RESPONSE TO COMMENTS
38 CSR 2
WEST VIRGINIA SURFACE MINING RECLAMATION RULE

The WV Department of Environmental Protection (DEP), Division of Mining and Reclamation (DMR) commenced the public comment period for proposed legislative rule 38C.S.R. 2 on June 7, 2019. The public comment period concluded on July 9, 2019 after satisfying the minimum 30-day period but upon request extended to July 16, 2019. A public hearing was held at the DEP Headquarters located at 601 57th Street SE, Charleston WV in the Coopers Rock Conference Room on July 8, 2019 to accept oral and written comments regarding the proposed revisions to legislative rule 38 C.S.R. 2. Any comments received after this time are considered ex parte communications and cannot be considered in accordance with WV Code Chapter 29A Article 3.

Written comments were received regarding proposed revisions to rule 38 C.S.R. 2. Some of the attendees present at the public hearing provided verbal comments. The full comment can be found in the public hearing transcript, also part of the formal rulemaking record.

There were no changes made to 38 C.S.R. 2 as a result of the comments.

Comment 1. Senate Bill 635 contains a clear directive to the Secretary of the WVDEP to review and clarify Rule 16.2 to address surface owner compensation for structure damage due to subsidence with consideration to adopting the Federal standard. (Tunnel Ridge, LLC, Murray Energy Corporation, Mettiki Coal (WV), LLC and West Virginia Coal Association)

Agency Response. SB 635 amended §22-3-14 by adding subsection (e) which states *"The secretary shall promulgate for review and consideration by the West Virginia Legislature during the regular session of the Legislature, 2020, revisions to legislative rules (38 CSR 2) pertaining to surface owner protection from material damage due to subsidence under this article. The secretary shall specifically consider adoption of the federal standards codified at 30 C.F.R. § 817.121."*

We have concluded our detailed review of the federal standards codified at 30 C.F.R §817.121(Attachment A) and we are not proposing to adopt the federal standards.

Summary of the Comparison between State Rule and Federal Regulations

1. *CSR 38–2–16.2.c.2.—Surface owner protection.* This section provides the provision to correct subsidence-related material damage and applies only to subsidence related damage caused by underground mining activities conducted after October 24, 1992. The Federal regulations require underground mining operations conducted after October 24, 1992, to: "promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining." The Director of OSM found that *CSR 38–2–16.2.c.2* to be substantively identical to SMCRA section 720 and the

Federal regulations at 30 CFR 817.121(c)(2) concerning repair or compensation for subsidence damage(64 FR 6211 Feb 9,1999).

Both the State Rule and Federal Regulations are ambiguous on how and who selects the method of repair or compensation. However, in a March 31, 1995 Federal Register, OSM stated that they believe repair or compensation will be down on a case by case negotiation with the surface owner.

2. CSR 38–2–16.2.c.3.—Presumption of causation. Differs from its federal counterpart at §817.121(c)(4). *Rebuttable presumption of causation by subsidence.* However, in 64 FR 71653, Dec. 22, 1999, the following paragraphs in § 817.121, (c)(4)(i) through (iv) were suspended, effective Dec. 22, 1999. To date nothing has been done by OSM relating to the suspension of its regulation.

3. CSR 38–2–16.2.c.4.—Bonding for subsidence damage. To qualify for an extension, the permittee must demonstrate, in writing with the Secretary's concurrence, that subsidence is not complete, not all probable subsidence related material damage has occurred to lands or structures, that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete repairs or replacement within the ninety day abatement period. If the abatement period is extended beyond 90 days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs or the estimated cost to replace water supply. The Federal regulations contain similar requirements regarding bond adjustments for subsidence related damage. The State provision differs from the counterpart Federal provision in that, under the State provision, the 90- day abatement period begins with the issuance of a notice to repair or replace, rather than with the date of occurrence of subsidence related material damage

   The State rule also provides for an extension to the 90-day abatement period requirement as described previously. The counterpart Federal regulation provides that an extension of the 90-day abatement period may be granted for the same reasons: that subsidence is not complete; that not all subsidence related material damage has occurred; or that not all reasonably anticipated changes have occurred affecting the protected water supply and, therefore it would be unreasonable to complete repairs within 90 days.

   Subsection 16.2.c.4. does not specifically require an operator, as does the Federal provision, to post additional bond "in the amount of the decrease in the value of the property if the permittee will be compensating the owner". We explained to OSM that the term ''compensation'' is not used in the State provision because ''compensation'' is a concept that must be adjudicated in West Virginia, and the WVDEP can't make that determination before the court does (64 FR 6211 Feb 9,1999). We further explained that under the phrase ''estimated cost of repair'' the rule requires an escrow bond that would

be the equivalent to the "compensation" required by the Federal regulations. The Director of OSM disagreed with our conclusion that "repair" is equivalent to "compensation." Nevertheless, the Director of OSM found that the State provision is no less effective than its Federal counterpart, because it requires the posting of an adequate bond to cover repair costs in all instances, even where the permittee proposes to compensate, rather than repair or replace. In this respect, the landowner will be assured of receiving adequate funds to cover the costs of repair or replacement of his or her structure in the event the permittee defaults on its obligation to repair, replace or compensate. Since repair, replacement and compensation are all acceptable means of meeting the permittee's obligations under the State counterpart to the Energy Policy Act of 1992, the State requirement to post a repair bond fairly meets the purposes of the Energy Policy Act (64 FR 6211 Feb 9,1999).

Comment 2. The WVDEP should explain if it agrees that this is the intention of this change, and why it is taking this approach to limit surface owner rights to compensation for material damages. (West Virginia Rivers)

Agency Response. The agency's proposed rule does not limit surface owner rights to compensation for material damages. The following is a synopsis of the procedure carried out by the agency after receiving a subsidence related complaint.

1. A complaint of damage or water loss is received related to possible subsidence.

2. Inspection is carried out to determine if the land/structure is within the area as shown in the permit requiring a pre-subsidence survey.

