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BEFORE THE RECLAMATION COMMISSION

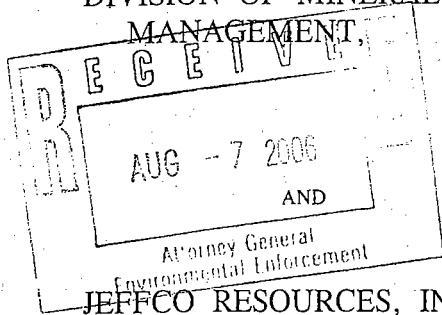
GREENBELT ADVOCATES,

Appellant,

-VS-

DIVISION OF MINERAL RESOURCES,
MANAGEMENT,

Appellee,



JEFFCO RESOURCES, INC.,

Intervenor.

Case No. RC-05-039

Review of Decision on Lands
Unsuitable Petition

FINDINGS, CONCLUSIONS & ORDER OF THE RECLAMATION COMMISSION

Appearances: John Preston Bailey, Counsel for Appellant Greenbelt Advocates; Mark G. Bonaventura, Holly Deeds Martin, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management; Otto A. Jack, Jr., Counsel for Intervenor Jeffco Resources, Inc.

Date Issued: Aug. 4, 2006

BACKGROUND

On March 16, 2005, the Greenbelt Advocates filed with the Reclamation Commission a notice an appeal from a decision of the Division Chief. This decision denied a petition to designate certain lands in the vicinity of the Village of Barnesville, Ohio as unsuitable for coal mining.

Ohio Valley Coal Company (and its affiliates), Oxford Mining Company and Jeffco Resources, Inc. requested intervenor status in this appeal. These companies own mineral resources in the area of Barnesville, Ohio. Intervenor status was **granted** to all three entities.

Prior to hearing, Ohio Valley Coal Company asked to be released as an intervenor, based upon a stipulation that the lands unsuitable petition does not address the underground mining of coal. The Commission **granted** Ohio Valley's request and this party was released as an intervenor. Oxford Mining also filed a request to withdraw as an intervenor. This request was **granted** by the Commission. Jeffco Resources filed a request to remain an intervenor in this action, but to take a non-participatory role in the merit hearing. Jeffco's request was **granted** by the Commission.

On October 5, 2005, a site view was conducted by the Commission, with all parties in attendance. A six-day merit hearing was held before five members of the Reclamation Commission. The hearing commenced on February 21, 2006, and concluded on March 8, 2006. At hearing, the parties presented evidence and examined witnesses appearing for and against them. Written closing arguments were filed by the Appellant and the Appellee. The last filing was made on May 19, 2006. After a review of the Record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Village of Barnesville is located within Warren Township, in western Belmont County, Ohio. Belmont County is an area of wooded rolling hills. Agriculture is a significant land usage in this area. Coal has also been a valuable resource in this area. Barnesville is a hill-top community. At an elevation of 1,317 feet, Barnesville is the highest incorporated point in Ohio. The population of Barnesville is approximately 4,200.

2. Mining has been actively pursued in Belmont County, and within the vicinity of Barnesville. Most mining near Barnesville has occurred north and west of the Village, and has been accomplished utilizing strip mining methods. Historically, a limited amount of underground mining has been undertaken in this area. Coal mining has come within one mile of the Village corporate limits.

3. The Barnesville area is rich in history. The Village has a historic district, which includes over 180 properties built during the late 19th and early 20th centuries. The historic district is recognized by the National Register of Historical Places. In the vicinity of Barnesville, two sites of pre-historic significance have been identified. These pre-historic sites are located more than one mile outside the Village limits. The pre-historic sites, known as Track Rocks and the Tower Site, are recognized by the National Register of Historical Places.

4. In 1973, the Barnesville Planning Commission drafted the Barnesville *Greenbelt Plan*. This document surveyed community attitudes towards land uses in the area of Barnesville, and recommended certain restrictions on the strip mining of coal. The plan did not propose a total ban on mining. The plan did attempt to protect an area within a one-mile radius of Barnesville by placing some limitations on mining within this area.

