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Mountain Watershed Association
PO Box 408/1414-B ICV Road
Melcroft, PA 15462

December 2, 2019

Environmental Quality Board
Rachel Carson Building, 16th Floor
400 Market Street
Harrisburg, PA 17101-2301

Re: Proposed Rulemaking for Water Supply Replacement for Coal Surface Mining

To Whom It May Concern:

These comments are submitted on behalf of the Mountain Watershed Association (MWA), home of the Youghiogheny Riverkeeper. MWA is a nonprofit citizen-led environmental organization focused on protection, preservation and restoration of the Indian Creek and greater Youghiogheny River watersheds. MWA represents over 1,900 members, many of whom are impacted daily by either: the legacy of surface mining in the region or active mining operations.

We applaud the Environmental Quality Board's ("Board") efforts to update Pennsylvania's water supply replacement regulations for coal surface mining. Some of these proposed updates will go a long ways towards achieving the Board's stated goal of protecting the rights of water supply owners and users. However, there are certain provisions which will likely have the opposite effect and must be adjusted before the rules are finalized.

First, it is highly problematic that the language creates a new exemption for impacts caused pursuant to a government-financed construction contract. Secondly, some proposed water supply survey requirements provide communities with a helpful new avenue for early notification and easier access to critical information. However, other aspects of this requirement create a loophole that could potentially undermine much of this possible support for communities. Lastly, the stated goals of the proposed amendments must be reconciled so that the requirement to provide advanced notice of potential impacts goes to water supply users, as well as owners.

1. <u>§§ 88.107 and 87.119 must not remove obligation for operators/owners to replace water supplies caused by government-financed construction contracts.</u>

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In regards to water replacement, the draft language unacceptably removes the obligation for persons engaged in government-financed construction contracts (GFCC's) to replace damaged water supplies. This is deeply problematic because GFCC's often utilize the exact same processes and procedures as surface mining. In our region, at least one operator has openly admitted to using the GFCC scheme to mine coal they otherwise would have proposed under surface mine permit-schemes, simply because it was a faster approval process.[1]

In Fayette County alone, GFCC's sites have pulled at least 150,000 tons of coal out of the ground over the last ten years. About one quarter of all GFCC's in Pennsylvania have required blasting and many of these GFCC projects have lasted over several years.

The original requirement for the GFCC program, that a project be partially funded by the state, no longer applies. Possibly in part because of this, it seems that we are seeing GFCC's being used in a way that is contrary to the original purpose. Instead of incentivizing companies to clean up dangerous abandoned mine sites, relatively stable sites are targeted. Such sites, along with the GFCCC program, provide a convenient façade that allows mine operators/owners to conduct new surface mining activities under a less regulated and less in-depth permitting scheme.

For more information on the lack of protections for landowners who live near GFCC's see Attachment A, "Problems With Using Government Financed Construction Contracts For Mining Activity: A Case Study of Amerikohl's Revtai Project."

It is unconscionable that the Commonwealth should remove what minimal protections there are for landowners whose water supplies are damaged, simply because they happen to live near mining activity that has been classified as a "GFCC" site.

Instead of decreasing those protections by removing the obligation to replace damaged water supplies, the state should be *increasing* them. Not only should GFCC's be included in the

[1] Blog Post, "Amerikohl's Revtai GFCC coal mine would leave community without standard state protections" available at: http://www.mtwatershed.com/2018/12/13/amerikohls-revtai-gfcc-coal-mine-would-leave-community-without-standard-state-protections/. David Maxwell, an executive from Amerikohl, explained that "Amerikohl has been interested in mining the site for a long time but the appropriate leases were not available until recently. He then told the meeting participants that Amerikohl chose to apply for the project under the GFCC program because they wanted to receive their permits more quickly."

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obligation to replace water supplies, but it should also be included in activities that are covered by the presumption of liability.

2. §§ 87.119a(a) and 88.107a(a): Water Supply Surveys

We strongly encourage the addition of subsection (a)(2), which says that - prior to issuance of a permit - mine owners/operators must submit the results of water supply surveys to: the Department, the water supply owner, and water supply user. This will be an incredibly valuable tool in protecting the rights of coalfield communities. For the many reasons set forth below, it is often the case that water supply users are never notified of potential threats, despite the fact that they are often the best situated to respond to such impacts. Providing them with information about their water supply is the best way to help ensure the protection of their rights.