3. If within the area requiring a pre-subsidence survey a notice is issued to the permittee advising them of reported subsidence material damage and of a presumption of causation of the damage due to subsidence. They are advised to repair or compensate the owner per 38-2-16.2.c.2 within 90 days or submit information to rebut the presumption of causation per 38-2-16.2.c.3.

4. If determination is made that damage is the result of subsidence and the presumption of causation has not been rebutted the permittee is advised to repair or compensate. If this has not been accomplished in 90 days, or cannot be accomplished per 38-2-16.2.c.4, then a violation is issued and an escrow bond is required.

The objective of the rule change is for clarification of the agency limitations in adjudicating property rights disputes related to subsidence damage claims which is in agreement with §22-3-9(a)(9) which states "*A description of the legal documents upon which the applicant's legal right to enter and conduct surface-mining operations on the proposed permit area is based and whether that right is the subject of pending court litigation: Provided, That*

nothing in this article may be construed as vesting in the director the jurisdiction to adjudicate property-rights disputes" and §22-3-18 (b)(5) which states "*In cases where the private mineral estate has been severed from the private surface estate, the applicant has submitted: (A) The written consent of the surface owner to the extraction of coal by surface-mining; or (B) a conveyance that expressly grants or reserves the right to extract the coal by surface-mining; or (C) if the conveyance does not expressly grant the right to extract coal by surface-mining, the surface subsurface legal relationship shall be determined in accordance with applicable law: Provided, That nothing in this article shall be construed to authorize the director to adjudicate property rights disputes.*" .

16.2. Surface Owner Protection.

16.2.a. General. Each person who conducts underground mining activities 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.

16.2.b. Plan Requirements. The operator shall comply with all provisions of the approved subsidence control plan prepared pursuant to subsection 3.12 of this rule.

Federal Counterpart

817.121 Subsidence control.

(a) Measures to prevent or minimize damage. (1) The permittee must either adopt measures consistent with known technology that 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 that provides for planned subsidence in a predictable and controlled manner.

(2) If a permittee employs mining technology that provides for planned subsidence in a predictable and controlled manner, the permittee must take necessary and prudent measures, consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings and occupied residential dwellings and structures related thereto except that measures required to minimize material damage to such structures are not required if:

(i) The permittee has the written consent of their owners or

(ii) Unless the anticipated damage would constitute a threat to health or safety, the costs of such measures exceed the anticipated costs of repair.

(3) Nothing in this part prohibits the standard method of room-and-pillar mining.

(b) The operator shall comply with all provisions of the approved subsidence control plan prepared pursuant to §784.20 of this chapter.

Existing Language

16.2.c. Material Damage. Material damage in the context of this section and 3.12 of this rule means: any functional impairment of surface lands, features, structures or facilities; any physical change that has a significant adverse impact on the affected land's capability to support current or reasonably foreseeable uses or causes significant loss in production or income; or any significant change in the condition, appearance or utility of any structure from its pre-subsidence condition. The operator shall:

16.2.c.1. Correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence;

Federal Counterpart

817.121 (c) Repair of damage—(1) Repair of damage to surface lands. The permittee must correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses that it was capable of supporting before subsidence damage

Existing Language

16.2.c.2. Either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase prior to mining of a non-cancelable premium-prepaid insurance policy. The requirements of this paragraph only apply to subsidence related damage caused by underground mining activities conducted after October 24, 1992; and

Federal Counterpart

817.121 (c) (2) Repair or compensation for damage to non-commercial buildings and dwellings and related structures. The permittee must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining. If repair option is selected, the permittee must fully rehabilitate, restore or replace the damaged structure. If compensation is selected, the permittee must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. The permittee may provide compensation by the purchase, before mining, of a non-cancelable premium-prepaid insurance policy. The requirements of this paragraph apply only to subsidence-related damage caused by underground mining activities conducted after October 24, 1992.

Federal Counterpart

817.121 (c) (3) Repair or compensation for damage to other structures. The permittee must, to the extent required under applicable provisions of State law, either correct material damage resulting from subsidence caused to any structures or facilities not protected by paragraph (c)(2) of this section by repairing the damage or compensate the owner of the structures or facilities for the full amount of the decrease in value resulting from the subsidence. Repair of damage includes rehabilitation, restoration, or replacement of damaged structures or facilities. Compensation may be accomplished by the purchase before mining of a non-cancelable premium-prepaid insurance policy.

Existing Language

16.2.c.3. Presumption of Causation. If alleged subsidence damage to any non-commercial or residential dwellings and structures related thereto occurs as the result of earth movement within the area which a pre-subsidence structural survey is required, a rebuttable presumption exist that the underground mining operation caused the damage.

16.2.c.3.A. If the permittee was denied access to the land or property for the purpose of conducting the pre-subsidence survey, no presumption of causation will exist.

16.2.c.3.B. The presumption will be rebutted if, for example, the evidence establishes that: the damage predated the mining in question; the damage was proximately caused by some other factors or was not proximately caused by subsidence; or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question.

16.2.c.3.C. In any determination whether damage to protected structures was caused by subsidence from underground mining, all relevant and reasonably available information will be considered by the Secretary.

Federal Counterpart

817.121 (c) 4) Rebuttable presumption of causation by subsidence—(i) Rebuttable presumption of causation for damage within angle of draw. If damage to any non-commercial building or occupied residential dwelling or structure related thereto occurs as a result of earth movement within an area determined by projecting a specified angle of draw from the outermost boundary of any underground mine workings to the surface of the land, a rebuttable presumption exists that the permittee caused the damage. The presumption will normally apply to a 30-degree angle of draw. A State regulatory authority may amend its program to apply the presumption to a different angle of draw if the regulatory authority shows in writing that the angle has a more reasonable basis than the 30-degree angle of draw, based on geotechnical analysis of the factors affecting potential surface impacts of underground coal mining operations in the State.

(ii) Approval of site-specific angle of draw. A permittee or permit applicant may request that the presumption apply to an angle of draw different from that established in the regulatory program. The regulatory authority may approve application of the presumption to a site-specific angle of draw different than that contained in the State or Federal program based on a site-specific analysis submitted by an applicant. To establish a site-specific angle of draw, an applicant must demonstrate and the regulatory authority must determine in writing that the proposed angle of draw has a more reasonable basis than the standard set forth in the State or Federal program, based on a site-specific geotechnical analysis of the potential surface impacts of the mining operation.