5. By resolution dated October 20, 1997, the Barnesville Village Council adopted "a Greenbelt area one mile around the [Village] corporate limits." The Village Resolution expressed the Council's "desires to restrict coal mining operations within one mile of the corporation limits." On October 29, 1997, the Board of Warren Township Trustees, in open meeting, resolved "to support the efforts in establishing a Green Belt Zone limiting surface mining operations on lands within a one-mile radius of the Village of Barnesville."

6. No evidence was produced at hearing to indicate that the Belmont County Commissioners have adopted the *Greenbelt Plan*.

7. On April 2, 2001, the Barnesville Village Council and the Warren Township Trustees submitted to the Division of Mineral Resources Management, a petition to declare approximately 4,530 acres surrounding the Village of Barnesville as unsuitable for mining. This petition was summarily denied by the Division, without consideration of the petition's merits. The Petitioners appealed to the Reclamation Commission [case number RC-01-013]. On October 19, 2001, the Commission **remanded** the matter to the Chief, with instructions to reconsider the petition, in a manner consistent with O.R.C. §1513.073 and O.A.C. §1501:13-3-07.

8. On February 3, 2004, the Barnesville Village Council and the Warren Township Trustees submitted a second petition to designate certain areas surrounding the Village of Barnesville as unsuitable for mining. The petition area is represented as a circle extending one mile from the Barnesville Village limits. The outer petition boundary has been expanded slightly beyond one mile in three areas, to encompass the entire surface watersheds of one existing reservoir and two potential reservoirs.¹ The petition area does not include properties within the Village's corporate limits. Exempt from the petition area are five currently-permitted mining sites (permits: D-573, D-680, D-877, D-676 and D-2122); and four associated adjacent area sites (permits: D-680-1, D-877-1, D-877-2 and D-676-1). The total acreage covered by active or pending permits is 1,366.4 acres. A total of 449 acres of previously mined and abandoned lands also lie within one mile of the Village corporate limits. Approximately 280 of these acres are already permitted for re-mining under the above-referenced active permits. The 449 acres of previously mined and abandoned lands are exempt from the petition area. Additionally, 385 acres of land owned by Intervenor Jeffco Resources have been removed from the petition area by agreement of Appellant and Jeffco Resources. The area for which a lands unsuitable designation is sought totals 4,144.6 acres. The petition does not address underground mining for coal or the surface impacts incident to underground coal mining.

9. The petition referenced certain land use documents, addressing the Barnesville/Greenbelt area. These referenced documents are: the *Greenbelt Plan*, the *Southeast Ohio Water Plan* and the *Inventory of the Muskingum River Basin*.

10. The *Southeast Ohio Water Plan* is a comprehensive study of the development and management of the regions' water resources, with particular emphasis on water supply and flood control. The Ohio Department of Natural Resources' Division of Water developed this plan in 1978.

11. The *Inventory of the Muskingum River Basin* was prepared in 1968, by the Division of Water. The inventory discusses siting criteria for potential reservoirs in smaller watersheds.

¹ The existing reservoir is identified as Reservoir #1. The two potential reservoirs are the Potential Northwest Reservoir and the Potential Southeast Reservoir.

12. More than 90% of the acres within the Greenbelt Area, which are currently covered by coal mining permits, are identified with a post-mining land use of "pastureland," meaning that after mining is concluded, these acres will be reclaimed to pasture.

13. Water is an important resource to the Village of Barnesville. Barnesville is a regional water supplier for an approximate 80 square mile area. This area includes portions of four counties. Barnesville distributes water to its Village residents, to Warren Township, to the neighboring Villages of Bethesda and Quaker City, and to the Switzerland of Ohio Water District, (which includes Miltonsburg, Jerusalem, Beallsville and Wilson). Barnesville also has the ability to supply emergency water to Belmont County and Woodsfield. Typically, Barnesville produces between 0.90 – 1.00 million gallons of finished water per day. The water system serves approximately 12,000 customers per day.

