UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
BOARD OF LAND APPEALS

AMERIKOHL MINING, INC,	)	
	)	
Appellant,	)	Docket No. IBLA-2015-0006
	)	
v.	)	
	)	
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT,	)	
	)	
	)	
Appellee.	)	

BRIEF FOR *AMICI CURIAE* MOUNTAIN WATERSHED ASSOCIATION, HOME OF THE YOUGHIOGHENY RIVERKEEPER IN SUPPORT OF AFFIRMANCE

Mountain Watershed Association, Home of the Youghiogheny Riverkeeper ("MWA"), by and through its undersigned counsel, files this amicus curiae brief in the above referenced matter.

MWA's Interest in the Appeal

MWA is a nonprofit organization formed in 1994 in response to a deep mine proposal in the Indian Creek Watershed, a sub-basin of the Youghiogheny River in Fayette and Westmoreland Counties, Pennsylvania. After the proposal was defeated, citizens committed to building an organization dedicated to protecting and restoring Indian Creek where streams and groundwater had been contaminated by more than 150 years of mining. In 2003, MWA petitioned the international Waterkeeper Alliance to take on the role of the Youghiogheny Riverkeeper. We were successful and became home of the Youghiogheny Riverkeeper, a program of MWA, which expanded our vision into the larger Youghiogheny River watershed. In that role we serve as the public advocate for the Youghiogheny and its tributaries. As public advocate, MWA regularly conducts extensive water sampling throughout the Youghiogheny watershed to monitor its quality, manages several projects that actively improve the quality of the watershed, and

works with regulatory agencies to ensure that all activities in our watershed fully comply with the law, among other actions. Therefore, as described, our over 20 years of work within the Youghiogheny watershed and countless hours and dollars spent ensuring its protection and restoration demonstrates MWA's interest in this matter concerning a direct source pollution into a section of the Youghiogheny River with a designated use of High-Quality Cold Water Fishes.

In addition to being interested based on our work in the Youghiogheny watershed generally, MWA's stake in this matter comes from the significant role our organization played in this action coming about. As detailed in Ms. Kasserman's affidavit (Exhibit 1), MWA was responsible for the first reporting of the Curry site's sedimentation discharge. Following that first report, MWA engaged two different bureaus of the DEP, the Fayette County Conservation District, and OSM in an attempt to find an entity that would take action to stop the flow of pollution from the site. These experiences and the fact that MWA continues to monitor the discharge clearly demonstrate MWA's interest in this matter.

This appeal presents an opportunity for the Board to provide a clear precedent for Pennsylvania and prevent further degradation of Pennsylvania's environment caused as a result of regulatory inconsistency. Both OSM and the ALJ have interpreted the state law correctly to define what occurred on the Curry property as surface mining activity. Amerikohl and DEP, in contrast, introduce unnecessary and arbitrary distinctions into a straightforward statutory definition. The federal floor clearly defines vegetation removal, such as the removal in this case, as surface mining activity. Pennsylvania cannot interpret state law to be less protective or inclusive. The case law, a plain reading of the law, and the federal preamble all support the conclusion that timbering can constitute mining and did constitute mining in this situation. Further, a permittee, such as Amerikohl in this case, is obligated to maintain their site in

compliance with an issued permit. A Board decision in favor of OSM will prevent future harm, conserve precious resources, and provide much needed direction to Pennsylvania's regulators.

Argument

1. Pennsylvania state law demonstrates the legislature's intent to be especially inclusive as to what surface activities count as surface mining activity.

Federal mining law is significant because it establishes the floor in terms of standards, and states cannot pass or interpret laws in ways that undermine those floor standards. However, in this case, state law alone should be able to resolve the question of whether the complained of activity constituted surface mining activity, and the discussion of the federal floor in § 3 only enhances this resolution.

OSM and the ALJ have interpreted the state law correctly to define what occurred on the Curry property as surface mining activity. Amerikohl and DEP have taken a simple and plainly inclusive statutory definition of "surface mining activity" and adulterated it by reading in various gradations, split hairs, and arbitrary distinctions. The state statutory definition that OSM approved is broad and reflects the legislature's intent to err on the side of inclusion. A review of the state's statutory interpretation principles bears this out.

Statutory interpretation principles are enshrined in Pennsylvania law. 1 Pa. C.S.A. Ch. 19; 1 Pa. C.S.A. § 1901. As part of any analysis, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage;...[.]" 1 Pa. C.S.A. § 1903(a). "When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. § 1921(b). "[I]t is well established that resort to the rules of statutory construction is to be made only when there is an ambiguity in the provision." *Mohamed v. Department of Transportation,* 40 A.3d 1186, 1193 (Pa. 2012) (citations omitted).

The IBLA has similar standards for statutory interpretation. Any issue of statutory interpretation must begin with the words of the statute itself. *Casey E. Folks, Jr., et al. (on reconsideration)*, 183 IBLA 359 (2013). When the language of a statute is plain, that is the end of the inquiry for this Board. *South Central Utah Telephone Assoc., Inc.*, 98 IBLA 275, 1987 WL 110457, *4 (1987).

While DEP in its amicus brief cites to a regulation for the definition of surface mining activities, there is actually a statutory definition in the PaSMCRA:

> **"Surface mining activities"** shall mean the extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip, auger mining, dredging, quarrying and leaching, and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto, but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. "Surface mining activities" shall not include any of the following:
> (1) Extraction of coal or coal refuse removal pursuant to a government-financed reclamation contract for the purposes of section 4.8.
> (2) Extraction of coal as an incidental part of Federal, State or local government-financed highway construction pursuant to regulations promulgated by the Environmental Quality Board.
> (3) The reclamation of abandoned mine lands not involving extraction of coal or excess spoil disposal under a written agreement with the property owner and approved by the department.
> (4) Activities not considered to be surface mining as determined by the United States Office of Surface Mining, Reclamation and Enforcement and set forth in department regulations.