(iii) No presumption where access for pre-subsidence survey is denied. If the permittee was denied access to the land or property for the purpose of conducting the pre-subsidence survey in accordance with §784.20(a) of this chapter, no rebuttable presumption will exist.

(iv) Rebuttal of presumption. The presumption will be rebutted if, for example, the evidence establishes that: The damage predated the mining in question; the damage was proximately caused by some other factor or factors and was not proximately caused by subsidence; or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question.

(v) Information to be considered in determination of causation. In any determination whether damage to protected structures was caused by subsidence from underground mining, all relevant and reasonably available information will be considered by the regulatory authority.

Existing Language

16.2.c.4. Bonding for Subsidence Damage: The Secretary shall issue a notice to the permittee when subsidence related material damage has occurred to lands, structures, or when contamination, diminution or interruption occurs to a domestic or residential water supply, and that the permittee has ninety (90) days from the date of notice to complete repairs or replacement. The Secretary may extend the ninety (90) day abatement period but such extension shall not exceed one (1) year from the date of the notice. Provided, however, the permittee demonstrates in writing, and the Secretary concurs that subsidence is not complete, that not all probable subsidence related material damage has occurred to lands or structures; or that not all reasonably anticipated changes have occurred affecting the water supply, and that it would be unreasonable to complete repairs or replacement within the ninety (90) day abatement period. If extended beyond ninety (90) days, as part of the remedial measures, the permittee shall post an escrow bond to cover the estimated costs of repairs to land or structures, or the estimated cost to replace water supply.

Federal Counterpart

817.121 (c) (5) Adjustment of bond amount for subsidence damage. When subsidence-related material damage to land, structures or facilities protected under paragraphs (c)(1) through (c)(3) of this section occurs, or when contamination, diminution, or interruption to a water supply protected

under §817.41 (j) occurs, the regulatory authority must require the permittee to obtain additional performance bond in the amount of the estimated cost of the repairs if the permittee will be repairing, or in the amount of the decrease in value if the permittee will be compensating the owner, or in the amount of the estimated cost to replace the protected water supply if the permittee will be replacing the water supply, until the repair, compensation, or replacement is completed. If repair, compensation, or replacement is completed within 90 days of the occurrence of damage, no additional bond is required. The regulatory authority may extend the 90-day time frame, but not to exceed one year, if the permittee demonstrates and the regulatory authority finds in writing that subsidence is not complete, that not all probable subsidence-related material damage has occurred to lands or protected structures, or that not all reasonably anticipated changes have occurred affecting the protected water supply, and that therefore it would be unreasonable to complete within 90 days the repair of the subsidence-related

---

Existing Language

16.2.d. Protection of Public Buildings and Dams. Underground mining activities shall not be conducted beneath or adjacent to public buildings and facilities, churches, schools, hospitals, or impoundments with a storage capacity of, or bodies of water containing, twenty (20) acre-feet or more, unless the Secretary finds that mining will not cause material damage or reduce the foreseeable use. The Secretary may, if necessary to minimize the potential for damage, limit the percent of coal extraction underneath or adjacent to such features or facilities. If subsidence causes material damage to such features or facilities, the Secretary may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified.

Federal Counterpart

817.121 (d) Underground mining activities shall not be conducted beneath or adjacent to (1) public buildings and facilities; (2) churches, schools, and hospitals; or (3) impoundments with a storage capacity of 20 acre-feet or more or bodies of water with a volume of 20 acre-feet or more, unless the subsidence control plan demonstrates that subsidence will not cause material damage to, or reduce the reasonably foreseeable use of, such features or facilities. If the regulatory authority determines that it is necessary in order to minimize the potential for material damage to the features or facilities described above or to any aquifer or body of water that serves as a significant water source for any public water supply system, it may limit the percentage of coal extracted under or adjacent thereto.

817.121 (e) If subsidence causes material damage to any of the features or facilities covered by paragraph (d) of this section, the regulatory authority may suspend mining under or adjacent to such features or facilities until the subsidence control plan is modified to ensure prevention of further material damage to such features or facilities.

817.121 (f) The regulatory authority shall suspend underground mining activities under urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments, or perennial streams, if imminent danger is found to inhabitants of the urbanized areas, cities, towns, or communities.

Existing Language

16.2.e. Progress Maps. Updated maps of underground workings as required in W. Va. Code §22A-2-1 et seq. shall be made available to the Secretary for determining compliance with the subsidence control plans required in subsection 3.12 of this rule, and projected location of potential subsidence. The maps and accompanying descriptions, as appropriate, shall identify 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 Secretary. Upon request of the operator, information submitted with the detailed plan may be held as confidential.

Federal Counterpart

817.121 (g) 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, of significant features of the underground mine, including the size, configuration, and approximate location of pillars and entries, extraction ratios, measure 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 §773.6(d) of this chapter.

WEST VIRGINIA RIVERS

July 8, 2019

WV Department of Environmental Protection
Division of Mining & Reclamation
601 57th Street
Charleston, WV 25304
Hand-delivered at public hearing on July 8, 2019

RE: Comments on proposed changes to agency rules

38CSR2 - West Virginia Surface Mining Reclamation Rule

We have general concerns that the proposed change in 38CSR2-16.2.c.2 will limit claims for recovery only under SMCRA. We are aware there are some common law property rights, such as the right to lateral support, that are often part of subsidence claims. However, the effect of the proposed provision may prevent claimants (property owners) from being able to go after the full repair amount using such common law claims.

Under SMCRA, the choice is to be paid diminution in value of the property *or* to force the company to perform repairs. The change seems to be aimed at preventing a lawsuit where the property owner can compel the company to pay for repairs. The WVDEP should explain if it agrees that this is the intention of this change, and why it is taking this approach to limit surface owner rights to compensation for material damages.

