burden on the regulated public. The goal should be to address the problems that evoked the regulations in the first place, not to eliminate the regulations themselves. For the Department of Environmental Protection to weaken environmental protection requirements in order to make it easier for mines to open and operate is simply irresponsible.

(B) ***A questionable assumption*** built into the Regulatory Basics Initiative is that federal standards and protections are acceptable, or even adequate. In the case of mining, the responsibility for administering the regulatory program has been delegated to Pennsylvania, and along with it the responsibility for protection of our natural resources. The federal SMCRA program was meant to provide a minimum baseline level of environmental protection. The original intent was that states receiving primacy would adapt the federal standards to their own local needs and conditions, primarily by making them more stringent. Instead, interstate competition and other economic considerations

have fueled a "race to the bottom" in terms of preserving environmental quality. Efforts to reduce federal oversight are further weakening the standards, and DEP's apparent willingness to follow suit is discouraging. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean air and water in accordance with Article 1, Section 27 of the Pennsylvania Constitution. They do not aspire to have the worst environmental quality allowed by federal law.

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(D) ***86.1. Definitions: Valid existing rights***: The existing definition should be retained. It can be difficult enough to understand these regulations without being forced to search for the referenced definition in the Code of Federal Regulations. Furthermore, the federal definition of VER is convoluted, is subject to legal interpretation, has been changed over the years, and still is not firmly resolved. The current definition at 86.1 is relatively clear and should not be changed. If any change is to be made, it should be done in clear language at 86.1 and not by reference to a federal regulation.

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The last part of the existing definition, beginning with "and buffer zones adjacent to the boundaries of areas where surface mining operations are prohibited ... ", should be retained. It is unclear why this language is proposed for deletion. If it is removed, it will significantly reduce environmental protections. The purpose of buffer zones is to protect the adjacent area, so by their very nature these zones are critical, and thus should be retained in this definition.

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circumstance should not be deleted. In those instances where a nonprofit organization has designated lands for public recreational use, it is entirely appropriate that those lands should be treated as public parks. It is the park's public use, not its ownership, that is the significant factor. For the same reasons, the word "primarily" should not be added in an apparent attempt to distinguish some public recreational uses from others; all such uses should be fully and equally protected.

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(H) ***86.102.(3). Areas where mining is prohibited or limited***: The phrase "on or eligible for inclusion" should be retained. To delete this phrase would significantly weaken existing protections of recognized historic resources. The term "eligible for inclusion" refers to specific resources that have been approved by the SHPO for listing on a State Register and/or have been formally nominated for listing on the National Register. In accordance with federal requirements under Section 106 of the National Historic Preservation Act, both listed and eligible resources must be protected in certain situations. The proposed deletion of the above phrase is an unacceptable reduction of current protections and should not be adopted.

(I) ***86.102.(9).ii and iii.*** The proposed changes reduce the protections of individuals whose dwellings are within 300 feet of proposed operations and thus should not be adopted. The proposed requirements lessen the burden on the mine applicant to gain the permission of existing landowners by expanding what is considered to be a valid waiver to include such things as a "lease, deed, or other conveyance" and the "constructive knowledge" of future owners. The existing language is adequate and should not be changed.

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mining operations will adversely affect these resources. The agency with jurisdiction should make that determination, and only after all of the relevant information about the proposed mining operation has been assembled and reviewed. The proposed change should not be adopted because it will weaken the existing protections of public parks and historic resources.

The proposed change in wording from "public park" to "publicly owned park" should not be made. As stated above in Comment F, ownership of a park is irrelevant. The important consideration in protecting the public's rights from adverse effects due to mining is whether the park is designated for public use, not who owns it. The existing language should remain unaltered.

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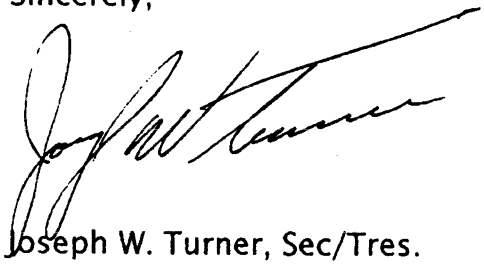

Joseph W. Turner, Sec/Tres.

