SUMMARY OF COMMENTS OF THE PENNSYLVANIA COAL ASSOCIATION

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

The amendments to Chapter 89 which DEP has proposed are part of a settlement which DEP has negotiated with the U.S. Office of Surface Mining Reclamation and Enforcement (OSM) concerning litigation over OSM's disapproval of regulations adopted by the EQB on March 17, 1998, to implement amendments to the Bituminous Mine Subsidence and Land Conservation Act (Subsidence Act) enacted by the General Assembly by Act 54 of 1994 (Act 54). A major element of that settlement is DEP's agreement to not oppose a proposed OSM rulemaking intended to supersede six provisions of the Subsidence Act to the extent they would apply to residential water supplies and dwellings and non-commercial structures covered by Section 720 of the Federal Surface Mining Control and Reclamation Act (referred to in the proposed regulations as EPACT structures and EPACT water supplies).

PCA opposes the proposed amendments to Chapter 89 to the extent they implement DEP's acquiescence in OSM's proposal to supersede portions of the Subsidence Act. The reasons why there are not sufficient grounds to supersede any provision of the Subsidence Act are set forth in PCA's written comments on OSM's proposal, a copy of which is attached to PCA's written comments to the EQB. Additionally, because OSM's proposal is not final, the provisions of the Subsidence Act proposed to be superseded are still valid. Therefore, the EQB lacks authority under state law to adopt regulations which are in conflict with the current provisions of the Subsidence Act.

If adopted as proposed, the amendments to Chapter 89 will result in a duplicative and confusing program for regulating subsidence impacts on water supplies and structures. There will be one set of requirements for EPACT structures and water supplies and one for non-EPACT structures and water supplies. This dual system of regulation is cumbersome, unjustified, unreasonable and not authorized by Pennsylvania law. Furthermore, it is absurd to suggest, as DEP does, that the proposed amendments will "simplify" and "streamline" the Pennsylvania surface owner protection program.

Many of the proposed amendments designed to "placate" OSM ignore the principal of Federal SMCRA that state regulatory programs may be tailored to specific state needs and interests and need not mirror Federal SMCRA and the Federal regulations. Examples are proposed amendments to Section 89.142a(f)(iii) (relating to when a structure must be in place to be protected), Section 89.142a(f) (relating to permanently affixed appurtenant structures), Section 89.143(c) (relating to the six month alternative dispute resolution period and the two year statute of limitations for filing structure damage claims), and Section 89.144a(f) (relating to pre-mining and post-mining inspections). Rather than surrender to OSM demands that state regulations mirror Federal requirements, DEP should insist on Pennsylvania's right to have a program tailored to its needs and interests.

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ORGE ELLIS
sident

October 22, 2003

Mr. George Rieger
Acting Director
Harrisburg Field Office
Office of Surface Mining Reclamation and Enforcement
Harrisburg Transportation Center
Third Floor, Suite 3C
4th and Market Streets
Harrisburg, PA 17101

Dear Mr. Reiger:

In addition to our attached written comments, PCA hereby adopts and supports the comments submitted by the National Mining Association regarding the proposed rules at 68 Fed. Reg. 55105-55137 (September 22, 2003).

Sincerely,

George Ellis
President of PCA

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GEORGE ELLIS
President

November 12, 2003

Mr. George Rieger
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Re: OSM Proposal To Suspend Certain Provisions of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA"), 68 Fed. Reg. 55134 (September 22, 2003)

Comments of the Pennsylvania Coal Association ("PCA")

Dear Mr. Rieger:

Our comments noted above contained an incorrect citation in footnote 3. In that footnote we incorrectly referenced *Penman v. Jones*, as standing for the proposition that the statute of limitations for common law claims arising out the removal of surface support arose when mining occurred not when surface damage manifested itself. Although this is a correct statement of the Pennsylvania common law, the correct citation should have been to Noonan v. Pardee, 200 Pa. 474 (1901).

I apologize for this error.

Very truly yours,

George Ellis
President, PCA

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GEORGE ELLIS
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October 15, 2003

Mr. George Rieger
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Re: OSM Proposal To Suspend Certain Provisions of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA"), 68 Fed. Reg. 55134 (September 22, 2003)

Comments of the Pennsylvania Coal Association ("PCA")[1]

Dear Mr. Rieger:

On its own behalf and on behalf of its member companies listed on Attachment 1, PCA submits the following comments on the Proposed Rule of the Office of Surface Mining Reclamation and Enforcement ("OSM") published at 68 Fed. Reg. 55934 (September 22, 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 Rule proposes to supersede 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 an not in accordance with the requirements of Section 720 of the Federal Surface Coal 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.