14. The Village of Barnesville sits at the top of three river basins, these being the Tuscarawas, the Muskingum and the Ohio River basins. Three reservoirs are located within the petition area. These reservoirs are known as: Reservoir #1, Reservoir #2 and Rotary Lake. Only one of these three reservoirs, Reservoir #1, is currently utilized for public water production. Reservoir #2 is located within the petition area, but is not currently contributing to the water supply system. Rotary Lake, a small reservoir located within the petition area, also does not contribute to the water supply system. Both Reservoir #2 and Rotary Lake are considered reserve emergency water supplies. An additional reservoir, the Slope Creek Reservoir [also referred to as Reservoir #3], is currently utilized for public water production, but is not located within the petition area.

15. Groundwater resources in the area of Barnesville are scarce. The reservoirs in this area receive their raw water primarily from surface drainage. Average precipitation in the Barnesville area is 40 – 41 inches per year, which is somewhat higher than in surrounding areas. The quality of the raw water entering the reservoirs is very good, and relatively little is required to treat the water for customers of this supply. The treatment plant currently draws raw water from two reservoirs: Reservoir #1 (located within the petition area) and the Slope Creek Reservoir (located outside the petition area).

16. Reservoir #1 was constructed in the 1960's and covers 24.7 acres of land within the petition area. Reservoir #1 is located approximately one mile south of Barnesville, and is just on the edge of the petition area. Reservoir #1 holds approximately 140 million gallons of water, and contributes to the Barnesville water supply system.

17. Reservoir #3, the Slope Creek Reservoir, was constructed in 1964 and covers 93.2 acres of land. The Slope Creek Reservoir is located approximately 3.5 miles southeast of Barnesville, and is approximately 2.5 miles outside the petition area. The Slope Creek Reservoir contains about 719 million gallons of water, and contributes to the Barnesville water supply system.

18. Barnesville's water treatment plant is located adjacent to Reservoir #1. Barnesville's original water treatment plant was constructed in 1964. In 2002, a new treatment plant was constructed. The new treatment plant utilizes a multi-barrier filtration system, which can only be used where the raw water coming into the plant is of a high quality. Water is drawn into the plant from Reservoir #1 and from the Slope Creek Reservoir. Water from the Slope Creek Reservoir is pumped directly into the treatment plant 40% of the time, and feeds Reservoir #1 the remainder of the time. Normal flow rates from the plant are 400 gallons per minute. The treatment plant performs rapid mixing, filtration, corrosion control, disinfection and fluoridation. The water entering the plant is of a very high quality. If the quality of the raw water were significantly degraded, the plant could not effectively treat the water, without modification of the plant. The capacity of the water treatment plant, is about 1.7 million gallons per day. Currently, the plant is producing 0.90 – 1.00 million gallons of finished water per day.

19. Plans are in progress to increase the plant's daily production from 1 million gallons to 1.7 million gallons. Plans are also under consideration to add Reservoir #2 (which is currently used as a reserve reservoir) to the water supply system. Two other potential reservoir sites have been identified, the Northwest Potential Reservoir and the Southeast Potential Reservoir. Over the past few years, the Village of Barnesville has engaged in several projects to improve and expand its public water system, investing more than \$8 million into the system.

20. The Barnesville lands unsuitable petition was submitted to the Division on February 3, 2004. On March 5, 2004, the Chief deemed the petition administratively complete. Notice of receipt of the petition was published on March 26, 2004 and April 2, 2004. Public comments and relevant information were requested to be submitted to the Division within ninety days of the April 2, 2004 publication. Many comments were received by the Division relating to this petition. On November 19, 2004, the Division sent notice of the date, time and location of the public hearing by certified mail to all persons with an identifiable ownership interest in the petition area, to the Petitioners, to other persons with a known interest, and to all interested local, state and federal agencies. Public notice of the date, time and location of the hearing was also published in a local newspaper [The Martins Ferry Times Leader] on November 24, December 1 and December 8, 2004. The public hearing was held on December 15, 2004, in St. Clairsville, Ohio. Approximately 87 people attended the public hearing. Twenty-two persons presented comments. Some comments supported the petition, some comments did not. The Division accepted additional comments and relevant information through the close of the comment period on December 31, 2004.