52 P.S. § 1396.3.

To begin with, there is no modifier that limits the meaning of the word "connected" in the phrase "all surface activity connected with surface or underground mining". The DEP, by stating

that only "timbering sufficiently connected" with coal removal can be regulated as surface mining activities, impermissibly reads the adverb "sufficiently" into the definition. DEP Amicus Brief at 6. DEP does so in order to support its arguments, including that grubbing may count as surface mining activities but not timber harvesting. *Id.* at 7. The Board should reject this attempt to insert gradations where none exist.

The definition is extremely broad, which evidences the legislature's desire to capture as much surface activity as possible. First, what counts as surface mining activity is "*all* surface activity" that bears some connection with surface mining. (emphasis added). The use of the word "all" demonstrates the legislature's intent to not exclude any surface activity – be it harvesting or grubbing or any other kind of vegetation removal.

Second, what counts as surface mining activity is "all surface activity" that is simply and plainly – not sufficiently or in any other way – "connected" with surface or underground mining. The word "connected" is defined as "joined or linked together" and as "having parts or elements logically linked together". Merriam Webster online, available at http://www.merriam-webster.com/dictionary/connected (last checked July 9, 2015). Removing any vegetation from the surface area where proposed coal mining will take place – be it so-called partial removal through harvesting or more complete removal through grubbing – is logically connected to that proposed coal mining.

Third, what counts as surface mining activity "includ[es], but [is] not limited to" various listed items. That phrase, especially when considered with "all surface activity", demonstrates the legislature's intent to exclude nothing and include everything without splitting hairs or creating arbitrary distinctions. There is no meaningful distinction between harvesting and grubbing in this context, but even if there were, the phrase in the definition would obviously

serve to include both, not to choose one over the other.

Fourth, what counts as surface mining activity is "site preparation", a term conspicuously lacking adornment. The word "preparation" means "the action or process of making something ready for use or service or of getting ready for some occasion, test, or duty." Merriam Webster online, available at http://www.merriam-webster.com/dictionary/preparation (last checked July 9, 2015). Removal of some vegetation – which caused a tremendous amount of pollution – clearly made the proposed mining area more ready for use than it had been. To prove the point, Dave Maxwell of Amerikohl actually sent an email to the landowner saying that it "would be nice if [the area] was cut by this March 31st", OSM Brief at 6 (citing to Tr. 428-29; R. Ex. 37), which happens to be the last day of the November-March timbering season that is restricted in time due to Indiana bat protection. See OSM Brief at 16-17. This demonstrates that the timbering made the proposed mining area more ready for use than it had been. The phrase "site preparation" does not say that the preparation must be conducted by the mining company, or pursuant to an agreement between the mining company and the landowner, or completed only after activation of a mining permit, or accomplished through grubbing instead of harvesting.

Fifth, what does not count are the four specifically enumerated exclusions. The legislature, through its statute, included as much as possible in the definition of surface mining activities by using capacious terms. Also through the statute, it communicated its very narrow intent to exclude with express exclusionary provisions that do nothing to affect vegetation removal. The combination of inclusive, capacious terms that define what surface mining activities are, and specific exclusive terms that do nothing to exclude vegetation removal, demonstrates that the legislature had no intent to exclude vegetation removal, let alone to differentiate between its varieties.

As it happens, the state regulatory definition of "surface mining activities" is not materially different from the statutory definition. 25 Pa. Code § 86.1. As to any differences between the two, DEP is bound to interpret the regulation in a manner that is consistent with the statute under which it is promulgated. *Slippery Rock Area School Dist. V. Unemployment Compensation Bd. of Review*, s983 A.2d 1231, 1241 (Pa. 2009) (citation omitted). As demonstrated, the statute's definition of surface mining activities is broad and inclusive. The regulatory definition is also broad and inclusive, and can only be interpreted in a manner that is consistent with the statutory definition.

Words in a statute and regulation have meaning. DEP and Amerikohl have attempted to read modifiers and gradations and complexities into a law that is plain and clear and simple. DEP has accepted that vegetation removal activities may count as "surface mining activities", DEP Amicus Brief at 5-6, but it requires: that the removal be done by grubbing; that it be done only after one has both obtained and activated a mining permit; that it be done only after notice is provided to the landowner; and that it be done only pursuant to an agreement between the mining company and the landowner. This is a truly incredible amount of detail and parsing, *none of which* exists anywhere in the language of the statute and *none of which* advances the clearly stated intent of the legislature.

2. Federal law, of which the preamble is part and parcel, demonstrates that the federal floor would define vegetation removal, such as the removal in this case, as surface mining activity, and Pennsylvania cannot interpret state law to be less protective or inclusive.

As this plain reading analysis suggests, the statutory language is clear. If the Board has any doubts about the meaning of the state regulations, however, the federal preamble provides useful guidance. Specifically, the preamble to the federal permanent program regulations regarding the definitions of "surface mining activities" and "surface coal mining operations" indicates that

explicitly including timbering in the definitions was unnecessary because the existing language already covers the removal of vegetation and site preparation, which logically includes timbering or logging. See Surface Coal Mining and Reclamation Operations, 44 Fed. Reg. 14902, 14940 (Mar. 13, 1979) (with respect to the definition of "surface mining activities"); 44 Fed. Reg. 14902, 14914 (Mar. 13, 1979) (with respect to the definition of "surface coal mining operations"); see also OSM Brief at 10. The preamble is instructive to the Board because: 1) preambles to regulations promulgated in the federal register provide necessary context for applying regulatory language to a specific set of facts, 2) where the regulatory language is at all unclear, a preamble is the best indication of legislative intent, and 3) federal legislative history, including the regulatory preamble, provides guidance in interpreting state regulations where they have the same operative language and the state regulations are approved as consistent with the federal regulations.

