Original: 2358

Comments to the Environmental Quality Board and the Office of Surface Mining; October 16, 2003 Pertaining to Proposed OSM/DEP Dispute Resolution Regarding Amendment of Pennsylvania's Coal Mining Regulatory Programs

By Beverly Braverman, Executive Director of the Mountain Watershed Association, Inc. and Chair of Tristate Citizens Mining Network; Contact Information: 724 455-4200; mwa@helicon.net.

We believe the current laws supporting the mining industry are unconstitutional, giving private corporate entities the right to deprive private citizens of their constitutional rights without due process of law. We believe that the agencies established by law to enforce environmental laws namely the Pennsylvania Department of Environmental Protection and the federal Office of Surface Mining, but particularly the PADEP have abrogated their duties to protect the waters, to protect the lands, and to protect the people of the Commonwealth. PADEP has deliberately interpreted existing laws and consciously proposed regulations that will continue to allow the destruction of the Commonwealth's water resources, most notably the absolute destruction of precious water used for agricultural purposes and therefore the destruction of agricultural lands, the subsidence of surface waters of the Commonwealth in direct and reckless disregard of the Clean Streams Law, and the diminishment of potable water supplies.

We believe that both these agencies have ignored their charge to protect the environment, which includes protecting the people of the Commonwealth. The facilitation of mining activities, which have been permitted by PADEP ensures that the coalfields of Pennsylvania will continue to be resource colonies for the rest of the country, that Appalachia will continue to be a national sacrifice zone, and that coalfield citizens will continue to be deprived of social and environmental justice.

That we have been struggling with the regulatory process to put in place workable regulations supporting Act 54, as flawed as it is, for the past many years leads the citizens to believe that the PADEP has an agenda other than enforcement of laws to protect the Commonwealth against the processes involved in the mining of coal. Co-opting activists is part of that agenda. That we feel compelled to struggle for the few changes we may glean to help protect us and our environment is a testimony to our disillusionment with the intentions of regulatory agencies.

Many people will be submitting comments on the proposed amendments. We ask that while reviewing these comments you remember that the coal industry is not a public agency. It does not have the right of eminent domain. It does not act based on public policy needs. It should be given no more latitude or support than any other business. It is a for-profit corporation with the bottom line as its major concern, not jobs, not water, not the people of the coalfields.

We have many concerns with both the dispute resolution process and the proposed amendments. The first is failure of the process to provide adequate public participation. We have already submitted comments about DEP's position that certain amendments will be "as effective as" the federal program. In fact, we asked to see the arguments supporting these assertions so that we could evaluate whether they indeed showed that the DEP program would be "as effective as" the federal program. This information was never produced, although my understanding was that DEP and OSM agreed to provide this information to us. By being deprived of this information, we have been deprived of the opportunity to effectively comment.

Further, DEP has suggested that the statute does not need to be changed in several areas of our concern. They have asserted that they will deal with these changes by regulation instead of statutory amendment. In point of fact the statute and the regulations are in conflict in several areas. Regulations will not protect us if appeals are taken challenging actions supported only by these regulations as statute always prevails over regulation. This may not be a conscious decision on DEP's part to leave us to the mercy and ministrations of the coal industry, but that will be the impact. For example, as to repairs of dwellings and structures, the current statute says the duty to repair is limited to repair and compensation of structures in place up to public notice of the permit application. OSM wants the language to say "as of the date of mining." DEP said they will comply with OSM's requirement by regulation. All it takes is one lawsuit by the mining industry the first time DEP tries to enforce the regulation in order to overturn the regulation. This leaves us with the statutory language in place. There are other examples of this problem. While DEP proposes an amendment to require prompt repair of structural damage, which is something we can support, it does not propose to modify the statute to reflect this change. This is another example of a regulation being in conflict with the statute. People in the coal fields have already suffered considerably by virtue of DEP interpretation of regulations and by litigation of the coal industry in its efforts to circumvent its obligations to homeowners.

There is an utter failure of the system to provide adequate protection of the Commonwealth's water resources. Today, the DEP Secretary gave a check of taxpayer's dollars, $50,000 of them to the Nottingham Township Supervisors to pay for expansion of the public water system necessitated by the destruction of private water supplies by Maple Creek Mining Company. The state subsidizes this industry in its destruction of the water supplies and water resources of the Commonwealth. Clearly, federal law does not permit dewatering of the countryside. DEP has the obligation to protect the waters of the Commonwealth. Permit applications that cannot prove they will not pollute, disrupt, or destroy the waters of the Commonwealth should be DENIED, a novel approach we know, but none the less. The economic feasibility of replacing water resources should not be a concern of citizens or DEP. If it is not feasible, then mining should not take place. Others will, or have, testified about destruction of the water resources. I will not go into further detail concerning this abhorrent practice.

Another concern is the argument over equivalent versus adequate water supplies: If you replace the word equivalent with equivalent, you do not have to know what foreseeable uses are. What are homeowners supposed to do, get out their crystal balls and predict what those uses might be. Further, are they going to have to argue with DEP and the mining company about what they versus the agency and the company think those foreseeable uses are. It is our considered opinion that making the regulation convoluted will only be an additional burden on the homeowner to prove their position. It provides an additional tool with which the company can intimidate them and hold up replacement of necessary water supplies or deprive the Commonwealth of further water resources.

There are no statutes of limitations on water supply and structure damage claims in the federal law, and there should be no such statutes in the state law. Water supply losses do not always occur immediately. Structure damage often evolves over time. Again, these limitations put the onus on landowners, not the coal company where it belongs.

We adamantly oppose the "deminimus" position that DEP asserts came out of the Environmental Hearing Board. First, we have been informed that the EHB never intended the adoption of this concept by DEP. Secondly, deminimus to some may not be deminimus to another. There should be no cost increase to affected surface owners and no subsidization of the coal industry by those same owners. That DEP would propose such a regulation is a clear indication of their support of the coal industry.

I live in the coalfields where coal operators for many years abrogated their responsibility for the damage they caused to both land and water. That the DEP would not strongly support operators being held responsible for the damages they cause is not acceptable. In no instance should the operator be relieved of liability where subsidence caused by mining is determined to be the cause of damage. To place the onus upon the homeowner by saying that if they do not allow a pre-mining survey, they are barred from damage claims is ridiculous. Unfortunately, it is the same thinking within the DEP that has resulted in disallowing claims for blasting damages during strip mining. If the damage to ones home, lands, or water is from subsidence caused by mining, then the damage is caused by mining and the company must be accountable. To hold the landowner to a level of proof similar to that required in a first degree murder case rather than a preponderance of the evidence is further indication of inequitable protections provided this industry.

A major concern of everyone should be the bonding required to cover water loss. Presently, the state of Pennsylvania suffers with over 3200 miles of streams damaged by past mining. The Indian Creek Watershed alone has over $4,500,000.00 worth of damage that will not be paid for by the mining companies that caused it. Not all of this damage predates bonding. The lack of funds to address these problems clearly exists because the state failed to take steps to enforce adequate bonding or insurance requirements. DEP has advised OSM that in addition to subsidence bonds, the insurance required of operators will now protect citizens with water losses. In fact some deep mine insurance policies specifically exclude coverage for subsidence damage. The bottom line here is that given all the past damage and current threats, DEP's program should be amended to explicitly include coverage of damage to water supplies. Failure to do this in light of the history of mining impacts on water is not merely negligent, it is an intentional oversight of criminal proportions. OSM's initial position concerning this matter was that Section 6 of the BMSLCA should be changed to expressly include the obligation to bond for water replacement.

Current state and federal rules require that the company "prevent material damage" to public buildings and certain surface impoundments. We oppose DEP's proposed change that will allow operators to minimize damage from longwall mining, rather than prevent material damage. The fact that DEP currently interprets the law to allow material damage and wishes to change the law to support that interpretation is not acceptable. Rather, they should tighten their interpretation to conform to the law, particularly in view of the damages caused to certain structures and impoundments, which the operators have failed to repair or correct. In some instances, they have failed to repair because they refuse to pay for their responsibilities. In some instances they have failed to correct because they do not know how.

I will close at this time so someone else can express their opinions and concerns, but will conclude by stating, that when the rule of law fails to protect those it is supposed to protect and resorts to protecting those it is meant to regulate, there is a systemic breakdown that results in inequity and injustice. Please do not be a party to that breakdown. Thank you for your time and consideration.

Original: 2358

THE HOTHOUSE FLORAL CO
Brandon Hudock 724-222-6739
24 Hothouse Lane
Washington, Pa 15301

Office of Surface Mining/Department of Environmental Protection
Hearing - Long Wall Mining
Meadowlands, PA

October 16, 2003

I want to thank the panel and those involved in this hearing for taking the time to try to understand the problems before us. My name is Brandon Hudock. In 1997 and again in 1998 only two miles from where we are today (The Holiday Inn, Meadowlands) my parent's home, our business, The Hothouse Floral Co., and 25 acres of our property were undermined by means of long wall mining.

I came to realize that long wall coal mining is a major life event forced upon home and property owners. With all of the premining formalities and concerns to final resolution the event can stretch 5 or more years. I think a great deal of the resistance in the coal communities can be summed up in three words "LOSS OF CONTROL".

Part of the American dream is to own your own home, own your own land, and to have the ability to own your own business. With the poor mining laws that are in existence, these rights are taken from you. Rights that I personally consider sacred. Your home . . . is **your** home, your land . . . is **your** land,

and your business . . . is **your** business. The control and destiny of your own life is at the mercy of corporate executives and the DEP. The current mining laws allow other individuals to dictate circumstances over your life, and to violate your privacy. It allows those executives and DEP to judge and scrutinize you as if you were guilty of a crime. The law along with the great power and influence of the coal industry gives the coal companies the ability to pick and choose who they will make whole and who they want to make an example of.

When you mine under a family's home, you are in reality mining under their lives. Every individual who is effected by mining is exactly that, an individual. These individuals all have different priorities in life and they all value things differently as everybody does. The DEP does not help in this issue. With our situation I feel as though the DEP made up their minds before they even had the chance to try to understand our situation. It is very difficult, complex, and takes a lot time to try to explain to somebody what the implications to a business can be by being in a state of standstill. DEP's lack of experience with small business has been to our great disadvantage and appears as a prejudice against us.

The coal companies are for profit businesses, and they make many executives wealthy. The coal companies have little respect for those they effect. In my opinion I think the coal companies just see the home and property owners as obstacles in their ability to generate more wealth for themselves.

I find it very insulting that others are given the ability to make very significant decisions over our lives. This is the United States of America. I find this ability given to coal companies an assault on our American ways of life and the fundamentals of our freedoms. There is no penalty placed on the coal

companies if they do not provide a quick and proper remedy. In fact there is incentive not to settle. In our situation it is going to cost 1.87 million to repair what has been damaged. In only 5 years that means the coal company saved around $250,000 in interest expenses. Interest expenses our family is burdened with through our creditors and lenders.

With my family's situation the mining began to effect our lives around 1996. With how friendly, helpful and professional the mine company representatives were, we never realized the magnitude, and complexities of what was before us. They were charming and agreeable. They appeared trust worthy and sincere, but where hard to get in touch with after they had extracted the coal.

I became involved in helping my parents with the mine problems in 2001. At that time I realized the mine company was doing nothing to resolve my parents subsidence issues, I saw how badly it was effecting their lives, and I realized it was going to cripple the business if my parents did not get resolution, and begin to move forward with the business. I realized my parents did not have the time or energy to deal with the tremendous burden the mine company had placed upon them. When I took on the task of trying to resolve the mine problems, I figured I would spend a couple of months getting this problem resolved, and that it was going to demand all of my time. I was willing to temporarily cut back on my professional workload to concentrate on the mine problems. I do not think I ever imagined it lasting any longer than 6 months. I was very wrong.

In 1996 although we never shut down, the business became idle as our family anticipated the inevitability of subsidence and its effects. Plans for the business were put on hold as our family waited for the

mine company to do what they were going to do and move on, but that never happened. We have over an acre and a half of greenhouse structures that need rebuilt, about 14 acres that needs regrading, a tremendous amount of debt we have incurred, and now our ground water is showing signs of turning orange. Our business was at it's financial best before the mining and now as the backlash, from being at a stand still hits us, we are practically crippled financially.

Since 2001 I must have promised my parents on about six different occasions that we were close to resolution. Unfortunately I was wrong on every occasion. To this day the coal company has not released even one cent to my family.

I can remember speaking to my dad years ago, before the mining came through. My father was sitting at his desk and I was sitting across from him at my mother's desk. I was trying to plead to my father to move forward with the plans for the business, but I could not convince him. I can remember being furious that he was so unwilling to do anything with the business. He insisted we needed to wait until after the mining had gone through. It was of great frustration to me, and I resented my father for his decision. In hind site I now realize my father made a wise decision. With all of the mining problems before us today The Hothouse Floral Co. would have been crippled years ago.

