



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
Deputy Secretary of State

RICHARD S. STEPHENSON
Deputy Secretary of State

Telephone: (304) 345-4000
Corporations: 345-8000

FILED

1985 APR 19 PM 3:51

WILLIAM H. HARRINGTON
Chief of Staff

RICH O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

VIRGINIA SKEEN
Special Assistant

(Plus all the volunteer
help we can get)

STATE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

PROPOSED RULES
STATE REGISTER FILING

=====

AGENCY Department of Natural Resources

CONTACT PERSON Bill Chambers PHONE 348-3267

TYPE OF RULE Interpretative

TITLE OF RULE Underground Mining Subsidence Control Plan

CHAPTER 20 ARTICLE 6 SERIES VII

AUTHORITY § 20-6-7

+++++

CHECK APPLICABLE ITEMS BELOW TO SHOW KIND OF ACTION BEING TAKEN

- | | |
|--|---|
| <input type="checkbox"/> NEW RULE | <input type="checkbox"/> NOTICE OF HEARING |
| <input checked="" type="checkbox"/> AMENDMENTS TO EXISTING RULE | <input type="checkbox"/> NOTICE OF AGENCY APPROVAL
(legislative rules only) |
| <input type="checkbox"/> REPEAL OF EXISTING RULE | <input checked="" type="checkbox"/> NOTICE OF AGENCY ADOPTION
(interpretive & procedural rules only) |
| NOTE: ALL FILINGS REQUIRE ONLY ONE COPY, EXCEPT FINAL FILING OF RULES WHICH REQUIRES AN ORIGINAL AND A COPY. | <input type="checkbox"/> FINAL FILING |
| | <input type="checkbox"/> FIRST EMERGENCY FILING |
| | <input type="checkbox"/> SECOND EMERGENCY FILING |

FILED

1985 APR 19 PM 3:51

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

AUTHORITY

This interpretive regulation is being promulgated by the authority of Chapter 20, Article 6, Section 7, Code of West Virginia, 1931, as amended.

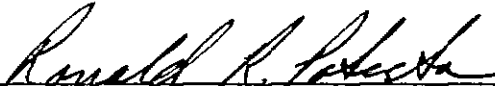
FILED

The following members of the Reclamation Commission hereby authorize and approve the interpretative regulation titled Underground Mining Subsidence

1985 APR 19 PM 3:51

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE


Control Plan:



Ronald R. Potesta, Member
Reclamation Commission



James E. Pitsenbarger, Member
Reclamation Commission



David Robinson, Member
Reclamation Commission

Barton B. Lay, Jr.
Reclamation Commission

Appendix D one

Notice of Agency Adoption

FILED

1985 APR 19 PM 4:03

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

(Interpretive)

Procedural Rule: Underground Mining Subsidence Control Plan

The above titled Procedural (Interpretive) rule constitutes the official rule adopted by the Department of Natural Resources on the 19th day of April, 1985 and filed pursuant to law in the Office of the Secretary of State, State of West Virginia.

Ronald R. Roberts

Entered

Appendix H

FILED

1985 APR 19 PM 4:03

Promulgation History Abstract

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

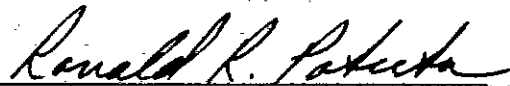
Rule Title: Underground Mining Subsidence Control Plan

Rule Type: Interpretive Regulation

Public Hearing Held: February 11, 1985, State Capitol, Building No. 7,
Conference Center, 1900 Washington Street, East,
Charleston, West Virginia

Final Rule Filed with Secretary of State: April 19, 1985

Effective Date: April 19, 1985



Ronald R. Potesta
Director

Entered

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

FILED
1985 APR 19 PM 4:03

Rule Title: Underground Mining Subsidence Control Plan of West Virginia
SECRETARY OF STATE

Type of Rule: Legislative XXX Interpretive Procedural

Agency: Department of Natural Resources Address: 1800 Washington Street, E.
Charleston, WV 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$ 0	\$ 0	\$ 0	\$ 0	\$ 0

2. Explanation of above estimates:

Current Reclamation Division staff will be available to review subsidence control plan. Subsidence control plans are currently being submitted by the coal industry and those plans are currently being reviewed by Division personnel.

3. Objectives of these rules:

The objective of this rule is to further clarify the current requirements of a subsidence plan and in many instances require more information so that damage to private structures, public structures and the State's natural resources, such as streams and agricultural lands, will be better protected from the damage from underground mine subsidence.

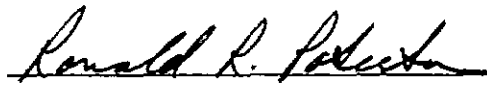
4. Explanation of Overall Economic Impact of Proposed Rule :

- A. This will have minimal impact on state government due to current existing regulations and this will not involve hiring of additional personnel.
- B. This will have a positive impact upon some small communities and county governments due to increased protection to communities, public buildings and renewable resource lands from subsidence damage. The underground coal mining industry will have additional cost for permit applications however, subsidence control plans are currently being required.

4. (Continued)

- C. The impact on the public will be positive for property/structure owners. This will provide some added protection to property/structure owners above new underground mine workings.

Date: April 19, 1985



Ronald R. Potesta
Director
Department of Natural Resources

PUBLIC HEARING
"Subsidence Control Plans"
February 11, 1985
ROSTER OF PARTICIPANTS

~~REMARKS~~ COMMENTS

(PLEASE PRINT)

✓ NAME Greg Gorrell
REPRESENTING Jackson, Kelly, Holt + O'Ferrell
ADDRESS _____

✓ NAME JOHN BRYAN
REPRESENTING Pittston Coal Group
ADDRESS LEBANON, VA. 24262

✓ NAME John Purbaugh
REPRESENTING 9W CAG
ADDRESS 1374 Virginia St. E.
Charleston, WV 25301

✓ NAME William Bosworth
REPRESENTING AEP
ADDRESS P.O. Box 700
Lancaster, OH 43130

✓ NAME BEN FAULKNER
REPRESENTING Leckie Smokeless Coal Co.
ADDRESS DRAWER A RUPERT W. VA.

PUBLIC HEARING
"Subsidence Control Plans"
February 11, 1985
ROSTER OF PARTICIPANTS

VERBAL COMMENTS

(PLEASE PRINT)

✓
NAME GARY SLABER
REPRESENTING CONROL
ADDRESS 1800 Washington Rd
gh 15241

NAME _____
REPRESENTING _____
ADDRESS _____

NAME _____
REPRESENTING _____
ADDRESS _____

NAME _____
REPRESENTING _____
ADDRESS _____

NAME _____
REPRESENTING _____
ADDRESS _____

WESTMORELAND COAL COMPANY
West Virginia Operations

Winding Gulf Mines
Tams, WV 25933
304-683-3281

Imperial Smokeless Mines
Leivasy, WV 26676
304-846-2501

Hampton Mines
Clothier, WV 25047
304-369-3311

February 13, 1985

WV Department of Natural Resources
Reclamation Division
Charleston, WV 25305

RE: DNR Interpretive Subsidence Control Plan Regulations.

Dear Sir:

The proposed interpretive regulations for underground mining subsidence control plans continue DNR's failure to recognize the express statutory exception for operators employing mining technologies that require planned subsidence in a predictable and controlled manner. OSM has implemented federal statutory language almost identical to Section 14 of the West Virginia Surface Coal Mining and Reclamation Act and provided the operator with a clear choice between two performance standards. Section 817.121(a) of the federal regulations provides that:

The operator shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible . . .; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining.

DNR's current and proposed regulations fail to adequately provide for full-extraction mining by requiring that an operator utilizing planned and controlled subsidence also demonstrate what methods will be used to prevent subsidence causing material damage.

It is not Westmoreland Coal Company's position that full-extraction mining is exempt from all environmental protection standards of the Surface Mining Act. There are several other environmental requirements applicable to

full-extraction mining which are not subject to the exception that ensure achievement of the objectives of the Surface Mining Act. For example, the submission of a subsidence control plan demonstrating that planned and controlled subsidence will be utilized in specified areas accompanied by a description of measures that will be taken to remedy any material damage that may occur adequately addresses many environmental concerns. Furthermore, special protection is given to public buildings and facilities, churches, schools, hospitals, or large impoundments that ensures that mining will not cause material damage or reduce the foreseeable use of these areas. Finally, the Director has the authority to suspend mining under urbanized areas, major impoundments or permanent streams if he finds imminent danger to the public.

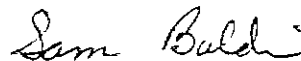
The proposed regulations, as presently written, will undoubtedly have the effect of shutting down many operations currently utilizing planned subsidence. Much of the coal projected to be mined by full-extraction methods may never be mined since the full-extraction method is the only economical way of removing this coal. Coal that is mined according to DNR's overly burdensome proposed regulations will be saddled with a distinct economical disadvantage. These results would be ironic in light of the fact that the drafters of the Federal Surface Mining Act actually preferred full-extraction mining. The drafters correctly believed that subsidence occurring in a planned and predictable manner was preferable since the adverse effects could be corrected immediately by the operator, whereas subsidence from other methods is often more difficult to predict and must be prevented.

To avoid this potential devastation of the mining industry in West Virginia, the proposed regulations must be revised to recognize the statutory exception for mining methods that rely on planned and controlled subsidence.

The proposed regulations envision that over 900 DNR permits for underground mines that have been in operation for many years will be amended by DNR following a second period of public notice and opportunity for public comment and appeal. DNR's current regulations, which were approved by OSM four years ago, do not require amendment for these permits. Thus, the proposed regulation represents a complete reversal in policy by DNR long after operators have invested heavily in mine development relying on the permits issued by DNR in 1982 and 1983. The proposed regulations must be revised to implement the subsidence control requirements in stages and avoid re-opening the public comment and appeal period for active operations.

Westmoreland Coal Company fully supports comments made by the WV Coal Association and other mining companies.

Sincerely,



Sam Baldwin
Chief Environmental Engineer

February 13, 1985

RECEIVED
DEPT OF NATURAL RESOURCES

Dr. Willis H. Hertig, Jr., Director
DEPARTMENT OF NATURAL RESOURCES
1800 Washington Street, East - Room 322
Charleston, WV 25305

FEB 19 1985

OFFICE OF DIRECTOR

Dear Dr. Hertig:

At the public hearing in Charleston on February 11th, we heard representatives of the coal industry speak of "the burden" and imagine "the nightmare" of paperwork which would result if coal operators are required to submit subsidence control plans; and, as though moved by some spark of humanitarianism, one of those representatives requested that the DNR "look to the needs of the State and its people"---having prefaced his request with much concern over "economic viability".

The State and its people?

Because of longwall mining, we are the people who saw every last natural source of water disappear from our 48.75-acre farm ---despite mining regulations made with an express purpose of protecting us, as well as the environment, from unregulated mining.

Because of longwall mining, we are the people who watch our dwelling continue to show the effects of major structural damage ---despite the right to be secure in our own home.

Because of longwall mining, we are the people who are forced to experience the real burden and nightmare of finding it necessary to live with the aftereffects---despite all of our protests beforehand.

We are, therefore, the people who are asking, now, that subsidence control plans be submitted prior to such mining beneath our neighbors' property; and we ask, please, PLEASE, for all of those other West Virginians who, sooner or later, will be affected by longwall mining, that a subsidence control plan be just that: a plan to control subsidence---because, from where we're standing, the subsidence appears to have been UNcontrolled and the longwall mining UNregulated.

Thank you.

Hopefully,

Morton G. Marsh
Patricia A. Marsh

Morton G. & Patricia A. Marsh
Pine Hill Road
R. D. 3 - Box 183
Wheeling, WV 26003

To: Dr. Willis H. Hertig, Director
DEPARTMENT OF NATURAL RESOURCES
1800 Washington Street, East - Room 322
Charleston, WV 25305

We, the undersigned, in an effort to protect our water, our land, our dwellings and other buildings from the adverse effects of subsidence caused by longwall mining, do hereby request that coal operators be made to comply with regulations requiring them to submit subsidence control plans; and, as citizens of this great state and nation, whose homes and lands must suffer the effects of such subsidence, we demand the right to approve subsidence control plans prior to mining beneath our property.

Thank you.

Name:

Address:

Name:	Address:
John A. Rogerson Jr	R.D.#3, Wheeling, W.Va.
Karen Rogerson	RD#3 W Va WV
Debra Rogerson	RD#3 Wheeling W
Cynthia Rogerson	R.D.#3 Wheeling, WV
Mrs Jennie Rogerson	RD#3 Wheeling, W.Va.
Christa Rogerson	Rd 3 Wheeling, W.Va.
Emmetta Rogerson	RD#3 Wheeling, W.Va.
Mary Rogerson	RD#3 Wheeling W.Va.
Daniel Rogerson	RD#3 Wheeling, W.Va.
Michael Woods	RD#3 Wheeling, W.Va.
Nancy Woods	RD#3 W Va W.Va.
Paul Woods	RD#3 " "
Linda Anglemeyer	Rd#3 Wheeling, W.Va.
Regis A. Anglemeyer	RD#3 Wheeling, W.Va.
Charles E. Hoskins	RD#3 Wheeling, W.VA
Melanie A. Berisford	R.D.#3 Wheeling W.VA.
Stephanie Berisford	RD#3 Wheeling, W.Va.
Mary Ann Hopkins	RD#3 Wheeling, W.Va.
William L. McWhorter	R #3 Wheeling W.Va.
Elinabeth McWhorter	R.D.#3 Wheeling W.Va.
Connie Plants	R.D.#3 Wheeling, W.Va.
Ronald Plants	RD #3 Wheeling W.Va.

Pine Hill Road

over 11

Pine Knot Camp
Gerry Gardner R.D.#3 Wheeling, W.Va.
Bob Gardner R.D.#3 Wheeling, W.Va.
Edward B King R.D. 3 Wheeling W.Va.
Sue Knollinger R.D. 3 Wkg. W.Va.
David Knollinger R.D. 3 Wkg. W.Va.

To: Dr. Willis H. Hertig, Director
DEPARTMENT OF NATURAL RESOURCES
1800 Washington Street, East - Room 322
Charleston, WV 25305

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Thank you.

Name:

Address:

- 2 - Mr & Mrs Thomas C Norris RD 3 Box 190-A Wheeling W. Va.
Thomas C Norris Jr. Rt 3 Box 190-A Wheeling W. Va.
Henry D. McConnell Box 190 1/2 Rd #3 Wheeling, W. Va.
Ernest F. Hutchins RD 3 Pine Hill Wheeling W. Va.
Bonnie S. McConnell Box 190 1/2 RD #3 Wheeling W. Va.
2 - Mr & Mrs David Wayne Hreathouse Rd 3 Pine Hill Wgy W. Va.
2 - Mr & Mrs Alvin James Dalton RD 3 Box 271 Wheeling W. Va.
Nancy B. Bullock R. D. 3 # Box 271 - Wgy - W. Va.
2 Alvin & Clara Dalton RD 3 Box 190 A-1-A Wheeling W. Va.
Gene Johnson RD 3 190 A1 Wgy W. Va.
Robert Dalton RD 3 Box 190 A-1-A Wheeling W. Va.
Russel Platt RD #3 Box 192 Wheeling W. Va.
2 - Mr & Mrs Walter J Johnson RD #3 Box 178 C Wheeling W. Va.
2 - Mr & Mrs William McWhorter G RD #3 Box 181 Wheeling W. Va.
2 - Mr and Mrs William G Ewing Rd 3 Box 276 Wgy W. Va.
2 - Mr & Mrs William B Ewing R-3 Box 178 B Wgy W. Va.
Andy McAlle Rt 3 Box 274 Wgy W. Va.
David Meeker Rd 3 B 274 Wgy W. Va.
2 - Mr & Mrs Ben Gatto R-3 Box 178 B Wgy. W. Va.
Charles A Gardner (Pine Hill Road Wheeling)
Louise Gardner " " "
H J MANNERS RD #3 BIG WHEELING W. Va. *over*

page 1 will read

John F.

LYNIKEY

BIG WIND CREEK

MAR. 10 LYNIKEY

To: Dr. Willis H. Hertig, Director
DEPARTMENT OF NATURAL RESOURCES
1800 Washington Street, East - Room 322
Charleston, WV 25305

We, the undersigned, in an effort to protect our water, our land, our dwellings and other buildings from the adverse effects of subsidence caused by longwall mining, do hereby request that coal operators be made to comply with regulations requiring them to submit subsidence control plans; and, as citizens of this great state and nation, whose homes and lands must suffer the effects of such subsidence, we demand the right to approve subsidence control plans prior to mining beneath our property.

Thank you.

<u>Name:</u>	<u>Address:</u>
Richard Lester	RD #1 Box 410-A Wayman's Ridge
Charles Hopkins	RD #1 Box 408 A Mds. W.V. 26041
David Moore	RD #1 Box 404 Mdsu. W.V. 26041
Red Sanders	R.D. 1 Box 403A Mdsu. W.V. 26041
Harry Darter	Rd 1 Box 403 Mdsu W.Va 26041
Mrs. Virgil Van Dyke	Rd 1 Box 410 Moundsville WV 26041
Mary Kelley	R.D. 1 Box 409 Moundsville W.V. 26041
Wm. Lee Evers	R.D. #1 ^{Box 389} Wayman's Ridge Mds. W.V. 26041
David C. Hill	RD #1 Box 411 Moundsville, W.V. 26041
Russell F. Goh	R.D. 1, Andale N.D. 1 2641
Ray D. Hill	R#3, Box 185, W. Va.
Mike Hill	R#3 Box 185 W. Va.