Preambles are useful for supplementing a plain language analysis

First, preambles provide the necessary framework and context for applying regulatory language to a specific case. "Early understandings of the APA suggest that the statement of basis and purpose, which comprises much of what is commonly referred to as the regulation's "preamble," was intended to have a dual role: not only identifying the legal and factual basis for the rule, but also providing guidance on its meaning and import for the public and the courts." Kevin M. Stack, *Guidance in the Rulemaking Process: Evaluating Preambles, Regulatory Text, and Freestanding Documents as Vehicles for Regulatory Guidance*, Administrative Conference of the United States (website), May 16, 2014 (available at https://www.acus.gov/sites/default/files/documents/Guidance%20in%20the%20Rulemaking%20Process%20Revised%20Draft%20Report%205_16_14%20ks%20final.pdf, last visited July 10,

2015). Based on this understanding, it is entirely appropriate to rely on a preamble to more fully explain application of the regulations to a specific case. See *McLaughlin v. ASARCO, Inc.*, 841 F.2d 1006, 1009 (9th Cir. 1988); *Eugene v. Vogel,* 65 IBLA 213, 216 (1982).

Even where a plain reading of the regulatory language is appropriate and sufficient, as it is here, the preamble to the regulation should be considered in order to conduct a meaningful analysis. See *UPG, Inc. v. Edwards*, 647 F.2d 147, 152 (Temp. Emer. Ct. App. 1981); Jack C. Gutte, 123 IBLA 295, 298 (1992). In *UPG v. Edwards,* the Court specifically states that, "[i]n considering the question of plain meaning, the preamble to the regulation in question *must not be disregarded.*" *UPG, Inc. v. Edwards*, 647 F.2d at 152 (emphasis added). *see also Martin v. Am. Cyanamid Co.,* 5 F.3d 140, 145-46 (6th Cir. 1993) ("The preamble to a regulation may be consulted in determining the administrative construction and meaning of the regulation"). In *Ramey*, the Court looked to the regulatory preamble to discern how the regulation should be applied. The Court stated that "[i]n addition to the text of the regulation, there is powerful extrinsic evidence [in the preamble to the regulation] that section 3.311 does not create a presumption of service connection [because]... [w]hen the DVA first promulgated... section 3.311, it discussed the contents of the regulation and made clear that the regulation was creating a framework for adjudicating the issue of service connection on a case-by-case basis." *Ramey v. Gober*, 120 F.3d 1239, 1245 (Fed. Cir. 1997). Similarly, in *Clark v. Alexander*, the Court noted that while the federal housing statutes and regulations did not provide a definition for "family," the preamble to HUD's applicable regulations "explained that 'family' in these programs includes only individuals who are occupying the same unit." *Clark*, 85 F. 3d at 153. Based on this definition, the Court found that the conclusion that David Clark and Stacey Clark were part of the same was family was consistent with the federal regulations. *Id.*

These cases are instructive for conducting an analysis of the definitions provided in the federal regulations here because, the question of whether timbering is included in the definitions of "surface mining activities" and "surface coal mining operations" can be readily resolved by pointing to the preamble of the federal regulations as initially promulgated in 1979. The preamble makes it clear that OSM determined the proposal to amend the regulation to explicitly include timbering was unnecessary because the existing language, addressing removal of vegetation and site preparation, was deemed sufficiently clear and inclusive of timbering activity. Ignoring this context in which the regulations were promulgated would be a mistake.

Where regulatory language is unclear, a preamble provides the most useful source of evidence for interpretation

Second, and in the alternative, it is recognized that where the regulatory language is at all unclear, a preamble is the best indication of legislative intent. Lars Noah, *Divining Regulatory Intent: The Place for A "Legislative History" of Agency Rules*, 51 Hastings L.J. 255, 307 (2000) ("The preamble that accompanies a final rule when it is published in the Federal Register represents the most obvious source of guidance"). "Although the preamble does not 'control' the meaning of regulation, it may serve as a source of evidence concerning contemporaneous agency intent." *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). Preambles to regulations "constitute authoritative guidance about the agency's understanding of the meaning of the regulations at the time they are issued." Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 Geo. Mason L. Rev. 669, 688 (2015) (concluding that "discerning guidance from preambles about the meaning of the regulations is more practical than using the multiple sources of legislative history in statutory interpretation."); James R. McColl, 159 IBLA 167, 180 (2003) (comparing the preamble of the final rule to the preamble in the proposed rule to determine BLM's legislative intent). Based on this understanding, where the

plain meaning of regulations is not discernable from the face of the regulations, it is entirely appropriate to look to the preamble to interpret the regulations. *See State of Vt. v. Thomas*, 850 F.2d 99, 103 (2d Cir. 1988); *LaRosa Fuel Company, Inc., v. OSM*, 134 IBLA 334, 354 (1996). To the extent that the state regulations at issue in this case do not explicitly include timbering within the definition of surface mining activities, the question can and should be readily resolved by pointing to the federal preamble.