21. On February 15, 2005, the Division Chief issued his decision denying the lands unsuitable petition.

22. The Greenbelt Advocates is a loose association of citizens interested in developing and preserving a "greenbelt zone" around the Village of Barnesville. The Advocates desire to restrict strip mining of coal within this "greenbelt zone." This association was formed in or around 1986 - 87. The Greenbelt Advocates did not file the lands unsuitable petition under consideration in this matter. However, they did support the petition. On March 16, 2005, following the Chief's denial of the lands unsuitable petition, the Greenbelt Advocates appealed the Chief's decision to the Reclamation Commission. The actual Petitioners, which are the Village Council of Barnesville and the Warren Township Trustees, did not appeal the Chief's decision.

CONCLUSIONS OF LAW

1. THE CHIEF DID NOT ACT ARBITRARILY, CAPRICIOUSLY OR IN A MANNER INCONSISTENT WITH LAW IN DETERMINING THAT MINING IN THE PETITION AREA IS NOT INCOMPATIBLE WITH EXISTING STATE OR LOCAL LAND USE PLANS OR PROGRAMS. THEREFORE, THE COMMISSION FINDS THAT THE CHIEF'S DECISION TO DENY THE REQUESTED DESIGNATION OF UNSUITABILITY WAS PROPER AND SUPPORTED BY LAW.

The Law: O.R.C. §1513.073(A)(2)(a) provides in pertinent part:

(A)(2) Upon petition . . . a surface area may be designated unsuitable for all or certain types of coal mining operations if the operations will:

(a) Be incompatible with existing state or local land use plans or programs;

Discussion: O.R.C. §1513.073 establishes a petition process, whereby the Chief of the Division of Mineral Resources Management may designate certain areas as unsuitable for all, or certain types of, coal mining. This process allows the Chief to examine whether mining might conflict with other lands uses or values. The lands unsuitable process requires the Division Chief to weigh the relative value of competing resources. Once a designation of unsuitability is made, interested persons may petition to terminate the designation.

A designation of unsuitability is mandated in only one circumstance. O.R.C. §1513.073(A)(1) requires the Chief to designate an area as unsuitable for mining if the Chief determines that reclamation pursuant to the requirements of Chapter 1513 of the Revised Code is not technologically and economically feasible on an area. In this appeal, there has been no claim or finding that reclamation, consistent with the requirements of Ohio law, cannot be accomplished in the Barnesville/Greenbelt area. Therefore, an unsuitability designation is not mandated by law.

In all other circumstances, a determination of unsuitability lies within the sound discretion of the Division Chief. O.R.C. §1513.073(A)(2)(a) asks the Chief to examine whether mining in a petition area would be incompatible with existing state or local land use plans or programs. If mining would be incompatible with such plans or programs, the Chief may exercise his discretion to designate the area as unsuitable for mining. The Petitioners identified three potential land use "plans" or "programs" for the Barnesville/Greenbelt area. These are: (1) the 1973 *Greenbelt Plan*, (2) the 1978 *Southeast Ohio Water Plan*, and (3) the 1968 *Water Inventory of Muskingum River Basin*.

There does not appear to be zoning in place, to address the concerns raised by the Petitioners. No publicly-approved land use plans or programs, affirmed by the electorate, were produced at hearing. Nor was a county-approved comprehensive land use plan produced. Notably, without the vote of the citizenry, documents addressing land use provide no more than guidelines to local officials.

The *Greenbelt Plan* indicates the desires of a certain group, with respect to the area surrounding Barnesville, Ohio. For this reason, the plan has been aptly described as "aspirational." Significantly, if one were to consult the *Greenbelt Plan*, mining does not appear to be incompatible with that document. The *Greenbelt Plan* does not prohibit mining. Rather, the *Greenbelt Plan* allows mining within the Greenbelt area, but places some restrictions on the location of mining. Mining cannot be viewed as incompatible with an aspirational land use plan, which actually allows mining to occur.