Pine Hill Road

To: Dr. Willis H. Hertig, Director
DEPARTMENT OF NATURAL RESOURCES
1800 Washington Street, East - Room 322
Charleston, WV 25305

IV

(12)

We, the undersigned, in an effort to protect our water, our land, our dwellings and other buildings from the adverse effects of subsidence caused by longwall mining, do hereby request that coal operators be made to comply with regulations requiring them to submit subsidence control plans; and, as citizens of this great state and nation, whose homes and lands must suffer the effects of such subsidence, we demand the right to approve subsidence control plans prior to mining beneath our property.

Thank you.

Name:

Address:

Thomas L. Powell	Box 102 Middlebourne, WVA
Shirley J. Cox	Box 89 Rockport W. Va.
D. B. Press	1201 5 th Street New Martinsville W. Va.
Coral Nicolette	22 Pine Knoll Wheeling WV
Sandi Hughts	17 Pine Knoll Wheeling W. Va.
Lois Stanger	21 Pine Knoll W. Va. W. Va.
Laurena J. Channell	23 Pine Knoll Acres Wheeling W. Va.
Mary Kay Channell	23 Pine Knoll Acres Wheeling W. Va.
Scott Collins	104 Pine Knoll W. Va. W. Va.
Marilyn Collins	RD #3 104 Pine Knoll Wheeling, WV
Michael Andrus	105 Pine Knoll Acres, Wheeling, WV.
Michael T. Hewitt	RD #3 Box 109 Wheeling, W. Va.

Pine Hill Road

11/14

JACKSON, KELLY, HOLT & O'FARRELL
ATTORNEYS AT LAW

P. O. BOX 553

CHARLESTON, WEST VIRGINIA 25322

1500 ONE VALLEY SQUARE

TELEPHONE (304) 347-7500 TELECOPIER G1 (304) 346-5148
TELECOPIER G11-111 (304) 347-7566

WRITER'S DIRECT DIAL NO. (304) 347-7536

618 MONONGAHELA BUILDING
P. O. BOX 612
MORGANTOWN, WEST VIRGINIA 26507

TELEPHONE (304) 292-7311
TELECOPIER (304) 292-7318

February 20, 1985

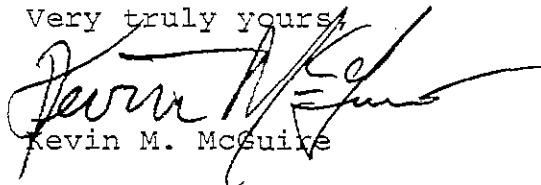
Mr. William Chambers
West Virginia Dept. of Natural Resources
1800 Washington Street, East
Room 322
Charleston, West Virginia 25305

Dear Bill:

Please send me a copy of all written comments received on DNR's Proposed Interpretive Subsidence Control Plan Regulations. I will be happy to reimburse your office for any expenses incurred in copying these documents.

Thank you very much for your help in this matter.

Very truly yours,



Kevin M. McGuire

KMM/rlb

RECEIVED
DEPT. OF NATURAL RESOURCES

FEB 19 1985

OFFICE OF DIRECTOR

Island Creek Coal Company

NORTHERN DIVISION

Drawer 75

CRAIGSVILLE, WEST VIRGINIA 26205-0075

Phone 304-742-5501

February 15, 1985

Mr. Ronald Potesta, Director
West Virginia Department of Natural Resources
1800 Washington Street East
Charleston, WV 25305

Re: Comments on Proposed Interpretive Rule for Underground Mining
Subsidence Control Plans

Dear Director Potesta:

We have reviewed the proposed rule relative to subsidence control plans for underground mining which was the subject of a public hearing on February 11, 1985. We appreciate the opportunity to submit our comments on this subject.

The West Virginia Coal Association, of which our company is a member, has prepared and submitted comments on this rule, both in writing and at the hearing. We fully support and endorse the comments presented by the association. We share the concern that the proposed rule does not recognize the statutory exception for operations which will result in planned subsidence in a predictable and controlled manner. Additionally, we would like the following specific comments to be considered.

We would point out that longwall mining is not the only type of operation which results in planned, predictable, and controlled subsidence. Room and pillar mining with secondary pillar removal is another mining technique which should be recognized as subject to the same statutory exception. Further, we would point out that the federal and state statutes both specifically provide that the standard method of room and pillar mining is not to be prohibited. We are concerned that the proposed rule would inevitably result in just such prohibition as Congress made clear was not to happen.

The proposed rule, in section VI.1, requires that all mines submit "a description of the measures to be taken in order to repair subsidence damage as specified in 7C.02(b)". Further, in section VI.3, it is stated that "the applicant must acknowledge surface lands shall be repaired in accordance with 7C.02(b) regardless of the right to subside". As the Coal Association points out, the existing regulation fails to track the language and intent of the statute, and section VI of the proposed rule goes even further by failing to correctly interpret or apply the apparent intent of the current regulation.

Section 7C.02(b) of the West Virginia Surface Mining Regulations states, in part:

"Each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence."

This regulation requires restoration of the land surface subsequent to subsidence in three cases, which are:

- (1) if material damage is caused by subsidence;
- (2) if subsidence reduces the value of the surface lands; or
- (3) if subsidence reduces the reasonably foreseeable use potential of the surface lands

The term "material damage" is not defined by West Virginia law or regulation. However, a dictionary definition and accepted usage of the word "material" in this context is "having real importance or great consequences". In consideration of the remote and undeveloped nature of lands at the location of many mines in the state, and the very limited uses made of the surface, it is clear that the minimal surface effects which could occur due to subsidence from operations so located have no real importance, and the consequences are insignificant.

It seems to be the intent of section VI to require restoration of surface lands regardless of the extent and the real importance or significance of the subsidence impacts (i.e. whether the damage is material or not), and regardless even of private property ownership and contractual rights. If this is the case, we strenuously object. Such a position is illogical, unreasonable, and totally unsupported by the language or intent of the statutes.

The requirement to restore all surface lands will undoubtedly result in closure of many operations and in de facto prohibition of mining of extensive and otherwise recoverable reserves. The fact that the importance of subsidence is relative to the nature of overlying lands, resources, and structures cannot be ignored. Subsidence which occurs in remote and undeveloped areas characteristic of so much of the lands overlying underground mines in this state cannot logically be treated in the same fashion as that which occurs under population centers or intensively utilized surface lands.

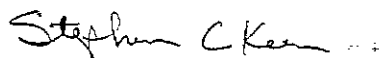
The value of remote and undeveloped surface lands will not be reduced by underground mining operations, nor will any existing or reasonably foreseeable uses of the land be reduced or negatively affected. The lands are most often unmanaged woodlands, and this is likely to remain the highest and best use. Minor surface effects due to subsidence will not negatively affect this use potential or value. A proper interpretation and application of the regulations, as outlined above, does not require restoration of the land surface overlying all mining operations with respect to subsidence effects.

WV Dept. of Natural Resources
February 15, 1985
Page 3

Finally, we would emphasize our agreement with the WVCA comment to the effect that it is totally inappropriate to allow this issue to cause a re-opening of public comment and appeal provisions for existing operations.

Again, we thank you for this opportunity to comment. We trust that these rules will be finalized and implemented only after careful and thorough consideration, and after the defects in language and intent have been corrected.

Sincerely yours,



Stephen C. Keen, PE
Manager of Engineering

SCK/bp

cc: H. Naumann
T. Turyn
L. Marshall
file

AMERICAN ELECTRIC POWER Service Corporation



P.O. Box 700
Lancaster, OH 43130
(614) 687-1440

February 21, 1985

State of West Virginia
Department of Natural Resources
Division of Reclamation Room 322
Washington Street East
1800 Block
Charleston, West Virginia 25305

Attn: Mr. Bill Chambers

REGARDING: CORRECTED COPY OF AEP COMMENTS ON PROPOSED INTERPRETIVE
REGULATION - SECTION 7C.03, WEST VIRGINIA SURFACE
MINING RULES AND REGULATIONS

Bill
Dear ~~Mr. Chambers~~:

Pursuant to our telephone conversation on February 20, 1985, I am enclosing corrected pages of the referenced comments that were previously provided to your office on February 18, 1985.

The information provided does not constitute new information and will not change the contents or intent of the previous submittal. These pages provide corrections to the text, including typographic and structural errors, that might confuse important issues.

I thank you for your patience.

Very truly yours,

AMERICAN ELECTRIC POWER
SERVICE CORPORATION

William C. Bosworth
Sr. Environmental Engineer
Fuel Supply Department

bm

Enclosure

cc: D. M. Cohen

I. ALL UNDERGROUND MINES

J-2A1.A

Change to read as follows:

A. All renewable resource lands which include, but may not be limited to: agriculture or pasture lands, and intensively managed commercial forests, ±Intermittent or perennial streams, and public use lands, ~~ete~~ as shown on a USGS Topographic Map, will also be included as part of the survey map.

JUSTIFICATION:

Section 2.91 of the West Virginia Regulations defines "renewable resource lands" as only those:

"geographical areas which contribute significantly to the long range productivity of a water supply, or food or fiber products."

Intermittent and perennial streams can not always be considered as renewable resource lands, and for that reason should be included separate of the category of renewable resource lands.

Assuming that the interpretation of "geographical areas" can be so broadly interpreted that it includes intermittent and perennial streams, these streams must still "contribute

significantly to the long range productivity of a water supply..." before they can actually be considered as "renewable resource lands."

There is no authority in Section 7C, (Subsidence Control), West Virginia Regulations, upon which the DNR can rely to demand that operators show all intermittent and perennial streams as part of the Subsidence Control Plan. There is not even a mention of intermittent and perennial streams in the "7C Regulations."

Even an overly-broad interpretation of the definition of renewable resource lands would still not address all intermittent and perennial streams.

Even though Section 7C does not authorize the DNR to require an operator to show all intermittent and perennial streams, AEPSC would be willing to show the intermittent and perennial streams "as shown on the USGS Topographic Map."

The word "etc." is deleted as it is not applicable with regards to "intermittent or perennial streams," and "public lands", and unnecessary relative to renewable resource lands because of the use of the phrase "but may not be limited to."

If the DNR elects to reject the above proposed change, then the provision should reflect exactly the definition of renewable resource lands, and should read "intermittent or perennial

streams which contribute significantly to the long range productivity of a water supply."

Incorporating a change similar to those herein proposed, will specify those intermittent or perennial streams to be identified in the Subsidence Control Plan. As now proposed the DNR is implying that all intermittent and perennial streams are considered as renewable resource lands. This flawed conclusion is not supported in light of Section 2.91 of the West Virginia Regulations.

I. UNDERGROUND MINES

J-2A1.B

Change to read as follows:

B. All structures clearly identified for use (including all protected structures). Structures shall include those structures which are depicted on a USGS Topographic Map, including but not be limited to public roads, multiple anchor high tension voltage power lines greater than 50,000 volts, dwellings, gas collection and transmission lines, gas and/or water wells, public water system distribution lines, dwellings, utility buildings, public buildings, businesses, industrial or commercial buildings, impoundments, coal refuse piles, etc. and other similar structures.

JUSTIFICATION:

The above changes are designed to identify structures that are to be included in the survey. The changes provide clarity to a provision that was previously too vague. Unless changed, the proposed provision fails to provide the operator with adequate direction to complete the survey, and fails to provide the DNR with a basis for its completeness review. Both the operator and the DNR should be working from the same set of guidelines. Due to the importance of the program, it is imperative that guess-work be minimized.

Specifically:

- o "roads" was changed to "public roads" to denote those roads which are of value to the general public and by virtue of the change excludes old abandoned roads and trails.
- o "high voltage power lines" was changed to "multiple anchor high voltage power lines greater than 50,000 volts" to represent those power lines that are more susceptible to subsidence damage.
- o "Water distribution lines" was changed to "public water system distribution lines" as the original phrase was overly-broad and all-inclusive to the point of directing the operators to identify every water pipe regardless of size and use.
- o "dwellings" was deleted as a duplication.
- o "public buildings" is redundant in that it falls under the general category of "protected structures" that is already included in this provision.
- o "businesses" is too vague, lacks statutory support, and is not always represented as a structure.

We suggest that it is more appropriate to use "industrial or commercial buildings," which is the same language as found in Section 20-6-14(c) of the West Virginia Surface Coal Mining and Reclamation Act.

- o "impoundments" was deleted because it would be included under "protected structures" if greater than 20 acre feet, and/or included elsewhere in the application as part of the PHC study, or as a developed water resource.

- o "but not be limited to" and "etc." were deleted to reduce questions as to what was actually needed in the survey. These are replaced with the phrases "those structures which are depicted on a USGS Topographic Map" and "and other similar structures." The changes provide the clarity necessary to complete the required survey with a reasonable amount of effort expended by both the applicant and the DNR review team.

*Added the word "use"
in the 1st line of
the 1st paragraph.*

I. ALL UNDERGROUND MINES

J-2A 1.C

Delete in its entirety.

C. ~~All significant aquifers. --- This information can be included by reference in the PFC portion of the application.~~

JUSTIFICATION:

It is not feasible to show aquifers on the survey map. In order to depict the areal extent of all significant aquifers within the 5-year plan area, including perched aquifers, it would likely require a map per aquifer in order to provide a comprehensible and useable document. It is not necessary to include this information on a map to satisfy the requirement of 7C.03(a)(1) requiring "a survey."

A discussion of significant aquifers is proposed elsewhere in J-2A.

I. ALL UNDERGROUND MINES

J-2A 2.

Add new paragraph "2" as follows:

2. A discussion of all aquifers which contribute significantly to the long range productivity of a water supply. This information can be included by reference in the PHC portion of the application.

JUSTIFICATION:

This information, originally proposed by DNR at J-2A 1.C, has been deleted from Section 1 of J-2A, which provides exclusively for the required contents of a survey map, because the information would be more comprehensible and useable in a form other than that proposed by DNR (information included on a survey map). This is especially true if the area in question exhibits more than one (1) aquifer that "contribute(s) significantly to the long range productivity of a water supply."

The proposed language is necessary to reflect the requirements of Sections 2.91 and 7C.03(a)(1), West Virginia Regulations.

Section 7C.03(a)(1) requires that the Subsidence Control Plan include:

"A survey that identifies structures or renewable resource lands and whether or not subsidence could cause material damage or diminution of value or use of such structures or renewable resource lands."
(emphasis added).

The DNR must rely on Section 7C.03(a)(1) to require that a discussion of aquifers be included in the Subsidence Control Plan. The DNR must further rely upon the inclusion of aquifers as a category of renewable resource lands, and therefore, must be directed to Section 2.91 of West Virginia Regulations which contains the definition of "renewable resource lands" which reads as follows:

"...geographical areas which contribute significantly to the long range productivity of a water supply...."

The DNR needs to identify which aquifers must be addressed in the Subsidence Control Plan, and must refer to the above definition of renewable resource lands.

The regulatory language of Section 2.91, West Virginia Regulations which states in part as follows:

"...which contribute significantly to the long range productivity of a water supply...."

should be used, as opposed to the proposed DNR language--

"significant aquifers."

*Added the word
"must" to the 2nd
sentence of the
1st paragraph*

The use of the language "significant aquifer" instead of exact regulatory language is unacceptable as it would serve to create another undefined term. The use of other than exact regulatory language would, in this case, provide unnecessary confusion.

AMERICAN ELECTRIC POWER Service Corporation



P.O. Box 700
Lancaster, OH 43130
(614) 687-1440

RECEIVED
DEPT. OF NATURAL RESOURCES

J. P. APEL
Vice President
Governmental Affairs - Coal

February 15, 1985

FEB 19 1985

Director
Department of Natural Resources
Room 322
Washington Street East
1800 Block
Charleston, WV 25305

OFFICE OF DIRECTOR

Re: Proposed Interpretive
Regulation - Section 7C.03,
West Virginia Surface Mining
Rules and Regulations

Dear Director:

Enclosed please find the comments of American Electric Power Service Corporation - Fuel Supply Department on the proposed interpretive regulation regarding informational requirements of Section 7C.03 of the West Virginia Surface Mining Rules and Regulations, Series VII, 1983.

We appreciate the opportunity to comment on this most important interpretive rule, and hope that the combined efforts of all concerned will result in a viable Subsidence Control Program.

If there are any questions, or if we may be of any help in the future, please contact us at your convenience.

Sincerely,

J. P. Apel
Vice President
Governmental Affairs - Coal

JPA/skh

In The Matter Of:)
)
Proposed Interpretive)
Regulation Regarding)
Section 7C.03 of the)
West Virginia Surface)
Mining Rules and Regula-)
tions, Series VII, 1983)

COMMENTS OF
AMERICAN ELECTRIC POWER
SERVICE CORPORATION
FUEL SUPPLY DEPARTMENT

AMERICAN ELECTRIC POWER
SERVICE CORPORATION
Fuel Supply Department
161 W. Main Street
P.O. Box 700
Lancaster, Ohio 43130
(614) 687-1440

February 18, 1985

COMMENTS OF
AMERICAN ELECTRIC POWER SERVICE CORPORATION
FUEL SUPPLY DEPARTMENT
ON PROPOSED INTERPRETIVE REGULATION
REGARDING SECTION 7C.03
OF THE WEST VIRGINIA SURFACE MINING
RULES AND REGULATIONS, SERIES VII, 1983

INTRODUCTION

The West Virginia Department of Natural Resources, Division of Reclamation (DNR) has issued proposed rules designed to implement Section 20-6-14(b) (1) of the West Virginia Surface Coal Mining and Reclamation Act (1980).

The DNR has requested written comments to its proposed interpretation, requiring the submittal of comments by February 18, 1985. These comments are filed on behalf of American Electric Power Service Corporation - Fuel Supply Department ("AEPSC") and Ohio Valley Electric Corporation ("OVEC").

