

**AREAS UNSUITABLE FOR MINING
PETITION NUMBER 11969901**

**MUDDY RUN WATERSHED
CAMBRIA COUNTY**

COMMENT AND RESPONSE DOCUMENT

INTRODUCTION

On March 21, 1996, pursuant to § 86.122 and § 86.123, the Reade Township Municipal Authority, Cambria County, submitted a petition to the Department requesting that approximately 3,200 acres of the Muddy Run watershed be designated as “unsuitable for mining.” The Department determined the petition to be complete and acceptable for technical study in April of 1997. The petitioner was notified accordingly on May 1, 1997.

Pursuant to § 86.124, notification of the receipt and acceptance of the petition was made to persons with known mineral ownership, surface ownership, and other interested parties on May 12, 1997. Notification to the general public was made on May 10 and 17, 1997, in the Progress, Clearfield, Pennsylvania, on May 11 and 18, 1997 in The Tribune Democrat, Johnstown, Pennsylvania, and in the Pennsylvania Bulletin on May 17, 1997 (27 Pa.B. 2476). Pursuant to § 86.125, in early 1998 local landowners were notified by mail of an opportunity to provide comments on the petition at a public hearing. Notification of the hearing was made to the general public on December 31, 1997, and February 14 and 21, 1998, in the Progress, Clearfield, Pennsylvania, and on January 29, and February 12 and 19, 1998, in The Tribune Democrat, Johnstown, Pennsylvania. The hearing was held on February 26, 1998, at Glendale High School in Reade Township.

The Muddy Run UFM technical study process was suspended in early 1999 and was re-activated in December of 2003. This suspension occurred while the Department awaited the courts’ decision on a challenge to a previous UFM designation as an unconstitutional taking. The Pennsylvania Supreme Court decided, in *Machipongo Land and Coal Company, Inc. v. Dep’t of Environmental Resources*, 569 Pa. 3 (2002), that a UFM designation was not an unconstitutional taking. Subsequently, in May of 2004, a second round of notification letters was sent to mineral and surface property owners primarily to solicit input from new property owners within the technical study area. This was done to address surface and mineral tracts that may have been sold, transferred, or subdivided since 1998.

The following comment and response document was prepared to address the comments raised at the public hearing, as well as written comments received since the Department accepted the petition.

LIST OF COMMENTATORS

1. Mr. James W. Thompson
Reade Township Municipal Water Authority
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2. Ms. Elaine Wilkinson
A. W. Lewis Coal Corporation
Box 458
Lilly, PA 15938
3. Mr. Anthony Spanik
Reade Township Road District
P.O. Box 154
Blandburg, PA 16619
4. Mr. Robert T. Noel
1581 Glendale Valley Boulevard
Fallentimber, PA 16639
5. Mr. Jon R. Williams
P.O. Box 111
Ramey, PA 16671
6. Mr. Norman Johns
Reade Township Municipal Water Authority
P.O. Box 76, Blandburg, PA 16619
7. Mr. William O'Shall
Beccaria Township Supervisor
R.D. 1, Box 51
Fallentimber, PA 16639
8. Ms. Jane Hommer Renshaw
170 Westover Drive
New Cumberland, PA 17070
9. Mr. Robert L. Robeson
2361 Skyline Drive
Glasgow, PA 16644
10. Mr. Orange L. Mulhollen
604 North West Street
Ebensburg, PA 15931-1235
11. Mr. Richard W. Hegarty
Samuel Hegarty Heirs
P.O. Box 377
Coalport, PA 16627
12. Mr. John G. Foreman
Indian Village Plaza
111 East Walton Avenue
Altoona, PA 16602
13. Curtis Run Land Co., Inc.
Mr. Duane Potaley
P.O. Box 103
Houtzdale, PA 16657
14. Mr. Walter H. Miller
1215 25th Avenue
Altoona, PA 16602
15. Mr. David A. DePastina
501 Garber Street
Hollidaysburg, PA 16648
16. Mr. Alan J. Mathew
Box 357
Irvona, PA 16656

Many of the following comments have been condensed and/or paraphrased. Similar comments have been grouped. The numbers in parentheses following each comment correspond to the commentators (listed on page 3).