In fact, the Proposed Rule is nothing more than an attempt by OSM to implement a "settlement" between OSM and the Pennsylvania Department of the Environmental Resources ("DEP"), designed to resolve a lawsuit filed by DEP against OSM at C.A.No. 02-CV-305

[1] These comments are submitted without prejudice to PCA's position that OSM lacks the power to supersede any duly enacted law of the Commonwealth of Pennsylvania in whole or in part.

(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 the above sections of the BMSCLA, various other provisions of the BMSCLA 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.

Background

The specific provisions of the BMSCLA which are proposed for supercession were added to the BMSCLA by Act 54 of 1994 ("Act 54"). A copy of Act 54 is attached hereto as Attachment 2.

History of Mine Subsidence Regulation in Pennsylvania

Pennsylvania is where underground coal mining began in this country and the General Assembly of the Commonwealth has had more experience regulating the surface impacts of underground mining than any other lawmaking body in the United States.

Pennsylvania was the first State to regulate the subsidence impacts of underground mining. It first did so in the 1920's when the General Assembly passed what was known as the Kohler Act, which required anthracite coal operators to mine so as not to cause damage to various surface structures and features. In the 1930's the General Assembly then passed a similar law regulating underground coal mining in Allegheny County, Pennsylvania, which was then the one county in the bituminous coal fields where underground mining was taking place beneath relatively densely populated areas. See 52 P.S. §§ 1407-1410d. Thirty years later, in 1966, the General Assembly passed the 1966 version of the BMSLCA ("1966 Act") which, for the first time, comprehensively regulated the subsidence impacts of underground mining throughout the bituminous coal fields of Western Pennsylvania. A copy of the 1966 Act is attached as Attachment 3.

Thus, unlike any other coal producing State, Pennsylvania has had a long and time-tested tradition of providing surface owners protection against the impacts of bituminous underground coal mining, having developed numerous programs over the years which were tailored to meet the needs of all Pennsylvanians, many of whom depend upon a strong and viable underground coal mining industry.

The 1966 Act was first amended in 1980 to enable Pennsylvania to seek primacy from OSM following the passage of SMCRA and the development of OSM's initial surface owner

protection regulations.[2] A copy of the 1980 amendments to the 1966 Act is attached as Attachment 4. As is clear, from a review of the 1980 amendments, although desirous of retaining primacy, the Pennsylvania General Assembly was equally desirous of preserving the unique nature of Pennsylvania State law to the maximum extent allowable under SMCRA.

Therefore, even after OSM granted Pennsylvania primacy in 1982, the BMSLCA still required underground mine operators to leave support coal in place beneath all of the structures protected by Section 4 of the 1966 Act, including dwellings used for human habitation which were in place on the date the law was enacted (April 27, 1966). See Attachment 3. The 1966 Act also still provided, in Section 15, that any surface owner who did not own the right of surface support (which is a separate and distinct estate in land in Pennsylvania) could re-acquire this right from the coal operator. *Ibid.* These provisions were far more stringent than OSM's final surface owner protection provisions that were in place prior to the 1992 Amendments to SMCRA, which are discussed below. See, e.g., 30 CFR § 817.121 (1984) a copy of which is attached as Attachment 5.

The stringent character of the BMSCLA prior to the passage of Act 54, and, in particular, the combined impact of Sections 4 and 15, made it extremely difficult (and in some instances impossible) for Pennsylvania longwall mining companies to efficiently and economically plan and conduct full-extraction longwall mining beneath and adjacent to structures protected by these provisions. This problem was compounded by the fact that in Pennsylvania, unlike many coal producing states, full extraction underground mining is (and has been for many years) limited to the Pittsburgh Seam of Coal, which underlies areas of Western Pennsylvania that are, in comparison to coal mining areas in other states, densely populated and experiencing growth. See Attachment 6, which compares the population of Washington and Greene Counties in Pennsylvania, the only two counties in Pennsylvania were full extraction longwall mining is now conducted with the populations of several counties in neighboring States where full extraction longwall mining is conducted.

In 1992 SMCRA was amended to impose, for the first time, regardless of the requirements of state law, a federal requirement that subsidence damage caused to dwellings used for human habitation had to be repaired or compensated for and a requirement that domestic water supplies adversely affected by underground mining had to be replaced or restored. In this same time frame, PCA and various of its members companies were participating in a Western Pennsylvania Conservancy sponsored "mediation" effort with other stakeholders for the purpose of developing a consensus on how best to amend the 1966 Act to eliminate the impediments to longwall mining imposed by Sections 4 and 15 of the 1966 Act and to accommodate the needs and rights of both surface owners and underground mine operators while meeting the requirements of Federal law. This process, known as the Deep Mine Mediation Process ("DMMP"), involved representatives of the coal mining industry, the agricultural community (Pennsylvania's largest industry), citizen's groups and other interested organizations. The participants engaged in months of discussion and debate over how best to develop amendments to the 1966 Act which would best meet the needs of Pennsylvania.