In the last couple of years it has been brought to my attention how greatly the psychological issues alter the lives of those effected by the mining. The mining can alter your decisions, your mood, your confidence, your motivation, your ambition, self-esteem, etc, etc, etc. Two powerful triggers of stress, anxiety, and even depression are ***fear of the unknown***, and ***loss of control***. I know this is true and I am

convinced it has had tremendous effects on my parents and our family. Frustration, anger, feelings of isolation, feelings of being a burden, feelings of helplessness, and many more emotions are associated with long wall mining.

Another issue that nobody has ever brought to light is the importance of closure. It needs to be recognized! When somebody dies you have a funeral and receive closure. When you buy a house you have a closing and receive closure. But when you are mined under many times you never receive proper closure. The coal companies have the ability to break up and resolve your issues piece by piece. I believe one of their tactics when they do not want to make a family whole is just to wait them out. Delay can burn people out financially and emotionally. I believe that if independent surveys were to be done, they would show many property owners are not completely happy with the resolution provided by the mine companies or DEP. It is in my opinion that there needs to be independent, non government studies on the psychological issues surrounding mining and the loss of control of your most sacred possessions, your home, your land, your business, and your life.

I want to conclude by thanking the panel for giving this issue attention. I also want to extend an invitation to the panel to visit our property if you wish to try to understand our experiences first hand.

Thank you very much.

Original: 2358

George Zanin
2633 Ben Franklin Hwy.
Ebensburg, PA 15931
Ph: 814-749-0307
October 15, 2003

Environmental Quality Board

Regarding proposed amendments to regulations relating to mining

To whom it may concern:

I am a home owner in Blacklick Township, Cambria County and a member of CAWLM, an organization concerned about water loss and property damage caused by mining.

I endorse any and all comments and proposals by members of CALWM this date.

I am also addressing a concern in reference to Act 1994-54, Section 5.6 (c) regarding agreements.

It is clear that agreements must be recorded and notice of any agreements must be given to subsequent purchasers of property by reference of such agreement in the deed of conveyance.

I inquired at the Recorder of Deeds Office at the Cambria County Courthouse in Ebensburg and personally searched deeds of properties that had mine subsidence damage and no agreements were recorded. I also inquired at our local DEP Office in Ebensburg and no information was available to me of any such agreements.

There is reason to believe that confidential agreements were made between coal operators and home owners and not recorded which may be in violation of current regulations.

Therefore, I am of the opinion that Part 5.6 (c) of the Act should be removed. If not removed, operators should be compelled to comply with regulations.

Attachment: excerpt from Act

Very truly yours,

George Zanin

George Zanin

mine operator shall not be considered to be perfected unless, within sixty days of the date on which the mine operator received the department's order, the operator has deposited an amount equal to the cost of repair or the compensation amount ordered by the department in an interest-bearing escrow account administered for such purposes by the department.

(f) If the mine operator shall fail to repair or compensate for subsidence damage within six months or such longer period as the department has established or shall fail to perfect an appeal of the department's order directing such repair or compensation, the department shall issue such orders and take such actions as are necessary to compel compliance with the requirements hereof, including, but not limited to, cessation orders and permit revocation. If the mine operator fails to repair or compensate for damage after exhausting its right of appeal, the department shall pay the escrow deposit made with respect to the particular claim involved and accrued interest to the owner of the damaged building.

(g) Except as provided in subsection (f), the existence of unresolved claims of subsidence damage shall not be used by the department as a basis for withholding permits from or suspending review of permit applications submitted by the mine operator against whom such claims have been made.

Section 5.6. Voluntary agreements for repair or compensation for damages to structures caused by underground mining; deed recital.—(a) Nothing contained in this act shall prohibit the mine operator and the landowner at any time after the effective date of this section from voluntarily entering into an agreement establishing the manner and means by which repair or compensation for subsidence damage is to be provided. Any release contained in such an agreement shall only be valid in releasing the operator from liability under this act if it clearly states what rights are established by this act and the landowner expressly acknowledges the release as consideration for the alternate remedies provided under the agreement, except that such remedies shall be no less than those necessary to compensate the owner of a building for the reasonable cost of its repair or the reasonable cost of its replacement where the damage is irreparable. Any such release shall be null and void if no mining occurs for a period of thirty-five years within the coal field of which the coal underlying the affected surface property forms a part.

(b) In every deed for the conveyance of property for which an agreement executed pursuant to subsection (a) is effective, the grantor, at the time of transfer, shall include in the deed a recital of the agreement and any release contained therein.

(c) The duty created by section 5.5 to repair or compensate for subsidence damage to the buildings enumerated in section 5.4(a) shall be the sole and exclusive remedy for such damage and shall not be diminished by the existence of contrary provisions in deeds, leases or agreements which relieved mine operators from such duty. Nothing herein shall impair agreements entered into after April 27, 1966, and prior to the effective date of this section, which, for valid consideration, provide for a release of any duty to repair or compensate for subsidence dam such waiver or release shall only be valid with respect to damag from the mining activity contemplated by such agreement.

(d) In every deed for the conveyance of property for agreement executed pursuant to subsection (c) is effective at t transfer, the grantor shall include in the deed a recital of the a and any release contained therein.

Section 6. Section 6 of the act, amended October 10, 1980 No.156), is amended to read:

Section 6. Repair of damage or satisfaction of claims; revo suspension of permit; bond or collateral.—[(a) If the removal o other mining operations by a holder of a permit granted und 5 causes damage to structures set forth in section 4 of thi permittee shall submit evidence that such damage has been re that all claims arising therefrom have been satisfied, to the de within six months from the date that the permittee knows, or h to know, such damage has occurred or, at the option of the p within such period there shall be deposited with the Secr Environmental Resources as security for such repair or such sa a sum of money in an amount equal to said damage or the re cost of repair thereof, as estimated by a reputable expert. In c the filing of such evidence or such deposit, the department shall or revoke said permit.

No permit revoked or suspended pursuant to this section reissued or reinstated until the applicant shall have furnished sat evidence to the department that the damage for which the per revoked or suspended has been repaired or all claims arising th satisfied, in accordance with this subsection.]

(b) The department shall require the applicant to file a bond i prescribed by the secretary payable to the Commonwealth and co upon the applicant's faithful performance of mining or mining oper accordance with the provisions of sections [4 and 5] *5, 5.4, 5.5* Such bond shall be in a reasonable amount as determined by the dep Liability under such bond shall continue for the duration of the n mining operation, and for a period of ten years thereafter or suc period of time as may be prescribed by rules and regulations pro hereunder, at which time the bond shall become of no force and ef it, or any cash or securities substituted for it as hereinafter provided returned to the applicant. Upon application of any proper party in int department, after due notice to any person who may be affected ther hearing, in accordance with the provisions of section 5(g), may c amount of said bond to be increased or reduced or may excuse th holder from any further duty of keeping in effect any bond furnished to a prior order of the department and return said bond, or the secu

Original 2358

BEFORE THE

ENVIRONMENTAL QUALITY BOARD

In re: Bond Adjustment and Bituminous Mine Subsidence Control and Standards (PA Code, CHS 86 and 89)

Before: David Strong
Mick McCommons
Harold Miller
Michele Tate
William Shakely

Held: Best Western University Inn
1545 Wayne Avenue
Indiana, PA 15701
October 15, 2003
5:00 p.m.

Witnesses: Ted Bowser, Peggy Clark

REPORTER: TAMMIE B. ELIAS, RPR

P R O C E E D I N G S

- -

MR. STRONG:

To open this meeting I have to read an opening statement so we know the ground rules and how to proceed. I'd like to welcome you this evening to the Environmental Quality Board's public hearing on the proposed bond adjustment and bituminous mine subsidence control and standards rule.

My name is David Strong. I'm a member of the Environmental Quality Board and a representative of the Citizen's Advisory Council to the EQB. With me this evening from the Department of Environmental Protection are Mike McCommons, Chief, Division of Permits, Bureau of Mining and Reclamation; Harold Miller, Chief, Underground Mining Section, Bureau of Mining and Reclamation; Michel Tate, Executive Policy Specialist, Policy Office; William Shakely, Assistant Counsel, Bureau of Regulatory Counsel.

The purpose of this evening's hearing is to receive comments concerning EQB's proposed rulemaking on the Bond Adjustment and Bituminous Mine Subsidence Control Standards. This rulemaking proposes to amend existing requirements in

25 Pa. Code, Chapters 86 and 89 relating to the undermining of structures, the repair of structure damage, the replacement of water supplies, and the adjustment of bonds posted to ensure the repair of damage to land and structures.

The proposed rulemaking was approved for publication by EQB at the July 15, 2003 meeting, and published in the Pennsylvania Bulletin on September 13th, 2003, with a recommended 60-day public comment period and two public hearings. In order to give everyone an equal opportunity to comment on this proposal, I'd like to establish the following ground rules. I will first call upon witnesses who have preregistered to testify at this evening's hearings as included in the schedule of witnesses, which tonight we don't have. So we'll call the ones that come forward after the meeting. After hearing from these witnesses, I will provide any other interested parties with the opportunity to testify as time allows. And we'll have plenty of time, so you can testify to your heart's content.

Oral testimony is limited to ten minutes for each witness. Organizations are requested to designate one witness to present testimony on its behalf. Each witness is asked to

submit three written copies of his or her testimony to aid in transcribing the hearing. Please hand me your copies prior to presenting your testimony. Please state your name and address for the record prior to presenting your testimony. We would also appreciate your help in spelling names and terms that may not be generally familiar so that the transcript can be as accurate as possible.

In addition to oral testimony presented at this evening's hearing, interested persons may also submit written comments on this proposal. All comments must be received by the EQB on or before November 12th, 2003. Comments should be addressed to Environmental Quality board, P.O. Box 8477, Harrisburg, PA, 17105-8477. Comments can also be e-mailed to Regcomments@state.pa.us. All comments received at this evening's hearing, as well as written comments received by November 12th, will be considered by the EQB and will become part of the comment response document which will be prepared for the EQB and reviewed by the Board prior to its taking final action on this regulation. Anyone interested in a transcript of this hearing may contact the Reporter here this evening to arrange to purchase a copy.

Before I call for the first witness, I would like to introduce Harold Miller, who will provide audience with a brief overview of the proposed rulemaking according to the background and the purposes concerning the proposed amendments.

MR. MILLER:

Thank you, Dave. Proposed rulemaking is intended to satisfy the conditions for maintaining the state primacy program under the Federal Surface Mining Control and Reclamation Act, also known as SMCRA. In order to maintain primacy, Pennsylvania is required to maintain a regulatory program that is at least as effective as the Federal regulatory program. Pennsylvania first obtained primacy in 1982 and since that time has updated its regulations several times to track changes in Federal law and regulation. The amendments proposed in this rulemaking are intended to address changes in the Federal regulatory program arising from the enactment of the National Energy Policy Act, which is also known as EPACT, and corresponding Federal regulations adopted on March 31st, 1995.

This is a second EQB rulemaking in regard to the repair of mine subsidence damage and the replacement of water supplies affected by

underground mining operations, since the adoption of the 1995 Federal regulations. The EQB's initial rulemaking, which was finalized on June 13th, 1998, amended 25 Pa. Code Chapter 89 to incorporate the provisions of Act 54 of 1994. Act 54 amended the Bituminous Mine Subsidence and Land Conservation Act to impose new requirements relating to the repair of subsidence damage and the replacement of water supplies affected by underground mining operations. It also removed certain provisions relating to the protection of structures. The Act 54 amendments did not mirror the provisions of the EPACT or the 1995 Federal regulations, because they were based on the recommendations of a mediation group that was convened in the late 1980s to negotiate the needs of Pennsylvania landowners and mine operators.

Act 54 covered a wider range of structures and water supplies that EPACT and established procedures for claim resolution, which have no Federal counterparts. In 1998, DEP submitted the Act 54 amendments and the Board's 1998 regulatory amendments to the U.S. Office of Surface Mining and Reclamation Enforcement or OSM, for approval. On December 27th, 2001, OSM issued its decision on Pennsylvania's 1998 program amendment. OSM approved

many of the changes, but specifically disapproved 22 statutory provisions and 25 regulatory provisions, which were found to be less effective than Federal regulatory requirements.

Following OSM's 2001 decision, DEP and OSM met in a series of negotiations sessions in an attempt to resolve issues arising from the disapproval. At the conclusion of discussions, DEP and OSM agreed on tentative solutions for all 47 of the disapproved provisions. Eight of the disapprovals were to be resolved through the submission of information that had not been provided to OSM for consideration at that time of the 2001 decision. Thirty-nine (39) of the disapprovals were to be resolved through regulatory amendments. These are the same regulatory amendments that are the subject of this hearing tonight.