The *Southeast Ohio Water Plan* and the *Water Inventory of the Muskingum River Basin* are documents which address the siting and development of public water supplies. These documents make certain recommendations relative to public water supplies, but do not amount to government-approved land use plans. Indeed, these documents are more akin to reference materials, to be consulted by local officials for guidance when making water supply decisions for their communities.

The Commission finds that no plans or programs were produced which establish land uses incompatible with mining, or which would require a designation of unsuitability.

2. THE CHIEF DID NOT ACT ARBITRARILY, CAPRICIOUSLY OR IN A MANNER INCONSISTENT WITH LAW IN DETERMINING THAT MINING IN THE PETITION AREA WOULD NOT RESULT IN A SUBSTANTIAL LOSS OR REDUCTION OF LONG-RANGE PRODUCTIVITY OF EXISTING WATER SUPPLIES. THEREFORE, THE COMMISSION FINDS THAT THE CHIEF'S DECISION TO DENY THE REQUESTED DESIGNATION OF UNSUITABILITY WAS PROPER AND SUPPORTED BY LAW.

The Law: O.R.C. §1513.073(A)(2)(c) provides:

(A)(2) Upon petition . . . a surface area may be designated unsuitable for all or certain types of coal mining operations if the operations will:

* * *

(c) Affect renewable resource lands in which the operations could result in a substantial loss or reduction of long-range productivity of water supply . . . , or aquifers and aquifer recharge area;

Discussion: Water is an extremely important resource to the Village of Barnesville. Several water supplies exist within the petition area, including Barnesville Reservoir #1, Barnesville Reservoir #2 [not currently in use], and Rotary Lake [a secondary, emergency water supply]. Barnesville Reservoir #3, the Slope Creek Reservoir, is not located within the petition area, but is utilized as a water supply to the Village.

The Petitioners, and the Appellant, have expressed a concern that an increase in sediment, non-point pollutants, and acid mine discharge, could impact the quality of Barnesville's public water supply. Appellant also suggests that if the water quality were to be impacted, Barnesville's filtration plant would not be capable of correcting this problem, unless the plant were substantially modified.

First, and quite importantly, it appears that extensive mining in the petition area is unlikely based upon the limited amount of minable coal resources in this area. Within the **watersheds** of the existing reservoirs, it is even more unlikely that mining will occur, due to this lack of coal resources. Historically, surface mining has not occurred within these watersheds. Even the Appellant concedes that: "[t]here is no economically recoverable surface coal in the area of the Barnesville reservoirs." Since it is unlikely that extensive surface mining will ever occur in these watersheds, it is equally unlikely that mining would have a "substantial" impact upon the water supplies.

The evidence clearly establishes that the reservoirs at issue are primarily fed by surface water, resulting from precipitation. Mining in this area clearly would not affect the amount of precipitation. Therefore, mining would not result in "substantial loss" of the source of this water supply. The Appellant's concern that mining could increase the rate of run-off and sedimentation in the petition area is addressed by the provisions of Ohio's mining and reclamation laws, which require that sediment control structures be utilized during mining and which further require that vegetation be quickly established on all lands affected by mining.

Significantly, if mining were to affect the quality or quantity of the water supplies in Reservoir #1 or Reservoir #2 (both located within the petition area), the alternative of using the Slope Creek Reservoir (located outside the petition area) is readily available. The evidence established that Slope Creek Reservoir holds an adequate water supply to produce water for approximately 2 years, even without recharge through rainfall.

Most importantly, and as articulated in O.A.C. §1501:13-3-07(A)(2), lands unsuitable petitions must be evaluated under the assumption that "**contemporary mining practices . . . would be followed if the area were to be mined.**" Therefore, any potential mining in this area would be subject to the permitting requirements and the reclamation standards of Chapter 1513 of the Ohio Revised Code. A primary focus of the permitting process is to assure that hydrologic balances and existing water resources are protected, both during and after mining.