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[2] As OSM knows full well, its initial "surface owner" protection regulations relating to structures were largely modeled after the requirements of Pennsylvania law, as the various references to Pennsylvania studies in the preamble to OSM's "initial" regulations confirm. *See* 44 Fed.Reg. 15272 (March 13, 1979). Of course, in 1983 OSM amended these regulations to remove many of the protections contained in its initial regulations which, ultimately, led to the passage of Section 720 of SMCRA some 9 years later.

As a result of the DMMP, a consensus was eventually reached concerning amendments to the 1966 Act. While no stakeholder got every amendment it believed was appropriate, virtually every stakeholder believed a reasonable compromise had been achieved. A copy of the DMMP final report ("DMMP Report"), which was communicated to the Pennsylvania General Assembly, is attached as Attachment 7. As is apparent from a comparison of Attachment 7 (the DMMP Report) and Attachment 2 (Act 54), the Pennsylvania General Assembly essentially adopted the DMMP Report as its model for amending the 1966 Act and declined to accept additional amendments that would have "gutted" many of compromises worked out by the DMMP. See Comments of General Assembly regarding the passage of Act 54, which are attached as Attachment 8.

In doing so, the General Assembly not only adopted the views of the DMMP participants, it also took into account various factors which are unique to Pennsylvania and developed a subsidence control program for Pennsylvania which, although far more comprehensive than OSM's, is nevertheless consistent with the goals and objectives of SMCRA and OSM's regulations. This is confirmed by the following brief summary of only three of the provisions of Act 54, which OSM proposes to supersede.

1. Pennsylvania law, like it has for years, continues to assure every owner of a dwelling used for human habitation a right to assert a subsidence damage claim for "repair" (not just a claim for diminution in property value) if they cooperate with the Commonwealth and the mine operator and allow access to their property in advance of mining to conduct pre-mining inspections of structures that will be undermined and to evaluate what pre-mining measures, if any, might prevent or minimize subsidence damage. Unlike, Federal law, of course, Pennsylvania law also assures many more owners a similar right, similarly conditioned. Nevertheless, as discussed below, OSM contends that while Pennsylvania is free to reasonably condition the right of some structure owners to pursue a post-mining subsidence claim on the grant of pre-mining access to inspect their structures, it cannot do so for persons who own a dwelling.

2. Pennsylvania law, like it has for years, continues to treat subsidence claims for structural damage like any other "tort claim," and requires that such claims be pursued in a timely manner to foster prompt resolution of disputes while avoiding problems relating to stale evidence and fading memories. Consequently, it provides that all statutory claims for subsidence damage must be brought within two years of date such damage was discovered. [3] Although Congress did not expressly provide for a time frame within which a subsidence damage claims had to filed and OSM's regulations on this issue are completely silent, OSM nevertheless now contends that while Pennsylvania can impose a statute of limitations on the right of some structure owners to file a subsidence claim, it cannot do so for persons who own a dwelling.

3. Pennsylvania law, like it has for years, continues to provide protection to all dwellings in place when its laws have changed to impose greater obligations on mine operators and, since 1994, has provided protection for structures built after 1994 if they are in place at a

[3] This is actually a more liberal requirement that exists at common law, which provides that common law claims for subsidence damage in Pennsylvania must be brought within two years of the date mining ceased, even if the surface owner had no reason to know that such mining had occurred or might have caused damage. *See, Penman v. Jones*, 256 Pa. 416 (1917).

time when the operator is (or should be aware) that the structure exists. However, the Pennsylvania General Assembly decided not to provide such protection to the persons who, with knowledge that mining will occur beneath their property within the next five years, voluntarily assume the risk of future subsidence damage by building a new structure, the location and value of which could seriously impede the operators ability to implement its already developed and approved mining plan. Even though underground mining in Pennsylvania, unlike, underground mining in other states, is a regular occurrence in areas where new structures are being built, and Pennsylvania affords protection to far more structures than Federal law does, OSM has concluded that Pennsylvania's program is not "consistent" with SMRCA and OSM's regulations. OSM has apparently done so because Pennsylvania law provides that persons who "elect" to build a new dwelling with knowledge that it might be damaged should be not be permitted to profit from their folly and should, like all other property owners, have an obligation to take reasonable steps to mitigate their own potential for damage.