AEPSC is the management and administrative arm of American Electric Power ("AEP"), which, in addition to AEPSC, is comprised of eight operating companies providing electric utility service in seven states--Appalachian Power Company in Virginia and West Virginia; Columbus and Southern Ohio Electric Company in Ohio; Indiana & Michigan Electric Company in Indiana and Michigan; Kentucky Power Company in Kentucky; Kingsport Power Company in Tennessee; Michigan Power Company in Michigan; Ohio Power Company in Ohio; and Wheeling Electric Company in West Virginia.

The Fuel Supply Department of the American Electric Power Service Corporation provides coal procurement and transportation

related services for the operating companies of American Electric Power and three associated generating companies. In addition, the Fuel Supply Department is responsible for the operation of the System's affiliated coal mines.

The Fuel Supply Department is responsible for ensuring that the present and future fossil fuel power plants of the AEP System have at all times, an adequate and reliable supply of appropriate, consistent quality coal which is obtained at the least cost over a period of years, consistent with safety and environmental regulation, with the overall intent of aiding the affiliated and associated generating companies in economically optimizing generating capacity to produce the lowest possible unit cost of electricity.

The AEP System's coal burning power plants consist of 52 generating units. On average, these generating units require the delivery of nearly 41 million tons of coal. In addition, three associated generating companies, Buckeye Power Company, Ohio Valley Electric Corporation, and Indiana-Kentucky Electric Corporation, for whom the Department also provides procurement and transportation services actually requires some 9-10 million tons of coal. In order to satisfy this combined requirement, the Department secures coal from both affiliate and non-affiliate sources and deploys that coal in the most efficient method practicable.

GENERAL COMMENTS

"In fact the bill's sponsors consider long-wall mining ecologically preferable, and it and other methods of controlled subsidence explicitly endorsed." (emphasis added).

This important piece of legislative history to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which forms the basis of Federal subsidence regulations with which each state's regulations must be consistent, appeared as an entry in the Congressional Record on July 10, 1974 by Congressman Mo Udall.

The state of West Virginia, through the proposing of an interpretive regulation regarding the informational requirements of Section 7C.03 (Subsidence Control Plans) of the West Virginia Surface Mining Rules and Regulations (West Virginia Regulations), is preparing to initiate a Subsidence Control Program, even though the regulations in Section 7C (Subsidence Control) conflict with the statute it is to explain.

AEP is very concerned with the developing situation regarding subsidence plans since proposed informational requirements for the plans are based upon seriously flawed regulations. The AEP system acquired more than 18 million tons of coal from West Virginia in 1984. Over 2 million tons came from our affiliate mine that utilizes longwall mining techniques. Much of the remainder comes from mines that are also utilizing longwall mining sections.

The state of West Virginia has 46 longwall units in underground mines, accounting for 25% of the state's production. These units contribute to the economic competitiveness of entire mining complexes. Thus the validity of longwall sections assure that the total production including the coal from conventional and continuous miner sections can be competitive.

Existing "7C Regulations" are being interpreted in light of their unquestionable deficiencies, leading to improper implementation of the language of the West Virginia Surface Coal Mining and Reclamation Act (West Virginia Act) at Section 20-6-14(b) (1) which requires that the operator:

"Adopt measures consistent with known technology in order to prevent subsidence and to the extent technologically and economically feasible, maximize mine stability and maintain the value and reasonably foreseeable use of overlying surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, that this subsection does not prohibit the standard method of room and pillar mining;" (emphasis added).

West Virginia Regulations at Section 7C (Subsidence Control) fail to reflect the intent of Section 20-6-14(b) (1) by not recognizing the distinction between full extraction and room and pillar mining contained in the statute. Incorporation of this exception into West Virginia Regulations is critical to the creation of a workable program.

The DNR is not taking advantage of the direction provided by well thought out Federal regulations and interpretive opinions. As an example, we have the West Virginia regulation at Section 7C.02(a):

"Each person who conducts underground mining activities shall adopt all measures technologically and economically feasible to prevent subsidence causing material damage or reducing the value or reasonably foreseeable use of surface lands."

that can be compared to Federal regulation at Section 817.121(a):

"The operator shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible...or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room and pillar mining." (emphasis added).

The regulations contain obvious differences, even though they are designed to implement statutes that are essentially mirror images of each other, (SMCRA at Section 516(b)(1) and the West Virginia Act at Section 20-6-14(b)(1). Senate Report No. 95-128, 95th Cong., 1st Sess., at 84 (1977) explains Section 516(b)(1) of SMCRA as follows:

Certain of the environmental protection standards for surface mining operations also apply to underground mines. In this section, the Secretary is required to incorporate in his regulations the follow-

ing key provisions concerning the control of surface effects from underground mining: Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as longwall mining, which completely extract the coal and which result in predictable and controllable subsidence, (emphasis added).

A critical distinction, absent in West Virginia Regulations, is provided in a discussion of the above explanation relative to the promulgation of the Federal regulations implementing Subsidence Control Plans as follows:

"In accordance with the explicit mandate of Section 516(b)(1) of the Act, a difference must be drawn in the case of true planned and controlled subsidence between measures to prevent material damage and plans to mitigate the effects of such damage." (Emphasis added).

44 Federal Register 15075 (March 13, 1979)

The above interpretation of the Federal regulations are supported by the above legislative history, as well as interpretive judicial opinion. (In re: Permanent Surface Mining Regulation Litigation, Civil Action No. 79-1144, 14 ERC 1083, 1098 (D.D.C. 1980).

The DNR should immediately revise the "7C Regulations." Legislative history and the West Virginia Act at Section

20-6-14(b) (1) should be considered in any effort to interpret these regulations. Of what value is an interpretation if that regulation being interpreted is invalid?

It is safe to say that the regulations still suffer from the same infirmities that existed prior to the interpretation.

If the DNR fails to change the "7C Regulations" the resulting program could constitute a challenge to the economic viability of many mining operations and impose an economic disadvantage for West Virginia coal when compared to coal produced in states which have properly interpreted statutory requirements, and have therefrom applied a reasonable subsidence program.

The creation of such a situation will fly in the face of the Administration's efforts to reduce unemployment levels in West Virginia, and to provide for an economically healthy atmosphere for industry in this state.

We urge the DNR to comprehensively assess their proposed program in light of these comments, and to act in accordance with the needs of this state and its people. We are willing to assist DNR in any manner possible toward revising the proposed interpretive regulation to meet such needs.

SPECIFIC COMMENTS

The following represents AEP's comments and proposed changes to specific regulatory provisions. The proposed changes are necessary, at a minimum, to insure that a realistic and understandable program is implemented that will "...strike a careful balance between the protection of the environment and the economical mining of coal..." mandated by Section 20-6-2(a) of the West Virginia Surface Coal Mining and Reclamation Act.

I. ALL UNDERGROUND MINES

J-2A1.A

Change to read as follows:

A. All renewable resource lands which include, but may not be limited to: agriculture or pasture lands, and intensively managed commercial forests, intermittent or perennial streams, and public use lands, etc. as shown on a USGS Topographic Map, will also be included as part of the survey map.

JUSTIFICATION:

Section 2.91 of the West Virginia Regulations defines "renewable resource lands" as only those:

"geographical areas which contribute significantly to the long range productivity of a water supply, or food or fiber products."

Intermittent and perennial streams can not always be considered as renewable resource lands, and for that reason should be included separate of the category of renewable resource lands.

Assuming that the interpretation of "geographical areas" can be so broadly interpreted that it includes intermittent and perennial streams, these streams must still "contribute

significantly to the long range productivity of a water supply..." before they can actually be considered as "renewable resource lands.

There is no authority in Section 7C, (Subsidence Control), West Virginia Regulations, upon which the DNR can rely to demand that operators show all intermittent and perennial streams as part of the Subsidence Control Plan. There is not even a mention of intermittent and perennial streams in the "7C Regulations."

Even an overly-broad interpretation of the definition of renewable resource lands would still not address all intermittent and perennial streams.

Even though Section 7C does not authorize the DNR to require an operator to show all intermittent and perennial streams, AEPSC would be willing to show the intermittent and perennial streams "as shown on the USGS Topographic Map."

The word "etc." is deleted as it is not applicable with regards to "intermittent or perennial streams," and "public lands" and unnecessary relative to renewable resource lands because of the use of the phrase "but may not be limited to."

If the DNR elects to reject the above proposed change, then the provision should reflect exactly the definition of renewable resource lands, and should read "intermittent or perennial

streams which contribute significantly to the long range productivity of a water supply."

Incorporating a change similar to those herein proposed, which specify intermittent or perennial streams are to be identified in the Subsidence Control Plan. As now proposed the DNR is implying that all intermittent and perennial streams are considered as renewable resource lands. This flawed conclusion is not supported in light of Section 2.91 of the West Virginia Regulations.

I. UNDERGROUND MINES

J-2A1.B

Change to read as follows:

B. All structures clearly identified for use (including all protected structures). Structures shall include those structures which are depicted on a USGS Topographic Map, including but not be-limited-to public roads, multiple anchor high tension voltage power lines greater than 50,000 volts, dwellings, gas collection and transmission lines, gas and/or water wells, public water system distribution lines, dwellings, utility buildings, public buildings,--businesses, industrial or commercial buildings, impoundments, coal refuse piles, etc. and other similar structures.

JUSTIFICATION:

The above changes are designed to identify structures that are to be included in the survey. The changes provide clarity to a provision that was previously too vague. Unless changed, the proposed provision fails to provide the operator with adequate direction to the operator to complete the survey, and fails to provide the DNR with a basis for its completeness review. Both the operator and the DNR should be working from the same set of guidelines. Due to the importance of the program, it is imperative that guess-work be minimized.

Specifically:

- o "roads" was changed to "public roads" to denote those roads which are of value to the general public and by virtue of the change excludes old abandoned roads and trails.
- o "high voltage power lines" was changed to "multiple anchor high voltage power lines greater than 50,000 volts" to represent those power lines that are more susceptible to subsidence damage.
- o "Water distribution lines" was changed to "public water system distribution lines" as the original phrase was overly-broad and all-inclusive to the point of directing the operators to identify every water pipe regardless of size and use.
- o "dwellings" was deleted as a duplication.
- o "public buildings" is redundant in that it falls under the general category of "protected structures" that is already included in this provision.
- o "businesses" is too vague, lacks statutory support, and is not always represented as a structure.

We suggest that it is more appropriate to "industrial or commercial buildings," which is the same language as found in Section 20-6-14(c) of the West Virginia Surface Coal Mining and Reclamation Act.

- o "impoundments" was deleted because it would be included under "protected structures" if greater than 20 acre feet, and/or included elsewhere in the application as part of the PHC study, or as a developed water resource.

- o "but not be limited to" and "etc." were deleted to reduce questions as to what was actually needed in the survey. These are replaced with the phrases "those structures which are depicted on a USGS Topographic Map" and "and other similar structures." The changes provide the clarity necessary to complete the required survey with a reasonable amount of effort expended by both the applicant and the DNR review team.

I. ALL UNDERGROUND MINES

J-2A 1.C.

Delete in its entirety.

- C. ~~All-significant-aquifers---This-information-can-be included-by-reference-in-the-PHC-portion-of-the application.~~

JUSTIFICATION:

It is not feasible to show aquifers on the survey map. In order to depict the areal extent of all significant aquifers within the 5-year plan area, including perched aquifers, it would likely require a map per aquifer in order to provide a comprehensible and useable document. It is not necessary to include this information on a map to satisfy the requirement of 7C.02(a)(1) requiring "a survey."

A discussion of significant aquifers is proposed to be elsewhere in J-2A.

I. ALL UNDERGROUND MINES

J-2A-1-D

Change to read as follows:

B C. Public or private water supplies (wells, developed
springs, etc.)

JUSTIFICATION:

For the purposes of the Subsidence Plan, and contrary to a PHC study, one should look at specific uses that would clearly indicate a developed resource. The proposed change brings the parenthetical examples into conformance with the concept of "public or private water supplies" which would be based upon the development of the resource to the extent necessary for the intended use.

Undeveloped springs will be identified in the PHC portion of the application, and should clearly be excluded from the category of water supplies.

"D" has been changed to "C" to retain an alphabetical sequence following the deletion of the old "C."

I. ALL UNDERGROUND MINES

J-2A 2.

Add new paragraph "2" as follows:

2. A discussion of all aquifers which contribute significantly to the long range productivity of a water supply. This information can be included by reference in the PHC portion of the application.

JUSTIFICATION:

This information, originally proposed by DNR at J-2A 1.C, has been deleted from Section 1 of J-2A, which provides exclusively for the required contents of a survey map, because the information would be more comprehensible and useable in a form other than that proposed by DNR (information included on a survey map). This is especially true if the area in question exhibits more than one (1) aquifer that "contribute(s) significantly to the long range productivity of a water supply."

The proposed language is necessary to reflect the requirements of Sections 2.91 and 7C.03(a)(1), West Virginia Regulations.

Section 7C.03(a)(1) requires that the Subsidence Control Plan include:

"A survey that identifies structures or renewable resource lands and whether or not subsidence could cause material damage or diminution of value or use of such structures or renewable resource lands." (emphasis added).

The DNR must rely on Section 7C.03(a)(1) to require that a discussion of aquifers be included in the Subsidence Control Plan. The DNR further rely upon the inclusion of aquifers as a category of renewable resource lands, and therefore, must be directed to Section 2.91 of West Virginia Regulations which contains the definition of "renewable resource lands" which reads as follows:

"...geographical areas which contribute significantly to the long range productivity of a water supply...."

The DNR needs to identify which aquifers must be addressed in the Subsidence Control Plan, and must refer to the above definition of renewable resource lands.

The regulatory language of Section 2.91, West Virginia Regulations which state in part as follows:

"...which contribute significantly to the long range productivity of a water supply...."

should be used, as opposed to the proposed DNR language--
"significant aquifers."

The use of the language "significant aquifer" instead of exact regulatory language is unacceptable as it would serve to create another undefined term. The use of other than exact regulatory language would, in this case, provide unnecessary confusion.

I. ALL UNDERGROUND MINES

J-2A 2

Change to Section "3."

23. The director may waive the remainder of the requirements for a subsidence plan if the survey indicates and the director determines that no material damage or diminution of value or foreseeable use of the land could be caused by subsidence.

JUSTIFICATION:

Retain numerical sequence.

II. LONGWALL MINING OR ROOM AND PILLAR WITH 80% RECOVERY OR
GREATER

J-2C 3

Delete Section 3 in its entirety.

3. ~~Specifically indicate those areas in which measures will be taken to the extent technologically and economically feasible to prevent or minimize subsidence and related damage. Document these measures in accordance with 76.03(a)5.~~

JUSTIFICATION:

This interpretation does not adequately reflect the exception contained in Section 20-6-14(b)(1) of the West Virginia Surface Coal Mining and Reclamation Act for full-extraction mining methods that result in planned subsidence.

III. ALL UNDERGROUND MINES

J-2D 2

Change to read as follows:

2. The depth to the coal from the surface indicated by an overburden isopach map or coal structure drawn on a Topographic Map on contour intervals of 50' or less (this can be done on the survey proposal map or separately) in accordance with 7C.03(a)(4).

JUSTIFICATION:

The change provides the operator some flexibility. Either method will provide the information required by the DNR. Typically an "isopach" map is used to depict coal thickness variations. The addition of "overburden" will clarify that the DNR is requesting information on overburden thickness.

IV. ROOM AND PILLAR MINING WITH LESS THAN 80% EXTRACTION

J-2E 2

Delete the entire section and replace it with language similar to the federal regulation at 30 CFR 817.121(g) as follows:

2. Within a schedule approved by the DNR, Division of Reclamation, the operator shall submit a detailed plan of the underground workings. The detailed plan shall include maps and descriptions, as appropriate, or significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the DNR, Division of Reclamation.

JUSTIFICATION:

The proposed change provides the operator and the DNR with more flexibility, and will allow for the application of more appropriate controls since they could be based upon actual conditions realized during the mining operation.

The appropriate "measures taken to prevent or minimize subsidence and related damage" will depend upon a combination of

factors. By requiring the operator to estimate all methods that he will use to prevent or minimize subsidence over a short term rather than a 5-year term, the number of unknown factors would be reduced, and would therefore, greatly enhance the ability of the DNR to accomplish the intent of the Act.

V. LONGWALL MINING OR ROOM AND PILLAR WITH 80% RECOVERY OR
GREATER

J-2E 1

Delete section in its entirety.

- ~~1. Under or adjacent to all structures and renewable resource lands demonstrate what methods will be used to prevent subsidence to the extent technologically and economically feasible causing material damage or reducing the value or reasonably foreseeable use of such. -- If it is not technologically and economically feasible a detailed explanation must be included.~~

JUSTIFICATION:

The DNR appears to have taken the performance standard found at 7C.02(a), West Virginia Regulations and incorporated it, following some drastic modification, into Subsidence Control Plan requirements for longwall mining.

The major flaw in J-2E 1 is that it represents a total disregard for the statutory exclusion of full extraction mining from requirements to prevent subsidence. Longwall mining, by design, results in planned subsidence. The DNR cannot request a demonstration of methods used to prevent subsidence when utilizing longwall mining methods and be consistent with legislative intent.

This problem, and the confusion inherent in all of the subsidence-related regulations stems from the fact that the existing regulations fail to implement the language and intent of the Act, specifically Section 20-6-14(b)(1).

Because of the failure to reflect the statutory exclusion of Section 20-6-14(b)(1) of the West Virginia Act, the provision should be deleted entirely.

If for some reason DNR should fail to recognize the validity of the above position, at a minimum DNR should rewrite the provision to refer to "all measures technologically and economically feasible to prevent subsidence causing material damage". As now written, an operator would be required to prevent subsidence to the extent technologically and economically feasible. This proposed regulation differs from the statutory language and the regulation being interpreted to prevent subsidence causing material damage to the extent technologically and economically feasible.

VII. ALL UNDERGROUND MINES

J-2F

Delete paragraph in its entirety.