SCHMID & COMPANY INC., CONSULTING ECOLOGISTS
1201 CEDAR GROVE ROAD, MEDIA, PENNSYLVANIA 19063-1044
Telephone: (610) 356-1416 FAX: (610) 356-3629

Environmental Inventories
Wetlands Mapping & Restoration
Expert Testimony

17 February 1999

Permit Coordination
Environmental Assessments
Impact Statements

David C. Hogeman
PADEP Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101-2301

Original: 1924
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Copies: Harris
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In re: Comments on Draft Final Chapter 86 Mining Regulations

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This letter is to provide comments on the Draft Final Rulemaking for Surface and Underground Mining (25 PA Code, Chapter 86) as published in the *Pennsylvania Bulletin* on 30 January 1999 (Vol. 29, No. 5, p. 548). These comments are provided as a public service and not on behalf of any client. They are based on my experience during more than 20 years as a private-sector environmental consultant during which time I have worked closely with the PADEP regulatory process.

My first two comments are general in nature. I then focus more specifically on the Chapter 86 changes that are proposed. Overall, the proposed revisions will weaken protections of the public and the environment, and for that reason should not be adopted as proposed.

(A) The Regulatory Basics Initiative, which is the basis of the proposed changes, has as its focus "easing the regulatory burden". This should not be equated with "eliminating necessary regulations". Poorly defined regulations, inconsistent application of the regulations by DEP, inadequate enforcement -- these are problems that should be corrected. The environmental protection requirements can be made less ambiguous without making them less effective. If the regulations were clearly defined and consistently applied, that would ease the burden on the regulated public. The goal should be to address the problems that evoked the regulations in the first place, not to eliminate the regulations themselves. For the Department of Environmental *Protection* to weaken environmental protection requirements in order to make it easier for mines to open and operate is simply irresponsible.

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In conclusion, the proposed revisions to Chapter 86 clearly were not made with the interests of the public and the protection of the environment in mind. The proposed changes undoubtedly will reduce the burden on the mine applicant, but at the expense of the environment and the general public. The people of the Commonwealth want and expect DEP to promote and protect their rights to clean air and water. The changes proposed for Chapter 86 are contrary to the goals of environmental protection and, therefore, should not be adopted.

Thank you for the opportunity to provide these comments. If a comment/response document is compiled, kindly send me a copy.

Yours truly,

Stephen P. Kunz
Certified *Senior Ecologist* (ESA)

Freeman, Sharon

From: Kurt J Weist [Kurt.J.Weist@law.widener.edu]
Sent: Tuesday, March 02, 1999 4:35 PM
To: RegComments
Subject: ANFR 25 Pa. Code Chapter 86

Original: 1924
McGinley
Copies: Harris
Sandusky
Wyatte

Untitled

Attached are the comments of the Widener University School of Law, Environmental law Clinic on the Advance Notice of Final Rulemaking concerning 25 Pa. Code Chapter 86. The Clinic's comments are limited to the proposed amendment to the definition of "surface mining operations" in 25 Pa. Code Sec. 86.101.

Kurt J. Weist, Director
Paul Polacek, Certified Legal Intern

Widener Law School

The Department of Environmental Protection's (DEP) proposed changes to 25 Pa. Code Sec. 86.101 regarding the definition of "surface mining operations" would eliminate language that includes both activities that take place on the surface and other surface impacts related to underground mining. Both DEP's proposed change to this definition and the proposed federal interpretive rule on which it assertedly is based are limited to the portions of the col mine regulation program that pertain to lands unsuitable for surface coal mining.

1. DEP's proposal to change the definition of "surface mining operation" is premature.

The definition of "surface mining operations" should remain unamended. DEP's proposed changes to 25 Pa. Code Sec. 86.101 are based on a federal proposed interpretive rule and therefore premature. By proposing to amend the definition at this time, DEP unnecessarily creates a risk that The Office of Surface Mining Reclamation and Enforcement (OSM) will change the proposed interpretation in its final rulemaking and create inconsistencies that would require another rulemaking proceeding to again amend the definition of "surface mining operations." DEP therefore should wait until the federal rulemaking proceeding is finalized before it proposes any changes to the definition of "surface mining operation."