Unless an applicant for a mining permit can establish that mining will be conducted in a manner that will minimize disturbance to the hydrologic balance in and around the potential permit area, a permit will not be issued. In fact, the permitting process requires both the applicant and the Division to project and evaluate any potential affects on the hydrologic balance in the area of the proposed mine. O.R.C. §1513.07(C)(13)(a)&(c) requires an applicant to submit a detailed description of the measures to be taken during the mining and reclamation process to ensure the protection of the quality and quantity of surface and ground water systems both on and off site. Numerous safeguards are incorporated into the application and mining process, including the construction of sediment impoundments, groundwater and surface water monitoring plans, the imposition of effluent limitations and the use of buffer zones surrounding streams. Notably, the permitting system also allows for the inclusion of Ohio EPA and Army Corps of Engineers restrictions as part of the permit approval process. Once permitted, any mining activity must also be conducted consistent with contemporary mining practices. The law requires that mining and reclamation proceed in a manner that protects water resources. Periodic inspections of mine sites by Division inspectors helps to ensure that mining and reclamation will be conducted in accordance with these important requirements of law.

Significantly, the capacity of the reservoirs is much greater than what is actually needed to supply the Village of Barnesville. This abundance of water has allowed the Village to enter into the business of selling water, and Barnesville has become an important regional supplier of water. Indeed, the Village has somewhat compromised its future water reserves, by providing water to neighboring communities. Although supplying other communities with water is laudable, the lands unsuitable petition process was not designed to support such a business venture, and should not be relied upon as a means to expand such a venture.

Appellant's concerns include reference to potential future water supplies, identifying a possible Northwest Reservoir and a possible Southeast Reservoir. O.R.C. §1513.073 does not require protection of potential resources, which are not yet developed. Such theoretical "water supplies" are no different that any surface watershed, which happens to be located near a need or demand for water. The law does not require the protection of such theoretical, undeveloped water supplies.

Also significant is the fact that these identified potential water supplies are not "necessary" to supply Barnesville's current water users, but are being considered for development as an economic benefit to the Village, via the sale of water to other communities.

3. THE CHIEF DID NOT ACT ARBITRARILY, CAPRICIOUSLY OR IN A MANNER INCONSISTENT WITH LAW IN DETERMINING THAT MINING IN THE PETITION AREA WOULD NOT RESULT IN SIGNIFICANT DAMAGE TO IMPORTANT HISTORIC, CULTURAL, SCIENTIFIC, AND ESTHETIC VALUES. THEREFORE, THE COMMISSION FINDS THAT THE CHIEF'S DECISION TO DENY THE REQUESTED DESIGNATION OF UNSUITABILITY WAS PROPER AND SUPPORTED BY LAW.

The Law: O.R.C. §1513.073(A)(2)(c) provides:

(A)(2) Upon petition . . . a surface area may be designated unsuitable for all or certain types of coal mining operations if the operations will:

* * *

(c) Affect fragile or historic lands in which the operations could result in significant damage to important historic, cultural, scientific, and esthetic values and natural systems;

Discussion: The Village of Barnesville is rich in history, and has a unique historic district, which includes several historic buildings and a museum. The Petitioners and the Appellant raise a concern that blasting activities associated with mining could cause damage to identified historic structures. The Appellant also alleges that mining could destroy currently unidentified historic properties.

Any mining proposed within the petition area would be subject to the permitting requirements of Revised Code Chapter 1513. As described under O.AC §1501:13-4-04(A)(2), the permit application process incorporates a comprehensive study to identify both known and unknown historic and archaeological sites. Notably no sites, which are eligible for placement on the National Register of Historic Places, have been identified within the petition area. However, should such sites be found during the permitting process, the law affords protection of these sites independent of the lands unsuitability provisions.