However, subsection (a)(4)(iii) potentially undercuts much of the utility of this rule and, in fact, much of the requirement to conduct water surveys, generally. This section seems to say that water supply owners (not users) will receive a notice of intent to survey and if they do not authorize the survey within 10 days, the operator is no longer obligated.

The newly proposed language §§ 87.119a (a)(4) and § 88.107a (a)(4) says:

> (a) The operator or mine owner shall conduct a survey of the quantity and quality of all water supplies within the permit area and those in adjacent areas that may be affected by mining activities, **except when the water supply owner denies the operator or mine owner access for the survey.**

The section goes on to set out examples of when a water supply owner's action, or inaction, constitutes such an exception:

> (4) If the operator or mine owner is prohibited from making a premining or postmining survey because the water supply owner will not allow access to the site, the operator or mine owner shall submit evidence to the Department of the following:
>
> (iii) The water supply owner failed to authorize access to the operator or mine owner to conduct a survey within *10 days of receipt* of the operator's or mine owner's notice of intent to survey.

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This language implies that if a water supply owner fails to, not only respond, but authorize access within 10 days of receiving notice, then the mine owner/operator is no longer required to conduct a water supply survey.

If this is the case, such a severe time restraint could functionally render the requirement of a water supply survey almost entirely moot. Experience shows us that very often, water supply inventories are rife with outdated and inaccurate information about the water supply owners. Many times, notification never even comes to the hands of the correct water supply owner. In these cases, such a severe time constraint would have the unjust effect of essentially releasing the mine operator/owner from the duty to conduct water surveys for anyone whose information is incorrectly listed.

Particularly in the tourist-heavy area of the Laurel Highlands, which covers many coal producing counties in Pennsylvania, "water supply owner" is often synonymous with "vacation home owner." Such seasonal residents may not be in the area, or even the country, for more than a few months a year. Hence, a large percentage of our region's water supply owners would be functionally excluded from their right to a water supply survey.

Furthermore, in many instances water supply owners rent their property to others who occupy it a majority of the time. Individual owners – if they do ultimately receive the notice - need to coordinate with their lessees and tenants before they may authorize such access, a process which could take several months. In fact, sometimes property owners are prohibited, by lease terms or landlord-tenant laws, from entering a leased property without a minimum of 30 days advance notice. Hence, it would be functionally impossible for water supply owners to authorize access within the 10 days stated in the rule.

If it is not the case that the Board intends to create such a stringent requirement, then the language should be revised and clarified so that no such potential loophole exists.

3. <u>§§ 87.47 and 88.27 must be amended to require notification to both the owner *and user* of any potentially affected water supply</u>

On page three of the proposed regulation, there is a section titled "Required Consistency of the Commonwealth's Mining Program with State Law". This section describes "proposed provisions [which] address regulatory gaps or lack of clarity issues under PA SMCRA." It goes on to say:

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> Proposed amendments to §§ 87.47 and 88.27 (relating to alternative water supply information)...state that the Department will give advance notice to water supply owners **and water supply users** whose water supplies are identified as potentially affected. (emphasis added).

It is reasonable to assume that given the explicit intent to provide notice to water supply users, the proposed amendments would reflect that language. However, this is not the case. Both §§ 87.47 and 88.27 merely say that "The Department will notify the **owner** of any potentially affected supply." As was previously mentioned, there are myriad ways in which notice may be delayed from reaching a water supply owner. To limit such notice to owners and not users would severely undercut the stated goal of this amendment.

Not only must the language be amended to provide notice to water supply users as well as owners but it should also be expanded to ensure that such notice is issued before the permit is issued. Much in the same way that sharing results of water surveys with users before permit issuance will help enable residents to know their rights and protect their water, as will alerting potentially affected users before issuance.