38CSR2F - Groundwater Protection Rules Coal Mining Operations

The proposed change to 38CSR2F-3.1 essentially appears to incorporate all of the requirements of the Aboveground Storage Act (ASTA) into the Surface Mining Act – thus placing DMR in a role in ASTA oversight. This move could have benefits for better protecting the environment and human health if implemented well. It seems to set out that authority for overseeing compliance with ASTA would be shared between DMR

and DWWM, potentially providing for additional capacity and efficiencies for oversight and enforcement – but it will require deliberate and thoughtful coordination and accountability.

In order for this change to work effectively, at least these initial key elements need to be in place:

1. A full training program for DMR inspectors on ASTA requirement and procedures.
2. Effective and timely communication systems between DMR, DWWM and the AST program.
3. Clear procedures for how violations are documented and addressed when detected by DMR staff for the AST program.
4. Adequate oversight of DMR inspectors from the AST program.
5. Regular evaluation among DMR and DWWM of the all of the points listed above.

We also noted a technical error on the notice of filing of this rule to the Secretary of State; it stated SB 635 amended 22-30-14, but SB 635 actually amended 22-30-24.

Thank you for your consideration of these comments, we look forward to your response.

Sincerely,

Angie Rosser
Executive Director

Mettiki Coal, LLC

Dwight Kreiser
Vice President – Mettiki Coal (WV), LLC
293 Table Rock Road
Oakland, Md. 21550

July 15th, 2019

Mr. Charles S. Sturey
Division of Mining & Reclamation
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Re: Comments by Mettiki Coal (WV), LLC
Proposed revisions to 38 CSR 2
West Virginia Surface Mining & Reclamation Rules

Dear Mr. Sturey:

As you are aware, Mettiki Coal (WV), LLC ("Mettiki") is an underground coal mine operator which has for decades been actively engaged in longwall mining thermal and metallurgical coal in Grant County, West Virginia, and surrounding Counties, with direct employment of 227 employees and hundreds of support related employees; having expended 143 million in developing the operation; and producing in excess of 2 million tons of clean coal each year. Mettiki strongly objects to the DEP's proposed revisions to the Rule, having failed to address the primary issue identified in the Coal Jobs and Safety Act of 2019 ("Senate Bill 635"), an issue of critical importance to the longwall mining industry.

These comments are organized in separate parts for your convenience and ease of reference.

KEY ISSUE

Senate Bill 635 contains a clear directive to the Secretary of the WVDEP to review and clarify Rule 16.2 to address surface owner compensation for structure damage due to subsidence with consideration to adopting the Federal standard. The applicable language from the Act is as follows:

> "The Secretary shall promulgate for review and consideration by the West Virginia Legislature during the regular session of the Legislature, 2020, revisions to legislative rules (38 CSR 2) pertaining to surface owner protection from material damage due to subsidence under this article. The Secretary shall specifically consider adoption of the federal standards codified at 30 C.F.R. § 817.121." (emphasis added)

The DEP elected to reject that legislative directive and filed an amended Rule on June 5, 2019. In the prefatory language to the revised Rule the DEP stated that it "elected not to adopt the federal standards".

Those rules include Rule 16.2.c.2 (the "Rule"), requiring an operator of an underground mine to:

> "Either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence" (emphasis added).

Regulations promulgated under the Federal Act, in virtually identical language, also provide the coal operator the option of choosing to repair or to compensate for the diminution in value of the structure and has been so construed by the OSM, United States Department of the Interior.[1]

BACKGROUND

The West Virginia regulation has been consistently applied by the WVDEP for nearly 40 years to provide the option to repair or compensate to the operator, until the West Virginia Supreme Court rendered a contrary opinion on April 12, 2018 in the matter Schoene v. McElroy Coal Company.[2] In Schoene, the court found the Rule to be ambiguous and, contrary to the Federal Regulation, decided that the landowner -- not the operator -- has the choice of repair or compensation. As a practical matter this reversal has radically increased the calculation of settlement payments by incentivizing contingent-fee attorneys to leverage large repair estimates for structures of modest market value. Further, should a surface owner elect repairs, and a coal operator commences with actual work to repair, disputes of workmanship, quality, efficacy, and satisfaction give rise to further litigation. Unfortunately, the Act does not provide any method, absent litigation, to address these disputes and the coal operator does not receive any release of the claim even after the repairs are made.

Prior to the Schoene decision, a coal operator held a remedy to choose diminution in value for settling these statutory claims. Diminished value was and remains an effective and simple calculation and was determined by enlisting licensed appraisers to evaluate properties before and after mining. Any subsidence effect to a structure could be professionally identified by a post-mining appraisal and calculated accordingly, thereby providing compensation for any devaluation of the residential or agricultural structure. Conversely, repair estimates are subjective, commonly contradict one another, and often are used to inflate compensation. As a result, the repair standard has become a beacon of dispute to plaintiffs' attorneys seeking contingent fees at the expense of the coal operators and structure owners.

COMMENTS

Option Clearly Belongs to the Operator: As discussed above, the language of the Rule -- virtually identical in the Federal and all State-level surface mining regulations -- clearly provides the operator with the option of repairing any damage or compensating the structure owner in the amount of the diminution (reduction) in market value resulting from any damage, not exceeding the pre-mining value of the structure.

Forty-year Precedent: The WVDEP, ten of the eleven, longwall-mining States and the Federal Office of Surface Mining ("OSM") have for the 40-years since adoption of the Federal and West Virginia Acts applied that regulation to provide the operator the option of paying for the damage (reduction in value) or repairing.

The Existing Formula has Worked Well: Until the Schoene case, no serious challenge has been made in any relevant State or Federal court to this interpretation of the Rule. As the WVDEP knows, application of the Rule has been consistent and fair since the Act was adopted in approximately 1980. Surface owners have consistently received fair and substantial compensation for structure damage.

Consistency with Common Law -- Since the founding of our Nation, the widely-held standard has been that compensation for damage to tangible property shall not exceed the value of the property prior to the damage: e.g., motor vehicle accidents; damage to buildings.

---

[1] Please see Comments submitted by the West Virginia Coal Association, citing 44 Fed. Reg. 14902, 15272 (March 13, 1979); and 80 FR 44436 (July 27, 2015).