~~List all owners of property and residents within the area above the proposed underground workings.--This list could be included on the survey or mine development map if sufficiently legible.--The area above the underground works shall mean within the angle of draw but at least 15° from any coal removal.~~

JUSTIFICATION:

Section 7C.01 requires that the operator notify owners of property and residents at least six (6) months prior to mining beneath his or her property or residence.

The requirement that a list of owners and residents be provided to the DNR up to 5 years prior to mining beneath the property or residence is unnecessary in view of the above requirement, and can serve no realistic purpose.

There is no authority within the Act or existing regulations to provide this information as part of an application.

VIII.

Change to read as follows:

Proposals to mine under or ~~adjacent~~ within the angle of draw relative to features or facilities indicated in section 7C.02(d) (i.e., churches, schools, public buildings, etc.) must be made in writing.

JUSTIFICATION:

"Adjacent areas" are defined in Section 20-6-3(e) of the West Virginia Act as:

"those land and water resources, contiguous to or near a permit area, upon which surface mining and reclamation operations conducted within a permit area during the life of such operations may have an impact."
(emphasis added).

The use of the word "adjacent," in terms of subsidence, creates confusion because of the above definition, and the historical use of the term "adjacent" relative to "permit areas". It is important that subsidence planning include the areas within the "angle of draw," which is a definable area and is generally acceptable as a planning tool. Angle of draw should be used relative to Subsidence Control Plans instead of "adjacent to". This will provide necessary clarity to the provision.

Hand Delivered 2:48 pm

RECEIVED
DEPT. OF NATURAL RESOURCES

FEB 19 1985

OFFICE OF DIRECTOR

JACKSON, KELLY, HOLT & O'FARRELL
ATTORNEYS AT LAW
P. O. BOX 553
CHARLESTON, WEST VIRGINIA 25322
1500 ONE VALLEY SQUARE
TELEPHONE (304) 347-7500 TELECOPIER G1 (304) 346-8148
TELECOPIER G11-111 (304) 347-7566
WRITER'S DIRECT DIAL NO. (304) 347-7 531

618 MONONGAHELA BUILDING
P. O. BOX 618
MORGANTOWN, WEST VIRGINIA 26507
TELEPHONE (304) 292-7311
TELECOPIER (304) 292-7318

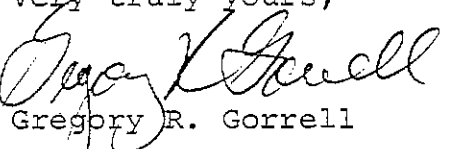
February 19, 1985

Director
Department of Natural Resources
1800 Washington Street, East
Charleston, West Virginia 25305

Re: Proposed subsidence regulations

Dear Director Potesta:

Enclosed are the comments of the West Virginia
Coal Association on the above-captioned proposed regula-
tions.

Very truly yours,

Gregory R. Gorrell

GRG/mbd
enclosure

WEST VIRGINIA COAL ASSOCIATION
COMMENTS TO DNR INTERPRETIVE SUBSIDENCE
CONTROL PLAN REGULATIONS

GENERAL COMMENTS

The proposed interpretive regulations for underground mining subsidence control plans continue DNR's failure to recognize the express statutory exception for operators employing mining technologies that require planned subsidence in a predictable and controlled manner. Section 14(b)(1) of the West Virginia Surface Coal Mining and Reclamation Act ("Surface Mining Act") requires operators to "adopt measures consistent with known technology in order to prevent subsidiaries causing material damage to the extent technologically and economically feasible except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner." OSM has implemented federal statutory language almost identical to Section 14 of the Surface Mining Act and provided the operator with a clear choice between two performance standards. Section 817.121(a) of the federal regulations provides that:

The operator shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible . . . ; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method or room-and-pillar mining.

DNR's current and proposed regulations fail to adequately provide for full-extraction mining by requiring that an operator utilizing planned and controlled subsidence also demonstrate what methods will be used to prevent subsidence causing material damage.

It is not the West Virginia Coal Association's position that full-extraction mining is exempt from all environmental protection standards of the Surface Mining Act. There are several other environmental requirements applicable to full-extraction mining which are not subject to the exception that ensure achievement of the objectives of the Surface Mining Act. For example, the submission of a subsidence control plan demonstrating that planned and controlled subsidence will be utilized in specified areas accompanied by a description of measures that will be taken to remedy any material damage that may occur adequately addresses many environmental concerns.

Furthermore, special protection is given to public buildings and facilities, churches, schools, hospitals, or large impoundments that ensures that mining will not cause material damage or reduce the foreseeable use of these areas. Finally, the Director has the authority to suspend mining under urbanized areas, major impoundments or permanent streams if he finds imminent danger to the public.

The proposed regulations will require substantial revisions in the mining plans of many operations and undoubtedly have the effect of shutting down many operations currently utilizing planned subsidence. Much of the coal projected to be mined by full-extraction methods may never be recovered since the full-extraction method is the only economical way of removing coal in certain areas. Coal that is mined in West Virginia according to DNR's overly burdensome proposed regulations will be saddled with a distinct economical disadvantage. These results would be ironic in light of the fact that the drafters of the Federal Surface Mining Act actually preferred full-extraction mining. The drafters correctly believed that subsidence occurring in a planned and predictable manner was preferable since the adverse effects could be corrected immediately by the operator, whereas subsidence from other methods is often more difficult to predict and must be prevented.

To avoid this potential devastation of the mining industry in West Virginia, the proposed regulations must be revised to recognize the statutory exception for mining methods that rely upon planned and controlled subsidence.

SPECIFIC COMMENTS

I.

- 1.A. (Option 1) Relocate "intermittent or perennial streams" to a new paragraph "E".

(Option 2) Following the words "intermittent or perennial streams" add the phrase "which contribute significantly to the long range productivity of a water supply."

Rationale: Intermittent or perennial streams are not included in the definition of "Renewable Resource Lands" located at Section 2.91 of the Regulations. If DNR intends to bring intermittent or perennial streams within the definition of renewable resource lands by broadly interpreting "geographical areas" then the modifying phrase "which contribute significantly to the long range

productivity of a water supply" must also be included.

Delete "etc".

Rationale: This word is unnecessary and repetitive since the phrase "which include but may not be limited to" already indicates that the list is not intended to be all-inclusive.

- B. Add "as set out in Section 7C.02(d) of the Regulations" following the words "protected structures" in the first sentence.

Rationale: As currently written the regulation is unclear on what is meant by "protected structure".

Add "public" before "road" in the second sentence.

Rationale: The word "road" is unreasonably and unnecessarily over-broad.

Delete "etc" from the second sentence and add the phrase "and other structures typically shown on USGS topographical maps".

Rationale: The word "etc" is unnecessary for the same reason as expressed in the comment to I.1.A. The phrase concerning USGS topographical maps is added because these maps are typically used for preparing permit applications and generally contain all of the necessary information.

- C. Assuming that a "significant aquifer" is an aquifer "which contributes significantly to the long range productivity of a water supply" then paragraph "C" is acceptable.

Rationale: Section 7C.03(a)(1) only requires that the survey identify structures and renewable resource lands. In order to have aquifer fall within the definition of "Renewable Resource Lands" then the modifying phrase "which contributes significantly to the long range productivity of a water supply" must be added.

- D. Add "This information can be included by reference in the PHC portion of the application".

Rationale: This information is already included in the PHC portion of the application pursuant to

Section 7A.02(2)(1). It is unnecessary to repeat this information in the subsidence control plan portion of the application.

II.

3. Add "Except for those areas where planned subsidence is projected as listed in paragraph II.1.," to the beginning of the first sentence.

Rationale: This is consistent with the statutory requirement that operators adopt measures that will prevent subsidence causing material damage to the extent technologically and economically feasible or adopt mining methods that utilize planned and controlled subsidence. This is precisely the manner in which the federal regulations have implemented the statutory requirements. See 30 CFR §§784.20(b), 784.20(d).

III.

2. Delete "an isopach map on contour" and add in its place "a map showing surface contours and bottom of coal contours in"

Rationale: An isopach is generally used to depict coal thickness variations. It is extremely difficult and cumbersome to use an isopach to depict overburden thickness variations in anything but flat terrain. The information that DNR needs to determine the thickness of the overburden can be more appropriately derived from a map that shows coal contours with a surface contour overlay.

IV.

2. This paragraph must be changed to provide for more flexibility.

Rationale: This information can be submitted before mining begins, but only in a very general fashion and with provisions for future changes if necessary. For example the operator could propose that a certain percentage extraction would be employed beneath structures; however, the exact location of the pillar or the exact design of the pillar could not be specified until the operation reached that area of the mine. The detailed plan for an underground mine necessarily progresses on the basis of the best information at any point as the mining proceeds. A wide

range of unknown conditions may be encountered underground such as roof and floor rock conditions and potential safety hazards which necessarily require that the operation have a high degree of flexibility in development of the detailed mining plan. Therefore the Industry recommends that DNR adopt an approach similar to OSM's which recognizes the need for flexibility and requires the operator to periodically update the general information contained in the subsidence central plan. See 30 CFR §817.121(g) which provides:

Within a schedule approved by the regulatory authority, the operator shall submit a detailed plan of the underground workings. The detailed plan shall include maps and descriptions, as appropriate, or significant features of the underground mine, including the size configuration, and approximate location of pillars and entries, extraction ratios, measures taken to prevent or minimize subsidence and related damage, areas of full extraction, and other information required by the Regulatory Authority. Upon request of the operator, information submitted with the detailed plan may be held as confidential, in accordance with the requirements of §773.13(d) of this chapter.

3. The above comment for paragraph "2" is even more pertinent to the information required in paragraph "3". Although the operator can predict the anticipated extraction for secondary mining, detailed information is not always obtainable until "first" mining is completed. Conditions discovered during "first" mining may allow the operator to safely extract more coal with secondary mining than was originally predicted. Hence, there should be a requirement for a general description of secondary extraction ratios and other plans for preventing subsidence causing material damage with a provision allowing for a periodic update.

V.

1. The whole paragraph should be deleted and replaced with the following paragraph:

Under all structures and renewable resource lands within the angle of draw the operator must either: (1) describe what methods will be used to prevent subsidence causing material damage or reducing the value or reasonable foreseeable use of such lands to the extent technologically and economically feasible; or (2) demonstrate that mining technology which provides for planned subsidence in a predictable and controlled manner will be utilized.

Rationale: The word adjacent is imprecise and has been replaced with the phrase "within the angle to draw" which is the area that is potentially vulnerable to subsidence. Furthermore the paragraph has been changed to clearly implement the statutory exception for operators utilizing planned subsidence that is controlled and predicted. As written, paragraph V.1. is contrary to Section 14 of the Surface Mining Act and therefore lacks statutory authority.

VI.

Delete subparagraphs 1, 2 and 3 and replace with the following subparagraphs:

1. A description of the measures to be taken in order to repair subsidence damage to structures as specified in Sections 7C.02(b)(1)-(3).
2. Any other measures taken to mitigate or remedy any material damage or diminution in value or foreseeable use that may occur due to expected subsidence.
3. An acknowledgment that if subsidence causes material damage or reduces the value or reasonably foreseeable use of the surface lands then the operator shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence regardless of the right to subside.
4. When an applicant feels it has the right to subside, a copy of relevant portions of the actual document providing the right to subside must be included. When the applicant has the right to subside, subparagraphs 1 and 2 of this section need not be addressed.

Rationale: This proposed revision of paragraph VI is necessary to more clearly reflect the

differences in restoration requirements for land and structures as set out in Section 7C.02(b). Section 7C.02(b) requires restoration of land only when subsidence causes material damage or when subsidence reduces the value or reasonably foreseeable use of the surface land. Furthermore the operator is only required to restore the land to a condition capable of supporting uses it was capable of supporting before subsidence. Although DNR's proposed paragraph VI incorporates Section 7C.02(b) by reference, Industry believes that some of the important phrases contained in Section 7C.02(b) must be included in paragraph VI. Since Section 7C.02(b) was already incorporated in DNR's paragraph VI, the Industry's proposed revision does not constitute a substantive change.

VII.

This paragraph should be deleted.

Rationale: The concerns addressed by this requirement are adequately covered by the 6-month notice requirement of Section 7C.01. Therefore this paragraph is unnecessarily repetitive and without authority.

*Hand Delivered 2:48 pm***Island Creek Coal Company**

NORTHERN DIVISION

Drawer 75

CRAIGSVILLE, WEST VIRGINIA 26205-0075

Phone 304-742-5501

RECEIVED
DEPT OF NATURAL RESOURCES

FEB 19 1985

OFFICE OF DIRECTOR

February 15, 1985

Mr. Ronald Potesta, Director
West Virginia Department of Natural Resources
1800 Washington Street East
Charleston, WV 25305

Re: Comments on Proposed Interpretive Rule for Underground Mining
Subsidence Control Plans

Dear Director Potesta:

We have reviewed the proposed rule relative to subsidence control plans for underground mining which was the subject of a public hearing on February 11, 1985. We appreciate the opportunity to submit our comments on this subject.

The West Virginia Coal Association, of which our company is a member, has prepared and submitted comments on this rule, both in writing and at the hearing. We fully support and endorse the comments presented by the association. We share the concern that the proposed rule does not recognize the statutory exception for operations which will result in planned subsidence in a predictable and controlled manner. Additionally, we would like the following specific comments to be considered.

We would point out that longwall mining is not the only type of operation which results in planned, predictable, and controlled subsidence. Room and pillar mining with secondary pillar removal is another mining technique which should be recognized as subject to the same statutory exception. Further, we would point out that the federal and state statutes both specifically provide that the standard method of room and pillar mining is not to be prohibited. We are concerned that the proposed rule would inevitably result in just such prohibition as Congress made clear was not to happen.

The proposed rule, in section VI.1, requires that all mines submit "a description of the measures to be taken in order to repair subsidence damage as specified in 7C.02(b)". Further, in section VI.3, it is stated that "the applicant must acknowledge surface lands shall be repaired in accordance with 7C.02(b) regardless of the right to subside". As the Coal Association points out, the existing regulation fails to track the language and intent of the statute, and section VI of the proposed rule goes even further by failing to correctly interpret or apply the apparent intent of the current regulation.

WV Dept. of Natural Resources
February 15, 1985
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Section 70.02(b) of the West Virginia Surface Mining Regulations states, in part:

"Each person who conducts underground mining which results in subsidence that causes material damage or reduces the value or reasonably foreseeable use of the surface lands shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence."

This regulation requires restoration of the land surface subsequent to subsidence in three cases, which are:

- (1) if material damage is caused by subsidence;
- (2) if subsidence reduces the value of the surface lands; or
- (3) if subsidence reduces the reasonably foreseeable use potential of the surface lands

The term "material damage" is not defined by West Virginia law or regulation. However, a dictionary definition and accepted usage of the word "material" in this context is "having real importance or great consequences". In consideration of the remote and undeveloped nature of lands at the location of many mines in the state, and the very limited uses made of the surface, it is clear that the minimal surface effects which could occur due to subsidence from operations so located have no real importance, and the consequences are insignificant.

It seems to be the intent of section VI to require restoration of surface lands regardless of the extent and the real importance or significance of the subsidence impacts (i.e. whether the damage is material or not), and regardless even of private property ownership and contractual rights. If this is the case, we strenuously object. Such a position is illogical, unreasonable, and totally unsupported by the language or intent of the statutes.

The requirement to restore all surface lands will undoubtedly result in closure of many operations and in de facto prohibition of mining of extensive and otherwise recoverable reserves. The fact that the importance of subsidence is relative to the nature of overlying lands, resources, and structures cannot be ignored. Subsidence which occurs in remote and undeveloped areas characteristic of so much of the lands overlying underground mines in this state cannot logically be treated in the same fashion as that which occurs under population centers or intensively utilized surface lands.

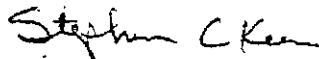
The value of remote and undeveloped surface lands will not be reduced by underground mining operations, nor will any existing or reasonably foreseeable uses of the land be reduced or negatively affected. The lands are most often unmanaged woodlands, and this is likely to remain the highest and best use. Minor surface effects due to subsidence will not negatively affect this use potential or value. A proper interpretation and application of the regulations, as outlined above, does not require restoration of the land surface overlying all mining operations with respect to subsidence effects.

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Finally, we would emphasize our agreement with the WVCA comment to the effect that it is totally inappropriate to allow this issue to cause a re-opening of public comment and appeal provisions for existing operations.

Again, we thank you for this opportunity to comment. We trust that these rules will be finalized and implemented only after careful and thorough consideration, and after the defects in language and intent have been corrected.

Sincerely yours,



Stephen C. Keen, PE
Manager of Engineering

SCK/bp



WEST VIRGINIA MOUNTAIN STREAM MONITORS
POST OFFICE BOX 170
MORGANTOWN, WEST VIRGINIA 26505

February 18, 1985

Mr. William Chambers
West Virginia Department of Natural Resources
1800 Washington Street, East--Room 322
Charleston, West Virginia 25305

Dear Mr. Chambers,

Enclosed please find the comments of WV Mountain Stream Monitors on the proposed interpretive regulation rule for Underground Mining Subsidence Control Plans. MSM is pleased that the DNR has taken this step and we make these comments in the spirit of supporting strong and effective regulation which protects the public and complies with the law.

We would like to be kept informed of any developments as they occur in the process of adopting this rule.

Sincerely,

A handwritten signature in cursive script that reads "Richard S. diPreto".

Richard S. diPreto, LLS
President and Secretary of the Board

COMMENTS
on
PROPOSED INTERPRETIVE REGULATION RULE for
UNDERGROUND MINING SUBSIDENCE CONTROL PLANS

Submitted by West Virginia Mountain Stream Monitors
February 18, 1985

These comments will follow the structure of the proposed interpretive rule without reproducing its parts here.