In the proposed interpretive rule, OSM acknowledges that it has applied the term inconsistently admitting that "[i]n some documents, OSM has apparently taken the position that section 522(e) [of SMCRA] does apply to subsidence from underground mining" and that "[t]he negative implication would appear to be that such operations and impacts (including subsidence) are otherwise prohibited by section 522(e)." 62 FR 4864, 4866. OSM explains that after withdrawing a similar proposed rule and obtaining a formal opinion (M-Op.) from the Office of the Solicitor, U.S. Department of the Interior, on what was considered a fundamentally legal issue, OSM published a Notice of Inquiry on July 18, 1991 accepting the M-Op.'s conclusion that Congress did not intend section 522(e), 30 U.S.C. Sec. 1272, to include subsidence. On September 23, 1993, the district court vacated OSM's NOI and remanded the matter to the Secretary for formal rulemaking. 62 FR 4864, 4865. In light of these events, the opinion of the Office of Solicitor is not entitled to any deference, and DEP should take no action based on the opinion until the judicially mandated interpretive rulemaking proceeding is completed.

2. No valid reason has been advanced to justify amendment of the definition of "surface mining operations."

Pennsylvania is not bound to follow existing federal regulations precisely. SMCRA section 505, 30 U.S.C. Sec.1255, allows for a State law to be more stringent but not inconsistent with the federal regulations. The U.S. Supreme Court has held that unlike substantive regulations, which are entitled to deference, even final interpretive rules are "general statements" and "courts are not required to give effect to interpretative regulation." *Chrysler Corporation v. Brown*, 99 S. Ct. 1705, 1724 (1979). The federal interpretive rule at issue here is a mere proposal, not a final interpretive rule and should receive no deference by DEP. The DEP has failed to provide adequate reasoning to

change a duly promulgated and presumptively valid State regulation. A mere proposed interpretive rule provides no such justification.

3. The definition of "surface mining operation" should remain unamended because the proposed amendment would make Pennsylvania law less stringent than its federal counterpart.

DEP proposes to eliminate the language; "and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area." "[A]ctivities involved in or related to underground coal mining which are conducted on the surface of the land" indisputably would fall within SMCRA's definition of "surface mining operations." SMCRA 701(28)(A), 30 U.S.C. Sec. 1291(28)(A), includes in the definition of surface mining operations "activities conducted on the surface... and surface impacts incident to an underground coal mine." SMCRA 701(28)(B), 30 U.S.C. Sec. 1291(28)(B), adds the "areas which such activities occur" and includes but is not limited to operations necessary for access and incident to the operation of the mine such as stockpiles, ventilation shafts, conveying water, holes or depression. It is clear that this definition would include these activities that are incident to operation of an underground mine. The deletion of the language from Section 86.101's definition would make Pennsylvania's regulation less stringent than its federal counterpart and therefore impermissible.

4. Any change to the definition of "surface mining operations" should be limited to the scope of the proposed federal interpretive rule, which relates only to the effects of subsidence caused by underground mining operations.

The proposed federal interpretive rule clearly focuses on the effects of subsidence as the surface effect not included in the definition of "surface mining operations." 62 FR 4864, 4866. It is clear in the explanation in OSM's proposed interpretive rule that the change in the definition of "surface mining operation" is limited to excluding the surface effects of underground mine subsidence from the scope of "surface mining operations." It is equally clear that the elimination of the language proposed by DEP would go beyond the limited scope of the proposed federal interpretive rule and exclude activities that indisputably constitute "surface mining operations" as defined in Section 701(28), 30 U.S.C. Sec. 1291(28). For example, the building of access roads, and the development of processing areas, stockpiles, overburden piles, boreholes, or surface water conveyances that relate to underground mines are all included in Section 701(28), 30 U.S.C. Sec. 1291(28), as surface mining operations. The elimination of the language proposed by DEP would remove such activities from the definition of surface mining operations. Again, the removal of these activities from the state regulation makes them inconsistent with the current federal regulations and therefore in violation of SMCRA section 505, 30 U.S.C. Sec. 1255.