Where state law is approved as consistent with federal standards, federal law guides analysis of the state law

Finally, federal legislative history, including the regulatory preamble, must provide guidance in interpreting state regulations where they have the same operative language and the state regulations were approved as consistent with the federal regulations. In this instance, the Pennsylvania regulations define "surface mining activities" to include "activities in which the land surface has been disturbed as result of or incidental to surface mining operations... " 25 Pa. Code § 86.1. Further, the regulations define "disturbed area" as "an area where vegetation... is removed..." 25 Pa. Code § 87.1. These State regulations were approved as consistent with and no less effective than the corresponding Federal regulations. see 30 U.S.C. § 1253(a)(7), 30 C.F.R. § 732.15, 30 C.F.R. Part 938. Notably, the corresponding federal regulations are essentially the same. see 30 C.F.R. § 701.5 (defining "surface mining activities") and 30 C.F.R. § 700.5 (defining "surface coal mining operations"). As the OSM Brief states, "the PADEP inspection staff lacks the authority, and certainly the discretion, to reinterpret the state's regulations contrary to the Federal interpretation expressed in the preamble to the initial permanent program regulations." OSM Brief at 27.

Amerikohl argues that, "federal law (and by logical extension any related preamble) is superseded by state law in a primacy state unless withdrawal of approval occurs." Amerikohl

Brief n.8 (citing *Bragg v. W. Virginia Coal Ass'n*, 248 F.3d 275, 295 (4th Cir. 2001). It is well established, however, that "[f]ederal legislative history and interpretation must control construction of the state law in these circumstances as a matter of simple federal preemption." *Brown v. Red River Coal Co.*, 373 S.E.2d 609, 610 (1988). "A common tenet of modern federalism holds that in substantive areas preempted by the federal government, such as coal surface mine reclamation, states may not enact laws that are less restrictive than or inconsistent with the federal law. *Brown,* 373 S.E.2d at 610 *(citing Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 290 (1981)). In *Red River Coal*, the Court found that where the federal act was interpreted by federal authorities to mandate issuance of NOVs to non-negligent mine operators, the state act must be interpreted in the same way. *Id.* Similarly, here where the state regulations have been approved as consistent with the federal regulations, interpretation of the state regulations should be guided by federal legislative history such as the regulatory preamble.

Although Amerikohl argues otherwise, this contention is further supported in *Bragg.* The *Bragg* Court noted that "Congress established in SMCRA 'minimum national standards' for regulating surface coal mining and encouraged the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards, as well as any more stringent, but not inconsistent, standards that they might choose." *Bragg v. W. Virginia Coal Ass'n*, 248 F.3d 275, 288 (4th Cir. 2001). Based on this, the Fourth Circuit concluded that SMCRA requires that *either* federal law *or* state law will regulate coal mining activity within a State, however, even when state regulations are approved by the Secretary, there is a continuing federal obligation to inspect and monitor the operations of the State program. *Bragg,* 248 F.3d at 289. So while the state regulations are the operative regulations, the federal

regulations (including any related preamble) continue to provide a "blueprint against which to evaluate the State's program." *Id.*; see also *Montana Envtl. Info. Ctr. v. Opper*, No. 2013 WL 485652, at *2-3 (D. Mont. Jan. 22, 2013); *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 97-98 (4th Cir. 2006). In this instance, the federal preamble which clearly indicates the legislative intent to include timbering activity as part of regulated surface mining activity should provide a "blueprint" for interpreting Pennsylvania's regulations.

3. Operators are accountable for violations that take place on permitted sites, even if they result from third-party actions

"[O]ne legally capable of exercising control over particular coal mining operations can be held responsible for compliance with any Federal performance standards applicable to the operations." *Bell Coal Co. v. OSMRE*, 81 IBLA 385, 394 (1984). The concept of a permittee's control over a permitted site, as Judge Sweitzer recognized in his opinion, is encapsulated in the long-standing principle that operators are responsible for third-party actions on their mining sites. (Sweitzer Opp 11). When a third party acts onsite, an operator cannot escape responsibility for a violation simply because the third party was acting outside of the operator's control or direction. *Lone Star Steel Co. v. OSMRE*, 98 IBLA 56, 62 (1987). *Lone Star Steel* and *Bell Coal Co.* provide clear precedent for this Board to follow in applying this principle to the vegetation removal on Amerikhol's permitted site and subsequent sediment flow.

In *Lone Star Steel*, the operator received a NOV for cattle grazing during the reclamation phase of a permitted mining site. 98 IBLA at 59. In its defense, the operator pointed out that the grazing cattle were not under its control in any way and that several attempts had been made to restrict them from the site. *Id.* at 62. The Board held that "[t]he fact that Lone Star took numerous measures to ensure compliance with the regulation, which ultimately failed, [did] not relieve it from such compliance." *Id.* The regulations strictly prohibit the grazing, and

third-party interference does not remove that prohibition. *Id.*

In *Bell*, one of the NOVs that the operator received was for mining without a permit. *Bell*, 81 IBLA at 393-94. The four unpermitted sites that the Board focused on were located on lands leased by the operator, but outside the boundaries of the operator's mining permit. *Id.* According to the operator, it was not responsible for the illegal mining. *Id.* It alleged that trespassers were mining without its permission and it was unable to stop them. *Id.* Even taking the operator's claims as true, the Board was not swayed by the defense of third-party activity. *Id.* The Board determined that by not taking action to prevent the unpermitted mining from occurring on the operator's lease, it was licensing the activity and therefore responsible for the violations. *Id.* at 394. Therefore, in *Bell*, the Board expanded operator liability for third-party actions to not just those areas permitted, but also those leased.