I. ALL UNDERGROUND MINES

1. Survey - An enlarged photocopy of a USGS topographic quadrangle will automatically omit any structures built after its latest photorevision. It is important that occupied dwellings be located on the mine maps by actual field surveys, with horizontal bearings and distances and vertical distances from dependable and publicly accessible control points included on the map. This is necessary for citizens to be able to protect their interests.

It might be desirable to specify a time period which these projections are supposed to cover.

- A. We are very pleased to see intermittent streams listed as renewable resource lands.
- C. The word "significant" needs definition. We feel that any geologic unit which meets the definition of an aquifer (capable of transmitting water in usable quantities to wells and springs) is significant.

II. LONGWALL MINING OR ROOM AND PILLAR WITH 80% RECOVERY OR GREATER

1. We feel that whatever angle of draw is proposed, supporting data should be included. This data should be in the form of actual field measurements tied in to dependable and publicly accessible control points. It is necessary for the data to be independently verifiable in order for citizens to be in a position to protect their interests.

It is worth noting that neither longwall mining or room and pillar with pillar extraction is a total extraction method and neither produces 80% or greater recovery ratios over the entire mine area. Any type of mining, including room and pillar without second mining, can be shown to be a high percentage extraction method if the area of calculation is selected to show that result. It is precisely the coal that is left that causes many of the problems in these "total extraction" methods.

III. ALL UNDERGROUND MINES

4. All diamond drill core logs and other site-specific lithologic data should be included in the plan. Once again, this is to enable citizens to independently verify conclusions stated in the plan by examining the original data. No third party can evaluate conclusions which have a bearing on his interests without examining the original data.

VI. ALL UNDERGROUND MINES

- 1., 2. When applicant does not have the "right to subside", it is wilfully negligent to plan to do so.

VII. ALL UNDERGROUND MINES

If the list of property owners and residents is not included on the survey or mine development map, it should be clearly keyed in to symbols on the map which allow identification of each such owner or resident. Surface property boundaries should be shown on the map.

February 14, 1985

Mr. William E. Chambers
Assistant Chief
Division of Reclamation
Department of Natural Resources
State Capitol
Charleston, West Virginia 25305

Re: Comments on proposed interpretive rule:
underground mining subsidence control
plan

Dear Mr. Chambers:

In response to the public notice of hearing and to amplify my oral comments made at the hearing on February 11, 1985, I wish to submit the following points for your review:

1. Section I(1) of the proposed regulation, as well as sections II(1), IV(2) and VIII all propose to use 15° as the minimum assumed angle of draw. As shown in exhibit 1 to these comments, the angle of draw in eastern coalfields varies from 15 to 35 degrees with an average angle of 25 degrees. Since in some instances the angle can reach 26 degrees or more for longwall mining and 33 degrees for room and pillar method, the act's requirement that regulations be "directed toward the surface effects of underground coal mining operation", § 20-6-14(a) requires the striking of the 15° angle of draw and its replacement by at least the 25° average angle of draw. It's impossible to regulate surface effects if the minimum angle accepted without contrary supporting information is 10° less than the average angle reported in the technical literature.

2. The reason for the existence of this regulation is the Brookover case, where the circuit court required submittal of a subsidence control plan by an operator who received his permanent program permit before the March 1983 regulations became effective. Many of these operators, who will be required to submit subsidence control plans under this interpretive regulation, have not previously submitted probably hydrologic consequences statements or cumulative impact assessments as required by § 20-6-10(a)(11). If simply signing a letter promising to obey the March 1983 regulation wasn't adequate for purposes of the subsidence control plan, it's similarly inadequate for these other two items. DNR should follow this interpretive rule with another requiring submittal of those items by previously permitted operators.

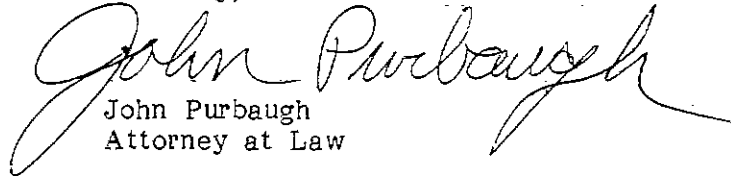
3. The argument raised by Mr. Gorrell on behalf of the West Virginia Coal Association in the Brookover case was that longwall mining is exempted from the subsidence control provisions of the act and regulations. At the hearing, his emphasis

seemed to shift to a claim that the legislative history "favored longwall mining" and that therefore this proposed regulation should do likewise.

One answer to these arguments is that § 20-6-14(b)(1) nowhere utters the words "longwall mining". To take advantage of the limited exception to the requirement of adopting preventative measures, the statute requires the operator to make a showing that longwall mining is in fact at this site, going to have predictable and controlled subsidence. The information requested in the proposed rule is necessary to make such a determination.

Thank you for the opportunity to submit these comments.

Sincerely,



John Purbaugh
Attorney at Law

JP:erh

cc: John McFerrin, Esquire

PS - My mailing address
is : 024.1, Box 106A
Kenning, WV 25248

"The caving angle...varies from 15 to 35 degrees with an average angle of 25 degrees." Syd S. Peng and S.L. Cheng
 Evaluation of Surface Subsidence Potential Due to Underground Coal Mining at Upper Shavers Fork, Monongahela National Forest, Randolph/Pocahontas County, WV, p.5

Table 1 For Eastern coalfield, the angle of draw is

Longwall	21-26°
Room and Pillar	26-33°

Peng's references:

Longwall: Kohli, K.K. and Peng, S.S., Surface Subsidence Due to Underground Longwall Mining in the Northern Appalachian Coalfield. 1980 AIME Annual Meeting, Las Vegas, NV, Preprint No. 80-53.

Room and Pillar: Kohli, K.K. and Peng, S.S., 1980, Subsidence Experiences in the Room and Pillar Mines of the Northern Appalachian Coalfield. Polish-American Conf. on Ground Control in Room and Pillar Mining, SIU, Carbondale, Ill.



RT. 2 BOX 72, SUTTON, WV 26601

PHONE (304) 765-7338

February 13, 1985

Dr. Willis Hertig, Director
Department of Natural Resources
Room 322
1800 Washington Street
Charleston, WV 25305

RE: Proposed interpretative regulation rule for Underground Mining
Subsidence Control Plans

Dear Director Hertig:

In regard to the above referenced rule, we wish to make the following comments for inclusion into the public hearing record. We support the position as stated by the West Virginia Coal Association, generally and offer the following comments specifically:

1) J-2A-1(B)- additional clarification should be provided for the definition of roads, water distribution lines, and utility buildings. In our opinion, roads should be limited to public roads and not include individual rights-of-way. Water distribution lines should be limited to public water system lines. Utility buildings should be defined by a minimum size so as to exclude small miscellaneous structures such as wood sheds, small outbuildings, outhouses, etc. Impoundments should be limited in size so as to exclude the small farm ponds.

2) J-2A-1 (D)- Water supplies should be limited to domestic supplies in service.

We appreciate the opportunity to comment on these proposed regulations. Thank you for your consideration.

Very truly yours,

D.K. Blankenship
President

LAW OFFICES
ROBINSON & McELWEE

P. O. BOX 1791

CHARLESTON, WEST VIRGINIA 25326

TELEPHONE (304) 344-5300
600 KBST CENTER

E. GLENN ROBINSON
CHARLES McELWEE
JOHN C. PALMER III
DAVID M. FLANNERY
JOSEPH S. BEESON
DAVID K. HIGGINS
M. ANN BRADLEY
ROBERT D. FLUHARTY
JOSEPH M. PRICE
KIM BROWN POLAND
MICHAEL B. VICTORSON
DAVID L. KYGER

TIMOTHY M. MILLER
WILLIAM C. FORTH, JR.
LYNN A. SMITH
BETHANY P. BOYD
HAROLD M. SKLAR
DOUGLAS C. McELWEE
WILLIAM E. ROBINSON
JAN L. FOX
REBECCA L. STEPTO
BRENT D. BENJAMIN
DAVID L. YAUSSY

February 18, 1985

State of West Virginia
Department of Natural Resources
Division of Reclamation
1800 Washington Street, East
Room 322
Charleston, West Virginia 25305

Re: Comments on Interpretative Regulations-
Underground Mining Subsidence Control Plan

Gentlemen:

19 FEB 25 10:22

Enclosed herewith for filing as part of the record are comments in response to the interpretative regulation filed with the Secretary of State on January 9, 1985, entitled "Underground Mining Subsidence Control Plan." RECD - 702H

Please note that these comments, filed on behalf of Old Ben Coal Company, are intended to replace comments mailed to your office by Old Ben Coal Company dated February 15, 1985. The comments sent on February 15 inadvertently did not include a paragraph which appears in the attached document. Accordingly, please discard the previous comment in lieu of the enclosed.

Sincerely,



Timothy M. Miller

TMM:nb

Enclosure

OLD BEN COAL COMPANY
333 West Vine Street
Lexington, Kentucky 40507
(606) 253-3300

February 18, 1985

State of West Virginia
Department of Natural Resources
Division of Reclamation
1800 Washington Street, East
Charleston, West Virginia 25305

Re: Comments on Proposed
Subsidence Control Regulations

Gentlemen:

Old Ben Coal Company, who operates an underground coal mine in Mingo County, West Virginia, submits these comments on the proposed interpretive regulation titled "Underground Mining Subsidence Control Plan".

The introduction to the proposed regulation, "General Section", states that the existing regulations are vague.

Old Ben agrees that the existing regulations need clarification; not only those dealing with the Subsidence Control Plan, 7C.03, but also the other regulations in Part 7C. The existing regulations fail to expressly recognize the statutory exception for planned subsidence, and the interpretive regulation compounds the problem by further ignoring that express statutory exception. We will address these items below.

The existing Regulation 7C.02(a) does not conform to §20-6-14(b)(1) of the West Virginia Code because it does not expressly provide the exception for planned subsidence from the requirements to adopt subsidence prevention measures. §20-6-14(b)(1) states that an operator shall:

Adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability and maintain the value and reasonably foreseeable use of overlying surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, that this subsection does not prohibit the standard method of room and pillar mining; (emphasis added)

Section 20-6-14 was passed as part of the package of legislation for West Virginia to obtain approval of its surface mine regulatory program pursuant to the Federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). The language of §20-6-14 is virtually identical to its federal counterpart, §516(b)(1) of SMCRA.

The intent of §516(b)(1) and §20-6-14(b)(1) was to minimize subsidence effects to the extent technologically and economically feasible. One characteristic of subsidence which disrupts land uses is its unpredictable occurrence in terms of time and location. The only effective method to prevent subsidence is to leave sufficient mineral in place for permanent support. However, some mining methods provide for total extraction and planned subsidence, i.e. longwall mining. Congress recognized there were mining methods which resulted in subsidence occurring at a predictable time in a relatively uniform and predictable manner. Thus Congress expressly exempted mining methods using planned subsidence from the general obligation of subsidence prevention measures.

It was never the intent of Congress in enacting SMCRA to legislate against total extraction mining methods. Congressman Morris Udall, a prime sponsor of SMCRA, made the following statement concerning the prevention of subsidence:

The House Bill contemplates rules to prevent subsidence to the extent technologically and economically feasible". The word prevent led to fears expressed. . . that the effect would be to outlaw longwall mining with its obvious subsidence . . . In fact, the bill's sponsors consider longwall mining ecologically preferable, and it and other methods of controlled subsidence are explicitly endorsed." See 123 Congressional Record H22731.

Although West Virginia state law expressly excepts planned subsidence, the existing regulations do not. The regulations appear to require a subsidence control plan to contain measures to prevent subsidence to the extent technologically and economically feasible even in areas where planned subsidence will occur. The existing regulations and the proposed interpretive regulation should be clarified to expressly state the statutory exception contained in both the federal law and the state law. An example of how this could be done can be seen in 30 CFR §§784.20(d) and 817.121(a) wherein the federal regulations clearly provide the operator the option to adopt measures to prevent subsidence or to adopt a mining method which provides for planned subsidence.

The proposed interpretive regulation continues the problem by ignoring the statutory exception. §II(3) and §V(1) request the operator to identify the areas where measures will be

taken to prevent subsidence and to state what those measures will be. Such a requirement is meaningless where subsidence is planned. It is in direct conflict with the titles of §§II and V which address full extraction. The interpretive regulation adds to the confusion on the requirements of 7C.03 rather than clarifying it. The proposal should be changed to allow for an option as provided for in 30 CFR §§784.20(d) and 817.121(a).

Moreover, we submit that DNR lacks statutory authority under West Virginia law to finally adopt interpretative regulation §V.1, as proposed, to the extent that section would apply to mining operations causing planned subsidence. Section 20-6-14(b)(1) of the West Virginia Code excepts mining operations causing planned subsidence from the subsidence prevention requirements therein. Proposed interpretative regulation §V.1. appears to require all mining operations, including those causing planned subsidence, to describe in a Subsidence Control Plan measures for preventing subsidence damage. As it is clear that DNR lacks authority under §20-6-14(b)(1) to require operations causing planned subsidence to prevent subsidence damage, DNR similarly lacks authority under §20-6-14(b)(1) to require those operations to explain how they will prevent subsidence damage in a Subsidence Control Plan.

Finally, Old Ben Coal Company questions the need for an interpretive regulation intended to clarify an existing regulation where that interpretive regulation on its face cannot accomplish the purpose stated. It appears that the only purpose the interpretive regulation accomplishes is, in fact, a restatement of the existing regulations in Section 7C. If the Department wants to clarify the requirements of a regulation, that can be accomplished by a policy statement or in this case by changing §J-2 of the DR14. The DR14 could be used to state what information will suffice for compliance. This interpretation could be easily accomplished by changing the form. Presently, §J-2 of the DR14 restates the regulation verbatim. It gives very little assistance or interpretive guidance and, of course, as discussed herein, does not reflect the exception provided in both the federal and state law for mining techniques requiring planned subsidence.

We appreciate the opportunity to submit comments.

Respectfully submitted,

OLD BEN COAL COMPANY

E. W. Cunningham, Manager
Environmental Affairs

OLD BEN COAL COMPANY

333 West Vine Street • Lexington, Kentucky 40507 • (606)253-3300 • Telex: 910-997-0495



February 15, 1985

State of West Virginia
Department of Natural Resources
Division of Reclamation
1800 Washington Street, East
Charleston, WV 25305

Re: Comments on Proposed Subsidence
Control Regulations

Gentlemen:

Old Ben Coal Company, who operates an underground coal mine in Mingo County, West Virginia, submits these comments on the proposed interpretive regulation titled "Underground Mining Subsidence Control Plan".

The introduction to the proposed regulation, "General Section", states that the existing regulations are vague.

Old Ben agrees that the existing regulations need clarification; not only those dealing with the Subsidence Control Plan, 7C.03, but also the other regulations in Part 7C. The existing regulations fail to expressly recognize the statutory exception for planned subsidence, and the interpretive regulation compounds the problem by further ignoring that express statutory exception. We will address these items below.

The existing Regulation 7C.02(a) does not conform to §20-6-14(b)(1) of the West Virginia Code because it does not expressly provide the exception for planned subsidence from the requirements to adopt subsidence prevention measures. §20-6-14(b)(1) states that an operator shall:

Adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability and maintain the value and reasonably foreseeable use of overlying surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, that this subsection does not prohibit the standard method of room and pillar mining; (emphasis added)

Section 20-6-14 was passed as part of the package of legislation for West Virginia to obtain approval of its surface mine regulatory program pursuant to the Federal Surface Mining Control and Reclamation Act of 1977("SMCRA"). The language of §20-6-14 is virtually identical to its federal counterpart, §516(b)(1) of SMCRA.

The intent of §516(b)(1) and §20-6-14(b)(1) was to minimize subsidence effects to the extent technologically and economically feasible. One characteristic of subsidence which disrupts land uses is its unpredictable occurrence in terms of time and location. The only effective method to prevent subsidence is to leave sufficient mineral in place for permanent support. However, some mining methods provide for total extraction and planned subsidence, i.e. longwall mining. Congress recognized there were mining methods which resulted in subsidence occurring at a predictable time in a relatively uniform and predictable manner. Thus Congress expressly exempted mining methods using planned subsidence from the general obligation of subsidence prevention measures.

It was never the intent of Congress in enacting SMCRA to legislate against total extraction mining methods. Congressman Morris Udall, a prime sponsor of SMCRA, made the following statement concerning the prevention of subsidence:

The House Bill contemplates rules to prevent subsidence to the extent technologically and economically feasible". The word prevent led to fears expressed ... that the effect would be to outlaw longwall mining with its obvious subsidence... In fact, the bill's sponsors consider longwall mining ecologically preferable, and it and other methods of controlled subsidence are explicitly endorsed." See 123 Congressional Record H22731.

Although West Virginia state law expressly excepts planned subsidence, the existing regulations do not. The regulations appear to require a subsidence control plan to contain measures to prevent subsidence to the extent technologically and economically feasible even in areas where planned subsidence will occur. The existing regulations and the proposed interpretive regulation should be clarified to expressly state the statutory exception contained in both the federal law and the state law. An example of how this could be done can be seen in 30 CFR §§784.20(d) and 817.121(a) wherein the federal regulations clearly provide the operator the option to adopt measures to prevent subsidence or to adopt a mining method which provides for planned subsidence.

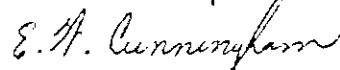
The proposed interpretive regulation continues the problem by ignoring the statutory exception. §II(3) and §V(1) request the operator to identify the areas where measures will be taken to prevent subsidence and to state what those measures will be. Such a requirement is meaningless where subsidence is planned. It is in direct conflict with the titles of §§II and V which address full extraction. The interpretive regulation adds to the confusion on the requirements of 7C.03 rather than clarifying it. The proposal should be changed to allow for an option as provided for in 30CFR §§784.20(d) and 817.121(a).