Citizens Advisory Council

to the Department of Environmental Protection

P.O. Box 8459 • Rachel Carson State Office Building

Harrisburg, PA 17105-8459 • 717-787-4527 • Fax 717-772-2291

Please Note: Our New Fax Number is 717-772-5748

March 2, 1999

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Mr. David C. Hogeman
Bureau of Mining and Reclamation
Rachel Carson State Office Building
400 Market Street, 5th Floor
Harrisburg, PA 17101-2301

Dear Mr. Hogeman:

Thank you for the opportunity to comment on the Advance Notice of Final Rulemaking 25 PA. Code, Chapter 86. I have several general issues followed by more detailed, section by section comments.

General Issues

First, no comment and response document has been provided, and no indication is made as to when one might be available. These regulations were approved as proposed by the EQB in October of 1997. There has been ample time to respond to the comments received, and it is impossible to understand some of the changes made (much less know about those that were rejected!) to the regulation without the comment/response document.

Similarly, there is no preamble to the regulation, explaining the changes being proposed—another serious shortcoming.

A side by side review of the ANFR and the proposed regulation indicates that the ANFR is missing several sections that were being changed in the proposed version; why have these not been included? Even if they were inadvertently removed, the Advance Notice is incomplete and incorrect, and may not be legally valid.

Finally, while the Department claims that there is no legal requirement to provide for additional public review and comment, the 30-day review provided for the ANFR is inadequate, especially given the missing sections, confusing changes and the serious implications of some of the language changes outlined below. I am particularly concerned by what could be construed as a backdoor attempt to exempt certain areas from their current designation as unsuitable for mining (see comments on section 86.130 at the end).

Numerous individuals and groups have contacted Council with concerns regarding these regulations and the short period of time provided for review and study. At least several of these have asked for an extension and I join in this request. The 30-day period has not allowed for time for Council review of these regulations; and as you know, Council sits on both the EQB and the MRAB, and has a longstanding concern with this program. If you are truly seeking public input and involvement, then at least another 30 days should be provided. As far as I know, there is no compelling reason not to provide an extension, especially if the regulation is not being presented to the MRAB until April. Closing the comment period before allowing the MRAB it's opportunity to comment makes a sham of asking for the Board's input.

Detailed Comments

§86.1. Definitions

Administratively Complete Application - The work "properly" should be inserted before "completed forms" in line 2—the existing language required properly completed forms, not just filled-in forms; we should still expect applications to be properly completed. (2)

Valid existing rights - I do not believe the changes made to this definition are a problem. However, in order to make it more consistent with federal requirements, several paragraphs of information have been replaced by one sentence referring to the federal definition of "valid existing rights" in 30 CFR, Section 761.5. Some commentators may object to this change, especially when the federal requirements are not listed. (1)

§86.101. Definitions

Fragile lands - The opening sentence now reads: "Geographic areas containing natural, ecologic, scientific or esthetic resources that could be SIGNIFICANTLY damaged or destroyed by surface mining OPERATIONS." I question the addition of the term "significantly" to this definition. It is apparently being used to clarify the kind of damage, but it is a subjective term especially when evaluating fragile areas. Fragile areas warrant additional consideration, as *any* potential damage could be significant. In addition, I question why the last clause of the definition is being deleted. (4)

Public building - A structure that is owned [by a public agency or used principally] OR LEASED AND PRINCIPALLY USED BY A GOVERNMENT AGENCY for public business[,] OR meetings [or other group gatherings]. Does this exclude schools and similar buildings? (5)

Public park - The last sentence of this definition should be retained. Nonprofit organizations owning lands should be considered a local agency under this subchapter. What is the rationale for deleting this language? (6)

Renewable Resource Lands - Why are we changing this definition? Is there a comparable federal definition? (0)