Pennsylvania law does nothing more than impose a limited five (5) year "moratorium" on the ability of property owners to build new homes over areas where it is known mining will occur. This is a reasonable and carefully crafted requirement which furthers the State's interest in maintaining its tax base by "encouraging" new construction in areas where mining is not immediately planned and "discouraging" new construction in areas to be mined until such time as mining has ceased.[4]

That Pennsylvania has done so to accommodate local conditions of growth, to encourage growth in a manner which minimizes the potential for subsidence damage, together with a desire to foster sensible planning of future mining while fostering the growth of a viable underground coal mining industry, does not render this aspect of the Pennsylvania program "inconsistent" with SMCRA or OSM's regulations.

Act 54 was "package" of amendments, all of which were inextricably intertwined, and all of which represented compromises on the part of everyone concerned. It is both unreasonable and unnecessary, and an abuse of discretion for OSM to contend 9 years after Act 54 was passed that it can "supersede" some provisions of Act 54 without completely disregarding the intent of the Pennsylvania General Assembly which passed that law.

OSM's Current Position Is Inconsistent With Earlier Positions It Has Taken And The Manner In Which OSM Has Enforced Federal Law In Pennsylvania For The Past Nine Years

Pennsylvania has, for over 9 years, been regulating the subsidence impacts of bituminous underground mining in accordance with the very provisions of Act 54 which OSM now proposes to "supersede."

Throughout this 9 year period OSM has been fully willing to "share" 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).

[4] As OSM is knows full well, once an area has been undermined by full extraction longwall mining methods the overlying surface areas can be fully developed for virtually any use without fear of further subsidence.

Significantly, and despite 9 years of "dual enforcement," there have been, to PCA's knowledge, only a few instances when OSM saw any need to "directly enforce" some aspect of its subsidence control program. See Attachment 9, Statement of George Ellis, President of PCA. PCA specifically requests that OSM respond, in detail, to PCA's comment that OSM has had no cause, for over 9 years, to conclude that the Pennsylvania subsidence control program has deprived anyone of their "rights" under Federal law.

Furthermore, PCA is aware on 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." *Ibid.* On the other hand, PCA is aware of instances where OSM knew that property owners were reluctant to allow mine operators pre-mining access to their property to take pre-mining mitigation measures, yet did nothing to "enforce" their alleged Federal "right" to deny such access. Perhaps the best example of this involved so-called "historic structures" which, but for the requirements of state law that require owners to allow pre-mining access, would have likely been severely damaged by mining. In these cases Section 5.4(c) of the BMSLCA worked precisely as it was designed to work---it "encouraged" otherwise reluctant landowners (whose real objective was to preclude any mining beneath their property, an objective which is, of course, inconsistent with SMCRA) to allow the mine operator to inspect their "historic structures" prior to mining to determine what damage already was present and, more importantly, to design a pre-mining mitigation program to minimize the potential for subsidence damage. As a result, mining was able to proceed, and allegedly "historic structures" were undermined with far less (in some instances virtually no) subsidence damage, all of which the mine operator was then required to repair. See Attachment 10, copies of correspondence between representatives of a PCA member company and the owner of an "allegedly" historic structure who had initially refused to allow a pre-mining inspection for sole purpose of precluding any mining beneath their "historic" structure.

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. This is well documented in a recent report to the General Assembly concerning the effectiveness of Act 54. See Attachment 11.

There exits no **factual** basis for OSM to conclude that any provision of Act 54 should be "superseded," and PCA requests that OSM respond to these comments by citing specific factual instances where the implementation of the Sections of the BMSLCA proposed for supercession, as applied, have resulted in actual inconsistencies with SMCRA or OSM's regulations.

In addition, after Act 54 was passed and during the development of regulations to implement that Act, PCA did not overlook the need to obtain the OSM's approval of both Act 54 and its implementing regulations. Indeed, it immediately opened discussions with OSM concerning the Act 54 amendments even before DEP formally submitted them to OSM for approval. See Attachment 12, copies of correspondence between PCA and OSM concerning amendments to Pennsylvania law which became Act 54.

Throughout these discussions, which occurred in the mid-1990's, PCA argued strenuously that Act 54 was a law which had strong and broad based support among all interested

OSM's proposed decision with respect to Sections 5.5(b) and 5.1(b) of the BMSLCA should not be finalized and these Sections should be found to be fully consistent with SMCRA and OSM's own regulations.