Finally, Old Ben questions the need for an interpretive regulation intended to clarify an existing regulation where that interpretive regulation on its face, cannot accomplish the purpose stated. It appears that the only purpose the interpretive regulation accomplishes is, in fact, a re-statement of the existing regulations in Section 7C. If the Department wants to clarify the requirements of a regulation, that can be accomplished by a policy statement or in this case by changing Section J-2 of the DR-14. The DR-14 could be used to state what information will suffice for compliance. This interpretation could be easily accomplished by changing the form. Presently Section J-2 of the DR-14 restates the regulations verbatim. It gives very little assistance or interpretive guidance and, of course, as discussed herein does not reflect the exception provided in both the federal and state law for mining techniques requiring planned subsidence.

We appreciate the opportunity to submit comments.

Respectfully submitted,

OLD BEN COAL COMPANY



E. W. Cunningham
Manager of Environmental Affairs

Joseph M. Richards
Executive Vice President - Operations

Consolidation Coal Company
Consol Plaza
Pittsburgh, Pennsylvania 15241
(412) 831-4375

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

February 14, 1985

West Virginia Department of
Natural Resources
1800 Washington Street, East
Room 322
Charleston, West Virginia 25305

Gentlemen:

Consolidation Coal Company (Consol) respectfully submits the following comments on the proposed interpretive rules for underground mining subsidence control plans as identified in a recent notice released by the West Virginia Department of Natural Resources. We ask that these comments be considered and made part of the official record.

Consol is West Virginia's largest coal producer. In 1984 Consol produced over 28 million tons of coal in the state, almost all of it by underground mining methods. Consol is the state's largest user of longwall mining systems. We currently have 18 longwall units in-place in West Virginia. As a company, Consol is firmly committed to longwall mining. It is the safest and most productive method of deep mining coal, and like other full recovery mining methods, it leaves the surface in a permanently stable condition on completion of mining.

Consol comments are divided into three parts. The first part addresses the failure of these proposed rules to recognize the exemption for full extraction mining as contained in 20-6-14 (b) (1) of the West Virginia Surface Coal Mining and Reclamation Act (Act). The second part reviews our specific concerns with the procedures and requirements addressed in these proposed rules. The third part contains suggestions regarding the submission of subsidence control plans pursuant to these proposed rules.

PART ONE - FULL EXTRACTION EXEMPTION

Sections J-2C (II.3) and J-2E (V.1) require operators to show how they will prevent subsidence causing material damage to or reducing the value of structures and renewable resource lands in full extraction areas. This includes areas where they would be using longwall mining systems or utilizing room and pillar mining with 80% or greater recovery. The prevention of

subsidence in these cases is completely contrary to the Act. Section 20-6-14(b) (1) of the Act specifically excludes areas of planned subsidence from these requirements. The Act states:

"Adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability and maintain the value and reasonable foreseeable use of overlying surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: provided, that this subsection does not prohibit the standard method of room and pillar mining;" (emphasis added)

Consol does not construe the statutory language as exclusionary from all subsidence related requirements. Indeed, operators utilizing planned subsidence would still have to meet applicable requirements pertaining to mapping and supplying environmental information. The real question is whether the proposed rules have any statutory basis to require the operator to prevent subsidence. We believe they do not. Even absent any statutory basis, DNR's thinking seems to be seriously flawed when these proposed rules are compared to DNR's existing permanent program rules (7C.03(a) (3)) and the revised federal permanent program rules promulgated by the Office of Surface Mining on June 1, 1983. OSM's rule states:

"§784.20 Subsidence control plan ... the application shall include a subsidence control plan which shall contain the following information:

(d) Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence..." (emphasis added)

OSM explains the meaning of this rule in the preamble support on page 24641 (FR 6/1/83 Vol.48, No.106):

"Paragraph (d) of the final rule requires, except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence or subsidence-related damage, ..." (emphasis added)

It further states:

"... The final rule recognizes two types of mining: Mining operations that propose to use planned subsidence, and those operations that propose to use mining techniques to prevent or minimize subsidence and subsidence-related damage. For

those operations that plan to comply with the performance standards by preventing or minimizing subsidence, it is important for the regulatory authority to understand what measures will be used to accomplish that goal." (emphasis added)

Section 817.121(a) of the same federal rules carries this idea further:

"§817.121 Subsidence control.

(a) The operator shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of surface lands; or adopt mining technology which provides for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of room-and-pillar mining." (emphasis added)

The preamble on page 24643 details the intent of this language:

"Paragraph (a) implements Section 516(b) (1) of the Act. It requires the underground mine operator to adopt measures consistent with known technology to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonably foreseeable use of surface lands. As an alternative, the operator may adopt a mining technology which causes planned subsidence to occur in a predictable and controlled manner." (emphasis added)

West Virginia rule 7C.03(a) (3) seems to closely track this federal concept by stating:

"(a) Each application shall include a subsidence control plan which includes the following:

(3) The location and extent of areas in which planned subsidence is projected, including anticipated effects; and those areas in which measures will be taken to prevent or minimize subsidence and related damage,"

It seems quite obvious that this state rule, which was supposed to mirror Section 784.20 of the federal rules wants two distinct areas identified in the subsidence control plan. The first are those areas where planned subsidence is projected and the second are the non-planned subsidence areas where measures will be taken to prevent or minimize subsidence.

The current proposed rules totally lose sight of these objectives by requiring in J-2E(V.1) that a longwall mining operator

"... demonstrate what methods will be used to prevent subsidence..."

We wonder how we can be asked to prevent subsidence when utilizing a technique that results in planned subsidence.

Viewing the importance of longwall mining to the West Virginia coal industry and to the state's economy, it is imperative that these proposed rules embrace full extraction mining in the same fashion that Congress did when it drafted the federal Surface Mining Control and Reclamation Act. The intent of Congress is clearly illustrated by a review of House Report 95-218. Congress' interest was not to prevent subsidence in any absolute sense. Indeed, Congress viewed planned subsidence as a control measure, the same as leaving coal in-place. Either measure protects the value and use of the surface lands. House Report No. 95-218 states in part on page 126:

"...It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands. Some of the measures available for subsidence control include:

- (1) leaving sufficient original mineral for support;
- (2) refraining from mining under certain areas except allowing headings to be driven for access to adjacent mining areas, or
- (3) causing subsidence to occur at a predictable time and in a relatively uniform and predictable manner. This specifically allows for the uses of longwall and other mining techniques which completely remove the coal."
(emphasis added)

As a control measure planned subsidence protects the value and use of the land. Given the Congressional mandates that clearly promote full extraction mining, given the similar language of 516(b) (1) and 20-6-14(b) (1) of the federal and state laws and given West Virginia rule 7C.03(a) (3), there is no basis for proposing a rule that clearly contradicts the intent of each overriding document. The language of J-2E, (V.1) must be deleted and J-2C(II.3) revised as shown below.

PART TWO - PROPOSED CHANGES

The following comments address specific points of the proposed rules. Suggested additions are underlined, deletions are bracketed.

o J-2A (I.1,A)

Change to read:

Identify all renewable resource lands which could be materially damaged or whose reasonably foreseeable use could be diminished if affected by subsidence. Renewable resource lands include but may not be limited to: agriculture or pasture lands, intensively managed commercial forests, streams which contribute significantly to the long range productivity of a water supply [intermittent or perennial streams] and public use lands. [etc.]

Justification

Two significant changes are suggested for this paragraph. The first limits the identification of renewable resource lands to only those which will be materially damaged or otherwise affected. This is necessary to track the approach used by OSM in Section 784.20 of their revised permanent program rules which require identification of only those areas likely to be affected. Further, without this new language, the "no material damage" determination required for (I.2) of the proposed rules cannot be made. OSM states in the preamble (15074, Vol. 44, No. 50) to their original 3/13/79 rules for Section 784.20 (which was essentially unchanged in the revised rules); "The application must contain an analysis of whether or not there are structures or renewable resource lands which would be damaged if subsidence...should occur." This proposed rule wants all renewable resource areas identified which goes beyond OSM requirements.

The second change deletes the stream language and inserts language consistent with the regulatory definition of renewable resources found at §2.91 of the West Virginia permanent program rules. Most intermittent and some perennial streams do not contribute significantly to a water supply and therefore could not be classified as a renewable resource. We do support showing streams on the maps required for this subsidence control plan as shown by our suggested addition (E) below.

o J-2A (I.1.B)

Change to read:

All surface features [structures] identified by [for] use. [(including all protected structures)]. Surface features

include occupied dwellings, public buildings, impoundments, cemeteries, coal refuse disposal areas, public roads and other structures typically shown on USGS Topographic Maps.
[Structures shall include but not be limited to roads, high tension power lines, dwellings, gas collection ... coal refuse piles, etc.]

Justification

These changes are necessary to more appropriately define what surface features must be identified. All the suggested terms except public road, which is self-explanatory, are defined in Section 2 of the WV permanent program rules. The use of anything but clearly defined terms will create confusion and hinder the application process. As an example, the proposed use of the term "roads" embraces the gamut between an interstate highway and an overgrown and abandoned right-of-way. Our suggestion clearly limits the effort to state maintained public roads. Additionally, USGS maps should be specified since they provide the basis for surveys and they are routinely used for preparing permit applications.

o J-2A (I,1,E)

Add this new section:

E. Intermittent and perennial streams

Justification

This picks up the deletion of the above language where it occurred in Section (A). Consol has no problems with showing or identifying these streams on our survey maps. These terms are defined in Section 2 of the WV Permanent Program Rules. They are not however renewable resources as defined in Section 2, hence this separate listing is more appropriate.

o J-2C (II.3)

Change as follows:

3. Specifically indicate those areas in which measures will be taken to the extent technologically and economically feasible to [prevent or] minimize subsidence [and] related damage. Describe [Document] those measures in accordance with 7C.03(a)(5).

Justification

Consistent with Consol's Part One arguments full extraction mining methods do not have to prevent subsidence. Certain

techniques may be available to minimize subsidence related damage which operators should be willing to address in certain situations. Otherwise mining should be planned so as to result in predictable and controlled subsidence with appropriate surface mitigation measures.

o J-2E (IV.3)

Change as follows:

Show [in detail] anticipated secondary mining plans...

Justification

It is unlikely that any operator can give, in detail, secondary mining plans over the five year life of a permit application. Operators could supply "typical" secondary mining plans or could supply post-mining details in a fashion similar to information that is submitted to the WV Department of Mines.

Consol feels that an operator cannot be strictly bound by the details delineated in a five year plan. Variations in mining conditions and other factors sometimes necessitate day to day changes in mining plans. Sufficient flexibility must exist in the permit application procedures to allow for variations without first having to obtain a permit revision.

o J-2E (V.1)

Delete this section in its entirety.

Justification

Part One of these comments clearly details Consol's position on the exemption due full extraction mining based on statutory and regulatory readings.

Our position that some information on full extraction areas must still be supplied is adequately addressed by the requirement of J-2C(II.3) of these proposed rules which we suggest should read:

3. Specifically indicate those areas in which measures will be taken to the extent technologically and economically feasible to minimize subsidence related damage. Describe those measures in accordance with 7C.03(a)5.

This requires that full extraction areas be identified, that damage to the land be addressed, and the overall impacts be discussed. It refers via 7C.03(a)5 to the obligation to repair surface lands and it also recognizes existing mining rights that

apply to structural damages. There is no need to restate these requirements, in a somewhat different and confusing context, in part J-2E(V.1). This section is in total opposition to our premise stated in Part One of these comments and should therefore be deleted.

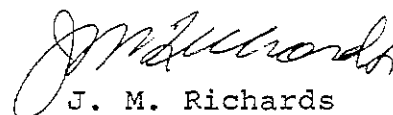
PART THREE - IMPLEMENTATION PLAN

Consol is extremely concerned that the implementation plan that preceded the proposed rules will create havoc and confusion within the industry as well as within the Department. It will be an administrative nightmare. It portends that (a) all existing permit holders for underground mines will be required to submit a Subsidence Control Plan (in accordance with Section 7C.03 and the interpretative regulation or rule) to the extent they have not already done so; and (b) that the Order compelling such submission(s) will follow public comment by not more than sixty (60) days. As of late September, 1984, more than 900 permits for underground coal mines had been issued prior to July 15, 1983 pursuant to applications which did not include a Subsidence Control Plan. Presumably, the number of pre-July 15, 1983 permits affected by the proposed submission of Subsidence Control Plans has changed, if at all, only negligibly since late September. The nightmare is forthcoming.

Consol believes that in order to avoid administrative review on a magnitude beyond the abilities of the DNR, that DNR provide underground coal operators with a reasonable interval for compliance. A phased submission program should be adopted that considers both mine location and the number of mines per operator. While a phased submission program runs the risk of postponing review of an operation which should have been reviewed sooner, it is more than counter-balanced by the opportunity for more thorough review of all operations on an individual basis. Thus, the long-term environmental-protective purpose of a Subsidence Control Plan would be furthered by a phased submission program, once the final contents of the proposed interpretative regulation or rule have been determined.

Consol hopes that these comments are given full consideration and incorporated into the proposed rules. In addition, Consol endorses those comments submitted by the West Virginia Coal Association.

Sincerely,


J. M. Richards

JMR:jk

STEPTOE & JOHNSON

ATTORNEYS AT LAW

SIXTH FLOOR

UNION NATIONAL CENTER EAST

P. O. BOX 2190

CLARKSBURG, W. VA. 26302-2190

(304) 624-8000

OF COUNSEL...
WILLIS O. SHAY
THOMAS A. WHITE

WRITER'S DIRECT DIAL NUMBER

(304) 624-8133

TELECOPIER

(304) 622-2676

February 8, 1985

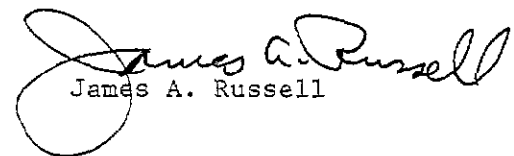
EUGENE G. EASON
RALPH BOHANNON
ERNEST C. SWIGER
HERBERT G. UNDERWOOD
JACKSON L. ANDERSON
ROBERT G. STEELE
JAMES M. WILSON
PATRICK D. DEEM
ROBERT M. STEPTOE, JR.
ANNE P. WILLIAMS
JAMES D. GRAY
VINCENT A. COLLINS
JAMES A. RUSSELL
FRANK E. SIMMERMAN, JR.
WILLIAM T. BELCHER
MICHAEL L. BRAY
J. GREG GOODYKOONTZ
IRENE M. KEELEY
EVANS L. KING, JR.
WALTER L. WILLIAMS
SUSAN S. BREWER
RONALD H. HANLAN
C. DAVID MORRISON
HARRY P. WADDELL
CLEMENT D. CARTER III
W. HENRY LAWRENCE IV
WILLIAM E. GALEOTA
CHRISTOPHER P. BASTIEN
GORDON H. COPLAND
RANDALL C. LIGHT
STEVEN P. MCGOWAN
RICHARD M. YURKO, JR.

West Virginia Department of
Natural Resources
1800 Washington Street, East
Room 322
Charleston, WV 25305

Gentlemen:

Enclosed please find "Comments in Response to Proposed Interpretative Rulemaking" regarding Section 7C.03 (Subsidence Control Plans) of the West Virginia Surface Mining Rules and Regulations, Series VII, 1983 which I desire to have made a part of the public hearing record.

Very truly yours,


James A. Russell

JAR:esj
Enclosure

WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES
RECLAMATION COMMISSION

In re:)
)
Proposed Interpretative)
Regulation or Rule)
Regarding Underground)
Coal Mining Subsidence)
Control Plans (West Virginia)
Surface Mining Reclamation)
Regulations (Series VII))
Section 7C.03))

COMMENTS IN RESPONSE TO
PROPOSED INTERPRETATIVE
RULEMAKING

Submitted By
James A. Russell

Union National Center East
P. O. Box 2190
Clarksburg, WV 26302-2190
(304) 624-8000

WEST VIRGINIA DEPARTMENT OF NATURAL RESOURCES
RECLAMATION COMMISSION

In re:)
)
Proposed Interpretative)
Regulation or Rule)
Regarding Underground)
Coal Mining Subsidence)
Control Plans (West Virginia)
Surface Mining Reclamation)
Regulations (Series VII))
Section 7C.03))

COMMENTS

1. These Comments are submitted in the captioned proceeding by the undersigned citizen who is concerned with the potential for the proposed interpretative regulation or rule to materially prejudice longwall mining operations in West Virginia.

2. These Comments are divided into three parts. The first part relates to the potential infringement of the existing legal rights of longwall coal operators embodied within the proposed interpretative regulation or rule. The second part refers to the need for further definitional content. The third part contains suggestions regarding the implementation of Subsidence Control Plans in West Virginia

I.

INFRINGEMENT OF LEGAL RIGHTS

3. Items II.3 and V.1, which are applicable to longwall mining (as well as room and pillar mining with 80% or greater recovery), purport to require an applicant to specifically indicate, and document, "those areas in which measures will be taken to the extent technologically and economically feasible to prevent or minimize subsidence and related damage." Inasmuch as item I.1 requires a survey covering all areas overlying the projected mine area within the angle of draw (presumed to be 15°), items II.3 and V.1 effectively emasculate the "planned subsidence" exemption of section 14(b)(1) of the West Virginia Surface Coal Mining and Reclamation Act ("the Act").