As was true with *Bell* and *Lone Star Steel*, third-party actions do not relieve Amerikohl of responsibility for the violations that occurred at the Curry site. This is especially true in this matter because Amerikohl, unlike Bell and Lone Star Steel, actively worked with the third party whose actions created the conditions for the violations. There is no dispute that Amerikohl leased the land where the vegetation removal took place and received a permit to mine that site. By taking those two steps, as *Bell* and *Lone Star Steel* demonstrate, Amerikohl placed itself in control of the Curry site. Once in control, Amerikohl was required to construct adequate E&S controls for a number of purposes, including to "minimize erosion to the extent possible." 25 Pa. Code § 87.106(1)-(4). Instead of fulfilling that responsibility, Amerikohl worked with Curry as Curry turned the permitted site into a disturbed area.[1] With no E&S controls in place and sediment flowing from the site, Amerikohl clearly did not minimize erosion on the site, not

[1] As has been highlighted many times throughout these proceedings, it would stretch the boundaries of common sense to exclude the cutting down of trees from the definition of a disturbed area under 25 Pa. Code § 87.1,which includes vegetation removal.

to mention failing to meet the other requirements of 25 Pa. Code § 87.106(1)-(4). Also, as the entity controlling the disturbed area, Amerikohl was required to ensure that all discharge met the appropriate effluent standards. 25 Pa. Code § 87.102. Again, Amerikohl failed to fulfill that responsibility when it allowed sediment flow in excess of those standards. So what this case presents is a clear cut example of the Board's long-standing policy that third-party action presents no excuse. The law clearly mandates that E&S controls must be installed onsite and that discharge from a disturbed area needs to meet effluent standards. Amerikohl can point to no exception or provision in the law that qualifies those requirements.

Amerikohl's only attempt to challenge its responsibility under this principle is by asserting that *Brown* 373 S.E.2d 609 (), which follows the principle discussed, should not apply because "no mining has occurred under the permit and the activity in question is not a surface mining activity." Amerikohl at 24. What Amerikohl fails to recognize is that, in addition to the fact that the timbering was mining activity, it accepted legal responsibility for the Curry site when it leased the land and received its mining permit. Once it received its permit, Amerikohl had a responsibility to uphold the standards required of it. When Amerikohl allowed sediment to flow off the permitted area without passing through E&S controls and in excess of effluent levels it committed a violation just as Lone Star Steel did when cows wandered onto its site, no matter how Curry's activity is classified. If Amerikohl had not received its permit then a link would need to be established between the operator and the activity by conducting a factual analysis, although it is MWA's position that upon applying for a permit a presumption of connectivity should arise. However, in this matter Amerikohl received its permit and therefore voluntarily agreed to put itself under the purview of SMCRA and to abide by its requirements—an endeavor in which it failed.

It is logical to see why the Board adopted this principle. In addition to following the clear mandate of the law, it puts the onus on the operators to maintain the sites that they control. In MWA's opinion, it has the effect of ensuring that operators reclaim their sites in a timely manner, withdraw permits where there is no continued expectation of activity, and take steps to secure the sites and to protect surrounding communities.

4. A decision in favor of OSM will prevent future harm, conserve precious resources, and provide much needed direction to Pennsylvania's regulators

Right now Pennsylvanians are stuck in a state of limbo due to the DEP's inability to form a position on this crucial issue. As Ms. Kasserman's affidavit (Exhibit 1) and the attached email from Heather Knupsky of the Fayette County Conservation District to Ms. Kasserman (Exhibit 2) highlight, the DEP is internally inconsistent when it comes to timbering on a permitted mine site. Kasserman Aff. ¶¶ 11-13, 16, 18, 23, 25. Several times, Ms. Kasserman was transferred from person to person as no one was willing to accept responsibility for regulating the conduct on the Curry site. *Id.* While the OSM, the DEP's Bureau of Waterways and Wetlands, and the Fayette County Conservation District asserted that this was a mining issue, the DEP's Bureau of Mining resisted as the lone holdout. *Id.* As this stalemate continued, our environment and residents absorbed the negative effects that resulted.

The lack of proper E&S controls on the Curry site resulted in sediment-laden water flowing into the Yough. Kasserman Aff. ¶¶ 9, 15, 19-21. As OSM's tests results revealed, it was extremely high in total suspended solids and iron. The water flowed to such a great extent that it created a plume a third of a mile long in the Yough. *Id.* at ¶21. Having that type and amount of water flowing into this section of the Yough is especially troubling due to the unique features of that section of the river. That section is designated High-Quality Cold Water Fishes and is therefore subject to greater protections. *Id.* at ¶33. It is upstream from two drinking water intakes

that serve over 28% of Westmoreland and 24% of Fayette County residents. (See Exhibit 3, slide prepared for MWA by Richard J. Hoch, Ph.D. by compiling public information). Furthermore, water high in total suspended solids, of which iron can be a component, poses a significant risk to the health of such a pristine portion of the Yough. "Suspended solids can clog fish gills, either killing them or reducing their growth rate. They also reduce light penetration. This reduces the ability of algae to produce food and oxygen." *Total Suspended Solids and Water Quality,* http://ky.gov/nrepc/water/ramp/rmtss.htm (Last Accessed on July 16, 2015). Once the sediment settles it can cause siltation that smothers eggs and other bottom-dwelling organisms. *Id.* "Indirectly, the suspended solids affect other parameters such as temperature and dissolved oxygen." *Id.* Additionally, "[s]uspended solids interfere with effective drinking water treatment. High sediment loads interfere with coagulation, filtration, and disinfection. More chlorine is required to effectively disinfect turbid water." *Id.* So the DEP's failure to act promptly allowed this pollution to continue over the course of close to a year.