Sections 5.2(g) and 5.2(h) of the BMSLCA Are Not Inconsistent With SMCRA Or OSM's Own Interpretation of Its Regulations Relating to the Replacement and Restoration Of Domestic Water Supplies.

OSM clearly recognizes that there exist situations where despite the best efforts of an operator an adversely affected domestic water supply cannot be replaced or restored and, further, that in such situations the appropriate remedy is provide the affected domestic water supply users with compensation. See discussion at 68 Fed.Reg. 55111 (September 22, 2003) ["OSM acknowledge[s] that rare cases may exist where the operator cannot develop an adequate replacement water supply...[u]nder these circumstances OSM would require the operator to compensate the landowner for the reduction in fair market value of the structure].[8] Nevertheless, it proposes to supercede Sections 5.2(g) and 5.2(h) of the BMSLCA which address situations where a water supply source cannot be replaced or restored.

Section 5.2(g) provides that if after 3 years of effort to provide a replacement water supply an adequate replacement water supply has not been provided compensation can be paid to the property owner. Section 5.2(h) provides that DEP can, at the request of the property owner, provide its views as to whether or not it is possible to provide an adequate replacement supply. In PCA's view, these provisions are completely consistent with OSM's interpretation of its own regulations namely, that if it (or a state agency) determines a domestic water supply cannot be replaced or restored to its pre-mining quantity and quality then it is appropriate to provide the property owner with fair compensation.

Nevertheless OSM has proposed to supercede these two provisions of the BMSLCA, which have never been interpreted or construed by the either the Environmental Hearing Board or any Pennsylvania Court of competent jurisdiction.

PCA submits that OSM's "interpretation" of these two sections of the BMSLCA is flawed, in part, because DEP itself appears to have improperly interpreted the language of these sections. Section 5.2(g) does not have to be read to mean that if three years pass and a the property owner has not had its **domestic water** supply restored or replaced that the operator is relieved of its obligation to try and provide such a supply and the only remedy available to the property owner is "fair compensation." Instead, because the BMSLCA is generally to be construed in a manner which would enable Pennsylvania to retain primary jurisdiction over the regulation of underground coal mining, an alternative and supportable interpretation of Section 5.2(g) is that, with respect to water supplies protected by Federal law, operators are required to promptly and diligently attempt to restore the affected domestic water supply or to replace it with an adequate alternative supply for at least 3 years, unless it can be sooner shown that it will be impossible to do so. If the operator advises the property owner that it believes it is not possible to restore the affected supply or provide an adequate alternative supply, after diligently

[8] OSM's view that such instances will be "rare," may well be the case in other jurisdictions. However, in Pennsylvania replacement or restored supplies often must meet "drinking water" criteria, a far more stringent requirement than imposed by Federal law. Consequently, it is more likely, in Pennsylvania, that it will prove impossible to provide an "adequate" replacement supply than would be the case in other jurisdictions.

