

Testimony of
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Resources and Energy Committee

Re: Coal Mine Reclamation
and Acid Mine Drainage

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Mr. Chairman, members of the House Environmental Resources and Energy Committee. Good Morning. My name is John Stilley, President of Amerikohl Mining Co., Inc., (AMI) which is headquartered in Butler, PA. Amerikohl mines coal by the surface mining methods in Butler, Armstrong, Lawrence, Fayette and Westmoreland Counties. Last year we produced over 600,000 tons of coal.

Amerikohl is also at the forefront in developing cost-effective and creative reclamation concepts for abandoned mine lands (AML). Over the past decade, Amerikohl has received 26 awards from the Pennsylvania Coal Association (PCA) and mining groups in Ohio and West Virginia for its outstanding reclamation work.

In view of our unique background, Amerikohl appreciates this opportunity to testify on the legal and regulatory impediments that deter operators from pursuing remining and reclamation work on AML.

Besides paying close attention to every business decision in today's tough regulatory and competitive environment, one of the most daunting problems for today's surface coal operators in the Commonwealth is finding coal to mine. Indeed, with tens of thousands of acres of prime coal reserves designated "Unsuitable for Mining," and other reserves off limits because of expansive regulatory programs to protect environmental features like wetlands, operators find they must increasingly turn to abandoned mine sites as a product source. Fortunately, with modern equipment and higher productivity mining techniques, remining can glean enough good quality coal to pay operator costs and turn a small profit. But more importantly for Pennsylvania, when

surface operators remine abandoned sites, they take on the responsibility to reclaim them to modern standards. In the process, they remove hazards like old mine openings, surface structures, highwalls and water-filled pits. According to the DEP, remining also eliminates or buffers baseline pollution loading of acid discharges 99 percent of the time.

Most active mining permits today include at least some abandoned acreage, and, over the past decade, Pennsylvania coal operators have reclaimed a total of some 15,000 acres of surface mined land. Last year alone, the private sector was responsible for reclaiming about 2,500 acres.

Given the high cost of treatment to mitigate acid drainage from abandoned sites, remining is one of our best options to help control it. In recent years, the Pennsylvania Legislature has acknowledged the benefits of remining by enacting legislation that seeks to promote it. The most recent legislation was House Bill 1940 of the previous session that was sponsored by Representative Sam Smith, passed the legislature overwhelmingly and was signed into law by Governor Ridge as Act 43 of 1996.

This legislation is intended to encourage the remining and reclamation of unreclaimed surface mines. Among other things, it included a provision that provides statutory authority for the DEP to allow a surety to elect to reclaim forfeited sites even though the surety had previously paid DEP the bond amount. In these cases, if the Department approves the surety's proposal to reclaim the forfeited site, the state treasurer is authorized to return to the surety any money paid to the DEP in connection with the forfeited bond.

It is this point, allowing a surety to retrieve a forfeited bond amount by electing to reclaim the related site, that, because of my familiarity with the issue, I will talk about in more detail.

In 1994, AMI and DEP signed a historic agreement whereby AMI would reclaim at no cost to the Commonwealth 63 abandoned mine sites covering more than 11,000 acres stretched across five counties including (Butler, Venango, Mercer, Lawrence and Armstrong) abandoned by the Adobe Mining Co. The agreement represented a breakthrough in cooperative effort between DEP and the coal industry in solving Pennsylvania's abandoned mine land problems. In its consent order and agreement, DEP transferred Adobe's mining permits to Amerikohl, with new reclamation bonds issued on our behalf by the United Pacific Insurance Company.

Reclamation bonds are required when mining permits are issued. Should a company fail to meet its reclamation obligations, its bonds are forfeited to the state, which are used in most cases along with public funds to finish reclamation at the company's mine sites. But with its agreement with Amerikohl, reclamation at the Adobe sites was completed at no cost to the Commonwealth.

Bringing in a third party to reclaim the sites saves the state millions of dollars normally spent overseeing the projects under its Abandoned Mine Reclamation Program. And because Amerikohl's reclamation activities didn't have to go through the state's bidding process, the work was completed more quickly.