That failure to act also consumed MWA's limited resources. Numerous long trips were made to observe the flow from the site. Kasserman Aff. ¶31. MWA also invested countless hours in advocating to the entities involved, responding to concerned citizens, and spreading awareness about this situation. *Id.* at ¶32. It is not hard to imagine the frustration that resulted from seeing this obvious issue go unaddressed despite MWA's efforts. The flow literally passed right under a portion of the Great Allegheny Passage trail where tens of thousands of visitors recreate. *Id.* at ¶36. It was highly visible from the trail as MWA received its reports from trail users—a terrible sight in an area that as a whole is very wild and remote. *Id.* at ¶¶35-38.

5. Conclusion

MWA is respectfully requesting that the Board send a clear statement to Pennsylvania's

environmental regulators. As highlighted above and by OSM, the case law, a plain reading of the law, and preamble all support the conclusion that timbering can constitute mining and did constitute mining in this situation. This fact is made even more apparent when an analysis of the facts in this case is conducted. Furthermore, this position makes sense because "[t]he regulations impose an affirmative duty upon the permittee to keep the site in compliance with the terms of the permit." *Brown*, 373 S.E. 2d at 610. When a site is permitted, the operator is responsible for policing it and all violations that occur, no matter the actor. *Id.* With the Board's positive action in this matter, a clear precedent for Pennsylvania will be set and the further degradation of Pennsylvania's environment caused as a result of regulatory inconsistency will be prevented.

Respectfully submitted,

Oday Salim, Esq.
PA309542
Counsel of Record
Ryan Hamilton, Esq.
PA318844
Of Counsel
Fair Shake Environmental Legal Services
3495 Butler Street, Suite 102
Pittsburgh, PA 15201
osalim@fairshake-els.org
rhamilton@fairshake-els.org
(412) 742-4615 office
(412) 291-1197 fax

Nick Kennedy, Esq.
PA317386
Of Counsel
Mountain Watershed Association
1414B Indian Creek Valley Road
Melcroft, PA 15462
Nick@mtwatershed.com
(724) 455-4200 x6

Counsel for Amicus Curiae MWA

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2015 a true and correct copy of the foregoing Brief for *Amici Curiae* Mountain Watershed Association, Home of the Youghiogheny Riverkeeper in Support of Affirmance, was sent by first class U.S. mail to:

Kevin J. Garber, Esq.
Babst, Calland, Clements & Zomnir, P.C.
601 Stanwix Street
2 Gateway Center, 6th Floor
Pittsburgh, PA 15222

Wayne A. Babcock, Esq.
Field Solicitor
U.S. Department of the Interior
Office of the Solicitor
Three Parkway Center, Suite 385
Pittsburgh, PA 15220

And by certified first class U.S. mail, return receipt requested to:

U.S. Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 North Quincy Street, MS 300-QC
Arlington, VA 22203

Oday Salim, Esq.
Fair Shake Environmental Legal Services
3495 Butler Street, Suite 102
Pittsburgh, PA 15201
osalim@fairshake-els.org
(412) 742-4615 office
(412) 291-1197 fax

EXHIBIT 1

Affidavit of Kristy Kasserman

STATE OF PENNSYLVANIA
COUNTY OF FAYETTE

The undersigned, Kristy Kasserman, being duly sworn, hereby deposes and says:

1. I am over the age of 18 and am a resident of the State of Pennsylvania. I have personal knowledge of the facts herein, and if called as a witness, could testify completely thereto.
2. I suffer no legal disabilities.
3. I am the Youghiogheny Riverkeeper. The Youghiogheny Riverkeeper is a program of the Mountain Watershed Association ("MWA").
4. The Youghiogheny Riverkeeper is the public advocate for the Youghiogheny River watershed.
5. As the Youghiogheny Riverkeeper, I use grassroots efforts to defend against further pollution, to improve water quality and to conserve the natural ecology and character of the region.
6. As the Youghiogheny Riverkeeper, I conduct patrols of streams in the Youghiogheny River watershed in order to document river conditions, analyze water quality, and identify any potential issues.
7. I am also a frequent recreational user of the Youghiogheny River and the Great Allegheny Passage in the vicinity of the Curry Mine.

8. For the purpose of brevity I will not detail those factual occurrences already mentioned in the pleadings of the parties that do not add context to my narrative.
9. On July 2, 2013 I filed a complaint with the Pennsylvania Department of Environmental Protection ("PADEP") using their online complaint form after personally observing turbid water emanating from the Curry Mine site.
10. After receiving no response, I followed up with PADEP in a July 10, 2013 letter.
11. In a phone call regarding my complaint with Glenn Krallman, Dunbar Township Mining Inspector with PADEP, Mr. Krallman stated he had found no sedimentation issues upon inspecting the site, and also asserted since no mining was occurring any timbering should comply with an Erosion and Sedimentation Control Plan filed with the Fayette County Conservation District.
12. Mr. Krallman further stated the Conservation District should be responsible for enforcing the Erosion and Sedimentation Control Plan, and that this was not a mining issue.
13. On July 19, 2013 I was informed via email by Heather Knupsky, Erosion & Sedimentation Technician for the Fayette County Conservation District ("FCCD"), that if the timbering was occurring for future mining it should be regulated by the mining NPDES permit.

14. After no action was taken by either FCCD or PADEP, on July 25, 2013 I filed a complaint with the Office of Surface Mining ("OSM").
15. Turbid water emanating from the Curry Mine site was brought to my attention once again by a MWA member on November 21, 2013.
16. On November 26, 2013 I spoke via telephone with Heather Knupsky at the FCCD. She reiterated that Glenn Krallman of PADEP Bureau of Mining had indicated this was not a mining issue, but that she felt she had no jurisdiction because it was on a permitted mine site.
17. I filed a complaint on November 26, 2013 with the PADEP (Bureaus of Mining and Waterways and Wetlands), the Office of Surface Mining, and the FCCD.
18. In a December 3, 2013 phone call with David Hamilton of the Office of Surface Mining, Mr. Hamilton informed me that PADEP was still unwilling to view this timbering as a mining issue.
19. On December 29, 2013 I again was notified by a MWA member that one of the streams draining the Curry Mine site was flowing with very turbid water which ultimately was causing a sediment plume in the Youghiogheny River.
20. I personally observed this turbid water on December 30, 2013.
21. To my horror the sediment carried by the water created a plume in the river that was visible for over a third of a mile.
22. I immediately filed a third complaint with PADEP (Bureaus of Mining and Waterways and Wetlands), OSM, and the FCCD.