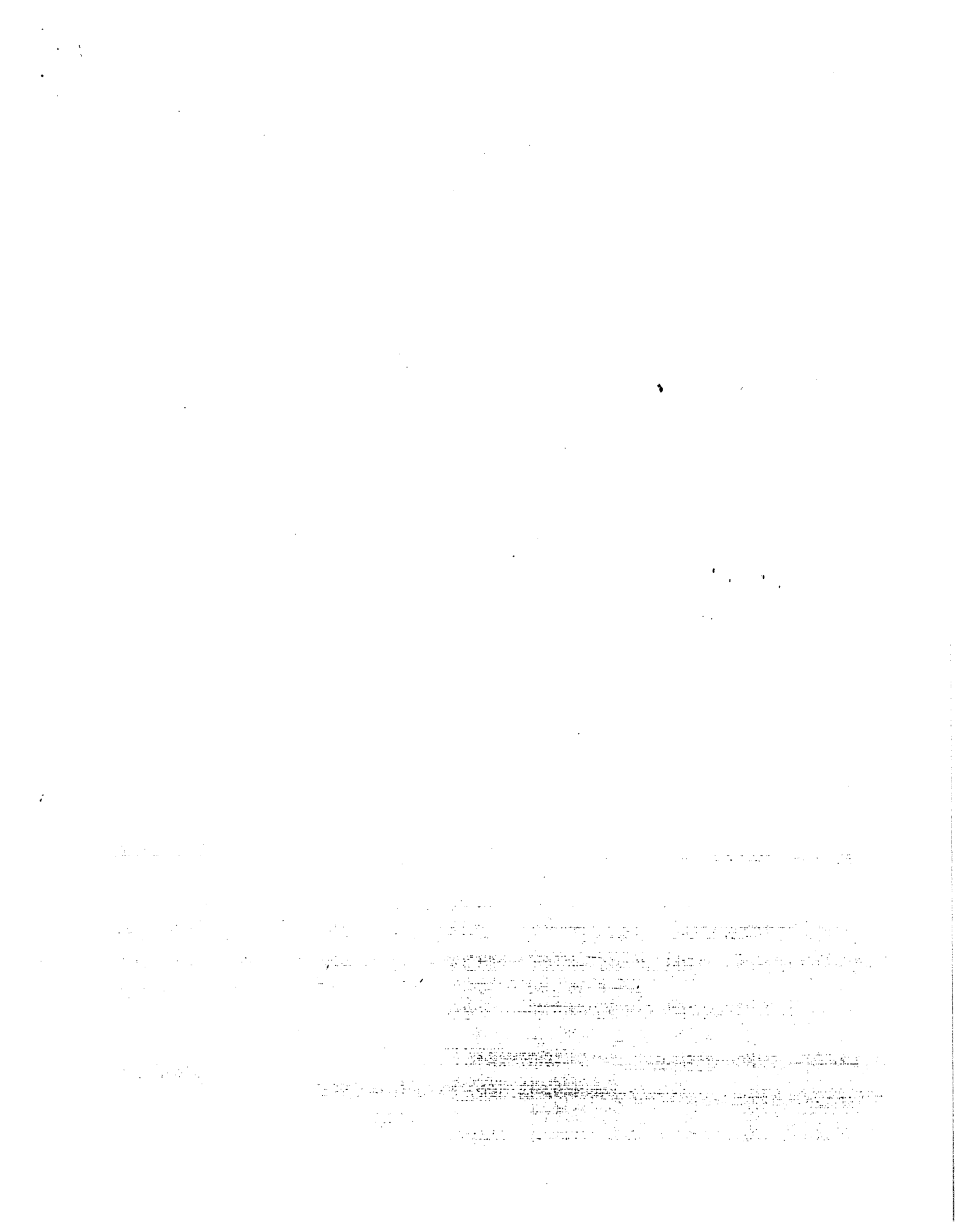
The Pennsylvania General Assembly clearly understood what OSM appears not to understand. The provisions of both State law and Federal law, which grant the owners of dwellings and the users of domestic water supplies a statutory right to pursue a claim for damages or water supply replacement/restoration 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 will 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 was justified by 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 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 faulty memories, stale evidence, or evidence that no longer exists or is unobtainable. Pennsylvania has ample local interests which justify its decision to enact Sections 5.5(b) and 5.1(b).

In the absence of any express prohibition in SMCRA on placing 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 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. 42 Pa.C.S.A. § 5524 .



interprets SMCRA as allowing for the filing of such claims at any time or as not allowing for states to impose reasonable limitation of action periods on such claims.

By superceding Sections 5.5(b) and 5.1(b) of the BMSLCA OSM is necessarily interpreting SMCRA as precluding any time limitation on the filing of subsidence damage claims. This interpretation effectively establishes a new regulatory requirement that all states must accept for processing any claim for subsidence damage to dwellings and any claim for the replacement or restoration of domestic water supplies no matter how long the property owner waits to file such a claim. PCA submits that OSM is required to engage in formal rulemaking before promulgating a new standard of general applicability. It is not free to issue "regulations" with a national scope in the context of ruling on a 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).

Quite simply, 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, in 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.

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.

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?

Furthermore, this provision is implemented in such a manner than 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 as to whether or not they own the coal beneath their property. Property owners know well in advance when mining is projected and planned and DEP's Surface Subsidence Agent Program now assures that property owners are fully informed, in person, of their rights under Act 54. See materials included in Attachment 13.

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.

Section 5.4(a)(3) does 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 with foster legitimate local and state interests.

OSM's proposed decision with respect to Section 5.4(a)(3) of the BMSLCA should not be finalized and Section 5.4(a)(3) should be found to be fully consistent with SMCRA and OSM's own regulations.

Imposing Reasonable Time Periods Within Which Claims for Subsidence Damage to Structures and Claims That Domestic Water Supplies Be Restored or Replaced Furthers Legitimate State Interests, And To The Extent OSM's Proposed Supercession of Sections 5.5 (b) and 5.1(b) of the BMSLCA Is Intended To Announce A Nationwide Regulatory Requirement of General Applicability It Constitutes Improper Rulemaking.

Section 5.5(b) of the BMSCLA provides that homeowner must file a statutory subsidence damage claim within 2 years of the date they discover the damage. Section 5.1(b) of the BMSLCA provides that a property owner whose domestic water supply has been damaged must file a claim within 2 years of the date they discovery the damage.