Although most of the proposed regulatory changes can be accomplished within the framework of Pennsylvania's existing subsidence law, several changes conflict with the existing statutory provisions. In order to make way for these changes, OSM has decided to exercises its authority to supersede six provisions of Pennsylvania's subsidence law to the extent they are inconsistent with Federal

law.

As a follow up to the negotiations, DEP submitted a formal program amendment to OSM, on August 17th, 2003. The amendment includes the additional information and proposed regulatory amendments needed to resolve the 47 deficiencies cited by OSM. At this time, there are three proposed rulemakings moving forward in parallel to resolve issues identified in the December 27th, 2001 disapproval. One is the EQB proposed rulemaking on Bond Adjustment and Bituminous Mine Subsidence Control Standards, which is the subject of this hearing. Another is an OSM proposed rulemaking on DEP's August 28th program amendment. The third is an OSM proposed rulemaking to supersede six provisions of the Pennsylvania subsidence law to the extent they are inconsistent with the Federal law.

The goal of these efforts is to promulgate a state regulatory program that is at least as effective as its Federal counterpart, while preserving the provisions of Pennsylvania, existing Pennsylvania law, to the maximum extent possible. The purpose of advancing all three rulemakings simultaneously is to achieve this goal as expeditiously as possible. In order to have a full

understanding of the scope of these efforts, it is necessary to meet all three rulemaking proposals.

The EQB proposed rulemaking and both Federal proposed rulemakings are open for public comment at this time. And OSM will hold a hearing in regard to its proposals in this room immediately after this hearing. Thank you.

MR. STRONG:

Okay. Mr. Bowser.

MS. BOWSER:

I'm Ted Bowser from Brush Valley Township. And I guess what I had to talk about is not about this. But I would like to talk with you after the meeting.

MR. STRONG:

Okay. Is there anybody else that would like to comment on the proposed regulations? Here you're always welcome

MS. CLARK:

Thank you. I'll bring up one that I did not bring up this morning in the interest of time, that are in my written remarks that I submitted to you. It's the provision that there would be no water supply replacement at three years after the mining activity. We believe the agency's error in

not requiring a change in 89.152(a)(2) of the present Pennsylvania rules, this allows water supplies to go unreplaced, even though loss was caused by mining, if they occur more than three years after mining activity ceased.

They reasoned --- they meaning you, I believe, reasoned that this would rarely happen and it would after all mining and reclamation work is complete, usually at least ten years. We believe there can be water losses in Roman pillar mines in later years and they should be covered. If it is not much of a problem or just doesn't happen, it would not put anyone at much disadvantage to require a replacement in the law. I guess I'll leave the rest for OSM.

MR. STRONG:

Thank you. We can keep the floor open for a while to see if somebody comes. Does OSM plan on doing their event at the time that you said or were you going to ---?

MR. RIEGER:

We'll do it at the scheduled time.

MR. STRONG:

We'll wait a little bit.

SHORT BREAK TAKEN

MR. STRONG:

I'll call again. Is there anyone that would like to give testimony? Hearing none, we'll close this hearing.

* * * * * * *

HEARING CONCLUDED AT 5:30 P.M.

* * * * * * *

C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED STENOGRAPHICALLY BY ME AND THEREAFTER REDUCED TO TYPEWRITING AND THAT THIS TRANSCRIPT IS A TRUE AND ACCURATE RECORD THEREOF.

SARGENT'S COURT REPORTING SERVICE, INC.

Tammie Elias

COURT REPORTER

Original: 2358

OSM ... DEP Public Hearings
Best Western Inn Indiana, PA
October 16, 2003

Office of Surface Mining
George J. Rieger
Acting Director
Harrisburg Field office

Department of Environmental
Protection - Penna.
William S. Plassio
District Mining Manager

Penn American Coal, L.P.
Burrell Mine
Indiana County
CMAP # 32961301

Victor J. Prola
207 Snyders Lane
Blairsville, PA. 15717

Gentlemen ... Ladies,

Looking around the room I see working people, like me and all of us who work, doing their jobs to the best of their abilities within their confinements, trying to keep things in balance.

I have a lot to say and many negative experiences to share in my dealings with Penn American Coal Company, that I will spare you. I realize that you have heard them all and I believe you are well aware of the flaws in the system. I'm not naive enough to believe that these unfair events that happened to me dealing with the Coal company, do not happen every day to someone else, somewhere else.

However, if we are to remain a civilized society we must find a way to get the coal at a profit other than at the expense of the property owners.

Thank you OSM and DEP for your time and the opportunity to share my thoughts and feelings.

However, I remain, disappointed in the system.

Victor Prola

Original: 2358

BEFORE THE

ENVIRONMENTAL QUALITY BOARD

In re: Bond Adjustment and Bituminous Mine Subsidence Control and Standards (PA Code, CHS 86 and 89)

Before: David Strong
Mick McCommons
Harold Miller
Michele Tate
William Shakely

Held: Best Western University Inn
1545 Wayne Avenue
Indiana, PA 15701
October 15, 2003
1:06 p.m.

Witnesses: Peggy Clark, Carol McQuiston, George Zanin, Victor Prola, John Zahornacky

REPORTER: TAMMIE B. ELIAS, RPR

P R O C E E D I N G S

- -

MR. STRONG:

Good afternoon. My name is David Strong. I have a statement that I'm required to read. I usually don't read statements, but we'll do this today and get things rolling so we can get our input.

I'd like to welcome you this afternoon to the Environmental Quality Board's public hearing on the proposed bond adjustments and bituminous mine subsidence control and standards rulemaking.

My name is David Strong. I'm a member of the Environmental Quality Board. I represent the Citizens Advisory Council to the EQB. With me this afternoon from the Department of Environmental Protection are Mick McCommons, Chief, Division of Permits, Bureau of Mining and Reclamation. Harold Miller, Chief, Underground Mining Section, Bureau of Mining and Reclamation. Michele Tate, Executive Policy Specialist, Office of Policy. William Shakely, Assistant Counsel, Bureau of Regulatory Counsel.

The purpose of today's hearing is to receive comments concerning the EQB's proposed

rulemaking on the Bond Adjustment and Bituminous Mine Subsidence and Control Standards. This rulemaking proposes to amend existing requirements in 25 Pa. Code, Chapters 86 and 89 relating to the undermining of structures, the repair of structure damage and replacement of water supplies and the adjustment of bonds posted to ensure the repair of damage to land and structure.

The proposed rulemaking was approved for publication by the EQB at its July 15, 2003, meeting and published in the Pennsylvania Bulletin on September 13, 2003, with a recommended 60-day public comment period and two public hearings.

In order to give everyone an equal opportunity to comment on this proposal, I'd like to establish the following ground rules. I will first call upon the witnesses who have preregistered to testify at this afternoon's hearing as included on the schedule of witnesses. After hearing from these witnesses, I will provide any other interested parties with the opportunity to testify as time allows.

Oral testimony is limited to ten minutes for each witness. Organizations are requested to designate one witness to present

testimony on its behalf.

Each witness is asked to submit three written copies of his or her testimony to aide in transcribing the hearing. Please hand me your copies prior to presenting your testimony.

Please state your name and address for the record prior to presenting your testimony. We would also appreciate your help in spelling names and terms that may not be generally familiar so that the transcript can be as accurate as possible.

In addition to or in place of oral testimony presented at today's hearing, interested persons may also submit written comments on this proposal. All comments must be received by the EQB on or before November 12th of this year, 2003. Comments should be addressed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA, 17105-8477. Comments can also be e-mailed to RegComments@state.pa.us.

All comments received at today's hearing as well as written comments received by November 12th will be considered by the EQB and will become part of the comment response document which will be prepared for the EQB and reviewed by the Board prior to its taking final action on this

regulation.

Anyone interested in a transcript of this hearing may contact the Reporter here this afternoon to arrange to for you to purchase a copy.

Before I call the first witness, I would like to introduce Harold Miller who will provide the audience with a brief overview of the proposed rulemaking including the background and purpose concerning the proposed amendment.

MR. MILLER:

Thank you, Dave. The proposed rulemaking is intended to satisfy conditions for maintaining the state primacy program under the Federal Surface Mining Control and Reclamation Act, also known as the Federal SMCRA. In order to maintain primacy Pennsylvania is required to maintain a regulatory program that is at least as effective as the Federal regulatory program.

Pennsylvania first obtained primacy in 1982 and since that time has updated its regulations several times to track changes in Federal law and regulations.

The amendments proposed in this rulemaking are intended to address changes in the Federal regulatory program arising from the enactment

of the National Energy Policy Act, also known as EPACT and the corresponding Federal regulations that were adopted on March 31st, 1995.

This is a second EQB rulemaking in regard to the repair of mine subsidence damage and replacement of water supplies affected by underground mining operation since the adoption of the 1995 Federal regulations. The EQB's initial rulemaking which was finalized on June 13, 1998, amended 25 Pa. Code, Chapter 89/ to incorporate the provisions of Act 54 of 1994. Act 54 amended the Bituminous Mine Subsidence and Land Conservation Act to impose new requirements relating to the repair of damage and the replacement of water supplies affected by underground mining operations. It also removed provisions relating to the protection of structures.

The Act 54 amendments do not mirror the provisions of EPACT or the 1995 Federal regulations, because they were based on the recommendations of a mediation group that was convened in the late 1980s to negotiate the needs of Pennsylvania landowners and mine operators. Act 54 covers a wider range of structures and water suppliers than EPACT and establishes specific procedures for claim resolution which have no Federal

counterparts.

In 1998, DEP submitted the Act 54 amendments and the Board's 1998 regulations to the U.S. Office of Surface Mining or OSM for approval. On December 27, 2001, OSM issued its decision on Pennsylvania's 1998 program amendment. OSM approved many of the changes but specifically disapproved 22 statutory provisions and 25 regulatory provisions which were found to be less effective than corresponding Federal regulatory requirements.

Following OSM's 2001 decision, DEP and OSM met in a series of negotiation sessions in an attempt to resolve issues arising from the disapproval. At the conclusion of discussion, DEP and OSM agreed on tentative solutions for all 47 of the disapproved provisions. Eight of the disapprovals were to be resolved through the submission of information that had not been provided to OSM for consideration at the time of its 2001 decision. Thirty-nine (39) of the disapprovals were to be resolved through regulatory amendments. These are the same amendments that are the subject of this hearing.

Although most of the proposed regulatory changes can be accomplished within the

framework of Pennsylvania's existing subsidence law, several changes conflict with existing statutory provisions. In order to make way for these changes, OSM has decided to exercise its authority to supersede six provisions of the Bituminous Mine Subsidence and Land Conservation Act to the extent they are inconsistent with the Federal SMCRA.

As a follow up to the negotiations, DEP submitted a formal program amendment to OSM on August 27th of this year. The amendment included the additional information and proposed regulatory amendments needed to resolve the 47 deficiencies cited by OSM. At this time, there are three proposed rulemakings moving forward in parallel to resolve the issues identified in the December 27, 2001 disapproval.

One is an EQB rulemaking on bond adjustment and bituminous mine subsidence control standards which again is the subject of this hearing. Another is OSM proposed rulemaking on DEP's August 27th program amendment. The third is an OSM proposed rulemaking to supersede six provisions of Pennsylvania's subsidence law to the extent they are inconsistent with Federal law.

The goal of these efforts is to

promulgate a state regulatory program that is at least as effective as its Federal counterpart while preserving the provisions of Pennsylvania's law to the maximum extent possible. The purpose of advancing all three rulemakings simultaneously is to achieve this goal as expeditiously as possible.

In order to have a full understanding of the scope of these efforts, it's necessary to read all three of the proposed rulemaking notices. The EQB proposed rulemaking and both Federal proposed rulemakings are open for public comment at this time and OSM will hold a hearing in regard to its respective proposals in this room immediately following this hearing.

Thank you.

MR. STRONG:

Peggy Clark.

PEGGY CLARK:

My name is Peggy Clark. And I live at 7311 Route 422 West, Indiana, PA. I am speaking for CAWLM today. We're submitting the following comments on the three commentaries that had been invited. They kind of cross branch in some places.

CAWLM stands for Concern About Water Loss due to Mining. It's been in existence since

1983. And since that time, we have continuously monitored and participated in public processes in development of the laws and rules pertaining to damage and water supply laws caused by underground mining.

I attended the three briefing sessions which were not mentioned here, but which DEP and OSM jointly held as they discussed and developed these regulations, these changes. Although OSM's original document which was published December 27, 2001, outlined discrepancies in Pennsylvania rules fairly accurately in our minds, there have been numerous changes since then which compromise or diminish OSM original positions.