COMMENTS AND RESPONSES

1. Comment: Surface coal mining within this watershed has destroyed private water supply springs and wells. Mining has degraded surface and groundwater and we must protect the remaining unpolluted water resources as a source of water supply. All of the coal in this study area has been stripped and re-stripped. The designation process is too little, too late. **(1) (13) (16)**

Response: The Department agrees that past mining activity has adversely impacted surface water and groundwater resources within the Muddy Run watershed. The Department's Areas Unsuitable for Mining (UFM) technical study documents historical mining-induced degradation of surface waters and degradation of groundwater within private water supply springs and wells. The UFM technical study indicates that geologic strata associated with the Lower Kittanning, Clarion, Brookville and Mercer coals have a high potential to produce acidic mine drainage and that acid mine drainage has impacted streams and groundwater. The UFM technical study has further determined that remaining mineable reserves of these coal seams still occur within the study area.

2. Comment: It would be very difficult to find alternative sources of water if the existing public water supply wells are degraded by mining. **(3)**

Response: The Department's technical study did not include a volumetric assessment of viable alternative groundwater sources for Reade Township and is not required to do so under the requirements of the UFM regulations. The DEP recognizes that the construction of the Reade Township Municipal Authority water supply wells was the result of several years of effort to locate and develop an adequate public water supply. Two previous attempts to develop water supply wells were not successful because of insufficient quantity or quality of groundwater resources.

3. Comment: The people of Reade Township have spent in excess of five million dollars and significant effort to develop a good quality water supply. There is no objection to taking minerals if it does not affect the quantity or quality of the water. **(6)**

Response: Pennsylvania and federal areas unsuitable for mining regulations and statues specifically address renewable water resources, which include water supply aquifers and aquifer recharge areas. The Department's UFM technical study addresses probable impacts to the Reade Township Municipal Authority (RTMA) public water supply well field, as well as to private water supply springs and wells.

4. Comment: Much of the mineable coal within the watershed has been recovered by the C & K Coal Company and others and they are treating degraded water discharges. These areas should not be designated unsuitable for mining. (5)

Response: The C & K Coal Company no longer exists and its mine sites within the UFM technical study area were forfeited in 2005 and still are in need of treatment. Twenty surface coal mines located within Reade Township have forfeited their permit bonds and are now abandoned. Pennsylvania UFM regulations clearly state that the process for designating areas as unsuitable for mining does not apply to areas on which surface mining activities are being conducted or for areas for which a permit application was submitted prior to the Department's receipt of an UFM petition.

5. Comment: There are unreclaimed surface mines within the watershed with good water entering from highwalls and red degraded water discharging from the spoil. Remining these areas would improve the water quality. (4)

Response: There are areas within the study area that may benefit from remining activity. However, there have been recent surface mining operations within the technical study area that have involved the remining of previously mined surface mines. Most, if not all, of these operations have produced postmining acidic discharges and several have further degraded private water supply springs and wells. The Department's recommendation does consider the possible beneficial effects from remining, but only recognizes this potential for future mining of coal seams that are not included as part of this designation.

6. Comment: The Reade Township water supply wells are located in the center of our property which includes several mines. Surface mining did not change the excellent water quality. (8) (14)

Response: The Department's UFM technical study found that the RTMA wells were designed and constructed to be reasonably well isolated from local coal-bearing units. Tests conducted during the development of the RTMA wells indicate increasing pressure with depth and upward flow from their lower water supply source aquifers to the overlying coal-bearing units. The pollution potential in the immediate vicinity of the RTMA wells would therefore appear to be low. However, groundwater tests conducted to date are not sufficient to characterize conditions beyond the immediate vicinity of the RTMA wells or to assess the localized impact of discrete, highly transmissive rock fractures and faults observed within the study area. Therefore, the potential does exist for hydrologic exchange between the RTMA supply aquifer and the overlying coal-bearing units. The elevated sulfate and specific conductance levels measured at the McElheny test well appear to confirm some degree of communication from the coal-bearing strata to the lower aquifer units. Furthermore, the Department's hydrologic and geochemical assessment of existing surface discharges of acid mine drainage located updip and nearer the headwaters of the Muddy Run watershed shows that discharge waters have infiltrated downward stratigraphically into much deeper underlying geologic formations and also traveled considerable distances

downdip and down slope within the watershed to areas in close proximity to the RTMA water supply wells.