Surface mining operations - The Department has proposed eliminating underground mining activities from the definition to make it "consistent with the equivalent federal legal interpretation and also consistent with the interpretation provided in the federal proposed rulemaking on section 522(e) of SMCRA." Actually, 30 CFR Section 761.5 includes a definition for *Surface operations and impacts incident to an underground coal mine*, which clearly includes such activities. Since this makes no distinction between surface operations and surface impacts incident to an underground coal mine, I question why Pennsylvania, which is highly impacted by both, can justify doing so. (3/4)

In addition, consistency with OSM's proposed 522(e) regulations is problematic as OSM has not been able to decide what to do about 522(e). A draft EIS was published 1/31/97 as was a proposed interpretive rule; the comment period for the proposed and EIS was later extended until 8/1/98, and no further action has been taken on either document. In other words, there is no clear-cut guiding document right now to firmly base a decision on.

The definition should remain unchanged. It would be prudent for DEP to wait until OSM resolves its own

issues with section 522(e) and any related documents. This would also provide additional time for public comment on this important change.

§ 86.102. Areas where mining is prohibited or limited.

§86.102(3)
You propose to delete the words "on or eligible for inclusion" yet this same language has been retained in the definition of *historic lands* on page 5 of the ANFR. This clause should be retained in this section.

§86.102(9)
(i) THE only part of the surface mining operations which is within 300 feet (91.44 METERS) of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling [or unless the current].

(ii) THE owner thereof has provided a written waiver [consenting] BY LEASE, DEED OR OTHER CONVEYANCE CLARIFYING THAT THE OWNER AND SIGNATORY HAD THE LEGAL RIGHT TO DENY SURFACE MINING OPERATIONS AND KNOWINGLY WAIVED THAT RIGHT AND CONSENTED to surface mining operations closer than 300 feet (91.44 METERS) OF THE DWELLING AS SPECIFIED. [The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.]

The term "current" has been removed from owner in (9)(ii). This should be retained to eliminate confusion over ownership and mineral rights issues if it is a older property.

(ii)(A) A VALID WAIVER SHALL REMAIN IN EFFECT AGAINST SUBSEQUENT OWNERS WHO HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE EXISTING WAIVER AT THE TIME OF PURCHASE. What is the difference between actual and constructive knowledge? Is this federal language?

(iii) A NEW WAIVER IS NOT REQUIRED IF THE APPLICANT FOR A PERMIT HAD OBTAINED A VALID WAIVER PRIOR TO AUGUST 3, 1977, FROM THE OWNER OF AN OCCUPIED DWELLING.... Such a waiver should only be deemed valid if it has been properly filed in public property records as outlined in paragraph (B) above. This would make it consistent with requirements for property owners and also ensure its validity.

(11) Within 100 feet (30.48 METERS) measured horizontally of a cemetery, CEMETERIES MAY BE RELOCATED UNDER THE ACT OF APRIL 18, 1877 (P.L. 54, No. 54 (9 P.S. §§41-52)). First of all, are we really relying on a law passed in 1877 for this? What are the provisions of this law? Is any kind of approval needed from the Department, local municipality or property owner to move a cemetery? If so, list this language.

§86.103. Procedures.
(e) When the proposed surface mining operations [may] WILL adversely affect a [public] PUBLICLY OWNED park or a place included on the National Register of Historic Places, the Department will transmit to the Federal, State or local agencies with jurisdiction over, or a statutory or regulatory responsibility for, the park or [historic] place, a copy of the completed permit application containing the following:

This change is being made to be more consistent with federal language. I think the term "may" should be

retained to ensure flexibility when determining short and long-term impacts. In addition, who bears the burden of proof here?

(2) A notice to the appropriate agency that it shall respond within 30 days from receipt of the request. 9.
(ii) FAILURE TO OBJECT WITHIN THE COMMENT PERIOD SHALL CONSTITUTE AN APPROVAL OF THE PROPOSED PERMIT BY THAT AGENCY.

I don't believe that this is consistent with federal language—what is the authority for this provision? I question whether this kind of restriction provides adequate time for public participation.

§ 86.121. Areas [designated] EXEMPT FROM DESIGNATION AS unsuitable for surface mining operations. O
(3) A PERSON ESTABLISHES THAT SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS IN SURFACE MINING OPERATIONS WERE IN EXISTENCE PRIOR TO JANUARY 4, 1977.