This process should not have been one of compromise. It is not a procedure to make new Federal laws or have Federal rules changed, but rather as a procedure to bring conformity of Pennsylvania laws and rules to the Federal standards already established.

CAWLM supports numerous changes, some of which eliminate two-year statutes of limitation, encourage more prompt resolution to problems and covers all increases in costs when replacing water supplies to homes and also a requirement to prevent

damage to homes mined under by room and pillar techniques. We're painfully aware that damage prevention requirement is limited to a very vague, minimize as much as is feasible, in cases where planned subsidence is deployed. This has meant very little to homeowners who continue to suffer severe damages.

We approve the changes to 89.143a, which, minus a pre-mining survey but in the presence of a preponderance of evidence, the operator shall repair or pay all the costs and the damage. Landowners should certainly be encouraged to report damages early and cooperate on their pre-mining surveys. However, there may be circumstances where this has not happened and it should not preclude the replacement of water supplies or repair of damages where there is evidence the damage was caused by mining.

This is not a large number of people who miss these deadlines, but there may be some who are unable to meet the deadlines for legitimate reasons and it meets OSM's requirement for repair or replacement in all cases where mining caused damage. We strongly support OSM and DEP's decision to eliminate the choice of the coal operator to either

buy the property or pay cash for a settlement instead of replacing the water supplies where it is possible to do so. We urge improved techniques and more careful permitting to make such incidence of impossibility to replace purely rare or non-existent.

There are, however, changes which we oppose. We are concerned about the change in the time that pre-mining water surveys, which are now taken prior to 1,000 feet from mining activities, to an uncertain distance decided case by case on when water supplies are susceptible to mining effects. Yes, we agree 1,000 feet is not always a sufficient distance. But this change is brought with it potential for complications, miscalculations and misuse.

The change OSM allowed was reportedly based on a letter from then OSM Director Karpan to Gregory Conrad, Director of Interstate Mining Commission on March 9, 1999.

Ms. Karpan acknowledged it would be permissible to change the date of water survey for individual properties at a time of mine application to a later time closer to the time of mining. The letter indicates it was her intent that a new point

could be established where all applicants would take samples, but it must be well ahead of the time the water supply might have been affected by mining.

I quote from her letter, the state must demonstrate through the regulatory program amendment process that the analysis would be sufficiently in advance of mining to avoid any adverse effect to the water supplies. And this was to be done through a regulatory change to be approved by OSM.

Would DEP now take each mine permit through the Federal regulatory program amendment process to show that it lives up to Ms. Karpan's rule. This system of individual decisions for each mining permit would put an untolerable burden on DEP's California office and open them up to time consuming challenges.

We believe an unquestionably safe uniform distance should be decided upon with the same standard for all permits. We suggest 2,500 feet ahead of the mining area which would have some certainty and convenience for DEP, the landowner and the operator. It would also have some advantage to landowners who become alerted to the oncoming mining, their water supply conditions and give them time to

take their own surveys if they desire.

In proposed 89.145a(b), OSM has accepted a standard for water supply replacement as one which adequately serves the pre-mining uses and reasonably foreseeable uses as a pre-mining supply. This is Pennsylvania's present rule. However, it seems to be a far cry from OSM's definition of a replacement water supply which appears in the Federal Code 30.701.5 which specifies replacement by operators to be equivalent to pre-mining quantity and quality. OSM justifies this acceptance of Pennsylvania rules by claiming the OSM standard is for equivalent use of the water supply and they promise to monitor Pennsylvania's adequacy of the supply to meet reasonably foreseeable uses.

The present water supply replacements in Pennsylvania sometimes appears to be based on what the operator can or is willing to provide at a particular spot. DEP has been known to approve supplies as low as two or three gallons per minute for a supply which may have been five or six or more gallons per minute before mining. It is necessary to keep in mind operators are never required to replace more water than was present before mining.

Former OSM Director Karpan's March

1999 letter decided that water supplies higher than ten gallons per minute would not be to be replaced at higher than ten gallons per minute unless the homeowner could show a future use, but water supplies which had up to ten gallons per minute must be replaced at pre-mining levels, unquote. We believe that should be DEP's standard. If the final rules retain this present requirement as published, adequate for present and reasonably foreseeable use as determined by DEP, regardless of our appeal to this rule, we strongly protest DEP or an operator determining what a foreseeable use would be. Only the homeowner can best foresee what uses will be needed and can be reasonable as families grow, hobbies develop, aging parents move in, illnesses occur, additions of swimming pools, more bathrooms or additional building might be needed.

If the water supply which was present before mining could have made these needs feasible, those needs should be covered in replacing the water supply. This is the only way the value of the property which includes the water supply could be maintained.

DEP's brief promise to replace based mostly on the number of bedrooms in a home is not

reassuring. Certainly those future uses should be controlled by the owner not DEP or the operator. The owner of the land should be satisfied that he can continue present use and has available uses which can reasonably occur over the years which he had before mining.

In the turmoil passage of Act 54, we heard a lot about the coal industry's promises to make landowners whole, that means providing what was there before mining. This, with OSM's regulatory definition of replacement of water supply as equivalent, would appear to provide the same quantity or at the very least the amount that the property owner best decides is required by him for future uses. Always keep in mind there's no requirement to replace more water than there was before mining. This might frequently be considerably less than ten gallons per minute especially in areas where there have been repeated mining.

However, industry's argument that many people get along on two or three gallons per minute, and so that amount is appropriate for any home in the area, should not be given credence. That would be like saying some people have incomes at the poverty level so that's enough for everyone in that area.

In proposed 89.145(f), the costs for EPACT water supplies exceed pre-mining costs --- if they exceed the pre-mining, costs must be paid by the operator. It's at OSM's direction that costs higher than pre-mining costs shall be paid by the operator even the so-called de minimis costs. However, in the 701.5 Federal definition, if the operator is paying for future costs in a one time payment, the operator and property owner shall come to an agreement on the time to be covered. This OSM requirement does not really make sense, because it can easily allow less than the excessive costs to be paid. Even if this is a Federal rule in 701.5, this is a lower standard than Pennsylvania now has because Pennsylvania now requires permanent payment for all increased costs in perpetuity as DEP's program guidance describes it.

When state rules are higher than Federal rules, they are not required to be changed to Federal standards. Careful reading of the December '01 OSM directives is silent on this issue. DEP gives no reason for the change for this part of the rule. Since Pennsylvania's present rule provides that increased costs be paid, there should be some rationale for making such a change, and an explanation before it is proposed in this process.

CAWLM believes that all increases in costs are inherent and truly replacing the original water supply.

We also object to the change because so many so-called agreements between landowners and numerous coal operators leave room for unfair, unchallenged settlements. How do you think an agreement between a owner out of water often unaware of all the legalities, hard pressed for funds for legal guidance, inexperienced in legal procedures, how do you think he fares in negotiations with the powerful company's well paid lawyer. We challenge the agencies to show us an agreement which puts the operator at a disadvantage. It's the property owner who is more often at a disadvantage with total costs and other limitations.

Pennsylvania now requires full payment for the permanent costs. They give no explanation for lowering the standard to an agreement between operator and property owner. And OSM does not specifically require it.

I want to comment briefly on Pennsylvania's compliance assistance plan, which actually is not part of the agreements that we have to work with, but since Pennsylvania offered in their

statement here as an aid to help citizens, I would just like to read this. Although not an actual part of legislative or regulatory requirements in this process, Pennsylvania points out the assistance given to surface owners in its Notice of Proposed Rule Making under the topic Pennsylvania's compliance plan, which presumably would make the rule changes work. It is stated that subsidence agents are available to help affected landowners and assist them in obtaining remedies provided by the law and rules. These agents have not been active in counties outside of Washington and Greene Counties. It's been publicly stated at an informal conference in Indiana County on a mine permit, that such help is not available here. Although this measure is not required by Federal rules, it is a disservice for DEP to claim it as an advantage in making DEP's program work. Resolving water supply complaints is a huge problem, establishing fair settlements, particularly for permanent payments required for public water establishment.

Homeowners on Snyder Lane in Indiana County can attest to a long drawn out unfair, unequal settlements for homes in similar situations, accompanied by threats, the company is going bankrupt

and offering uneven payment. In Armstrong County people wait for a public line to be put in while local government struggle with funds. Isn't the coal company required to get that line in? Subsidence damage is a less frequent problem in this area, but it's equally difficult to resolve in the absence of a DEP presence.

They seem to enter into the picture too late to be some help. Where is the help for these counties? CAWLM asks you to review our comments and these issues carefully and make decisions which will truly fulfill the Federal laws and rules. Citizens affected by mining have driven over the years for fair treatment from Federal as well as state regulators through hard fought battles. Please do not take us backward in this process. I thank you for your attention and consideration. And we look forward to hearing the outcome of these rules.

MR. STRONG:

Thank you so much, Mrs. Clark. Carol McQuiston

MS. MCQUISTON:

I'm Carol McQuiston, 3149 Parkwood Road, Shelocta. I have an issue that seems to be

overlooked when underground mining companies apply for permits, and that's the availability of water sources to replace the wells and springs that are lost as a result of the mining process. This needs to be established, both in room and pillar and longwall mining. In 1985, R & P Coal Company mined under the Parkwood area of Indiana County. Since that time, I and many of my neighbors have experienced diminished water supplies. We have spent large amounts of money and efforts trying to stretch the reduced water in our wells. In my own case, my husband and I have bought a front-loading washing machine, two low-flo toilets, set up a system of rain barrels for outside uses, and use the water from our central air conditioning and dehumidifier for miscellaneous needs.

Our neighbor installed a system of pumps and a large storage tank to assist the two wells he uses at a cost of over $8,000. Both of these properties had adequate water wells until the mining activities pumped our supply down. And it has not yet returned to the level of the pre-mining. In 1995, we approached the Indiana County Municipal Services Authority to discuss the possibility of running public water lines to Parkwood. We are a

rural location with homes built along country roads, not side by side as in larger communities. As such, we will be faced with great expense for a public system, but we feel we have no choice.

Finding a suitable water source has proven to be an even bigger problem than the cost of the system. When a possible source was proposed it took many months and now years of testing, both quantity and quality. And we are still waiting for all the permits to be granted. It has been over eight years since this process began to find a suitable water source to replace what was taken from our area. We have no idea when or if the public water line will go through Parkwood. It is my belief that these situations should be anticipated and always considered before mining is permitted. If it cannot be proven that a reliable source of water is available, then mining should not take place. Thank you.

MR. STRONG:

Thank you. George Zanin.

MR. ZANIN:

My name is George Zanin. I live at 2633 Ben Franklin Highway, Ebensburg. I am a homeowner in Blacklick Township, Cambria County and a

member of CAWLM, an organization concerned about water loss and property damage caused by mining. I endorse any and all comments and proposals by members of CAWLM this date. I'm also addressing a concern in reference to Act 1994-54, Section 5.6(c) regarding agreements. It is clear that agreements must be recorded and notice of any agreements must be given to subsequent purchasers of property by reference of such agreement in the deed of conveyance.

I inquired at the Recorder of Deeds Office at the Cambria County Courthouse in Ebensburg and personally searched deeds of properties that had mine subsidence damage, and no agreements were recorded. I also inquired in our local DEP office in Ebensburg, and no information was available to me of any such agreements.

There is reason to believe that confidential agreements were made between coal operators and homeowners and not recorded, which may be in violation of current regulations. Therefore, I am of the opinion that Part 5.6(c) of the Act should be removed. If it's not removed, operators should be compelled to comply with the regulations. Thank you.

MR. STRONG:

Thank you, sir. Victor Prola.

MR. PROLA:

Gentlemen, ladies of the DEP, good afternoon. My name is Victor Prola, and I live on Snyder's Lane, Blairsville, Pennsylvania, Indiana County. I began losing my well water two and a half years ago. It was diminished at first and several months later, after the longwall mining was completed, I had to schedule an appointment with myself to flush the toilet. You just can't realize what good abundant water is worth until you lose it.

Looking around the room, I see working people like me and all of us who work, doing their jobs to the best of their abilities within their confinements, trying to keep things in balance. I have a lot to say and many negative experiences to share in my dealings with Penn American Coal Company that I will spare you. I realize that you have heard them all before and I believe you are well aware of the flaws in the system. I'm not naive enough to believe that these unfair events that happened to me dealing with the coal company do not happen every day to someone else, somewhere else.

However, I do believe if we are to remain a civilized society, we must find a way to

get the coal out of the ground at a profit other than at the expense of the property owners. The system doesn't work fairly for all involved and I believe that I'm looking at the people that can change it. Is this how the Office of Surface Mining and the Department of Environmental Protection has progressed through the years? If you want justice and fairness, simply pay for it, hire an attorney. Truly, the scales of justice is tipped favoring on one side over the other. How do you fix something when those in the lead will not publicly admit that it is broken.