If water supply users and owners are not notified of potential impacts until after permit issuance, it is much less likely they will utilize their right to water replacement supplies. Resident may even be entitled to water replacement supplies prior to when construction begins under section § 87.119a (Water Supply Replacement Obligations). Yet, if they did not receive notice until after the permit is issued, it may be too late for them to understand such a threat and employ their right to the available protections.

Conclusion

For these reasons, MWA requests that the aforementioned amendments be retained or altered as appropriate. Thank you for considering these comments.

Melissa W. Marshall, Esq.
Community Advocated
Mountain Watershed Association

Attachment A

Mountain Watershed Association
YOUGHIOGHENY RIVERKEEPER
protecting, preserving, restoring

Problems With Using Government Financed Construction Contracts For Mining Activity: A Case Study of Amerikohl's Revtai Project

Lack of Protections for Private Drinking Water Supplies

1. Existing Protections For Projects Permitted As a Surface Mine

Normally, before a surface mining operation can receive a permit, the company must prove that they have conducted water testing for all private water supplies within 1,000 ft. of the project boundary.[1] While there is no explicit requirement that they do this, there is a law that creates something called a "rebuttable presumption" zone or area. A rebuttable presumption means that the company is presumed to be responsible for any contamination that occurs to those water supplies within a certain radius of the project, for surface mines the rule is 1,000 ft. from the project barrier. (25 Pa. Code § 87.119(a)(1)(b)(1); 52 P.S. § 1396.4b).

One of the only ways that operators can prove that they are not responsible for contamination - or "rebut" the presumption - is if they can point to pre-construction water tests that show the contamination was already present. If there is no pre-construction water analysis, there is almost no way operators can present their rebuttal. So, even though there is no regulatory or statutory requirement for companies to conduct such water testing, it is in their best interest and has become a standard practice for the industry. In the DEP's guidance documents they even say that in order to determine the completeness of an application they consider whether such testing has been performed. (http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=7990&DocName=COMPLETENESS%20REVIEW%20FOR%20ACCEPTANCE%20OF%20COAL%20MINING%20ACTIVITY%20PERMIT.PDF%20%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E)

2. Difference With GFCC's

So, let us envision an imaginary strip mining project. Assume the project area is 35 acres and there are 40 homes with water supplies within 1,000 feet of that project boundary. Under surface mine regulations, every single one of those homes will receive baseline water quality testing. However, if that same activity were permitted with a GFCC it is possible that none of those homes receive such testing. The statutes and regulations governing GFCC's address the issue of private contamination only very briefly. The law simply says that operators must restore or replace water supplies if they are contaminated by the GFCC operations. But without a zone of rebuttable presumption the obligation is has no implementary "teeth" and so in practice holds little to no significance.

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[1] http://www.depgreenport.state.pa.us/elibrary/GetDocument?docId=7990&DocName=COMPLETENESS%20REVIEW%20FOR%20ACCEPTANCE%20OF%20COAL%20MINING%20ACTIVITY%20PERMIT.PDF%20%20%3Cspan%20style%3D%22color%3Ablue%3B%22%3E%3C%2Fspan%3E

It appears as though DEP anticipated that problem and, since they have no authority to create regulations, attempted to address the issue via their permitting process. In the GFCC application, section (e) of Module 3.2: Hydrology, asks the applicant to include analysis of certain water supplies in their background monitoring plan. Those water supplies include "each private water supply within the project area and each water supply within 1,000 feet of the project area where the potential for degradation or loss exists as determined by the Department." (The 1,000 feet seems to have been pulled from thin air but the DEP was likely inspired by the existing limits in the surface mining statutes.)

As one can imagine, the permit language's statement that baseline testing is only necessary high risk supplies and that such risk is "determined by the department" is highly problematic. This means that the determination of who is entitled to baseline water testing is a largely a discretionary decision. For example, during permitting for Revtai, Amerikohl made their own initial determination that certain homes within the 1,000 ft. radius were not at risk and the Department rubber stamped their approval of that assessment. (However, after some cajoling by MWA, the Department was persuaded to reassess and ultimately changed their determination to include at least one additional supply.) In the case of the Revtai GFCC, 15 homes are identified on their permit map as being within 1,000 feet of the project. Of those, only three received baseline water testing.