Are the revisions under this section based on federal language, specifically the change from designated to "exempt from designation as?" The double negatives here make this section very confusing and it is not clear why it is necessary. The way I read it, the operations that should be exempt from designation are now exempt from the exemption section—where does that leave them?

§86.121(3). What constitutes "substantial legal and financial commitments?" Does this section mean that owning the coal rights exempts them? The existing language specified that such commitments were defined by the OSMRE under section 522 of SMCRA if the operation existed prior to 1-4-77; you have deleted this and opened this up to potentially exempt anyone who owns mineral rights.

§86.123. Procedures: petitions.
(5) Identification of the petitioner's interest which is or may be adversely affected. A PERSON HAVING AN INTEREST WHICH IS OR MAY BE ADVERSELY AFFECTED MUST DEMONSTRATE AN "INJURY IN FACT" BY DESCRIBING THE INJURY TO THE SPECIFIC AFFECTED INTEREST AND DEMONSTRATING HOW THEY ARE AMONG THE INJURED. 10

There currently is no (5) in the regulations; the first sentence in the new (5) above is the language found in the current (4). Is this new language found in the federal requirements? What is "injury in fact?" Is it a legal definition? Should it be included in Chapter 86's list of definitions?

§ 86.125. Procedures: hearing requirements.
(b) states that the hearing...will not allow cross examination of witnesses. Federal law in fact allows cross examination of expert witnesses, so this is inconsistent. O

(e)(3) A person with] PERSONS KNOWN TO THE DEPARTMENT TO HAVE an ownership or other interest [made known to the Department] in the area covered by the petition. Will this language be the new (e)(2)?

(i) should be retained as it provides some flexibility to the department.

§ 86.126. Procedures: decision.

(b) (1) **IF THE DECISION IS TO DESIGNATE AN AREA AS UNSUITABLE FOR SURFACE MINING OPERATIONS, THE EQB** will deposit and publish its **[REGULATORY]** decision as a regulation in the manner required by the **REGULATORY REVIEW ACT (71 P.S. §§ 745.1 et. seq.); THE COMMONWEALTH DOCUMENTS LAW**....

What does this do to the rulemaking process (assuming that it will still be a regulation?). Is the EQB's decision a final decision, by-passing the proposed rulemaking stage (and relevant public participation requirements)? Or does it get published as a proposed rulemaking? The EQB's role in this is very fuzzy.

§86.127 sections (a) and (c) were changed in the proposed rulemaking, but are not included here—why?

§86.129. Coal exploration ON AREAS DESIGNATED AS UNSUITABLE FOR SURFACE MINING OPERATIONS.
(1) THE EXPLORATION IS consistent with the designation. [or the purposes of the submitted petition and will]
(2) THE EXPLORATION WILL be conducted to preserve and protect the applicable values and uses of the area[.] UNDER SUBCHAPTER E (RELATING TO COAL EXPLORATION), [Exploration may not be conducted unless] AND the Department has [been notified in advance and has] issued written approval for the exploration [under §86.133(f) (relating to general requirements). Approval will not be issued unless the person seeking the approval has described the nature and extent of the proposed operation, and has described in detail the measures to be employed to prevent adverse effects].

This change is being made to be more consistent with federal language. DEP needs to clarify how exploration can be consistent with an area already designated unsuitable for mining.

Under 86.129 (b)(2), why is the requirement that the applicant describe "the nature and extent of the proposed operation" deleted?

§86.130 Areas designated as unsuitable for mining is a list of areas unsuitable for surface mining and where surface mining will not be permitted. The ANFR adds to section (13)(ii) reference to section 86.121(a), which, as revised, now deals with areas exempt from designation as unsuitable for surface mining. Are the areas listed in the paragraph now exempt from their previous designation as unsuitable for mining?

Thank you again for the (brief) opportunity to comment on this rulemaking. I again urge the Department to extend the comment period since much confusion remains.

Sincerely,

Susan M. Wilson
Executive Director

cc: Council