SMCRA 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

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 claimant's 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. See Pa.R.C.P. 4009.31 and 4009.32.

If OSM's proposed action is made final Pennsylvania will find itself in the absurd situation where it must allow a farmer, who has denied an operator access to conduct a pre-mining or post-mining inspection of his property, to proceed with a claim for damage to his house but bar him from proceeding with respect to a claim for damage to his barn, silo or other agricultural structures.

OSM's proposed decision with respect to Section 5.4(c) of the BMSLCA should not be finalized and Section 5.4(c) should be found to be fully consistent with SMCRA and OSM's own regulations.

Section 5.4(a)(3), 52 P.S. § 1406.5d(a)(3) Is Not Inconsistent With SMCRA Or OSM's Regulations Because It Does Not Operate To Deny Any Owner Who Has No Ability To Avoid Having His Structure Undermined A Right To Assert A Claim For Subsidence Damage And Furthers Legitimate State Interests

Section 5.4(a)(3) of the BMSLCA does not deny any owner of a dwelling who has no control over whether 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.[7]

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. As Attachment 6 confirms, Washington County, in particular, is a relatively "urban" area where new construction is not uncommon. 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 undermined. 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.

[7] Permits must be renewed every five (5) years, therefore the maximum amount of time a person would be required to wait to build a new structure is 5 years.

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) 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. See Attachment 15.[6] 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. As noted in DEP's "Surface Owners' Rights" materials, a pre-mining inspection in Pennsylvania is actually a "right" of the surface owner which is designed to assist not penalize surface owners:

> "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."

Surely, a state is free to develop a program of "pre-mining inspections" under Section 1201(f) of SMCRA which actually affords surface owners more protection than does OSM's regulatory program.

Moreover, as noted above, if OSM's position concerning Section 5.4(c) prevails, 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. PCA submits OSM cannot disapprove as consistent 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.

PCA submits that only those surface owners with "something to hide," or whose intent 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 5.4(c) which provides that a person who denies a post-mining inspection cannot pursue a subsidence claim is nothing more than a

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[6] Attachment 14 contains some examples of proposed "mitigation" plans that PCA member companies have had prepared in advance of full extraction mining beneath various structures. These plans were prepared after pre-mining access was granted. As is apparent from a review of the plans, it would not be feasible to prepare plans like these (which are intended to assure compliance with OSM's own regulations) unless pre-mining access was afforded.

With respect to the pre-mining inspection condition set forth in Section 5.4(c), the reasons for this limited condition are obvious. Few dwellings or institutional structures (the only class of structures to which OSM's supercession applies) do not have normal damage caused by weathering and wear and tear. See, e.g., the two pre-mining inspections attached as Attachment 13. The nature of this damage is often indistinguishable from certain types of damage that can be caused by mine subsidence. *Ibid.* To assure that operators are not required to pay compensation equal to the cost of repair (the Pennsylvania compensation standard which is different from, and more stringent than, 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. See Attachment 13.[5] This aspect of Act 54 was specifically recommended and endorsed by the DMMP.

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 is 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 this has occurred. The operator is then required to sent 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. See Attachment 14, which are various materials obtained from DEP's web page which explain "Surface Owner Rights," and provide various other information to Pennsylvania citizens concerning the Commonwealth's subsidence control program. In particular, your attention is directed to a "Fact Sheet," which explains on page 2, under the heading "Pre-Mining and Post-Mining Inspections" how the pre-mining inspection process is regulated by DEP.

OSM's objection to this requirement is particularly difficult to understand because OSM itself insists that mine operators who engage in full extraction longwall mining are **required**

[5] Attachment 13 contains examples of "per-mining" and "post-mining" surveys conducted by various PCA member companies. The practice in the industry is for an operator to provide the homeowner with advance notice of when an inspection will take place and to have the homeowner accompany the "inspector." Video tapes of the inspection are often made and a report showing the pre-existing condition of the structure(s) is prepared. A copy of the report is then provided to the property owner. This is done at no cost to the homeowner and is available for use by the homeowner in documenting his claim.

However, SMCRA does not impose the standard of review applied by OSM in this case and does not require that a State program "mirror" that of OSM's. Instead, 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 "mirrors" 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.

Judged against this standard and not OSM's "mirror image" standard, none of the provisions OSM proposes to supersede are "inconsistent" with federal law.