Now, I must repeat the question I have asked many times. Where is the justice? Where is the justice? Is there anyone out there for the right of the property owners? Today is a time, time to make necessary changes in antiquated and inadequate laws. It is your time, Mr. Rieger and OSM. It is your time, Mr. Plassio and DEP to seek justice, justice for all concerned. Is there anyone out there for the property owners? I have found the answer to be yes, in a group called CAWLM and people like Peggy Clark, whose group is relentless in seeking justice and fairness through truth, information, guidance and hard work. To all of them, I give my most dear regards. Thank you. Thank you

all. Your efforts are most appreciated, but without your guidance and information, my head and others like me, may still be buried in the sand of ignorance, exposed to those who will take advantage. God bless you all and give you strength to continue. We need you. We need your help.

Thank you, OSM. Thank you, DEP. Thank you for your time and the opportunity to share my thoughts and my feelings. It is also appreciated. However, I remain disappointed with the system. Victor Prola, Snyder Lane, Blairsville. Have a good day.

MR. STRONG:

Thank you so much, sir

MR. PROLA:

You're welcome.

MR. STRONG:

Is there anyone else that's not scheduled that would like to speak?

MS. DICK:

I would like to second Peggy Clark's remarks and ask the Board to give a very serious consideration. Gloria Dick from Brush Valley

MR. STRONG:

Thank you, ma'am. Sir, state your

name, please

MR. ZAHORNACKY:

My name is John is Zahornacky. I'm a property owner on Snyder Lane. And Mr. Prola said it quite eloquently. And thanks, Peggy. But my grandpap drilled a well in 1952 on Snyder Lane, the only well, the only house that was on that Snyder Lane. The mine, Penn American, came within 75 feet of my well. I no longer have water at my residence there. I don't live there, but I have a farm there. I have a tenant on this property. It appears that Penn American is coming in and offering someone this amount of dollars to settle and this amount of dollars to settle and this amount of dollars to settle. But it doesn't seem to be an even basis of trying to get a settlement. I have talked to their representative and it appears that he doesn't ever get back to me. Like I said, I had a very good well, and now it's doing zero. We pulled everything out, the pump out and everything out. And we have, of course, a water buffalo sitting in the garage so it doesn't freeze in the winter. It takes up my garage space at the property.

I just want to bring this to your attention, ladies and gentlemen, that this is not a

good situation. I was probably instrumental in helping getting Snyder Lane, Mr. Prola and I, to get water up Snyder Lane. We went and had meetings and we went down to the township and to LICMA. And we've got a water line up there. But even with saving the company, Penn American, the amount of money to get a permanent replacement, which we done, we have done, they're still not settling with the property owners on Snyder Lane.

I am a member of the Blairsville Municipal Authority, which handles --- which supplies LICMA with water. I'm the vice-chairman of that Board. And we do supply LICMA with water for the Burrell Township use. I feel that we need some help. We need a lot of help. We need help from you folks, to make this thing --- make it a viable situation and we need your help now. We don't need it a year from now. We need it now. So anything you can do to help us, we'd appreciate it. Thank you very much.

MR. STRONG:

Thank you, sir. If there's no more comments, then this hearing will come to a close. Thank you so much for your comments. Those of us that sit on the advisory committees realize the time

and trouble that it takes to prepare and take time out of your life to do this. It's greatly appreciated.

* * * * * * *

MEETING CONCLUDED AT 1:43 P.M.

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C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS WERE REPORTED STENOGRAPHICALLY BY ME AND THEREAFTER REDUCED TO TYPEWRITING AND THAT THIS TRANSCRIPT IS A TRUE AND ACCURATE RECORD THEREOF.

SARGENT'S COURT REPORTING SERVICE, INC.

Tammie Elias

COURT REPORTER

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GEORGE ELLIS
President

Original: 2358

November 12, 2003

The Honorable Kathleen McGinty
Chairperson
Pennsylvania Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17101-2301

Re: Proposed Amendments to 25 Pa.Code, Chapters 86 and 89 published at 33 Pa.B. 4554 (September 13, 2003)

Comments of the Pennsylvania Coal Association ("PCA")

Dear Ms. McGinty:

The Pennsylvania Coal Association ("PCA"), on its own behalf and on behalf of its members, hereby files the following comments in response to the Notice of Proposed Rulemaking concerning proposed amendments to 25 Pa.Code Chapters 86 and 89 which appeared in the Pennsylvania Bulletin on September 13, 2003.

Interest of PCA

PCA is an unincorporated trade association which represents the interests of the Pennsylvania bituminous mining industry, including those of its members who mine bituminous coal by underground mining methods.

The Proposed Amendments are an attempt by DEP to implement a "settlement" between DEP and the Federal Office of Surface Mining Reclamation and Enforcement ("OSM"), which is intended to resolve a lawsuit filed by DEP against OSM at C.A.No. 02-CV-305 (Middle District of Pa.). This lawsuit was filed by DEP on behalf of the Commonwealth following the publication by OSM of a final rule at 66 Fed.Reg. 67011 (December 27, 2001) ("OSM Disapproval Rulemaking"), which purported to suspend various sections of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1, *et seq* ("BMSLCA") and which obligated Pennsylvania to take a plethora of very specific actions with respect to its subsidence

control regulations set forth at 25 Pa.Code Chapter 89. PCA has pending a motion to Intervene in this litigation, which is currently stayed.

PCA also filed a similar lawsuit against OSM, at C.A.No. 02-CV-300 (Middle District of Pa.), which remains pending and which has been consolidated with DEP's lawsuit.

In its pending lawsuit against OSM, PCA has alleged that the OSM Disapproval of Proposed Amendments to the Pa. Program was, *inter alia*, an abuse of discretion.

Incorporation of Comments Submitted To OSM Concerning Related Federal Rulemakings

Attached to these comments are copies of comments submitted to OSM concerning two rulemakings it has proposed which are related to the EQB's proposed rulemaking. PCA hereby incorporates, by reference these comments and all the Attachments thereto. Also attached hereto are comments submitted to OSM by the National Mining Association on the two proposed Federal rulemakings. These comments contain a discussion of various points that are relevant to the State's proposed rulemaking and are, therefore, also incorporated into these comments.

Introduction

Although PCA believes that the Proposed Amendments are unwarranted and an improper attempt by OSM and DEP to modify Pennsylvania law to make it "mirror" the language of OSM's regulations, it does not oppose many of the Proposed Amendments because they only "codify" existing policies or practices of DEP and PCA member companies.

In addition, a few of the Proposed Amendments actually appear to propose reasonable changes to the Pennsylvania Program, which will improve existing policies and practices of DEP and PCA member companies.

However, PCA strenuously opposes portions of the Proposed Amendments for the reasons discussed below.

The proposed rulemaking will, if adopted, result in the "set aside" of certain duly enacted provisions of the BMSLCA and a dramatic, wholesale modification to the current regulations set forth in 25 Pa. Code Chapter 89, which implement the provisions of this Act.

Background

As of the early 1990's, both Federal and State law required that subsidence damage to dwellings used for human habitation be repaired or compensation paid for such damage in an amount equal to diminution in value of the property and further required that domestic water supplies adversely affected by underground mining be restored or replaced. However, then existing Pennsylvania law, unlike federal, law, required operators to leave coal in place beneath various "protected structures," which made it difficult (and in some instances impossible) for Pennsylvania operators to fully utilize modern, full-extraction longwall mining methods.

Consequently, the Pennsylvania underground mining industry was at a distinct competitive disadvantage with operators from other coal producing states.

In an effort to level the playing field, PCA and certain of its member companies became active participants, along with various other stakeholders, in a lengthy and productive mediation process, known as the Deep Mine Mediation Process ("DMMP") which resulted in a number of recommended modifications to the 1966 version of the BMSLCA ("1966 Act"). These recommendations formed the basis for what became Act 54 of 1994 ("Act 54"), which amended the 1966 Act in a number of significant ways.

Act 54 was "package" of amendments, all of which were inextricably intertwined, and all of which represented compromises on the part of everyone concerned. Ultimately, the coal industry, in return for a relaxation of the "support" requirements of the 1966 Act, accepted a number of modifications to the 1966 Act which would impose more stringent requirements than were (and are) required by Federal Law.

Among these more stringent requirements were the obligation to repair subsidence damage to many structures (e.g., various agricultural structures and industrial and commercial structures) not afforded protection by federal law, which only protects "dwellings," and a more stringent compensation requirement, which obligates operators to compensation the owner for the costs of repair, not just the diminution in value of the property. In addition, Act 54 obligates Pennsylvania operators to restore or replace many water supplies (e.g., agricultural, industrial, commercial and recreation water supplies) not protected by federal law, which only protects "domestic" water supplies and also imposed a provision, not required by federal law, that mining within a specified distance of an "affected" water supply will be presumed to have caused the adverse affect. In addition, the use of longwall mining could be prohibited under certain structures if such mining would cause irreparable damage.

The mediation process also resulted in the stakeholders reaching agreement, or not opposing, other new statutory provisions which were not then, and are not now, addressed by Federal law. For example, the General Assembly concluded that it made sense, for Pennsylvania, to have property owners first submit property damage claims to the mine operator and to then provide for a brief, six-month period during which the property owner and the mine operator could negotiate a resolution of the claim. After the passage of this six month period of "alternative dispute resolution," the General Assembly then expressly authorized the property owner to submit a claim to DEP, which, in turn, was obligated to timely adjudicate the claim. There are, as discussed below, many valid reasons why such an approach to claim resolution makes sense for Pennsylvania.

The General Assembly also concluded, after imposing a requirement that a temporary replacement water supply be immediately provided, that it was also appropriate, in certain circumstances, to allow land owners and mine operators to negotiate cash settlements for water loss claims.

In addition, the General Assembly, recognized that claims for subsidence damage (whether to structures or water supplies protected by Act 54) are nothing more than statutory tort

claims, and determined that it was appropriate to impose a two year limitation of action period on such claims.

Also, because the General Assembly concluded that there was a need to allow mine operators access to properties prior to mining for the purpose of determining the pre-mining condition of the various structures protected by Act 54 (and to develop appropriate plans to mitigate damage to such structures) it decided that property owners needed to be "encouraged" to allow such inspections and to permit such mitigation to occur. Accordingly, it provided in Act 54 that unless a structure owner granted a mine operator pre-mining and post-mining access to conduct an inspection the owner of the structure could not, thereafter, submit a statutory claim for subsidence damage to DEP. Various other "unique state law" provisions were included in the Act 54 amendments.

Opponents of underground mining sought, without success, to defeat many of the Act 54 Amendments that would foster the development of the mining industry.

Following the passage of Act 54, the Environmental Quality Board adopted a comprehensive set of amendments to Title 25 Pa. Code Chapter 89. See 28 Pa.B. 2761 (June 13, 1998). These regulations, for the most part, were supported by PCA, because they were generally consistent with the provisions of Act 54 which PCA and its member companies had supported or otherwise agreed to accept or not oppose.[1]

As noted by the EQB when it promulgated the current provisions of 25 Pa.Code Chapter 89:

> This rulemaking is intended to bring the Commonwealth's regulations on mine subsidence control, subsidence damage repair and water supply replacement into conformance with the act of June 22, 1994 (P. L. 357, No. 54) (Act 54) amendments to the BMSLCA. In addition to inserting the new provisions implemented by Act 54, this rulemaking also incorporates several changes aimed at clarifying and facilitating the implementation of the new statutory provisions.
>
> This rulemaking also includes changes which are intended to bring the Commonwealth's underground coal mining regulatory program into closer conformance with its Federal counterpart. While the Commonwealth's program is generally broader in terms of the scope of structures covered by subsidence damage repair requirements and the scope of water supplies covered by replacement requirements, there are some areas where the Commonwealth's regulations are not as inclusive as the Federal regulations or incorporate different approaches for resolving damage claims. Regulations are included to resolve these differences to the extent practical and permissible under the BMSLCA.

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[1] In one or two instances, DEP adopted a subsequent "interpretation" of these regulations which was inconsistent with the clear language of Act 54. For example, despite the clear language of Act 54 that claims for water loss "discovered" more than three after mining cannot be made, DEP, to placate OSM, interpreted this requirement to mean that no claim could be made more than 3 years after a mine was closed. In other words, if a property owner undermined in 2000 discovered a "water loss" 25 years later but within 3 years of the date the mine was "closed," he could still file a claim for water loss.

28 Pa.B. 2761 (June 13, 1998).

This statement was true in 1998 and remains true today. There is no need to generally amend 25 Pa.Code Chapter 89.