This was a truly novel approach to solving a coal industry problem with a win-win solution for all parties involved, affected landowners had their lands and farms reclaimed in a much more timely manner and to a better condition than under normal procedures; the surety companies did not forfeit the bond money they posted on behalf of Adobe Mining Co.; and the coal industry was allowed to correct its problems from within while bolstering its excellent reputation for environmentally sound mining and reclamation.

Since this project, AMI has undertaken three other similar projects in Pennsylvania where reclamation was effected on another 64 sites as well as an additional 18 abandoned mine sites in Maryland and Ohio. We are currently negotiating with the state of Kansas and Travelers Insurance Company to complete reclamation on 12,000 acres in that state.

The bond program substitution worked for several reasons. The most important was that the funds never found their way into the state treasury. Once that occurred, statutory requirements raised the cost of reclamation significantly. In order to expand the program, there had to be some mechanism to remove the paid in funds from the state treasury. Our solution was to pass legislation, Act 43, which would resurrect the previously forfeited bonds and to return the funds to the surety.

Prior to Act 43, when a coal mining reclamation bond was issued by a surety for the benefit of a coal operator and where there was a forfeiture, a surety traditionally had two options; either to perform the reclamation work itself via contractor; or, pay the bond monies into the state.

If the first approach was followed, the surety assumed continuing exposure, a lot of paperwork, a sometimes long-term commitment to the problem and, oftentimes significant legal fees. If the latter practice was followed, the surety's exposure was limited and further liability terminated; however, the entire bond amount was lost.

The bond substitution approach developed by AMI and DEP and incorporated into Act 43 provides a third option, allowing a surety to submit a plan for reclamation work for a site where the surety's bond money has been forfeited and collected by DEP. A reclamation operator (in our case, AMI) agrees to reclaim the property for an agreed upon price. In addition, the reclamation operator substitutes its bond for the surety's posted bond. At the closing of the transaction the surety receives an unconditional release of its bond and an irrevocable waiver of collection from the state. The reclamation operator receives the negotiated payment from the surety. Finally, the reclamation operator enters into a consent order and agreement with the state regarding the scope of reclamation to be performed. Its performance is assured with a performance bond provided by a new surety.

The advantage to the surety is that it pays less than the face amount of the bond and it receives a total release of liability. In addition to the release, AMI provides a hold harmless and indemnification covenant.

Under traditional approaches, the state would receive the funds and the performance history in Pennsylvania was not laudable. It took between 6-7 years from the date the state received the

forfeited bond funds to begin reclamation. In fact, if the problem was not considered priority, the site may never get reclaimed. The bond substitution program developed by AMI and others has dramatically improved the system. With specific reference to the Adobe agreement, AMI reclaimed over 11,000 acres inside of 30 months. In all other cases over the additional 64 sites, reclamation was completed within 12-18 months of execution of the agreements.

On March 25 of this year, DEP issued a draft policy guidance on how it intends to implement those provisions of Act 43 covering abandoned surface coal mining sites where the Department previously forfeited and collected some amount of the surety bond. In general areas this draft is inconsistent with Act 43 and imposes limitations which are not justified and would undermine the framework for a bond substitution program as conceived by the framers of Act 43.

In its draft policy, the Department has developed project eligibility criteria and procedures which are unwarranted under the Act, overly burdensome and will not encourage surety reclamation of the abandoned mine sites in the Commonwealth.

Our specific concerns with the document include:

- The draft guidance assumes DEP has more discretion than envisioned under Act 43. Act 43 provides adequate protection to the public interest by requiring the posting of a full replacement bond. Under the Act, the Department has very little discretion as to whether or not to accept or reject surety reclamation proposals if the reclamation plan is consistent with or better than the approved permitted reclamation plan, and the company posts a full

replacement bond. The Department's "measuring stick" should be the adequacy of the work in the field, i.e. the actual reclamation.

- The Department has indicated that projects involving reclamation of several sites should be encouraged. There is no requirement under the Act for multiple sites to be considered; however, we understand the concept of "global" reclamation plans that could involve multiple sites of one or more bankrupt companies. Where it makes sense to negotiate with the Department for a multiple site reclamation plan, companies will consider it; however, the Department has no discretion in judging project eligibility based on whether or not multiple sites are involved.