Section 5.4(c), 52 P.S. § 1406.5d(c) Is Not Inconsistent With SMCRA Or OSM's Regulations Because It Does Not Operate To Deny Anyone A Right To Assert A Claim For Subsidence Damage To A Dwelling And Furthers Legitimate State And Federal Interests

Section 5.4(c) of the BMSLCA does not deny any owner of a dwelling the right to file a subsidence damage claim. Instead, this section of the BMLSCA merely conditions 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.

stakeholders and represented a reasonable and carefully crafted approach to regulating the subsidence impacts of mine subsidence in Pennsylvania, which has its own unique interests to be addressed. And, for the most part, PCA was completely justified in concluding that it had successfully demonstrated to OSM that virtually all of the provisions of Act 54 were fully consistent with Federal Law. This is best evidenced by a letter from George Ellis, President of PCA to OSM, dated May 5, 1995, in which Mr. Ellis confirmed the substance of his discussions with the agency concerning its then "views" on Act 54. See Attachment 12. As is clear from Mr. Ellis's letter, as of 1995, OSM **did not** believe that Act 54's requirement that a subsidence claim for structural damage had to be filed within 2 years was "inconsistent" with SMCRA or OSM's regulations, or that the requirements of Sections 5.4(a)(3) of the BMSLCA, now proposed for suspension, were a "problem." Indeed, OSM's concerns, as communicated to PCA were limited to 4 specific areas: (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** (not structural damage) 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. No other concerns were expressed by OSM after this time until it issued the OSM Disapproval Rulemaking in December of 2001.

Moreover, OSM has again changed its views on 2 of its initial 4 concerns. For example, it no longer believes Pennsylvania's mine subsidence bonding program is a "concern," (see discussion at 68 Fed.Reg. 55120 (September 22, 2003) and it now recognizes the obvious, that in circumstances where DEP concludes that a domestic water supply cannot be restored or replaced it is the equivalent of "permanent property damage," which can, and is best, handled by the payment of fair compensation (see discussion at 68 Fed.Reg. 52112 (September 22, 2003).

Without question OSM, itself, has not taken a consistent interpretation of Act 54's "consistency" with State law and therefore, its most recent views are not entitled to deference.

OSM's Proposed Suspension of Certain Provisions of the BMSLCA Is Not Justified Because These Provisions are Not Inconsistent With SMCRA or OSM's Regulations And Are Reasonable Requirements Imposed By Pennsylvania To Deal With Specific and Legitimate State Interests And Local Conditions Within The State

After informing PCA in 1995 that it had only 4 areas of concern with the provisions of Act 54, OSM issued, without warning of any kind, its Disapproval Rulemaking. OSM's Disapproval Rulemaking invalidated virtually all of the Act 54 amendments and virtually all of the regulations adopted by the Pennsylvania Environmental Quality Board ("EQB") to implement the Act.

Even a cursory review of the Disapproval Rulemaking demonstrates that OSM, as of December 2001, believed that a state subsidence control program had to be a "mirror image" of OSM's regulatory program. Even the most insignificant differences in wording between the Pennsylvania regulations and OSM's regulations was deemed an "inconsistency." Clearly, OSM applied the wrong "standard of review" in December of 2001 and continues to do so now, by insisting that Pennsylvania's program slavishly adhere to OSM's "interpretation" of SMCRA and its own regulations.

attempting to do so, then DEP will advise the homeowner, pursuant Section 5.2(h), whether it has concluded that the supply cannot be adequately replaced (applying the standard which OSM itself appears to accept as appropriate). If DEP concludes that the water supply can actually be restored or replaced then the operator will continue to have an obligation to do so.

PCA submits that rather that taking the extraordinary approach of "superceding" a duly enacted State law, particularly in the absence of any basis to conclude that Section 5.2(g) and 5.2(h) have given rise to any situations where water supplies that could be restored or replaced were not, the appropriate course of action is for OSM is to wait and see if, in fact, there really a factual problem with these provisions.

Alternatively, PCA submits because there exists a question as to whether or not Sections 5.2(g) and 5.2(h) can be construed in a manner which does not result in an operator being able to "walk away" from its obligation under SMCRA to diligently try to restore an affected supply or to provide a replacement supply, that the appropriate action for OSM to take in this case is not to "supersede" these sections but to condition the Pennsylvania Program with a requirement that the State provide OSM with an opinion from an appropriate state official concerning whether these sections of the BMSLCA can be interpreted in a manner which avoids a potential conflict with SMCRA.

PCA appreciates this opportunity to provide its comments on OSM's proposed rulemaking and urges the agency to reconsider its proposed actions with respect to each of the provisions of the BMSLCA which it proposes to supersede.

Respectfully submitted,

George Ellis

George Ellis
President of PCA