[2] Schoene v. McElroy Coal Company, 240 W.Va. 475, 813 S.E.2d 128 (2018).

Encouraging Litigation: The new interpretation of the regulation has incentivized plaintiffs' attorneys to game the process by obtaining questionable, exaggerated repair estimates, slowing the settlement process to the harm of landowners and primarily benefiting attorneys. The calculation of the payments is now being influenced by competing repair estimates from landowner attorneys. It is not uncommon for repair estimates provided by contingent fee attorneys to be 200-300% of the appraised value of some structures. As a result of the ambiguity in the Rule, the Scboene decision effectively has allowed contingent-fee attorneys to weaponize the Rule and provides no clear remedy other than costly litigation.

Competitive Disadvantage: If not adequately addressed, this sudden and unexpected change in regulatory interpretation will certainly result in the reallocation of capital investments in underground coal mining to surrounding States, and severely damage the underground mining industry in West Virginia.

CONCLUSION/REQUEST

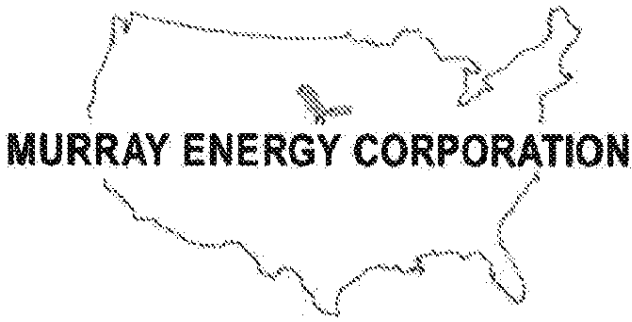
Our hope is that the Department will revise the Rule to address the purported "ambiguity" in our regulation and resulting discrepancy with Federal SCMRA, and provide a standard that allows the operator to have a remedy to calculate subsidence settlements quickly and efficiently, for the benefit of the structure owner and West Virginia's underground mining industry. The revision may be accomplished by very simply adding four words to the Rule, as follows:

> At the operator's election, either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. (recommended revision underlined).

A return to the Federal, and former West Virginia, standard of allowing a coal operator to choose the remedy will ensure that West Virginia continues to be a State that maintains effective protections for surface owners while also mitigating an environment of litigation which primarily benefits plaintiffs' attorneys.

Sincerely,

Dwight Kreiser
Vice President
Metiki Coal (WV), LLC



46226 NATIONAL ROAD
ST. CLAIRSVILLE, OHIO 43950

PHONE: (740) 338-3100
FAX: (740) 338-3405
www.murrayenergycorp.com

VIA EMAIL charles.s.sturey@wv.gov
and FIRST CLASS U.S. MAIL

July 15, 2019

Mr. Charles Sturey
601 57th Street
Charleston, WV 25304

Dear Mr. Sturey:

Please accept the following as the comments of Murray Energy Corporation ("MEC") which were invited via the June 5, 2019 Notice of Public Comment Period relative to the West Virginia DEP's proposed amendment of legislative rules governing remedies of landowners following coal mine subsidence, specifically, Section 38-2-16.2.c.2 of the West Virginia Code of State Rules (*i.e.*, West Virginia Surface Mining Reclamation Rule, hereinafter "Reclamation Rule").

In short, MEC urges that the West Virginia DEP amend the Reclamation Rule to make clear that in the event of damage to structures due to longwall mining subsidence, the choice in implementing the alternative obligations of the mine operator to repair that damage or to pay the landowner the diminution in value of the structure rests exclusively with the mine operator.

MEC and its affiliates own and operate six (6) longwalls in five (5) underground coal mines in the state of West Virginia, and the related facilities to support those mines. These operations provide employment for nearly 3100 people, over 2300 of them West Virginia citizens. The importance and the effect of legislative rules relative to MEC's obligations as an operator of coal mine facilities, and in particular, MEC's duties and obligations pursuant to the Reclamation Rule, cannot be overstated.

History of the Reclamation Rule

For well over forty (40) years, since the initial passage of the federal Surface Mining Control and Reclamation Act and the resulting West Virginia statute and regulations and various amendments thereto, operators and landowners have largely been able to work together to reach mutually beneficial agreements when coal mining operations have resulted in material subsidence damage to structures. The reason is simple: there has never been any question that operators must either repair material subsidence damage to structures *or* pay the owner of the structure for the diminution in value, and, until recently, there was never any question that it was the *operator's* choice to either repair or compensate.

The federal OSM regulations were first published in 1979 and the West Virginia program, which, by definition, had to be as restrictive as the federal regulations, was submitted in 1980 and approved effective January 21, 1981. There is no question that West Virginia's use of the phrase "surface owner protection" was derived from the 1979 Federal OSM regulation Section 817.124. As set forth below, it was a mere clerical change (to remove excess verbiage) to the OSM regulations in 1982 which resulted in a combining of Sections 817.121 and 817.124 and re-titling of the new section, removing the phrase "surface owner protection." The Federal OSM made absolutely clear that this was not a substantive change—the obligations of operators and the protections afforded landowners *remained the same*.

The applicable state rule, W.V. C.S.R. §38-2-16(c)(2), mirrors its federal counterparts, 30 U.S.C. §1309a(a)(1) and the regulation implementing the same, 30 C.F.R. §817.121(c)(2). The plain language of these regulations/rules and the federal statute on which they are based make clear that it is the *operator* which decides whether to repair a residence or pay compensation in the amount of the diminution in value. The obligation is plainly set forth—repair or compensate for material damage—and that obligation is discharged by the operator's satisfaction of one of the alternatives specified.

The federal OSM (which first published the applicable regulations in 1979, providing the blueprint for the West Virginia program submitted a year later) has consistently instructed that the selection of the alternative remedies set forth in Section 817.121 be given to the operator.

On March 13, 1979, pursuant to Section 501(b) of the federal SMCRA, the OSM promulgated permanent program rules pertaining to, *inter alia*, subsidence control at underground coal mines, including Sections 817.121 and 817.124 of 30 C.F.R. 44 F.R. 14902 et seq. (JA-0544-0547). In the 1979 version of the regulations, these sections included alternatives—restoration or compensation—for the operator to choose in order to address damages to residential dwellings caused by coal mine subsidence.