As required by Federal Law, DEP then submitted the Act 54 amendments and its implementing regulations to OSM (which had been kept fully aware of the Act 54 amendments to the 1966 Act and the rulemaking that occurred to implement these amendments) for its approval. And, significantly, before these amendments were formally submitted to OSM, PCA determined that OSM had only 4 "concerns" with Act 54: (a) a concern over conditioning the right to file a statutory subsidence claim for structural damage on allowing operators pre-mining access (a concern which, as discussed below is not justified); (b) a concern over the two year statute of limitation on water loss claims for domestic water supplies (which is also without foundation); (c) a concern that Pennsylvania allowed water supply users to accept compensation in circumstances where their water supply could not be replaced; and (d) a concern over the manner in which Pennsylvania operated its subsidence "bonding" program.

To the surprise of both PCA and, its believes DEP, OSM subsequently and without advance warning, published a final rulemaking in late 2001, which purported to "set aside" as "inconsistent" with Federal law numerous provisions of Act 54 and the regulations adopted by the EQB to implement the BMSCLA, as amended by that Act. The effect of OSM's action was to effectively "repeal" most of the provisions of Act 54 and its implementing regulations which had been accepted by PCA and the various stakeholders as a reasonable approach to regulating the subsidence impacts of underground mining.

DEP's initial response to OSM's decision was appropriate and forceful---it initiated the lawsuit discussed above asserting that OSM lacked the power to "repeal" duly enacted state statutes and that the current provisions of state law regulating mine subsidence were not "inconsistent with" or "less effective" than the requirements of Federal law. Also, as noted above, PCA filed its own lawsuit against OSM, asserting similar claims and taking the position that none of the proposed amendments to the state's subsidence regulations were "inconsistent with" or "less effective" than Federal Law.

However, for reasons best known to DEP, its resolve quickly faded and it elected to "negotiate" with OSM with a view toward reaching an agreement with OSM that would result in "gutting" the current Pennsylvania program for regulating mine subsidence.

The end result of these negotiations are the proposed amendments to 25 Pa Code, Chapters 86 and 89 published in the Pennsylvania Bulletin on Saturday, September 13, 2003.

Although, and as discussed below, PCA does not oppose all of the proposed amendments, some are appropriate clarifications of existing policy and practices, it does strenuously object to DEP's "agreement" to allow OSM to "set aside" any provisions of Act 54 and further objects to any of the proposed modifications of the current subsidence regulations which impose obligations at odds with the provisions of Act 54. These are identified in more detail below.

Aside from the "unreasonableness" of many of these proposed modifications PCA submits that the EQB should not approve any amendments to the current regulations which are inconsistent with the provisions of Act 54 because DEP is not authorized to "promulgate" regulations and, in this case, that is precisely what is occurring.

Quite simply the EQB is being asked to "rubber stamp" a "settlement" by DEP which "consents" to setting aside validly enacted State laws, a "settlement," PCA submits, DEP lacks the power to enter into.

In addition, PCA respectfully submits that the EQB also lacks the power, under State law, to adopt regulations which are in conflict with duly enacted laws of the Commonwealth or to repeal regulations which are consistent with and required by the duly enacted laws of the Commonwealth. PCA submits that this is true whether or not OSM proceeds with its so-called "supercession" of certain provisions of the BMSCLA.

General Comment

"Agreement" to Allow OSM to Supersede Various Provisions of the BMSLCA Act

As noted various of the proposed amendments are designed to implement an "agreement" by DEP to not oppose a recently proposed Federal Rulemaking published by OSM at 68 Fed. 55134 (September 22, 2003). Specifically, DEP has agreed that OSM should be free to supercede the following sections of the BMSLCA: § 5.1(b), 52 P.S. § 1406.5a(b); § 5.2(g), 52 P.S. § 1406.5b(g); § 5.2(h), 52 P.S.§ 1406.5b(h); § 5.4(a)(3), 52 P.S.§ 1406.5d(a)(3); § 5.4(c), 52 P.S. § 1406.5d(c); and § 5.5(b), 52 P.S. § 1406.5e(b) because these State statutory provisions allegedly are not in accordance with the requirements of Section 720 of the Federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1309a, and the rules and regulations issued by the Department of the Interior purporting to implement this section.

PCA opposes each of the Proposed Amendments which are being proposed by DEP for the purpose of furthering OSM's illegal and unjustified action for the reasons set forth in its comments to OSM on its proposal to supercede various provisions of the BMSLCA, a copy of which are attached hereto and made a part hereof.

The EQB's responsibility is to promulgate regulations which implement the duly enacted laws of the Commonwealth, not to promulgate regulations for the purpose of invalidating or superceding such laws or to implement OSM's "interpretation" of State of law.

Specific Comments

1. Proposed Amendments to 25 Pa.Code § 89.5, relating to Definitions:

The Proposed Amendments attempt to create two separate surface owner protection programs for Pennsylvania---one that "mirrors" what OSM insists are mandatory requirements of Federal Law and which provide protection to dwellings used for human habitation and institutional structures and to domestic water supplies and one that follows the requirements of

Act 54 and provides protection to structures and water supplies not otherwise covered by Federal Law.

Thus "dual" system of regulation is cumbersome, unjustified, unreasonable, and not authorized by existing Pennsylvania law. Furthermore, it is absurd for anyone to suggest, as the discussion in the proposed rulemaking does, that the proposed amendments will "simply" and "streamline" the Pennsylvania surface owner protection program. In fact, the proposed amendments have the exact opposite impact. Therefore, PCA opposes the proposed new definitions in 25 Pa.Code § 89.5, of the terms "EPACT structures," EPACT water supplies," and the proposed deletion of the definition of "Permanently affixed appurtenant structures."

2. Proposed Amendments to 25 Pa.Code § 86.1 relating to Definitions:

PCA opposes the proposed amendments to 25 Pa.Code § 86.1 which would expand the definition of "underground mining activities" to include "post closure mine pool maintenance." This is a transparent attempt to invalidate Section 5.2(c)(2) which provides that claims for water loss must be submitted to DEP within three years "after mining." The phrase "after mining" clearly was intended by the General Assembly to mean "after coal extraction" was completed beneath or near the affected water supply. The General Assembly did not intend for the EQB or DEP to allow claims for water loss to be filed 5, 10 or 25 years after mining in a specific area was completed.

There is no reason at all for allowing water loss claims for supplies, such as agricultural, recreational and commercial supplies, that have no federal protection to be filed 5, 10 or 25 years after mining beneath the supply has been completed. Moreover, providing that "mining" does not cease until a mine pool has stabilized was not necessary to satisfy OSM's concerns relating to "domestic" supplies. Instead, DEP's initial interpretation of its authority under the BMSCLA (see footnote 1, supra) was all OSM "required."

Therefore, and alternatively and without conceding the need to operate a "dual" program of surface owner protection, the EQB should, under no circumstances, allow claims for non-Federally protected water supplies to be made in violation of Section 5.2(c)(2) of the BMSCLA. Claims for alleged damage to, for example, industrial, commercial or recreational water supplies must be filed within 3 years of the date when mining beneath the supply ceased.

3. Proposed Amendments to 25 Pa.Code § 86.152, relating to Bond Adjustments:

PCA does not oppose this proposed amendment to the extent that nothing in this amendment would extend the current 10 year time period during which subsidence bonds must be maintained after a mine closes.

4. Proposed Amendments to 25 Pa.Code § 89.141(d) relating to the content of subsidence control plans and 25 Pa.Code § 89.142a(d) relating to measures to minimize/prevent subsidence damage and 25 Pa.Code § 89.143a(c)(3) relating to when DEP can require a subsidence control plan to be modified:

PCA does not oppose the proposed amendment to 25 Pa.Code § 89.141(d) to the extent it requires operators that will be mining beneath dwellings and permanently affixed appurtenant structures protected by Act 54 using full extraction mining methods to provide a description of the methods they intend to utilize to minimize subsidence damage and to comply with the performance requirements of 25 Pa.Code § 89.142a(d)(1)(i), as proposed for amendment. In addition, PCA does not opposed the proposed amendments § 89.141(d) to the extent it requires operators that will be using less than full extraction mining methods to provide a description of the methods they intend to utilize to prevent subsidence damage and to comply with the performance requirements of 25 Pa.Code § 89.142a(d)(1)(ii), as amended. In addition, PCA does not oppose the amendment to 25 Pa.Code § 89.142a(c)(3) relating to required modifications to subsidence control plans. The proposed amendments merely clarify and codify what has been the practice of PCA member companies for many years and can be implemented without the need to develop a separate definition for "EPACT Structures" or the operation of a "dual" program of surface owner protection. Consequently, PCA does oppose these amendments to the extent they propose to utilize the term "EPACT Structures."

PCA notes, however, that it will be impossible for operators to comply with these "newly" codified requirements if the EQB adopts amendments to 25 Pa.Code § 89.144a (which would allow the owners of so-call "EPACT structures" to deny operators the opportunity to conduct a pre-mining inspection). See discussion below, in paragraph 13.

5. Proposed Amendments to 25 Pa.Code § 89.142a(f)(iii) relating to when a structure must be in place to be "protected."

PCA opposes the proposed amendment to 25 Pa.Code § 89.142a(f)(iii) which is intended to "settle" a dispute between DEP and OSM concerning the requirements of § 5.4 (a)(3) of the BMSLCA.

Federal SMCRA specifically recognizes that each state should be free to develop its own program of laws and regulations governing subsidence control which is tailored to its specific needs and interests and that, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States" 30 U.S.C. § 1201(f).

Furthermore, as recently recognized by the United States Court of Appeals for the Third Circuit:

> "As we have observed, 'there would be no reason to allow the states to impose their own regulations if the regulations had to be the same as the federal Act and regulations." (cite omitted). Indeed, Congress was well aware that... there could not be a uniform federal standard because of the wide differences in such things as geology and topography in areas subject to mining operations in the various states and the states' familiarity with local conditions. Thus, Congress determined that 'the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations....should

rest with the States." 30 U.S.C. § 1201(f).

Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 316 (2002).

The inquiry is not whether Act 54 and the current State regulations which implement that Act "mirror" the requirements of SMCRA and OSM's regulations. The inquiry is whether differences between the two regulatory programs are justified by legitimate state interests and/or local conditions and do not, as applied, frustrate the goals of federal law to provide surface owners in Pennsylvania with an appropriate level of protection from the surface impacts of underground mining.

Section 5.4(a)(3) of the BMSLCA and 25 Pa.Code § 89.142a(f)(iii) do not deny any owner of a dwelling who has no control over whether or not his structure will be undermined the right to file a subsidence damage claim. Instead, this section of the BMLSCA is designed to discourage property owners, who have knowledge that mining is imminent, from building a new dwelling in a location where it could be damaged and to encourage such persons to build in areas which will not be undermined.

This section provides only that the mine operator is not responsible for any resulting subsidence damage to a dwelling that was not in place when Act 54 was passed or at the time the mine operator submitted its most recent application for a permit or permit renewal. In other words, it imposes no more than a 5 year moratorium on new home construction in areas that could be undermined within this time frame.

This section of the BMSLCA takes into account several factors unique to Pennsylvania and attempts to balance them in a way which is fair to both property owners and mine operators. First, it recognizes that Pennsylvania mine operators are required to plan and operate their mines in areas where development is more common than may be the case in other states. Therefore, Pennsylvania concluded that it was unreasonable to require operators to plan their mines without knowledge as to what structures they should avoid undermining or for which they might have to develop plans to mitigate or repair. Second, it recognizes that it is bad land use planning to permit new construction in areas where it is highly likely that the new structure will be damaged. Third, it recognizes that it is unreasonable, and otherwise inconsistent with general principles of Pennsylvania law, to allow someone to assert a claim for damage in circumstances where they could have, through their own conduct, mitigated or avoided the damage they now claim to have suffered.

There is nothing unreasonable, nor is there anything in SMCRA or OSM's regulations, which would preclude local municipalities from enacting a zoning ordinance which provides that new home construction is not to be permitted in areas that are unstable or prone to subsidence or slips. Such a local zoning ordinance would be completely justified on several legitimate state interest grounds including, without limitation, an interest in assuring that the local tax base is not unreasonably reduced by avoidable damage to new structures.

Why then does OSM contend that the General Assembly of Pennsylvania, for similar reasons of legitimate state concern, cannot enact a similar law? Indeed, given that OSM's own

regulations only protect domestic water supplies in place when the permit is issued, it is difficult to understand why OSM is so concerning about a provision of state law which provides no protection for structures that were not in place on the same date---apparently OSM believes that it makes sense to repair a structure that has no water supply.[2] PCA submits that this is a ridiculous outcome and one which Pennsylvania is not required to adopt.