23. In a January 7, 2014 phone call with Heather Knupsky of the FCCD, Ms. Knupsky informed me that Bill Schuss of PADEP Bureau of Mining had informed her he could not do anything about this issue until the mining permit was activated.
24. Ms. Knupsky indicated the timbering was being conducted by Appalachian Timber Company which had not filed an Erosion and Sedimentation Control Plan with the FCCD.
25. Ms. Knupsky during this call again expressed hesitation to get involved in this matter because she felt this was a mining issue.
26. On March 12, 2014 I attended OSM's inspection of the site.
27. The site had been logged extensively. There was little in the way of ground cover. Haul roads had not been stabilized at all, and ruts from tires were several feet deep in places. It was raining, and water was running uncontrolled off of the site toward the river.
28. On March 20, 2014 I observed turbid water in the stream draining the site as well as mud on the rocks and large deposits of sediment in the stream. I observed a small plume of sediment in the Youghiogheny River.
29. Despite the Notice of Violation and a later cessation order, I continued to observe turbid water flowing from the site through June of 2014 as I made frequent visits to the Great Allegheny Passage in the vicinity of the site.
30. Over the next several weeks I continued to advocate that the FCCD and/or PADEP Bureau of Waterways and Wetlands cite Amerikohl and/or the timbering company for the pollution.

31. Each trip to Ohiopyle to observe the turbid water is 50 miles roundtrip. This represents a significant expense for a small nonprofit, especially given the number of times we visited the area as the flow of turbid water was allowed to continue.
32. Additionally, I have invested a significant amount of time in phone calls with various agencies, fielding inquiries from concerned citizens, preparing and filing complaints, and providing necessary follow-up to those complaints.
33. The section of the Youghiogheny River into which the turbid water was flowing is designated High-Quality Cold Water Fishes by the Pennsylvania Code (25 Pa. Code § 93.9v).
34. This section of river flows through Ohiopyle State Park which attracted over a million visitors in 2014, as told to me by the park administration.
35. The path the sediment most often takes from the site passes under the Great Allegheny Passage in a culvert, which makes it visible to those on the trail.
36. The Ohiopyle State Park portion of the Great Allegheny Passage is anticipated to host over 50,000 visitors in 2015, as told to me by the Maryland Department of Planning.
37. The Youghiogheny River Gorge in this area is part of a large, contiguous forested area that is very wild and remote. It harbors qualities of an interior forest that provides undisturbed habitat for many native animal and plant species and natural communities.

38. This area is significant in the natural heritage of the county, region, and eastern United States.

I declare that, to the best of my knowledge and belief, the information herein is true, correct, and complete.

Executed this 16 day of July, 2015.

Kristy Kasserman

NOTARY ACKNOWLEDGEMENT

STATE OF PENNSYLVANIA, COUNTY OF FAYETTE, ss:

On this 16 day of July, 2015, before me, Shari R Bukovac, personally appeared Kristy Kasserman, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within Affidavit, and, being first duly sworn on oath according to the law, deposes and says that she has read the foregoing Affidavit and that the matters stated herein are true to the best of her information, knowledge, and belief.

In witness whereof I hereunto set my hand and official seal.

Notary Public

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Shari R. Bukovac, Notary Public
Saltlick Twp., Fayette County
My Commission Expires April 16, 2018
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

Title (and Rank)

My commission expires_____

EXHIBIT 2

Subject: Curry timbering
Date: Friday, July 19, 2013 at 9:57:07 AM Eastern Daylight Time
From: Heather Knupsky
To: Krissy Kasserman

Hi Krissy - Abbey Owoc at DEP told me if they're timbering for future mining use it should be part of the mining permit. How do you spell Glenn's last name and what office is he out of? She wanted to CC him on the e-mail she sent me but couldn't find him. Thanks!

Heather Knupsky
Erosion Technician

Fayette County Conservation District
10 Nickman Plaza
Lemont Furnace, PA 15456
(724) 438-4497

EXHIBIT 3

Public Water Supply, Environmental, and Cultural Considerations for the Proposed Curry Mine Site, Dunbar Township, Fayette County, Pennsylvania

Figure 1.

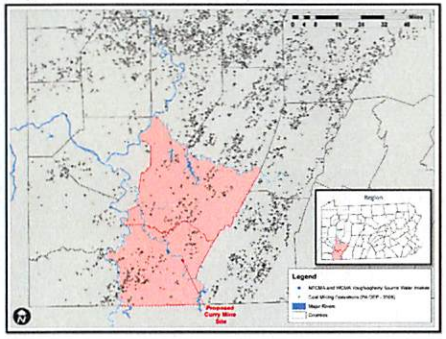


Figure 2.

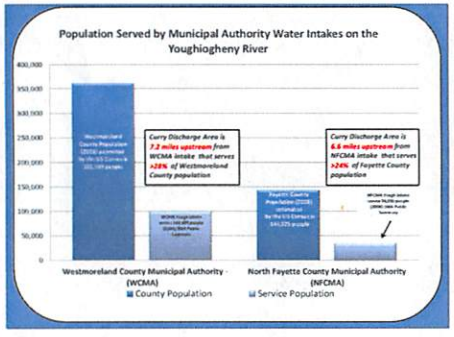


Figure 3.