When first published in 1979, Section 817.121 of the federal regulations was titled "Subsidence control: General requirements," and addressed the operator's obligation to plan and conduct mining so as to prevent subsidence from causing material damage to the extent technologically and economically feasible. Section 817.124 was titled "Subsidence control: *Surface owner protection*," and addressed the operator's obligation to "repair or compensate." 44 F.R. 15440 (March 13, 1979) (JA-0552) (emphasis added).

In announcing the final rules, the OSM made clear that mitigation measures following subsidence are to be chosen by the operator. With respect to rules governing "Subsidence Control: *Surface owner protection*," (§817.124) the OSM stated as follows:

> Section 817.124 provides protection for the rights of owners of surface lands or structures . . . [.] Operators of mines that cause subsidence-related damage are required to mitigate the damage by restoration, rehabilitation, or removal and replacement of structures, purchase of the damaged structure or feature and restoration of surface to pre-mining capability, or by providing surface owners with prepaid insurance to cover the amount of diminution in value caused by subsidence or other similar protection.

* * *

> Several suggestions dealt with language of the proposed regulations. Most concerned the concept of consultation by operators with surface owners as provided in the proposed Section 817.124. As stated above, the Office's modification of this Section has incorporated alternatives to the "consultation" concept suggested by commenters *by providing options for the operator* and protection for the surface owner. This is consistent with the Act in that it recognizes that coal is necessary to meet our energy needs and also recognizes that the environment must be protected from the adverse consequences of mining.

See 44 F.R. 14902 at 15275.

On April 16, 1982, the OSM published proposed changes to certain regulations implementing SMCRA. *See* 47 F.R. 16604. In an effort to avoid excess verbiage, certain sections of the then-existing regulations relating to subsidence control were eliminated and/or consolidated. This included *combining* Sections 817.121 ("Subsidence control: General requirements") and Section 817.124 ("Subsidence control: *Surface owner protection*") into *one* section, to be titled "Subsidence control." "The proposed rule would consolidate the requirements of existing §§817.124 and 817.126 into the requirements of §817.121. This consolidation would streamline the rules and eliminate excess verbiage. *It is not intended as a substantive change.*" 47 F.R. 16604, at Section III. B.

Following a comment period, the OSM issued its final rule on June 1, 1983. *See* 48 F.R. 24638. With regard to "Subsidence Control Requirements"—the newly-consolidated section—the OSM stated as follows:

> The provision for surface-owner protection in the proposed rule is changed in final §817.121(c). The proposed paragraph contained little change from previous §817.124. *The underground mine operator would have been given several options to remedy all material damage caused by subsidence.* The final rule establishes a distinction between damage to land and damage to structures or facilities. As discussed below, all subsidence-caused material damage to the land is required to be repaired.

(emphasis added).

On March 31, 1995, in response to the passage of the Energy Policy Act of 1992, the OSM once again revised Section 817.121(c), removing the reference to "State law" because the amendment to SMCRA (addition of 30 U.S.C. §1309a) required operators to repair or compensate residences irrespective of state law. 60 F.R. 16722 at pp. 16749-16750. That version of Section 817.121(c), which applies to mining occurring after October 24, 1992, is the version in effect today.

The OSM's most recent proposed changes to these rules (in the 2015 Stream Protection Rule)[1] made it absolutely clear that it views the alternative mitigation measures to be options in the hands of the mine operator. Among the proposed changes were editorial (*i.e.*, non-substantive) changes to Section 817.121 to provide "clarity and ease of reference." In addition to removing Section (c)(4) (relating to previously-suspended rules on presumption), "[w]e also propose to restructure this section for clarity and ease of reference and revise it in accordance with plain-language principles to make it more user-friendly. *We do not propose any substantive*

[1] The 2015 Stream Protection Rule was ultimately stricken. However, OSM made clear that the proposed "changes" to Section 817.121 were merely editorial, not substantive.

revisions." Specifically, the revised rule would have read in a question-and-answer format, ***directed to coal mine operators***:

> §817.121 What measures must I take to prevent, control, or correct damage resulting from subsidence?
>
> * * *
>
> (d) Repair or compensation for damage to non-commercial buildings and dwellings and related structures.
>
> (1) You must promptly repair, or compensate the owner for, material damage resulting from subsidence caused to any non-commercial building or occupied residential dwelling or structure related thereto that existed at the time of mining.
> (2) ***If you select the repair option***, you must fully rehabilitate, restore or replace the damaged structure.
> (3) ***If you select the compensation option***, you must compensate the owner of the damaged structure for the full amount of the decrease in value resulting from the subsidence-related damage. You may provide compensation by the purchase, before mining, of a non-cancellable, premium-prepaid insurance policy.

(emphasis added).

Accordingly, the alternative mitigation requirements of Section 817.121 of the federal SMCRA and the nearly identical mitigation requirements set forth in West Virginia State Rule §38-2-16.2.c.1 and c.2 are obligations of underground mine operators, and with regard to damage to residential structures, it is the mine operator which chooses the option.

Since 1981, the West Virginia SMCRA and regulations relative to have gone no further than the corresponding federal regulations with respect to subsidence damages to a residence, and they have been interpreted and applied in the same manner. The state regulations were based on the federal regulations, and absent state legislative history to the contrary (which legislative history is absent here), the state regulations were interpreted in a manner consistent with the legislative history of the very regulations upon which they were based.

Until recently, the West Virginia program was predictably interpreted and applied in a manner consistent with the corresponding federal program, and never in a manner which is *more stringent* than the federal program with regard to structure damages. This level of consistency and predictability allowed operators to act responsibly and structure owners to act reasonably relative to disputes surrounding structure damages *without* court intervention.

Schoene v. McElroy Coal Company and Coal Jobs & Safety Act, SB 635

On April 12, 2018, the West Virginia Supreme Court of Appeals issued an opinion answering certified questions from the United States Court of Appeals for the Fourth Circuit in the matter of *Schoene v. McElroy Coal Company*. Among the issues was whether it is the operator or the landowner who chooses repair or compensation for diminution in value under West Virginia's Reclamation Rule as to structures damaged by coal mine subsidence.