Furthermore, this provision is implemented in such a manner that no property owner will be "caught" unaware. Mine operators are required to publish notice of their intend to apply for a permit in local newspapers and every person who purchases property in Pennsylvania is given a bold warning in the property deed as to whether or not they own the coal beneath their property. Property owners know well in advance when mining is projected and planned. In addition, the Subsidence Agents are now generally providing personal, direct information concerning future mining to everyone that owns property over an area to be permitted.

All Section 5.4(a)(3) says to a property owner who has not yet decided to build a new home is that you will have to wait no more than 5 years to build this structure if you want to be compensated in the event mining damages it.

It is completely proper for the General Assembly to encourage a brief moratorium on construction in areas that will be undermined in the near future.

Section 5.4d(a)(3) and 25 Pa.Code §89.142a(f)(1)(iii) do nothing more than foster several legitimate land use planning goals on a statewide rather than on a municipality by municipality basis, by inserting a disincentive to development for a limited period of time.

Pennsylvania is authorized by 30 U.S.C. § 1201(f) to development laws and regulations governing mine subsidence which foster legitimate local and state interests.

PCA submits: (a) DEP should have "defended" Pennsylvania's right to development "local" requirements pursuant to 30 U.S.C. § 1201(f) that are based on valid state interests unique to Pennsylvania; and (b) the EQB lacks the authority to amend 25 Pa.Code § 89.142a(f)(1)(iii) in the manner proposed because it is in direct conflict with the provisions of Section 5.4(a)(3) of the BMSLCA.

6. Proposed Amendments to 25 Pa.Code § 89.142a(f) relating to "permanently affixed appurtenant structures."

PCA opposes the proposed amendment to 25 Pa.Code § 89.142a(f) which is intended to "settle" a dispute between DEP and OSM concerning the requirements of § 5.4 of the BMSLCA which expressly only affords protection to appurtenant structures which "are permanently affixed."

[2] Although OSM contends that federal law protects structures that are build after a permit is applied for, it must concede that federal law does not protect water supplies that were not in place when the permit was issued. A rational person, however, might ask what value is a "repaired structure" that has no source of potable water?

Federal SMCRA specifically recognizes that each state should be free to develop its own program of laws and regulations governing subsidence control which is tailored to its specific needs and interests, and that, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States" 30 U.S.C. § 1201(f).

OSM apparently construes Section 720 of SMCRA as imposing absolutely no obligation on property owners to take reasonable steps to mitigate their own potential for damage. While OSM may believe this is a reasonable rule, Pennsylvania has concluded for a variety of legitimate reasons of its own (including state property law) that such a rule is unreasonable.

Under the current Pennsylvania Regulatory Program only structures appurtenant to dwellings which are securely and permanently affixed to the ground are entitled to "protection" against subsidence damage. This is the case because a structure that can be easily moved is not a "fixture" and therefore not "real property" under Pennsylvania law. States are free to define for themselves what is and what is not "real property," and pursuant to 30 U.S.C. § 1201(f) Congress gave Pennsylvania the latitude to do define what is "real property" for purposes of surface owner protection.

In addition, Pennsylvania has concluded that surface owners who will be undermined have the same obligation as all other citizens of Pennsylvania who wish to assert claims for damages against another namely, an obligation to take reasonable steps to mitigate their own potential losses. By informing property owners that they can only assert a claim for subsidence damage to "structures" that cannot be easily moved from the path of potential mining Pennsylvania is doing nothing more than further a local interest, which it is entitled to do.

There is absolutely no reason why a mine operator should be expected to repair or compensate for damage to an above ground swimming pool or any other "appurtenant structure" such as small outbuildings, sheds, gazeboes and similar "structures" that can be easily dismantled or moved before mining and reinstalled after mining takes place.

PCA submits: (a) DEP should have "defended" Pennsylvania's right to development "local" requirements pursuant to 30 U.S.C. § 1201(f) that are based on valid state interests unique to Pennsylvania; and (b) the EQB lacks the authority to amend 25 Pa.Code § 89.142a(f) in the manner proposed because it is in direct conflict with the provisions of Section 5.4 of the BMSLCA.

7. Proposed Amendment to 25 Pa.Code § 89.142a(f)(1)(a) relating to "Prompt" repair of subsidence damage.

PCA does not oppose amending 25 Pa.Code § 89.142a(f)(1)(a) to make clear what has always been the case namely, that operators must "promptly" repair or compensate for subsidence damage caused to structures protected by Act 54.

However, to the extent DEP has "silently" agreed with OSM that it will no longer adhere to the requirements of Section 5.5(b) of the BMSLCA which impose a brief 6 month period during which structure owners are expected to first negotiate with a mine operator without DEP's involvement, they vigorously oppose such a result.

There is no requirement that a State Program "mirror" the language of SMCRA or OSM's regulations. 30 U.S.C. § 1201(f). First, Pennsylvania has almost 40 years of experience with statutory subsidence claims. OSM has had virtually none, particularly in Pennsylvania where since 1992 OSM has "deferred" completely to Pennsylvania. See discussion, infra on "Dual Enforcement." Consequently, Pennsylvania was fully justified in concluding, as it did, that if homeowners and mine operators are afforded a brief period of time during which they can attempt to amicably resolve a subsidence claim, the interests of all parties (including the Commonwealth) in swift and amicable dispute resolution is furthered. Both private parties avoid the costs of counsel and experts and the Commonwealth is able to devote its limited resources to other enforcement activities which actually involve "environmental protection." Second, Pennsylvania has elected to provide far more structure owners with a repair/compensation remedy for subsidence damage than Congress or OSM did. Consequently, Pennsylvania has an even greater interest in encouraging "alternative dispute resolution" than do other States.

Providing for a reasonable period of alternative dispute resolution to accommodate local interests is something which Pennsylvania is authorized to implement pursuant to 30 U.S.C. § 1201(f).

There is no reason at all for allowing claims for damages to structures such as agricultural, industrial or commercial structures that have no federal protection to be filed sooner than 6 months after damage occurs because OSM has raised no objection to this enforcement approach.

Therefore, and alternatively and without conceding the need to operate a "dual" program of surface owner protection, the EQB should, under no circumstances, allow claims for damage to non-Federally protected structures to be made in violation of the BMSCLA. Claims for alleged damage to, for example, industrial, commercial or agricultural structures cannot be filed until at least 6 months after any alleged damage has been reported to the operator.

8. Proposed Amendments to 25 Pa.Code § 89.142a which would incorporate the "new" definition of "Underground mining operations."

PCA does not oppose the proposed amendments to 25 Pa.Code § 89.;142a which incorporate the "new" definition of "Underground mining operations." This amendment merely clarifies what has been the case for years namely, that operators are required to repair or compensate for subsidence damage caused by all underground mining activities, not just those that involve the actual removal of coal.

10. Proposed Amendments to 25 Pa.Code § 89.143(c) relating to deleting 6 month period of alternative dispute resolution.

Pennsylvania's decision to provide for a brief 6 month period of alternate dispute resolution before authorizing DEP's to become involved in "adjudicating" subsidence claims is required by Act 54 and the EQB has no power to alter this requirement, particularly with respect to structures that are not protected by Federal Law.

PCA opposes the above proposed amendment to 25 Pa.Code § 89.143(c) to the extent DEP now claims the authority to issue orders before the six month negotiation period provided for by Act 54 has expired. Furthermore, under no circumstances should DEP be authorized to take any enforcement action during the first six months after a claim for subsidence damage is filed by the owner of a structure which is not protected by Federal law.

11. Proposed Amendments to 25 Pa.Code § 89.143(c) relating to a Statute of Limitation on the filing of subsidence damage claims for structures and Proposed Amendments to 25 Pa.Code § 89.152 relating to a Statute of Limitation on the filing of water loss claims.

PCA opposes the proposed amendments to 25 Pa.Code § 89.143(c) and 25 Pa.Code § 89.152 which are intended to "settle" a dispute between DEP and OSM concerning whether Pennsylvania can impose a reasonable time limit within which claims for subsidence damage must be filed.

Federal SMCRA specifically recognizes that each state should be free to develop its own program of laws and regulations governing subsidence control which is tailored to its specific needs and interests, and that, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States" 30 U.S.C. § 1201(f).

The BMSCLA and the EQB's current regulations provide that homeowners must file a statutory subsidence damage claim within 2 years of the date they discover the damage.

While DEP apparently now suggests that the BMSLCA does not impose a 2 years statute of limitations on such claims, this suggestion is simply wrong and nothing but an attempt by DEP to placate OSM.

SMRCA is completely silent on the issue of whether claims for subsidence damage to dwellings and claims for the replacement of domestic water supplies must be filed within any defined time frame. Of equal importance, OSM has never promulgated any regulation which interprets SMCRA as allowing for the filing of such claims at any time. In addition, it is clear that a reasonable statute of limitations for subsidence damage claims would not conflict with SMCRA. This view is shared by the D.C. District Court, which held in *National Mining Association v. Babbitt*, that:

> "Since subsidence is unpredictable and may occur long after mining has taken place, the federal register states that this obligation extends indefinitely into the future, but **once the damage has occurred it is reasonable to assume that normal statute of limitations principles will govern**...Long established principles of repose allow for statutes of

limitations to run from the date of the injury in cases where the starting point is the most appropriate policy choice."

National Mining Association v. Babbitt, No. 95-0938 (D.D.C. May 29, 1998)(emphasis added), Slip Op. at 15.

Since the limitation of action period provided for in the BMSCLA only begins to run from the date damage was discovered (not the from date mining occurred as is the case with common law claims for subsidence damage[3]) there is no question that it is a reasonable and appropriate provision of a lawful State Program.

Moreover, in the absence of any express prohibition in SMCRA on placing time limits on the time within which subsidence damage claims must be filed, there is no basis for OSM to conclude that Pennsylvania's decision to do so is not authorized by 30 U.S.C. § 1201(f). Indeed, in the absence of any express limitation of action period on a federal statutory claim the Courts will traditionally provide for one. When a statute creating a right of action does not specify a limitations of action period, it is not assumed that Congress intended that there be no time limit at all on the action. *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). Indeed, this has been the law since the infancy of our Nation. *See Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Marshall, C.J.) ("[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain for ever liable to a pecuniary forfeiture"). Rather, it is the judiciary's "task to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello*, 462 U.S. at 158.

The statute of limitations in federal practice depends first on what the basis of subject matter jurisdiction is in the action. When Congress fails (as it did in Section 720 of SMCRA) to create a federal statute of limitations, courts generally apply the statute of limitations of the most analogous cause of action under the law of the state in which the federal cause of action arises. *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980), which in the case of Pennsylvania is a two year period of limitations otherwise applicable to claims for property damage.

Furthermore, there are a myriad of legitimate reasons why Pennsylvania is free to impose a reasonable limitation of action period on statutory claims which are statutory tort claims.

For example, Pennsylvania law currently protects far more structures and far more water supplies than does Federal law. Moreover, Pennsylvania full extraction longwall mines tend to be located in more densely populated areas that similar mines in neighboring states. Therefore, the potential volume of claims facing DEP will be far greater than its counterparts in other jurisdictions. Establishing a reasonable basis for limiting the total number of claims that DEP might have to process is a legitimate matter of local interest, which Pennsylvania is entitled to consider.

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[3] *See, Noonan v. Pardee,* 200 Pa. 474 (1901) (cause of action for removal of surface support begins to run from the date support was removed regardless of whether surface owner knew mining had occurred and regardless of whether or not damage had yet manifested itself on the surface).

Moreover, Pennsylvania requires that mine operators repair all subsidence damage they cause or pay the costs of repairing the damaged structure, not simply opt to pay the difference between the property's pre-mining value and its post-mining value, which is the case in other states. Therefore, if Pennsylvania homeowners are free to wait years after discovering subsidence damage before filing a claim, the mine operator would, if found liable, be required to repair the structure 5, 10 or 25 years after the damage was first discovered, at greatly inflated costs. In addition, DEP and operators will be forced to sort out, years after the fact, the amount of non-subsidence damage that naturally occurred to a structure that has aged from that which was actually caused by mining that took place 5, 10 or 25 years earlier.

There are reasons why statutes of limitation are imposed on "damage" claims in every jurisdiction in the United States, and they relate to a legitimate interest of the State in barring claims that are premised on stale evidence and which are not pursued until memories have faded and evidence is lost or destroyed.

In addition, the justification for Pennsylvania creating these new statutory claims for homeowners was a desire to preserve its local *ad valorem* tax base. This goal is not fostered if homeowner can wait 5 or 10 or 25 years to file their claims. On the other hand, it is fostered if claimants are encouraged to file their claims promptly, and a reasonable statute of limitations certainly encourages the timely filing of subsidence damage claims.