- Act 43 does not contemplate that the solvency of the Surface Mining Conservation and Reclamation Fund will play any role in eligibility criteria for surety reclamation. It is our opinion that if sureties are "encouraged" and provided with the incentives that Act 43 envisions, reclamation bond rates in the Commonwealth will become stable and generally more available as the surety industry realizes that it can mitigate its losses through legal mechanisms such as Act 43.

- The exclusionary criteria stated in paragraph four of the draft regarding whether or not the reclamation work will cost significantly less than the amount of money to be returned is clearly unjustified. Utilization of this factor by the Department will defeat the purpose of Act 43 by providing a disincentive to bond substitute reclamation. The purpose of the statute is to encourage reclamation by the private sector which can conduct the activity in a cost-effective

and competitive matter. The entire purpose of Act 43 is to promote reclamation by allowing the sureties to save some of the bond amounts. If there is no savings to the surety, there is no surety reclamation. Further, based on experience, notwithstanding up-front engineering and legal costs required in order to put together an Act 43 proposal, the estimated cost of reclaiming the site will not account for contingencies such as cost overruns, revisions of the reclamation plans due to unforeseen conditions, or legal or associated costs incurred in negotiating with and/or settling disputes with disgruntled landowners or in defending appeals. If any of these contingencies occur, the additional costs could drive the cost of the project over the amount of the bond.

- We agree that the site reclamation proposal should be reviewed by the Department and become part of a Consent Order and Agreement. The reclamation proposal should address the technical aspects of the project as would the reclamation plan of a surface coal mining application. However, as long as the company is posting a new full performance bond on the site, there is no need for an economic analysis of the project by the Bureau of Mining and Reclamation or the Bureau of Abandoned Mine Land Reclamation. The surety can work with private sector contractors in an expedient and expeditious manner in order to optimize the goals of satisfying the landowner, accomplishing reclamation and saving money. There is no need for the surety to divulge its business relationships or contracts with reclamation contractors. As long as the Department is fully bonded and can measure the success of reclamation on its own merits, there is no risk to the Commonwealth and no need for the Department involvement in private contracting matters.

- We strongly recommend that the District Mining Offices take the lead in reviewing these projects. In many instances, the reclamation proposed by Sureties may be that as already approved in the surface mine permit which the district mining office would be inspecting and enforcing. There is no need for an additional administrative layer to evaluate the adequacy of reclamation proposals when the permit reviewers and inspectors responsible for the site have already conducted that review when the site was an active mine. The Act 43 program should not be modeled on the Title IV AML program. Rather, the Department should look at the framework under which the bond substitution program has succeeded to date.

In summary, Act 43 provides a way for our industry to deal with many of its own problems efficiently and effectively if implemented in a manner consistent with the legislative intent under which it was passed and signed by the Governor. If, however, the present draft under which Act 43 is to be implemented is saddled with burdensome and unwarranted procedures and requirements, the chances of utilizing it as a tool to clean up abandoned mine land in Pennsylvania will be greatly diminished.

Perhaps the most formidable deterrent to re-mining work being performed by coal operators today is the liabilities associated with AML sites. Particularly, the long term risk of financial responsibility for water discharges, that is the obligation to perpetually treat a preexisting water discharge, is the single most significant barrier that limits industry's involvement.

In canvassing operators prior to my testimony on impediments to re-mining, they invariably cited horror story after horror story about engaging in voluntary reclamation work at the request of the Department or mining under a re-mining permit in which they were subsequently cited by DEP for failure to treat a preexisting discharge beyond what was specified in their permit.

Indeed, one operator told of an incident in which he performed voluntary reclamation work where he was subsequently charged and required by both OSM and DEP to perform long-term treatment of a discharge that predated his mining (and the original permittee's mining), was off the permit area and was not hydrologically connected to the mining.

After spending over \$250,000 in engineering and legal fees and despite having an OSM Administrative Law Judge rule in his favor, he still awaits a trial before the EHB on the same issue. This is because DEP has not backed off its order which contains the same argument that was struck down by the ALJ.