Despite the rule being modeled directly after the federal rule which has been interpreted and applied (by the very agency which drafted it) to leave the decision with the operator, and without any legislative history suggesting that West Virginia meant a more stringent rule than its federal counterpart, the Court decided the rule was "ambiguous" and went on to conclude that the decision rests with the landowner. Its decision in this regard was essentially based on the notion that the West Virginia SMCRA is "remedial" in nature.

In its opinion, the Court expressly invited the agency and the legislature to address this supposed ambiguity. In response, the Coal Jobs and Safety Act, SB 635 amended Section 22-3-14 by adding subsection (e) and requiring the Secretary to specifically consider adoption of the federal standards codified at 30 C.F.R. 817.121.

On June 5, 2019, the Secretary responded that the DEP will not adopt the federal standard, and instead added language to the Reclamation Rule to clarify that the Secretary has no jurisdiction to adjudicate property rights disputes.

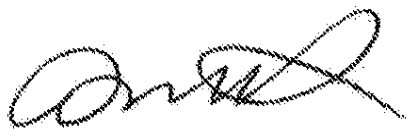
Analysis

The language of the federal Reclamation Rule is already nearly identical to the language of the West Virginia Reclamation Rule. The federal OSM has expressly indicated, on several occasions, that the choice of repair or compensation as to structures rests with the operator. The West Virginia Supreme Court's decision has upset forty (40) years of coal mine operator expectations and has led to some rather unfortunate results.

- Upsets stability of prior system and encourages unreasonable demands from landowner;
- Encourages litigation;
- Under prior system, everyone knew the pre-mining value and it was easy to put a fair number on diminution in value;
- Now landowners can obtain bogus, post-mining estimates for repair to leverage settlement amounts far in excess of the actual value of the structure
- Creates windfall for landowners and adds several hundred thousand dollars of cost to operator for each structure undermined
- Remedial or not, the statute should not result in windfall to any party;

The Secretary has the opportunity and obligation to correct the erroneous interpretation of the Reclamation Rule by the West Virginia Supreme Court, and MEC joins all other West Virginia coal mine operators in calling for the Secretary to reconsider its position and make clear that the operator, and not the landowner, decides whether to repair or compensate for subsidence damages to structures.

Respectfully submitted,



Jason D. Witt, Esq.
Assistant General Counsel and
Director of Land Management

TUNNELRIDGEMINE
2596 Battle Run Road
Triadelphia, WV 26059

Evan Midler,
Land Manager
office: 304-547-2537
fax: 304 547 2940
evan.midler@arlp.com

July 8, 2019

Mr. Charles S. Sturey
Division of Mining & Reclamation
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Via email: csturey@wvdep.org
and first-class mail

Re: Comments by Tunnel Ridge, LLC
Proposed revisions to 38 CSR 2
West Virginia Surface Mining & Reclamation Rules

Dear Mr. Sturey:

As you are aware, Tunnel Ridge, LLC ("Tunnel Ridge") is an underground coal mine operator which has since 2005 been actively engaged in longwall mining thermal coal in the northern panhandle of West Virginia, employing hundreds of underground miners and related employees; having expended many millions of dollars in developing the operation; and producing in excess of 7 million tons of clean coal each year. Tunnel Ridge strongly objects to the DEP's proposed revisions to the Rule, having failed to address the primary issue identified in the Coal Jobs and Safety Act of 2019 ("Senate Bill 635"), an issue of critical importance to the longwall mining industry.

These comments are organized in separate parts for your convenience and ease of reference.

KEY ISSUE

Senate Bill 635 contains a clear directive to the Secretary of the WVDEP to review and clarify Rule 16.2 to address surface owner compensation for structure damage due to subsidence with consideration to adopting the Federal standard. The applicable language from the Act is as follows:

> "The Secretary shall promulgate for review and consideration by the West Virginia Legislature during the regular session of the Legislature, 2020, revisions to legislative rules (38 CSR 2) pertaining to surface owner protection from material damage due to subsidence under this article. The Secretary shall specifically consider adoption of the federal standards codified at 30 C.F.R. § 817.121." (emphasis added)

The DEP elected to reject that legislative directive and filed an amended Rule on June 5, 2019. In the prefatory language to the revised Rule the DEP stated that it "elected not to adopt the federal standards".

Those rules include Rule 16.2.c.2 (the "Rule"), requiring an operator of an underground mine to:

> "Either correct material damage resulting from subsidence caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence" (emphasis added).

Regulations promulgated under the Federal Act, in virtually identical language, also provide the coal operator the option of choosing to repair or to compensate for the diminution in value of the structure and has been so construed by the OSM, United States Department of the Interior.[1]

BACKGROUND

The West Virginia regulation has been consistently applied by the WVDEP for nearly 40 years to provide the option to repair or compensate to the operator, until the West Virginia Supreme Court rendered a contrary opinion on April 12, 2018 in the matter Schoene v. McElroy Coal Company.[2] In Schoene, the court found the Rule to be ambiguous and, contrary to the Federal Regulation, decided that the landowner – not the operator – has the choice of repair or compensation. As a practical matter this reversal has radically increased the calculation of settlement payments by incentivizing contingent-fee attorneys to leverage large repair estimates for structures of modest market value. Further, should a surface owner elect repairs, and a coal operator commences with actual work to repair, disputes of workmanship, quality, efficacy, and satisfaction give rise to further litigation. Unfortunately, the Act does not provide any method, absent litigation, to address these disputes and the coal operator does not receive any release of the claim even after the repairs are made.

Prior to the Schoene decision, a coal operator held a remedy to choose diminution in value for settling these statutory claims. Diminished value was and remains an effective and simple calculation and was determined by enlisting licensed appraisers to evaluate properties before and after mining. Any subsidence effect to a structure could be professionally identified by a post-mining appraisal and calculated accordingly, thereby providing compensation for any devaluation of the residential or agricultural structure. Conversely, repair estimates are subjective, commonly contradict one another, and often are used to inflate compensation. As a result, the repair standard has become a beacon of dispute to plaintiffs' attorneys seeking contingent fees at the expense of the coal operators and structure owners.