7. Comment: Once a designation is made, it is there forever and nothing can be done with the property. An unsuitable for mining status should be reviewed periodically to determine any need to maintain this UFM status. (4) (5) (15)

Response: The regulations at 25 Pa. Code § 86.123(d) outline procedures for petitioning to terminate a designation. The process to terminate an UFM designation is similar to the process for designation, in that it requires a new petition to be submitted which must contain allegations of fact and supporting evidence that indicate that the area could be successfully mined and reclaimed without adverse impacts to the resource(s) identified in the original designation. Designation of an area as unsuitable for mining limits only one use and portion of a property and does not affect or apply to any other use of the property.

8. Comment: If the concern of the petitioners is water quality control, why limit the designation to surface mining when underground mining could also be a factor? (5)

Response: Pennsylvania's unsuitable for mining statutes and the Department's implementing regulations documented within 25 Pa. Code §§86.101 — 86.130, are specific to "surface mining operations," which includes surface activity connected with surface or underground coal mining. Surface activities connected with underground mining include entry, shaft and tunnel construction and borehole drilling. The unsuitable for mining statutes and regulations do not apply to the extraction of coal by the underground mining method. There is no law that authorizes area to be designated unsuitable for underground mining.

9. Comment: If the area is designated unsuitable for mining, property owners should be compensated for the cost mineral resources. (2) (4) (5) (7) (9) (10) (11) (12) (15)

Response: A designation of the area as unsuitable for mining would be to prohibit mining that would cause acid mine drainage pollution and to prevent the public water supply from being polluted by mine drainage. Government action that limits how property is used in order to prevent pollution of the streams and wells is a valid constitutional action that does not require compensation. The constitution only requires compensation be paid to property owners when their property is taken by the government or when government action limits every use of a property and the government action is not designed to prohibit pollution or a public nuisance. The Pennsylvania Supreme Court decided, in *Machipongo Land and Coal Company, Inc. v. Dep't of Environmental Resources*, 569 Pa. 3 (2002), that a challenge to a UFM designation as an unconstitutional taking is subject to the regulatory takings analysis set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). An owner of property within an area designated unsuitable for mining must prove that the parcel of land as a whole (including both surface and mineral rights) has been subjected to an unconstitutional taking under the *Penn Central* test. If the court finds the regulation is an unconstitutional taking of the property, the remedy is to invalidate the designation and the property owner may be entitled to compensation for the temporary period of time the

regulation was in effect. In addition, the *Machipongo* Court explained that if a regulation prohibits behavior that could be abated or prohibited by general principles of State property law (e.g., the law of public nuisance), the government action is constitutional and compensation is not required. The Pennsylvania Supreme Court has expressly held that the public has a right not to suffer acid mine discharge into its public waters, and that such discharges constitute a public nuisance as a matter of statutory and common law. *Machipongo*, 569 Pa. at 41 (citing *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392 (1974)). The government is not required to pay property owners for taking action on their land that would have the effect of preventing the pollution of public waters. The Department has determined that there is a significant potential for pollution of public waters from the mining of coals designated in this proposed UFM designation. The Department carefully evaluated the facts and law and is confident that the proposed UFM designation would not affect a regulatory taking under the applicable Pennsylvania and U.S. Supreme Court rulings. Therefore, the regulation would be valid and property owners would not be entitled to compensation.

- 10. Comment:** How can one person submit a petition to have an area designated unsuitable for mining? I thought a petition was supposed to have more people's names on it. (4)

Response: Federal and Pennsylvania statutes and regulations authorizing the designation of areas unsuitable for mining provide that any person having an interest, which is or may be adversely affected by mining, has the right to request that an area be designated. The term "petition" in these statutes and regulations means a formal written request to be submitted. The UFM petition may be initiated by an individual or group of individuals, or by a business or organization, or by any government agency or entity, including DEP.