Section 14(b)(1) of the Act establishes the definitive subsidence control performance standard within which the administrative regulations must operate. That statutory standard is an optional one: an operator must either (a) adopt measures, to the extent technologically and economically feasible, to prevent subsidence causing material damage; or (b) adopt a mining technology entailing planned subsidence in a predictable and controlled manner. The technology alternative was fashioned by Congress for the specific benefit of longwall mining, and the West Virginia

Legislature (which could have rejected the technology alternative)¹ fully embraced that standard when the Act was re-enacted in 1980. Thus, a longwall operator is not required to "adopt measures" (other than the technology measure). Items II.3 and V.1 ignore the "planned subsidence" exemption, which is necessary to the effective utilization of longwall mining, and thereby effectively takes away from a longwall operator the alternative performance standard afforded by Congress and the West Virginia Legislature.²

4. Item VI.3. purports to require an applicant to acknowledge in writing that surface lands will be repaired in accordance with 7C.02(b) "regardless of the right to subside." The written acknowledgement provision unnecessarily infringes upon, and tends to prejudice, an applicant's ability to assert the invalidity of the 7C.02(b) requirement

¹ The federal Surface Mining Control and Reclamation Act ("SMCRA") did not preempt the authority of the states to prescribe more stringent standards than those established in SMCRA. 30 U.S.C. § 1255(b). Inasmuch as the "adopt measures to prevent subsidence causing material damage" standard is patently more stringent than the "planned subsidence" standard, at least insofar as longwall mining is concerned, the West Virginia Legislature could have deleted the technology alternative if it had seen fit to do so.

² To the extent that the underlying intent of items II.3 and V.1 is to require the longwall operator to "adopt measures" only for those areas which are outside the area of planned subsidence, the interpretative effort is poorly drafted. Items I.1 and II.1 establish a presumptive "planned subsidence" area circumscribed by a 15° angle of draw. The interpretative regulation requires a survey limited to such area. Thus, everything within the scope of the survey is within the "planned subsidence" area. Moreover, the statutory standard is framed in terms of "instances," not areas. W. Va. Code Ann. § 20-6-14(b)(1) (1984 Cum. Supp.).

that subsided surface lands be restored to the extent feasible,³ irrespective of the applicant's mining rights.

Without questioning the Legislature's authority to enact environmental legislation, and while acknowledging that SMCRA has passed facial constitutional muster, it is easily foreseeable that, in a specific case, a post-mining absolute obligation to restore subsided surface lands could render the proposed mining of such lands economically unfeasible, or substantially diminish the value of the underlying coal, and, thus, constitute an unconstitutional taking. The distinct possibility of a site-specific taking due to the application of 7C.02(b) is especially pertinent in West Virginia where the state constitution is more restrictive on governmental regulation, in terms of a compensable taking, than is the federal constitution.⁴

³ One can easily conclude from a reading of 7C.02(b) that an operator's post-mining obligation to restore subsided surface lands turns on whether the operator has the property right to subside such lands without liability. Nonetheless, this commenter understands that the Department of Natural Resources ("DNR") construes 7C.02(b) to obligate an operator to restore subsided surface lands to the extent feasible without regard to the operator's mining rights (although the extent of the operator's post-mining obligation to restore, purchase or compensate for damaged structures or surface features depends upon the operator's mining rights). Comment C above presumes the foregoing DNR construction of 7C.02(b).

⁴ The United States Constitution requires compensation only when an outright taking of private property occurs, whereas the West Virginia Constitution requires compensation when private property is either taken or damaged. Compare U. S. Const., amend. V, with W. Va. Const., art. 3 § 9. Consequential damages, measured by the property's diminution in value, are recoverable without an actual taking in West Virginia. Flowers v. City of Morgantown, 272 S.E.2d 663 (W. Va. 1980). Thus, regardless of what governmental action rises to the level of a compensable taking, something less than a "taking" requires compensation under the West Virginia Constitution.

The proposed requirement that an applicant acknowledge an obligation to restore surface lands is onerous because a court in a case could construe the acknowledgement as a voluntary undertaking by the applicant. Bearing in mind that the 7C.02(b) requirement probably is not unconstitutional on its face (but could be unconstitutional if and when applied to a given situation), it is unnecessary to require a written acknowledgement to uphold the validity of 7C.02(b) in general. It is further unnecessary to obtain a written acknowledgement as a guarantee that an applicant is aware of 7C.02(b) because ignorance of a valid administrative regulation is immaterial. Thus, the principal effect of a written acknowledgement of an obligation to restore subsided lands is that the acknowledgement tends to prejudice the applicant's ability to challenge the validity of 7C.02(b) in a site-specific context.

The Act has unquestionably increased the regulatory compliance burden of West Virginia coal operators. Nonetheless, the Act is justifiable as a societal tool for balancing the public interest in favor of coal production with the public interest in favor of a sound environment. To that extent, subsidence control standards and implementing or interpretative regulations are appropriate. The proposed written acknowledgement provision exceeds the scope of propriety, however, because it unnecessarily infringes on the post-Act legal rights of coal operators without enhancing their post-Act environmentally-grounded obligations.

II.

NEED FOR FURTHER DEFINITIONAL CONTENT

5. Item VII purports to obligate applicants to list owners of property and residents within the area above the proposed underground

workings. This Comment is directed to what Item VII does not express - the definition of "property owners" - rather than what it does express.

The DNR recently construed the term "property owner," for Section 7C.01 notice purposes, to include a natural gas pipeline company, a public service district and the West Virginia Department of Highways, all of which held only easements for certain public quasi-public facilities (a gas pipeline, a water pipeline and a public road).⁵ Given the importance of the meaning of the term "property owner," as the term is used in Section 7C.01, a coal operator is continually subject to the risk of administrative sanction or a lawsuit because, six or more months earlier, the operator did not give the 7C.01 notice to a party allegedly entitled to such notice.

6. Item I.1.B. relates to the structures which must be identified on the survey. Further definitional content is necessary therein.

The conceivable ambit of the term "roads" embraces the gamut between an interstate highway and an overgrown and abandoned right of way for logging access. The term "utility buildings" connotes a chicken coop

⁵ The referenced construction is evidenced in Director Hertig's order or letter dated December 14, 1984 relating to Consolidation Coal Company's modified Subsidence Control Plan for its Permit No. U-53-83. Such construction is presently under appeal to the Reclamation Board of Review and, also, may be subject to review by the Circuit Court of Kanawha County, West Virginia, in the civil action styled Gene Bropkover, et ux. v. Consolidation Coal Company, et al. (Civil Action No. 84-C-3890).

as well as a two-car detached garage. A lemonade stand is just as much a "business" as is a retail hardware store.

Presumably, the intent underlying the foregoing terms was to exclude the admittedly extreme suggested connotations. Moreover, it is unfair to suggest that the DNR will apply regulatory definitions in a ridiculous fashion. Nonetheless, recognition of the probably sound application of the terms set forth in item I.1.B on a case-by-case basis does not militate against the need for further definitional content. If, by the term "roads," the DNR means "public roads within the jurisdiction of the West Virginia Department of Highways," then the DNR should say so. The difficulty of the task, or the abstract risk of omission, does not render the need for definitional content any less compelling.

7. Item VII provides that proposals to mine under or adjacent to churches, schools and other features or facilities indicated in Section 7C.02(d) must be made in writing. The term "adjacent to" needs definitional content.

Evidently, the purpose served by requiring permission to mine "adjacent to" a church is to avoid material damage to the church. Thus, the prospect of material damage may tend to conceptually define what constitutes "adjacent to" (e.g., mining 100 feet away from the church may be "adjacent to" if mining at that location reasonably can be predicted to cause material damage to the church, but 100 feet away is not "adjacent to" if material damage to the church cannot be predicted).

The fundamental problem with the foregoing conceptual definition is that it purports to define a relative term (i.e., adjacent to) by reference to an elusive and undefined term (i.e., material damage). Even if "material damage" were to be defined (or could be defined), a definition of "adjacent to" limited to a reference to "material damage" would suffer from a lack of certainty in many cases. Effective regulation requires certainty, where certainty is possible.

The proposed interpretative regulation or rule apparently purports to introduce a presumptive 15° angle of draw into subsidence control regulation. Presumably, that angle of draw is felt to manifest, on a state-wide basis, a reasonable criterion for the outer limit of "material damage." Irrespective of the pro's and con's associated with a presumptive angle of draw, it offers the advantage of certainty. Perhaps, then, the term "adjacent to," for 7C.02(d) purposes, should be defined to embrace any church, school and other 7C.02(d) feature or facility located within the survey area, as determined in accordance with items I.1 and II.1,⁶ as well as any other 7C.02(d) facility which the applicant believes could suffer material damage as a result of the proposed mining.

⁶ Inasmuch as the proposed interpretative regulation or rule permits an applicant the opportunity to demonstrate that the site-specific angle of draw will be something other than 15° and inasmuch as both the identification of the survey area and the term "adjacent to" seem to embrace a common theme of avoiding material damage, it is submitted that any church or the like located within the survey area should be "adjacent to" the proposed mining.

III.

IMPLEMENTATION OF SUBSIDENCE CONTROL PLANS

8. The General Section preceding the proposed interpretative regulation or rule portends that: (a) all existing permit holders for underground mines will be required to submit a Subsidence Control Plan (in accordance with Section 7C.03 and the interpretative regulation or rule) to the extent they have not already done so; and (b) that the Order compelling such submission(s) will follow public comment by not more than sixty (60) days. As of late-September, 1984, more than 900 permits for underground coal mines had been issued prior to July 15, 1983 pursuant to applications which did not include a Subsidence Control Plan.⁷ Presumably, the number of pre-July 15, 1983 permits affected by the portended submission of Subsidence Control Plans has changed, if at all, only negligibly since late-September. Hence, an administrative nightmare is forthcoming.

It is submitted that, in order to avoid administrative review on a magnitude arguably beyond the ability of the DNR to carry out and to provide underground coal operators with a reasonable interval for compliance, a phased submission program should be adopted, whereby both

⁷ Reference is made to the testimony of William Chambers on September 28, 1984 in the civil action mentioned in footnote no. 5.

geographic⁸ and compliance-burden⁹ considerations are manifested. Admittedly, it is difficult to state with any reasonable degree of certainty that, within the context of a phased submission program, a particular operation which is the subject of a later submission should not have been the subject of an earlier submission for whatever reason. Nonetheless, within the context of effective environmental regulation for the unexpired term of human history, the risk of postponing review of an operation which should have been reviewed sooner (which risk inheres in a phased submission program) is more than counter-balanced by the opportunity for more thorough review of all operations on an individual basis (which opportunity also inheres in a phased submission program). Thus, the long-term environmental-protective purpose of a Subsidence Control Plan

⁸ The proposed "geographic" consideration assumes that subsidence constitutes a more serious environmental or societal problem in some parts of the state than it does in others. If the aforementioned assumption is arguably correct, perhaps an enlightened approach to ultimate state-wide compliance would entail submission of Subsidence Control Plans for operations in A, B, and C Counties in advance of submissions for operations in X, Y and Z Counties.

⁹ The proposed "compliance-burden" consideration acknowledges that Operator A may have only one permit affected by the submission program, whereas Operator B may have multiple affected permits. The burden of submitting multiple Subsidence Control Plans obviously exceeds the burden of submitting one Subsidence Control Plan, even if one assumes that a multiple-permit operator may have greater resources than a single-permit operator. Perhaps an enlightened approach to ultimate state-wide compliance would entail an effort to normalize the compliance burden on a given operator with the burden on other operators by: (a) establishing numerical categories for "compliance-burden" purposes (e.g., 1 affected permit equals Category A, 2-3 affected permits equals Category B, and so on) and (b) scheduling the submission of Subsidence Control Plans in light of such categories (e.g., one submission by X date, two more by Y date, and so on).

would be furthered by a phased submission program, once the final contents of the proposed interpretative regulation or rule have been determined.

9. A latent issue regarding the contents of a Subsidence Control Plan applicable to a longwall mining operation should be addressed, i.e., the extent to which the projected mine areas reflected on the plan include all projected mining for the unexpired term of the affected permit(s).

Longwall mining involves the extraction of virtually all of the coal within a rectangular area, referred to as a "panel," anywhere from 300 to 700 feet wide and 3000 to 7000 feet long. Weeks or months in advance of the commencement of longwall extraction from a panel, the panel is "developed" (i.e., via continuous mining or other, more traditional methods, entries, cross-cuts and the like are prepared). Nonetheless, given the extreme differences between the productivity and profitability associated with longwall extraction and the much lower productivity and profitability associated with the development of a panel, panels are not developed any further in advance of mining than is reasonably necessary to commence the production of one panel promptly upon completion of the preceding panel. Although panels can be laid out on a map as far in advance of mining as one desires, subterranean mining conditions pertaining to a given panel are not known until the panel is actually developed. Thus, the actual layout of a panel is subject to adjustment until a short time prior to commencement of longwall extraction.

The bulk of the extant permits for longwall operations presently underway in West Virginia have unexpired terms of 3 years or longer. The common term for a newly-issued permit is 5 years. Inasmuch as

the time required to complete the mining of a longwall panel commonly occupies 6-9 months, the area conceivably covered by a Subsidence Control Plan may include anywhere from 4 to 10 longwall panels if the plan relates to the entire area projected to be mined within the remaining term of the permit. Given the likelihood for adjustments of panels shortly prior to commencement of longwall mining, it is foreseeable, if not probable, that a plan which covers the "permit area" will have to be modified on one or more occasions to reflect the resulting differences in superadjacent surface lands, structures, features, uses and the like. Consequently, the inclusion of the entire "permit area" within a Subsidence Control Plan for a longwall operation portends frequent modification. The resultant, cumulative burden on the industry will be staggering.

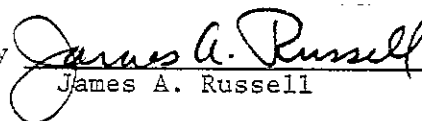
An alternative exists. Property owners receive notice of projected mining, under 7C.01, six (or more) months in advance. Underground coal operators in West Virginia have been required for many years to submit "six-month" mine maps to the Department of Mines.¹⁰ The requisite scale and detail of such maps appears to more than suffice for the scale and detail required of the survey under 7C.03 and the proposed interpretative regulation or rule (save the obvious underground-surface distinction). Thus, in other, very important instances, requirements applicable to events six months in advance of actual mining have been deemed to be sufficient.

¹⁰ W. Va. Code Ann. § 22-2-1 (1981 Replacement Volume).

It is submitted that a "six-month (or more, at the applicant's option) Subsidence Control Plan" serves the environment-protection purpose of section 14(b)(1) of the Act as well as, if not better than, a "permit area Subsidence Control Plan" due to the more detailed focus on site-specific conditions which inherently attends a plan applicable to a smaller geographic area; and a "six-month Subsidence Control Plan" also serves to prevent or minimize the likelihood of frequent modification which is inherent in a "permit area Subsidence Control Plan" insofar as a longwall operation is concerned. Thus, prior to ordering the submission of Subsidence Control Plans for all extant longwall operations in the State, the DNR should, by further interpretative regulation or rule or by modification of the proposed one, interpret 7C.03 to require only a "six month Subsidence Control Plan" for longwall mining operations.

WHEREFORE, the undersigned concerned citizen requests that these Comments be made a part of the public hearing record in this proceeding.

Respectfully submitted

By 
James A. Russell

Union National Center East
P. O. Box 2190
Clarksburg, WV 26302-2190
(304) 624-8000

BEFORE THE DEPARTMENT OF NATURAL RESOURCES

IN RE:

Public hearing concerning interpretative
regulations concerning subsidence control
regulations for underground mining
operations

TRANSCRIPT OF PROCEEDINGS had and testimony
adduced in the above-styled case, taken pursuant to notice
before the Department of Natural Resources in Building 7,
at the Capitol, Charleston, West Virginia, on the 11th day
of February, 1985, at 1:00 p.m.

Before: Bill Chambers
Reclamation Division

Action Court Reporting

John J. Berkhouse

879 Chappell Road

Charleston West Virginia 25304

304/925-5588

MR. CHAMBERS: If I can, I would like to begin this public hearing. I am sorry that we don't have public address facilities, but I will just try to speak over top of any noises that may occur.

My name is Bill Chambers, I am with the Reclamation Division of the Department of Natural Resources, and, as you all know, we are here to take testimony and comments concerning the interpretive regulations concerning subsidence control regulations for underground mining operations. We are here just solely for the purpose of taking testimony. This won't be, under any circumstances, a debate or a commentary on those rates by the Department of Natural Resources. We are only here to take comments from you all, at which time we will incorporate those as such into the final interpretative regulations. As I stated, if you wanted to make oral comments, it is necessary to sign the sheet up front. When you come up here, if you will stand up, as I am, if you would state your name, who you represent, and make your testimony. If you have nothing other than written comments to make, there is another sheet up there, too, if you would provide them to Mrs. Jewell Crank, here on my right, prior to leaving, you must also sign a sheet stating who you are and who you represent and

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also that should be included, of course, on any documents that you submit to us.

As I also stated earlier, for any of you who came in late, we are going to take the people wishing to speak in specific order, and if you want to talk after the last person has come up, then it is fine to do so then and sign the sheet or whatever. Are there any questions over the procedure -- I don't really want to answer any in regard to the actual regs, but procedure?

VOICE: It was my understanding from the public notice that you would accept written comments until next Monday, is that right?

MR. CHAMBERS: That is correct.

VOICE: Who do we send them to?

MR. CHAMBERS: You send them to the Director, Department of Natural Resources, 1800 Washington Street, East, Room 322.

If there aren't any other questions, we will just proceed. I would like to do it somewhat informally, so, with that, the first person on the list is Mr. Greg Gorrell.

MR. GORRELL: Thank you Mr. Chambers, my name is Greg Gorrell, I represent today the West Virginia Coal Association, which is the State's underground coal.