Until the disincentive of operator liability for preexisting discharges at abandoned mines is made more economically realistic or until the state is prepared to share in the liability, many otherwise suitable re-mining sites will be passed over by the industry. Coal companies simply will not place their economic future at risk in terms of the potential long-term liabilities imposed under the program.

Another major disincentive to re-mining is the expense of gathering all the hydrologic data needed for approval of a re-mining permit. In some cases its more difficult and more expensive to obtain a permit on an AML site with a bad discharge then on a virgin site.

In addition to the bond money that is forfeited to the state and other supplemental funds (e.g. mine operator \$100 per acre reclamation fee) that the state uses towards reclamation of forfeited sites, the other funding source for this purpose is contained in Title IV of federal SMCRA.

Recognizing coal mining's legacy, Title IV provided for a federal Abandoned Mine Reclamation Fund, paid for by coal operators through a levy on their production, and reimbursed to the states by the U.S. Office of Surface Mining on the basis of historical coal production.

Since SMCRA was signed into law in 1977, OSM has collected a levy on coal production to support its Abandoned Mine Land Fund to the tune of 35 cents per ton from surface operators and 15 cents per ton from deep mining companies.

Pennsylvania bituminous coal operators contribute approximately \$12 million into the federal AML Fund every year, for a total of over \$300 million since the fund's inception. Because disbursements to the states are calculated on the basis of historic coal production, the Commonwealth receives some \$20 million from the AML Fund every year for a total of over \$600 million to date. Approximately 7,500 acres have been reclaimed in Pennsylvania under this program since its inception.

Beyond environmental improvements, and health, safety and general welfare benefits, there are other significant economic benefits directly resulting from AML reclamation contracting. For every \$1 million in AML reclamation contracts, 27 jobs are created in support of those construction efforts. Nearly every AML contract is awarded to a Pennsylvania company, and all contractors employ Pennsylvania labor. Measured in job opportunities, the \$600 million granted to Pennsylvania has created over 16,000 jobs for Commonwealth citizens. Since many AML reclamation projects occur in rural areas, significant rural development and long term investment in the future of rural areas is generated as well. Projects in urban and suburban areas protect properties and property values and provide land use alternatives which prove economically beneficial.

While this is significant, more growth could occur if the entire fund was used for its intended purpose. There is currently available over \$1 billion of unappropriated balance in the Trust Fund and the balance continues to grow. The Fund is controlled by the U.S. Congress, which, at least until now, refuses to release more reclamation dollars at a time when they are juggling massive budget deficits.

A number of groups - including the coal industry, private groups and state regulators - have long urged Congress to release more money from the federal AML Fund. Most recently, the Senate of Pennsylvania unanimously adopted Senate Resolution 38 which urges the President and Congress to make more of the \$1 billion of Federal moneys already earmarked for abandoned mine land reclamation available to states to clean up and make safe our abandoned mine lands.

We need to continue these efforts to convince the federal government to return more of our industry's hard-earned money to the states to correct our past environmental problems.

Among other recommendations to provide incentives for re-mining is to enact legislation that creates re-mining tax credits to be applied against an operator's total state tax liability. This concept is similar to tax credit legislation adopted in Virginia and most recently in West Virginia.

Another incentive would be to waive the \$100 per acre reclamation fee for re-mining permits.

Given the attrition which has occurred within the Pennsylvania surface coal industry and the continuing economic and regulatory threats to its future including fuel competition, utility deregulation and implementation of the Clean Air Act Amendments of 1990, now is not the time to impose further restrictions on an industry that is fighting for its very survival, but instead to provide incentives for its environmentally sound growth.

With better understanding by regulators of coal industry needs, innovative agreements to reclaim abandoned mine lands, continuing research into effective acid mine drainage treatment, and constructive input by industry, government, communities and concerned citizens, Pennsylvania's modern surface mining companies can continue to offer the capital, equipment, personnel and reclamation know-how necessary to help abate acid mine drainage and bring abandoned mine land back into safe, productive use across the Commonwealth.