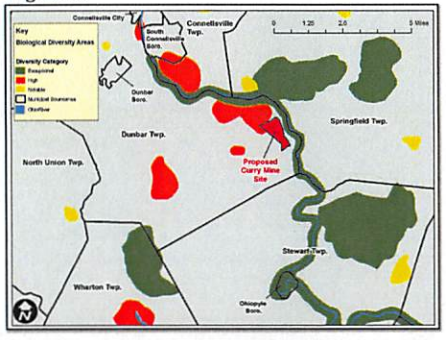
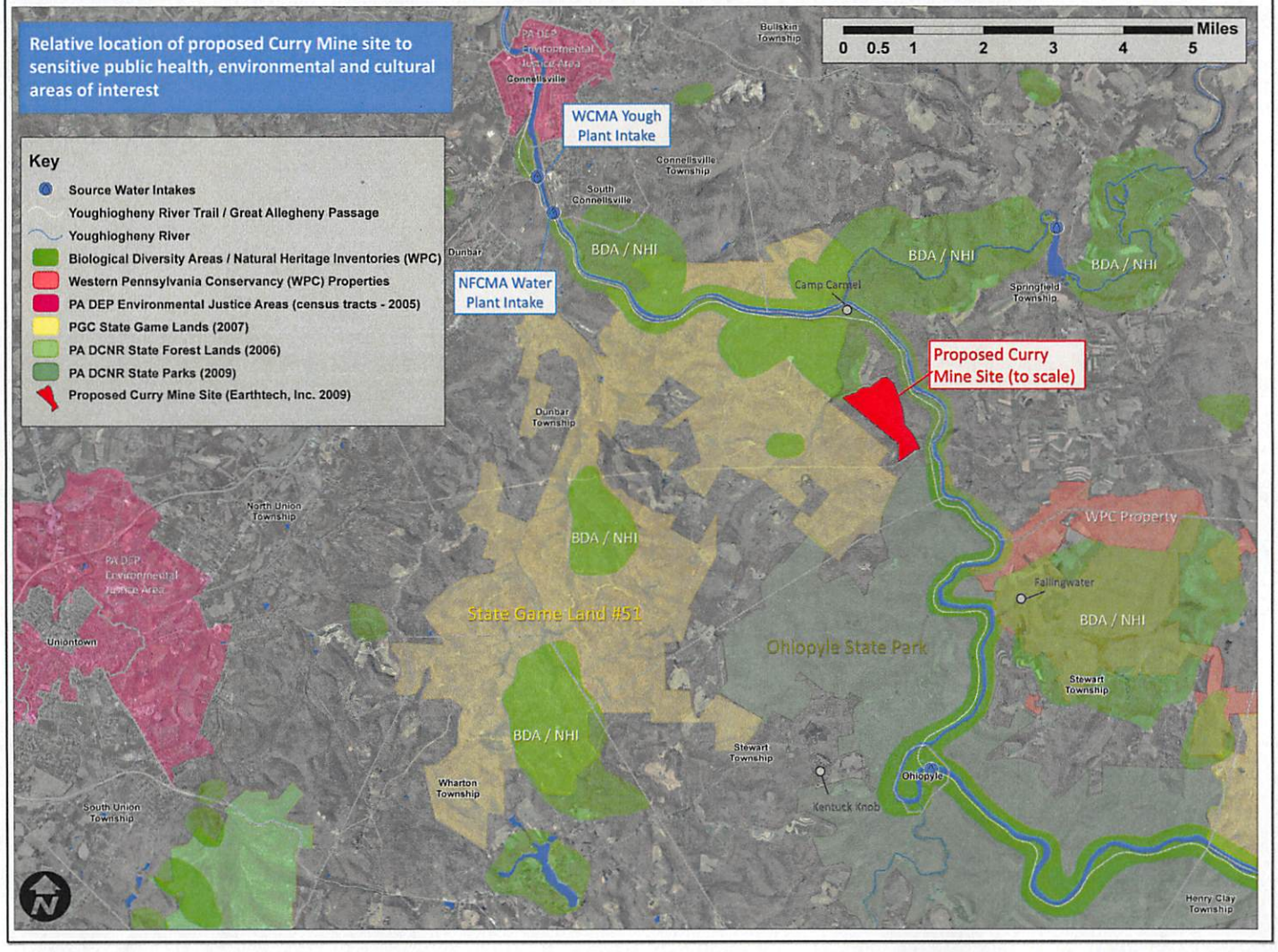


Figure 4.



Compiled and Produced by Richard J. Hoch, Ph.D., AICP (#020887), CFM (#761054) / richardhoch@gmail.com / June 2009

Data Sources: (All resources publicly available at the Pennsylvania Spatial Data Access, National Spatial Data Infrastructure Geo-Portal – www.pasda.psu.edu:)

SWI – SPC
WPC Properties &BDA-NHI – Western Pennsylvania Conservancy
Environmental Justice Areas – Pennsylvania Dept. of Environmental Protection
State Game Lands – Pennsylvania Game Commission

Rail Trails – Pennsylvania Dept. of Conservation & Natural Resources
State Forest Lands – Pennsylvania Dept. of Conservation & Natural Resources
State Parks - Pennsylvania Dept. of Conservation & Natural Resources
Coal Mining Operations – Pennsylvania Dept. of Environmental Protection

County Boundaries - PennDOT
Municipal Boundaries – PennDOT
Water Bodies – ESRI
Curry Mine Site – Earthtech, Inc., Exhibit 18

Aerial Photography – PAMAP (2006)