3. Issues With Lack of Rebuttable Presumption

While having baseline water testing is certainly a helpful protection in many ways, it is not clear how much better off those three out of 15 who received it actually are. Even with baseline testing, but without the rebuttable presumption statute, it is enormously difficult for a homeowner to prove that a GFCC was the cause of contamination. Although the GFCC statute language says that an operator "shall" restore or replace contaminated water, it is silent as to who or how the determination of a cause for contamination is made.

Presumably, the homeowner would file a complaint, and DEP would launch a water supply investigation as they do under the rules for mining, oil and gas. Anecdotally, we have seen that these investigations are cursory and rarely conclude with an official "determination" that the project is the cause of contamination. This is even truer when the contamination occurred beyond the rebuttable presumption zone. So, where there is no statutory rebuttable presumption zone, the only way for DEP to determine a causal connection is if they consider the baseline tests, conduct a complex and in-depth investigation where DEP experts prove that the project was the cause of contamination. Otherwise, (and even possibly even in that case) the operator will almost certainly challenge the determination by DEP in court. Court proceedings may last years and require expert hydrogeologists, biologists, and staff by both the DEP and other operator to testify about the likelihood of a connection. Realistically, it is only after such proceedings and a positive determination by a judge, that the GFCC's statutory responsibility to restore or replace a water supply would be triggered.

The scenario previously described is one in which there *is* baseline water monitoring and it is used by the DEP to make a positive determination. Without the baseline tests, the DEP would almost certainly be incapable of determining a causal link. If property owners wanted to contest an investigation's finding of negative or non-determinative connection they would have to pay the entire cost of a court challenge themselves. The cost of these court challenges easily reaches in the many tens of thousands of dollars but more likely hundreds of thousands. Even with a barrage of experts testifying on behalf of a property owner, without any sort of baseline data, such legal attempts have historically proven almost always futile.

No Protections from Blasting Damage

Even though many GFCC's in Pennsylvania require blasting, GFCC's are not required to adhere to the more stringent state rules designed to protect homes from surface mining blast damage.

A GFCC's blasting activity is regulated under 25 Pa. Code § 211, which governs blasting activity somewhat generally and does not include the stricter blasting requirements found in the Chapter 87 Coal Regulations. A GFCC operator must still receive a blasting activity permit under § 211 but unlike with the Chapter 87 Coal Regulations, A GFCC evades two major requirements intended to protect the safety and welfare of the community.

The first major difference is that a GFCC operator does not need to notify the surrounding community of upcoming blasting, nor the proposed blasting schedule. Under coal mining regulations, a surface mine operator would generally need to publish blast notices/schedules in the local newspaper or distribute copies to the public by mail. One can only imagine the array of catastrophes that might ensue if a neighbor is caught unaware by deafening and ground-shaking blasts.

The second major difference is that there is no requirement for a GFCC operator to conduct pre-blast surveys. In the case of Revtai, the DEP used its discretion to require Amerikohl to conduct pre-blast surveys for all those within 1,000ft of the project, even though the surveys were not technically required. The pre-blast surveys help landowners to establish fault if any structures are damaged as a result of blasting by the operator. The surveys also traditionally help put neighbors on notice and so helps prevent neighbors from finding themselves in dangerous situations during blasting hours.

While not all GFCC operations involve blasting, our review of data made available by the DEP reflects that over the last ten years about one quarter of all active GFCC sites utilized blasting.

	Number of Total Active GFCC's in PA	GFCC's with Blasting	Percentage of Total GFCC's with Blasting
2008	38	10	26.32%
2009	41	10	24.39%
2010	42	12	28.57%
2011	26	7	25%
2012	22	4	18.18%
2013	12	3	25%
2014	15	3	20%
2015	13	3	23.07%
2016	7	2	28.57%
2017	5	2	40%
Total Average			**25.9%**

GFCC's Require Inadequate Analysis of Existing Features

1. No Overburden Analysis Is Required

Despite the fact that many GFCC operations are essentially identical to strip mining activity - and such GFCC's are, by their nature, conducting such mining at or on previously mined sites - there is no overburden analysis required by the Department. According to the GFCC application materials, the operator should "provide geologic logs of all test holes and over burden analysis, *if required by the Department.*"

In the case of Revtai, Amerikohl opted not to conduct an overburden analysis. Amerikohl's entire justification is as follows:

> It is proposed that no overburden analysis be performed. This is a proposed reclamation project, with best practices proposed in Module 4 to effectively reclaim the site. Removal of potentially acidic coal and proper reclamation procedures could only prove to be beneficial.