COMMENTS

Option Clearly Belongs to the Operator: As discussed above, the language of the Rule virtually identical in the Federal and all State-level surface mining regulations clearly provides the operator with the option of repairing any damage or compensating the structure owner in the amount of the diminution (reduction) in market value resulting from any damage, not exceeding the pre-mining value of the structure.

[1] Please see Comments submitted by the West Virginia Coal Association; citing 44 Fed. Reg. 14902, 15272 (March 13, 1979); and 80 FR 44436 (July 27, 2015).
[2] Schoene v. McElroy Coal Company, 240 W.Va. 475, 813 S.E.2d 128 (2018).

West Virginia Coal Association
PO Box 3923, Charleston, WV 25339 • (304) 342-4153 • Fax 342-7651 • www.wvcoal.com

July 16, 2019

Mr. Charles S. Sturey
Division of Mining & Reclamation
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
Submitted via electronic mail: csturey@wvdep.org

Re: Comments on Proposed Revisions to State Surface Mining & Reclamation Rule (38 CSR 2)

Dear Mr. Sturey:

Pursuant to the notice published by the West Virginia Department of Environmental Protection (WV DEP), the West Virginia Coal Association (WVCA) offers the following comments and observations regarding the agency's proposed revisions to the state's Surface Coal Mining & Reclamation Rule (38 CSR 2).

WVCA is a non-profit state coal trade association representing the interests of the West Virginia coal industry on policy and regulation issues before various state and federal agencies that regulate coal extraction, processing, transportation and consumption. WVCA's general members account for 98 percent of the Mountain State's underground and surface production of both thermal and metallurgical coal. WVCA's membership accounts for 100 percent of the state's coal production from longwall mining operations. WVCA also represents associate members that supply an array of

services to the mining industry in West Virginia. WVCA's primary goal is to enhance the viability of the West Virginia coal industry by supporting efficient and environmentally responsible coal removal and processing through reasonable, equitable and achievable state and federal policy and regulation. WVCA is the largest state coal trade association in the nation.

Section 16.2.c.2 of WVDEP's rule provides that operators must "either correct material damage from subsidence caused to any [non-commercial] structures by repairing the damage or compensate the owner of such structures or facilities in the full amount in the diminution in value resulting from the subsidence. The West Virginia Supreme Court found the rule was ambiguous and resolved the ambiguity in favor of the landowner by relying on the remedial nature of the West Virginia Surface Coal Mining and Reclamation Act. *WVCA believes this interpretation is counter to the federal regulations and the historic implementation of the state program by WV DEP.*

In March 2019 the West Virginia Legislature enacted Senate Bill 635, directing the agency to examine its rules related to subsidence and surface owner protection and instructing the agency to specifically consider the adoption of the corresponding federal regulations.[1] Finding the state and federal regulations to be virtually identical, WV DEP proposed the language that is now the subject of the current comment period.

[1] http://www.wvlegislature.gov/Bill_Text_HTML/2019_SESSIONS/RS/bills/SB635%20ENR.pdf

The parallel federal rule appears at 30 CFR § 817.121(c) and includes language nearly identical to West Virginia's. The federal Office of Surface Mining (OSM), however, has long resolved any ambiguity in its rule by declaring that the option to repair or compensate belongs to the mine operator rather than the landowner. See 44 Fed. Reg. 14902, 15272(March 13, 1979) (construing nearly identical subsidence repair or compensation provisions then set out in §817.124, OSM stated that the rule *"provid[ed] options for the operator and protections for the surface owner."*).

Later, in 2015, OSM restructured the rule as part of its later rescinded "Stream Protection Rule." There, OSM announced that it was making no substantive change to the rule, but recast the rule in a question and answer format that clearly recognized the choice of remedy as belonging to the mine operator *("If you select the repair option, you must fully rehabilitate, restore or replace the damaged structure," and "If you select the compensation option, you must compensate...."]* 80 FR 44436 (July 27, 2015)[2]

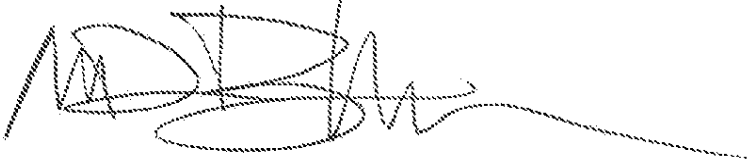
By providing the choice of remedy to the mine operator, the federal rule effectively adopted the general rules of damages that the measure of compensation is the lesser of the cost or repair or the diminution in value –and that injured party may never demand a remedy that entails paying more than the fair market value of a structure as it existed before subsidence. Those rules of damage should apply here, regardless of which remedy is chosen or who chooses it. That is, a landowner should not

[2] OSM noted in its 2015 rulemaking relative to the subsidence control provisions: *"we also propose to restructure this section for clarity and ease of reference and revise it in accordance with plain language principles to make it more user-friendly. We do not propose any substantive revisions."* 80 FR 44436 (July 27, 2015).

be able to recover more than a structure was worth before mining and mine operators should have to pay only the lesser of the cost to repair or the diminution in value.

If WVDEP adopts its current proposal without acknowledging that the State rule must also be construed to limit recovery of damages as envisioned by the choice of remedies that OSM granted to mine operators, then it will effectively be adopting a rule that is more stringent than federal law as construed by OSM. While the federal Surface Mining Control & Reclamation Act does not prohibit such a result, West Virginia law does. W.Va. Code § 22-1-3a prohibits WVDEP from adopting state rules after 1994 that are more stringent than are their federal counterparts without making the specific findings and determinations set out in that section—findings that WVDEP has not offered in its rulemaking. Accordingly, regardless of whether the choice or remedy is left to the operator or surface owner, WVDEP should acknowledge that the cost of the remedy may not exceed the pre-subsidence value of the damaged structure.

Respectfully Submitted,



Jason D. Bostic
Vice-President