The Pennsylvania General Assembly clearly understood what OSM appears not to understand. The provisions of both State law and Federal law, which grant the owners of dwellings and the users of domestic water supplies a statutory right to pursue a claim for damages or water supply replacement/restoration are, quite simply, statutory tort remedies.

In addition, Pennsylvania's program, unlike OSM's regulations, provides that if mining occurred within so many feet of an allegedly affected water supply there exists a presumption that mining was the cause of the loss. This presumption may well have some basis in fact when the claim is pursued within two years of the date the damage is discovered but can it have any validity if the claim is filed 5, or 10 or 25 years later, when it may not even be possible to prove when the loss occurred in relationship to mining?

Although the General Assembly concluded that granting the owners of dwellings a right to assert a statutory claim for damages and granting the users of domestic water supplies adversely affected by mining a right to compel the restoration or replacement of such supplies in circumstances where they had no right to assert such a claim at common law could be justified on a variety of legitimate state interests, the elements of these "causes of action," are indistinguishable from the elements of a common law tort or trespass claim. The plaintiff homeowner, must be able to demonstrate causation and prove both the level of damage he allegedly suffered as well as the "value" of that damage. The nature of the claim is dependent upon factual issues which, in turn, are dependent upon human recollection of events, and statute of limitations are designed to prevent the prosecution of tort claims based on stale evidence and faulty memories. Pennsylvania has ample local interests which justify its decision to enact reasonable statutes of limitations on claims for subsidence damage.

12. Proposed Amendments to 25 Pa.Code § 89.143(d)(1)relating to investigations.

PCA does not oppose the proposed amendment to 25 Pa.Code § 89.143(d)(1).

13. Proposed Amendment to 25 Pa.Code § 89.144a(1) relating to Pre-Mining and Post-Mining Inspections:

PCA opposes the proposed amendment to 25 Pa.Code § 89.142a(f) which is intended to "settle" a dispute between DEP and OSM concerning the requirements of § 5.4(c) of the BMSLCA relating to pre-mining and post-mining inspections.

Federal SMCRA specifically recognizes that each state should be free to develop its own program of laws and regulations governing subsidence control which is tailored to its specific needs and interests, and that, "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this Act should rest with the States" 30 U.S.C. § 1201(f).

25 Pa.Code § 89.144(a)(1), implements Section 5.4(c) of the BMSLCA, and does not deny any owner of a dwelling or an institutional building the right to file a subsidence damage claim. Instead, these provisions merely condition this right by providing that in return for being given a right to file a statutory subsidence damage claim the structure owner must grant the mine operator an opportunity to conduct a pre-mining and a post-mining inspection.

There is absolutely nothing in SMCRA or in OSM's regulations which suggests a State cannot impose this type of limited condition on the statutory right to file a subsidence claim if it has valid reasons for doing so.

With respect to the pre-mining inspection condition set forth in Section 5.4(c) and 25 Pa.Code §89.144a(f)(1), the reasons for this limited condition are obvious. Few dwellings or institutional structures (the only class of structures to which the proposed amendment to § 89.144a(f)(1) apply) do not have normal damage caused by weathering and wear and tear. The nature of this damage is often indistinguishable from certain types of damage that can be caused by mine subsidence. To assure that operators are not required to pay compensation equal to the cost of repair (the Pennsylvania compensation standard which is different from OSM's) for "damages" they did not cause, the Pennsylvania General Assembly concluded homeowners should not be allowed to file subsidence damage claims unless they allow the mine operator access to their dwelling to establish a pre-mining baseline of its condition. Copies of the pre-mining inspections must be submitted to the homeowner, who is, of course, free to do his own such inspection.

Pennsylvania, unlike OSM and virtually every other state where mining occurs, has had years of experience processing and resolving subsidence damage claims and was fully justified in concluding that such claims are more likely to be resolved amicably if the structure owner and the mine operator have a "baseline" against which to determine what is and what is not subsidence related damage. In addition, Pennsylvania was also fully justified in concluding that

its own enforcement of the subsidence damage claim provisions would be simplified if DEP had some pre-mining "baseline" to consider when adjudicating liability. This precisely the type of legitimate State interests (an interest in efficient and fair resolution and adjudication of disputes) which 30 U.S.C. § 1201(f) intended for the States to be free to further through special state requirements.

Moreover, this provision of the BMSLCA is not implemented by DEP in a manner which would allow homeowners to unwittingly lose their rights to assert a subsidence damage claim. If a homeowner denies access to a mine operator to conduct a pre-mining inspection the operator is required to inform DEP that it has occurred. The operator is then required to send the property owner a written notice setting forth the consequences of continuing to refuse to allow a pre-mining inspection. This written notice states that a claim for damage will be denied if access is not granted within a reasonable time prior to mining. This notice must be sent by certified mail return receipt requested and proof of receipt must be supplied to DEP. Only then, can an operator rely upon this section of the BMSLCA as a "defense" to subsidence damage claim. Indeed, DEP itself has recognized that the pre-mining inspection provisions of the BMSCLA are actually beneficial to property owners, calling these inspections a right all property owners have:

> "You have the right to a pre-mining survey to record the existing condition of your home and water supply to help identify damage or loss of water. The pre-mining survey can also help in the design of measure that will help prevent damage to your property like bracing, trenching around the building, installing flexible connections to utilities and providing replacement water supplies ahead of any need."

See DEP's "Fact Sheet" on the BMSLCA, which appears on its web page.

This construction of the requirements of Section 5.4(c) makes perfect sense because denying a pre-mining inspection does not preclude mining, and unless owners and operators are "encouraged" to make pre-mining inspections such mining will occur without the implementation of pre-mining mitigation measures and likely cause more damage than would have resulted if pre-mining mitigation measures had been implemented.

OSM's objection to this requirement (and DEP's willingness to allow it to be "superceded") is particularly difficult to understand because OSM itself insists that mine operators who engage in full extraction longwall mining are **required each time they propose to undermine a dwelling** to determine if pre-mining measures should be implemented in advance of mining. How, PCA asks, can an operator comply with this Federal requirement (a requirement that its member companies are more than prepared to comply with) and the proposed amendments to 25 Pa.Code §§ 89.141(d) and 89.142a discussed above in paragraph 4) if they are denied access to a property prior to mining? Commonly used pre-mining mitigation techniques involve trenching around the foundation of structures, installing cabling around the structure and installing "buttress" supports in locations that might be prone to suffer subsidence damage. The only way to determine what techniques are appropriate is to inspect the structure prior to mining. The only way to implement appropriate measures is to have access to the property to do so. Of course, if structure owners refuse to allow a pre-mining inspection, not only does this interfere with an operator's ability to comply with his legal obligations it results in

the property owners refusing to discharge a legal obligation they have namely, the obligation to mitigate their own potential damage.

If 25 Pa.Code § 89.144a(1) is amended as proposed, in the future persons whose sole objective is to stop mining beneath their property will be able to do so simply by denying operators the right to conduct a pre-mining inspection and access to implement mitigation. Had the owners of the Kent Farm (and the owners of the "historic" Thrall House) been able to deny mine operators who proposed to mine under their properties pre-mining access to their properties they would not have been able, under OSM's then understanding of Section 105 of the National Historic Preservation Act, to mine as planned and projected and considerable damage to these structures would have occurred.

Only those surface owners with "something to hide," or whose intend is to "stop mining altogether" will seek to deny pre-mining access. Simply put, the law should only help those who are willing to help themselves and should not encourage individuals to frustrate the ability of others to comply with their obligations or unreasonably increase another's liability.

With the respect to the post-mining condition of Section 5.4(c), OSM's concern is equally difficult to understand. Does OSM contend that SMCRA and its regulations on surface owner protection supersede local rules relating to the adjudication of claims before administrative agencies? The provision of Section 5.4d(c) which provides that a person who denies a post-mining inspection cannot pursue a subsidence claim is nothing more than a recognition by the General Assembly that if a person who wants to use the Commonwealth's adjudicatory tribunals is unwilling to allow the "defendant" a right to engage in reasonable discovery concerning the nature of the claimants claim (the current rules of discovery applicable to subsidence damage claims clearly allow for inspections of the claimant's property by the "defendant"), such claim can, and should, be dismissed

PCA submits: (a) OSM cannot disapprove as inconsistent with SMCRA and its own regulations a reasonable requirement of State law which clearly furthers the implementation of OSM's own regulations and one of the very purposes of SMCRA, namely fostering the development of a strong coal industry; (b) DEP should have "defended" Pennsylvania's right to development "local" requirements pursuant to 30 U.S.C. § 1201(f) that are based on valid state interests unique to Pennsylvania; and (c) the EQB lacks the authority to amend 25 Pa.Code § 89.142a(f) in the manner proposed because it is in direct conflict with the provisions of Section 5.4(c) of the BMSLCA.

14. Proposed Amendment to 25 Pa.Code § 89.145a(a)(1) relating to the timing of pre-mining water surveys.

PCA does not oppose the proposed amendment to 25 Pa.Code § 89.145a(a)(1) to the extent pre-mining water surveys can now be conducted at a time more relevant to mining and to the extent the amendment clarifies when such samples need not be taken.

15. Proposed Amendment to 25 Pa.Code § 89.145a(b):

PCA supports the proposed amendment to 25 Pa.Code § 89.145a(b) which "codifies" what PCA member companies have been attempting to do since Act 54 was passed namely, provide a permanent adequate replacement or alternative water supply promptly, which equals the pre-mining quantity of the supply.

16. Proposed Amendment to 25 Pa.Code § 89.145a(e) relating to temporary water supplies.

PCA supports the proposed amendments to 25 Pa.Code § 89.145a(e) relating to temporary water supplies to be provided to persons whose domestic supply has been determined to be adversely affected by mining because these amendments merely "codify" what PCA member companies have been doing since Act 54 was passed namely, providing a temporary water supply in an amount equal to the pre-mining quantity to every domestic water supply user whose supply has been determined to be adversely affected by underground mining. However, there is no need to create a separate definition of "EPACT water supply," because Act 54 already provides comparable protection to "domestic water supplies."

17, Proposed Amendment to 25 Pa.Code § 89.145a(f) relating to "costs" to landowner.

PCA does not oppose an amendment to 25 Pa.Code § 89.145a(f) which would obligate its member companies to pay all increased costs of operating and maintaining a restored/replaced domestic water supply.

18. Proposed Amendment to 25 Pa.Code § 89.146a relating to compensation in lieu of water replacement.

PCA supports an amendment to 25 Pa.Code § 89.146a which would establish a mechanism whereby its members can be relieved of their obligation to replace or restore an adversely affected water supply (of any type protected by Act 54) in circumstances where it has been determined by DEP that it is not possible to do so. However, there is no reason to drawn a distinction between "EPACT water supplies" and other water supplies that are also protected by Act 54 and the procedures for allowing compensation in lieu of replacement/restoration should be the same for all water supplies protected by Act 54.

Comment on "Dual Enforcement"

In the discussion concerning the Proposed Amendments it is suggested that the Proposed Amendments will eliminate the so-call condition of "Dual Enforcement" that has existed in Pennsylvania since Act 54 was passed.

PCA submits that this justification is absurd. Pennsylvania has, for over 9 years, been regulating the subsidence impacts of bituminous underground mining in accordance with the very provisions of Act 54 and the EQB's current subsidence control regulations which are now proposed for supercession or amendment.

Since 1995, OSM has "shared" enforcement authority with DEP, reserving the right to "directly enforce" its interpretation of Federal law in circumstances where it found that citizens of Pennsylvania were being denied their "rights" under SMCRA or OSM's regulations. See 60 Fed.Reg. 44352 (July 28, 1995).

Significantly, and despite the years of "dual enforcement," there have been, to PCA's knowledge, only one instance when OSM saw any need to "directly enforce" some aspect of its subsidence control program.

Furthermore, PCA is aware of no instances where the provisions of Act 54 relating to pre-mining inspections imposed by Section 5.4(c)of the BMSLCA, or the two year statute of limitations imposed by Section 5.5(b) of the BMSLCA, or the provisions of Section 5.4(a)(3) of the BMSLCA, relating to the time when a structure must have been built in order to be "protected," or any of the other provisions of the BMSLCA which OSM proposes to supersede, were found by OSM to have created any need for "federal enforcement."

Pennsylvania's record speaks for itself. Nothing is "wrong" with the Pennsylvania subsidence control program by OSM's own tacit (and in some instances direct) admission. There exits no **need for any of the proposed amendments which either fail to implement or eviscerate provisions of Act 54.**

PCA appreciates this opportunity to provide its comments on the EQB's September 12, 2003 proposed rulemaking. Attached is a one-page summary of our comments for distribution to Board members.

Respectfully submitted,

George Ellis
President of PCA