MWA's consulting expert provided comment in which they explained the necessity of such analysis:

> Overburden analysis from past surface mine permits in the area have demonstrated that when the overburden thickness is less than 50 feet, most, if not all overburden neutralization potential alkalinity has been weathered away from acidic rainfall.

DEP responded with an un-illuminating defense[2] and ultimately required no overburden analysis from Amerikohl.

GFCC's May Allow Coal Companies to Avoid Compliance with Local Zoning Rules

Despite that the activity proposed for the Revtai project fell squarely within the Fayette County's definition of surface mining activities, we discovered that the County considers all GFCC's to be categorized as "reclamation" and not mining activity.[3] Under the Fayette County Zoning Ordinance, surface mining activity must receive a "special exception" if they wish to develop in a rural or residential area such as Saltlick Township.

The special exception permitting processed is meant to ensure public participation, scrutiny by local officials, and ultimately, continuity with the types of land uses already at play. For a surface mine, an operator would submit an application for special exception to the Zoning Hearing Board (ZHB) for consideration. Also, after the application was submitted, the public may review the application and submit their comments to the County as well. Once the ZHB received the application, the county would provide notice to the public of a hearing, at which the ZHB will consider the application and the public could attend and certain community members could become a party to the proceeding. A decision is usually made by the ZHB within 45 days of the Hearing. The ZHB is also allowed to approve the application but attach special conditions to the permit which they feel may make it safer for the community. Since Amerikohl circumvented this process they deprived the County and community of vital opportunities to make their voices heard and create safer and improved operations.

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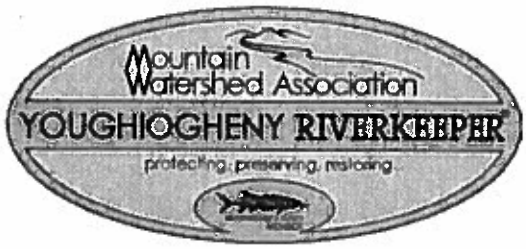
[2] The response in full reads:

> GFCCs do not require overburden analysis. The permits cited in the written reports was obtained are older permits from the late 1980s. Overburden analysis was still in infancy and may not have been done correctly. There are no poor-quality discharges or adverse impacts to the UNTs within the GFCC area. The alkalinity may be partially weathered out and similarly, the potential acidity/toxics. The presence of the up to seven feet of limestone is noted in the driller's logs immediately below the Upper Kittanning coal.

[3] Fayette County Zoning Ordinance defines Surface Mining Activity as, "Activity defined as such by the Pennsylvania Department of Environmental Protection Bureau of Mining and Reclamation."

The Pennsylvania Department of Environmental Protection defines surface mining, in relevant part as "Activities whereby coal is extracted from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between the coal or otherwise exposing and retrieving the coal from the surface" (25 Pa. Code § 86.1).



In Fayette County there are also some specific rules for surface mines activities that were evaded by Amerikohl. For example, the County Ordinance requires that the perimeter of a surface mine is screened off from adjoining properties in order to protect neighbors from the dust, noise, odors, etc. that may migrate towards them from a mine.

However, since Fayette County classified Revtai as a "reclamation" project it was not required to adhere to these additional local requirements. After encouragement from MWA, county officials agreed to voluntarily enforce the portion of the ordinance titled "surface mining,"[4] which sets out those additional rules for surface mining activity. This was a bit confounding, since in doing so, they acknowledged that it was correct to apply surface mining rules to the project. Yet they still refused to classify the work as "surface mining activity" so it remains without the special exception permit generally required.

[4] The rules are found in the section titled "§1000-848. Mining, surface"