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association, representing approximately 80 to 85 percent of coal production in West Virginia. The Coal Association will submit written comments prior to the date that John referred to earlier. I am here today really to emphasize one or two of those comments, which we feel are vital to the interests of the coal industry in West Virginia. The comments go primarily to the effects we believe this regulation will have on longwall mining in West Virginia.

Longwall mining, for those of you who may not know, is becoming an increasingly strong factor in the state's coal production. Just four or five years ago it accounted for less than 10 percent of the coal production in West Virginia. In 1984 that percentage was over 25 percent of total coal production in West Virginia. The Coal Association, after analyzing these regulations, believes that the regulations will have a severe and detrimental impact on longwall mining in the state. Testimony from the United Mine Workers and other groups have pointed out that longwall mining is the safest method of mining in West Virginia, that's primarily because it has a moveable roof control system that goes with it. It is also, usually, the most productive or one of the most productive methods of mining in West Virginia. So we feel it is particularly

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inappropriate that these regulations, these proposed regulations should put longwall mining at a disadvantage compared to other types of mining in West Virginia, considering those safety and productivity concerns.

The longwall method of mining has also been found in the legislative history of the surface mining act to be more desirable from an environmental point of view, in that any subsidence that occurs will occur fairly promptly after the mining has been completed and at such time as any damage can be repaired, as compared to some other types of mining where the consequences and the subsidence effects are a good bit longer in occurring. So we feel that the regulations that are before the Department today should be revised to remove this disadvantage that longwall mining is at under the regulations.

Specifically, the proposed regulations fail to contain any reference to a statutory exception in the West Virginia Law. The West Virginia Law regarding subsidence says that each permit issued by the Director must contain -- must require the operation to adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, except in those instances where the

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mining technology used requires planned subsidance in a predictable and controlled manner. The problem with these regulations that are proposed today is that they don't differentiate between longwall mining and other types of mining, such a room and pillar mining. They treat both types of mining essentially the same. There are critical differences in the mining methods, in the effects and in the legal system set up to regulate the two types of mining, and we believe that it is imperative that these regulations be revised to account for the differences between longwall mining and room and pillar mining.

In the Federal Regulations there is a statement which clearly gives the operator a choice in cases involving underground mining, and I would like to read that. "The operator shall either adopt measures consistent with known technology which prevent subsidance from causing material damage, or adopt mining technology which provides for planned subsidance in a predictable and controlled manner." Federal Regulations clearly recognize the statutory exception that I just referred to. The federal statute is the same as the state statute, but yet the state regulations do not allow for this option of the operator to show that he is going to use a plan of controlled subsidance.

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We believe that the proposed regulations should be revised to put emphasis on two points that aren't really mentioned in these regulations. The first of these is the subsidence control plan should require the submittal of information allowing the operator to make a demonstration that the subsidence is going to be planned and controlled, thereby qualifying the operator for the exemption referred to in the statute. The statute basically saying that the operator must prevent subsidence, the exception saying except in the case of longwall mining, and the regulations should go more to allowing the operator to qualify for this exception, rather than simply restating the performance standards.

The second point we feel that the regulations should be revised to include is some emphasis on restoration of any damage that does occur, and in these regulations we don't feel get into the method of restoration and that should be the real emphasis of longwall mining, making sure that the mining and the subsidence are going to occur in a planned and controlled manner and if by accident subsidence damage does occur, making sure that the restoration of the land is feasible. If restoration is not feasible for one reason or the other, then obviously the permit issuer

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arrives at a different conclusion than if the the subsidence control plan demonstrates that restoration is feasible, but this proposed regulation does not hit on either of those two points.

We will deliver written comments later going into more detail on some of those specific areas. Thank you.

MS. CRANK: Mr. John Bryan will be our next speaker. Will you please come up.

MR. BRYAN: I am John Bryan, Director of Environmental Affairs for Pittston Coal. We are also a member of the West Virginia Coal Association, and I would like to say that we support the comments that you just heard from Greg Correll, those being the comments of the Coal Association.

One point that I might make on the longwall issue, we -- at least, our economic analysis indicates that if we aren't able to longwall, we find that a vast amount of the deep reserves that we have in West Virginia may be lost forever. We don't really have a lot of specific comments to make today. There are certain -- there are about three or four different items in the regulations that we think need some language clarification. The section discussing the mapping, the size of the mapping is vague, it needs

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clarification. The area talking about the aspect mapping, we think there are probably some miscommunications from the maps that we have seen from DNR. They are clear to what we think you are asking for, but it isn't what the regs -- isn't how they are described in the regs. There are some other minor issues like we think the gas lines and utility lines should be sized for their importance, not simply just to say that all gas lines -- we think there is a problem with the definition of residence, as opposed to property owner and minor things like that. Those comments we will have and we will sit down and talk with the Division any time. But again let me reiterate the position of the Coal Association has presented here according to longwall mining, we are in support of it 100 percent.

Thank you.

MS. CRANK: Mr. John Purbaugh.

MR. PURBAUGH: My name is John Purbaugh and I represent today, the West Virginia Citizen's Action Group, which will file written comments later. I really only want to comment on a couple of things.

First of all, I think it is an advance in regulation for DNR to tell us how they are going to interpret their other rules in writing. So much of the past

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it has been up in the air or interdepartmental memos, so while this may be a painful process, you disagree about what the interpretative rules should contain, at least we are going to have how we interpret the meaning of the other rules in writing. So I will give you a plus one for that.

Specific comments on the contents of the regulations would include that when you say that if you propose that the angle of draw is less than 15 degrees, you have to provide supporting information. The technical literature that I reviewed, which Mr. Penn and Mr. Coley discuss the range of subsidence effect varying from 21 to 26 degrees for longwall and 26 to 33 degrees for room and pillar mining, it seems to indicate to me that that number of regulation should be changed to at least 25, as indicated by them to be the mid-point in the range, if the goal is to regulate in order to protect surface effects of underground mining and that is the length of the act, then the full range of that surface effect, that full beautiful 25 degree angle of draw needs to be included, rather than just the 15 degree sometimes called critical angle draw. So if you are going to comply with the purpose of the act, you address surface effects of underground mining and you are going to have to widen that angle of draw.

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Secondly, I think that the focus of the interpretative rule is on protection of resources that are in existing use, significant aquifers (phonetically) in existing use, and I think the purpose of the act goes a little further in terms of protecting resources that have a foreseeable use. I will have some specific language to address to that.

I don't believe that the regulation does discriminate against longwall, except perhaps to the extent that it has different data that the longwall mines have to submit than room and pillar mines, and since the technical literature indicates that the range of subsidence experienced in these coal fields is different for those different mining methods, I think it is quite rational to require them to have a discrimination, meaning a distinction, or a difference, in the kinds of data required to be submitted.

That's all. Thank you.

MS. CRANK: Mr. William Bosworth.

MR. BOSWORTH: My name is William Bosworth and I am representing American Electric Power Service Corporation Fuel Supply with two operations in the State of West Virginia, Windsor Powerhouse Coal Company and the Martinka

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Division of Southern Ohio Coal Company. My comments today will be brief, but prior to the assigned deadline, we will be providing detailed comments on the proposed interpretative rule outlining informational requirements of subsidance plans. We are very concerned with the situation, that is developing in this state, relative to these plans, and in particular the required contents of the plans.

Without going into great detail in the history, the DNR has reversed a long-held position relative to Section 1.02A of the West Virginia Regulations, and now proposes interpretative rules that will require subsidance control plans be submitted by West Virginia operators within some as yet undefined time frame. The industry has seen all too often the results of hasty actions on the part of regulatory authorities with this particular effort having a potential for resulting in yet unheard of burdens upon the coal operators and the people of this State. We urge the Division of Reclamation to avail itself of every possible opportunity and to make every effort to create an appropriate subsidance program for the State of West Virginia. Specifically, we would request that the Division of Reclamation evaluate existing regulations that are being interpreted today, in light of the fact that they do not

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properly implement the language of the West Virginia Surface Coal Mining and Reclamation Act, nor do they take advantage of the direction provided by well thought out federal regulations, legislative history and interpretative opinions. As an example, we have the West Virginia Regulation at Section 7C-02-A, "Each person who conducts underground mining activity shall adopt all measures technologically and economically feasible to prevent subsidence causing material damage or reducing the value or a reasonably foreseeable use of the land -- use of surface lands." That can be compared to Federal Regulation at Section 817.121A, "The operator shall either adopt measures consistent with known technology which prevent subsidence from causing material damage to the extent technologically and economically feasible or adopt mining technology which provided for planned subsidence in a predictable and controlled manner. Nothing in this part shall be construed to prohibit the standard method of ground pillar mining."

The regulations that I have read contain obvious differences, but believe it or not are designed to implement statutes that are essentially mere images of each other. The Federal regulations stand strong, supported by legislative history and interpretative judicial opinion, and for these

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reasons, at least in part, I question whether the in place subsidence regulations of the State of West Virginia do, in fact, properly implement Section 20-6-14-B1 of the West Virginia Surface Mining and Reclamation act. If we are, and I believe we can safely assume that we are, involved in assessing the DNR's efforts relative to the interpretation of particular regulations that do not adequately implement respective language and intent of the Statute itself, we are, in fact, involved in not only an erroneous task, but in what might be considered an exercise in futility. Of what value is an interpretative rule if that rule under consideration is a best question. Specifically, and to steal a phrase used in the drafting of this interpretative rule, specifically but not limited to the statutory exclusion in Section 20-6-14-B1 of the act relative to full extraction mining methods, et cetera.

Let me digress a little and center my discussion on a synopsis of the typical problem solving approach taken by government entities. First, a problem is perceived; second, a statute is written that is supposedly designed to solve that perceived problem; third, regulations are written to implement the statute and accomplish exactly what the statute was supposedly designed to accomplish. Throughout

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the legislative process and as a function of the people's mandate to their legislators, all efforts must be based on the concept of the greatest good for the greatest number. This mandate must not be cast aside once we become involved in the regulatory process. We saw this disregard for the people's good all too often at the federal agency level during the late 1970's and into the year 1980, the results were obvious. If the DNR takes a hardheaded stance on existing regulations, retaining a disregard for obvious statutory guidance, the program could constitute a challenge to the economic viability of many mining operations, and/or impose an economic disadvantage for West Virginia Coal, when compared to coal produced in states who have properly interpreted statutory requirements and have therefrom applied a reasonable subsidance program. The creation of such a situation will fly in the face of the administration's efforts to reduce unemployment levels in West Virginia and to provide for economically healthy atmosphere in this state. The DNR would be remiss if it were to act improperly just because it feels compelled to act. We urge the DNR to comprehensively assess their proposed program in light of these and forthcoming comments, and to act in accordance with the need for this State and its

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people. In short, look at the overall picture with full consideration of the people's mandate and of legislative history.

I will close with an important piece of legislative history being disregarded by the DNR, specifically, "In fact, the bill sponsors consider longwall mining ecologically preferable, and it and other methods of controlled subsidance explicitly endorse." What I have read was taken from an entry in the congressional records on July 10, 1974, by Congressman Mo Udall.

We will be providing comments at a later date.

MS. CRANK: We will now hear comments from Mr. Ben Faulkner.

MR. FAULKNER: My name is Ben Faulkner, I am a Biologist for Leckie Smokeless Coal Company in Greenbrier County, and we would like to go on record that we support the concerns of both Mr. Bryan and Mr. Gorrell. We pray that the Department of Natural Resources will bring about regulations that the coal industry, the coal community may live with, and that we will have a bright future for West Virginia.

MS. CRANK: Mr. Gary Slagel will you please come up.

MR. SLAGEL: I am Gary Slagel, Manager of Environmental Services with Consolidated Coal Company out of Pittsburgh. We are here today to present some comments that will essentially be detailed in our written submission that will be made on February 18.

As a start, I would like to say that Consol has a deep interest in the course of these interpretative rules and subsidence rule making in general in the State of West Virginia. Consol is West Virginia's largest coal producer. In 1983, Consol mined over 25,000,000 tons of coal in the State, and we are looking at right now we have about 18 longwall systems in the State. As a company, we are firmly committed to longwall mining. As a company, we also have a firm believe that we need regulations that specifically view longwall mining in the proper context of its economic viability in today's underground mining industry, and from the standpoint that programs must be based on the fact that exemptions contained in both the Federal and State statutes must be fully recognized and implemented by any regulations promulgated thereunder.

My comments today will essentially address two areas of concern. One is the previously mentioned statutory exemption, and the other will be the actual implementation

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of the program in terms of submission of the mine plans. We also support the comments that were previously made by Mr. Gorrell for the West Virginia Coal Association and in the context much of the comments that he made will be reflected in what I have to say here this afternoon.

Our concern under what we consider the full extraction exemption, when we look at sections J2C, II, III, and J2E, V, I, of the interpreter of the proposed rules, we have a great deal of concern because these require operators to show how they will prevent subsidence causing material damage or how they will prevent subsidence that reduces the value of structures and renewable resource lands. We feel that the prevention of subsidence in this case is completely contrary to the act. Section 20-6-14-B1 specifically excludes full extraction mining from these requirements, and I am not going to go back and re-read the exemption as it appears in the statute, because I think you have heard that about three times already today.

But as we see it, the real question is whether the proposed rules have any statutory basis to require the operators to prevent subsidence, we contend they don't. Even absent any statutory basis, DNR is thinking it is seriously flawed, when these proposed rules are compared to DNR's

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existing program rules. Specifically, if you look at 7C-03-A3, and if you look at the revised Federal Permit Program Rules promulgated by the Office of Surface Mining on June 1, 1983, OSM rules state in part, and I am looking at Section 784.20, subsidence control plans, the application shall include the subsidence control plan, which shall contain the following information, and then under DSS, except for those areas where planned subsidence is projected to be used, OSM explains the meaning of this rule and the preamble support to that rule by saying that paragraph D of the final rule requires, except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence related damage. It further states that this final rule recognizes two types of mining, mining operations that propose to use planned subsidence and those operations that propose to use mining techniques to prevent or minimize subsidence. Section 817-121A of those same rules carries on this thought. It says in Paragraph A, "The operator shall either adopt measures consistent with known technology which prevents subsidence from causing material damage to the extent technologically and economically feasible or adopt a mining technology which provides for

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planned subsidence in a predictable and controlled manner." The preamble to that paragraph states it requires that underground mine operators shall adopt measures consistent with known technology or as an alternative, the operator may adopt a mining technology which causes planned subsidence to occur. It sounds a little redundant, but I am doing so because every time we look to these regulations and in the supporting preamble, we see these same statements remade and remade at the Federal level, and we feel that they are made for some specific purpose.

I guess we feel that when you look at the proposed rules this objective is really lost, because particularly in J2E they require that the longwall mining operator demonstrate what methods will be used to prevent subsidence. The question we have is how can a technique that results in planned subsidence be asked to prevent subsidence. I guess the fact that it comes under the heading of longwall mining or room and pillar mining with 80 percent recovery, sort of adds injury to insult. We feel it is absolutely senseless to embrace a mining technology in a heading of a major section in the rule and then follow it up with requirements that essentially disallow its use.

In summary, we can say that it was congress's

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intent not to prevent subsidence in any absolute sense. Indeed, congress viewed planned subsidence as a control measure the same as leaving coal in place. Either measures protect the value and the use of the surface lands. Turn to House Report 95-218, which on page 126 states in part, "It is the intent of this section to provide the secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands. Some of the measures available for subsidence control include leaving sufficient original mineral in place for support, refraining from mining under certain areas or causing subsidence to occur at a predictable time and in a relatively uniform and predictable manner.

The other aspect that I mentioned at the onset that we wanted to submit some comments and make a statement here today on is on the implementation of the planned requirements or the submission requirements. Consol is extremely concerned that the implementation plan that essentially preceded these proposed rules will create havoc and confusion in the industry as well as within the Department of Natural Resources. We look at it really being

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an administrative nightmare. It pretends that, one, all existing permit holders for underground mines would be required to submit a subsidence control plan to the extent that they have not already done so, and, second, that the order compelling such submission will follow public comment by not more than 60 days. If you look at the total number of underground mines and permits for those mines, which I think borders on something in the neighborhood of 900 underground mines in the State of West Virginia, we believe that something more than what we are envisioning here is going to be necessary to avoid an administrative nightmare that will be of a magnitude beyond the abilities of the DNR. We are looking really, we pray that DNR will adopt a method that will provide for a reasonable interval for the submission of these plans, and primarily in that regard, we suggest and will go into more detail in our written comments, that something along the order of a phase submission program be considered by the DNR as one of the -- as a viable approach to rectifying these problems. We feel that the long-term environmental protective purpose of the subsidence control plan would be furthered phase submissions, as all operators would have considerably more time to prepare and submit and the Department of Natural Resources will have additional

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time to review comments and issue all subsequent permit applications. Thank you.

MS. CRANK: Do we have anyone else that would like to make comments today? Please come up and sign the register.

MR. CHAMBERS: Anybody else want to make oral comment?

(no response)

MR. CHAMBERS: I would also point out that if anybody wishes a transcript of what was said today, they can do so by requesting it in writing to the Department, which you will get a bill for. With that, if there is no one else to comment, you can leave your written comments here if you have them today, make sure you sign the sheet, and we did schedule the hearing until 4:00, so if you get out the door and on the sidewalk and find out there is something that you forgot to say, you can come back in and say it. We will be here until 4:00 today. As was stated earlier, we will accept comments until the 18th, informally, we will accept them until that date.

So with that, there is nothing more that the Department has to say.

(WHEREUPON, the hearing in the
above-entitled matter
was closed).

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REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

DEPARTMENT OF NATURAL RESOURCES, to-wit:

I, John T. Berkhouse, Staff Reporter for V. Ann Woofter, Official Reporter for the Department of Natural Resources, hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of proceedings had and evidence adduced at a hearing held in the foregoing case on the 11th day of February, 1985.



John T. Berkhouse
Staff Reporter

A.C.R.