Any blasting operations in the area would need to be conducted in a manner consistent with Ohio's blasting laws. These laws have been developed to assure that blasting is located at a distance from structures that will ensure safety, and will protect property from damage. The law, at O.R.C. §1513.161 and O.A.C. §1501:13-9-06, specifically sets forth strict limitations on blasting, addressing both ground vibration and air blasts.

Blasting has been scientifically studied for many years, and these studies establish that ground vibrations or air blasts would need to be significantly higher than the legal limits in order to actually damage a structure. The Division's blasting expert testified that blasting at the distances and at the levels allowed by law should not cause damage to properties within the Village. However, if deemed necessary, the Division is authorized under O.A.C. §1501:13-9-06(F)(5)(a)&(10), to increase the level of protection from blasting on a permit-by-permit basis.

While the Commission heard the testimony of one citizen who believed that blasting caused damage to his home, this alleged damage was investigated by the Division, and was found to be unrelated to blasting. The citizen's testimony is not persuasive to this Commission, as a single instance of anecdotal testimony, disproved by an investigation, does not outweigh the bulk of blasting science.

4. THE CHIEF'S FAILURE TO STRICTLY COMPLY WITH THE PROCEDURAL REQUIREMENTS RELATIVE TO THE LANDS UNSUITABLE PROCESS DOES NOT SUPPORT A FINDING THAT THE DENIAL OF THE LANDS UNSUITABLE PETITION WAS ARBITRARY, CAPRICIOUS OR ISSUED IN A MANNER INCONSISTENT WITH LAW. THEREFORE, THE COMMISSION FINDS THAT THE CHIEF'S DECISION TO DENY THE REQUESTED DESIGNATION OF UNSUITABILITY WAS PROPER AND SUPPORTED BY LAW.

The Law: O.R.C. §1513.073(A)(3)(c) requires the Chief to develop:

... procedures for proper notice and opportunities for public participation, including a public meeting prior to making any designation or redesignation, pursuant to the [lands unsuitable law] ...

The procedures for reviewing a lands unsuitable petition are articulated in the Ohio mining regulations at O.A.C. §1501:13-3-07. O.A.C. §1501:13-3-07 (C)(3) provides:

Notice of hearing shall be sent by certified mail and postmarked not less than thirty days before the scheduled date of the hearing.

O.A.C. §1501:13-3-07(C)(4) states:

The chief shall notify the general public of the date, time, and location of the hearing by placing a newspaper advertisement once a week for two consecutive weeks and once during the week prior to the hearing in the locale of the area covered by the petition. The advertisement shall begin between four to five weeks before the scheduled date of the public hearing.

O.A.C. §1501:13-3-07(C)(1)(d) addresses the public hearing, which the Division must conduct to review a Lands Unsuitable Petition, and states:

A record of the hearing shall be made and preserved according to state law. No person shall bear the burden of proof or persuasion

....

Discussion: The lands unsuitable procedures require that the Division conduct a hearing to receive public input relative to a petition for unsuitability. This public hearing is non-adversarial, and is used to gather information, which the Chief may then utilize in reaching his decision upon a pending petition. The public hearing is part of the petition process and is in no way related to the administrative hearing conducted by this Commission upon the appeal of the Chief's unsuitability decision.

The statutory language addressing public participation in the Division's public hearing requires that "proper notice" and "opportunity for public participation" be given. The Commission believes that public participation was both sought and received by the Division.

The regulation addressing the lands unsuitable process is more specific as to the timing and type of notice that should be employed in the processing of a petition. The regulations require at least 30 days notice of the public hearing on a lands unsuitable petition. In this matter, only 26 days notice was given. The regulations also require that newspaper publication of the public hearing must begin between four to five weeks before the scheduled hearing date. In this matter, publication began only three weeks before the hearing. The evidence revealed that the Division did not comply with the time frames set forth for notice of the public hearing. And while the time frames articulated in the regulations should be followed, the Commission does not believe that public participation was precluded or hampered under the particular facts of this case. The Division testified that it distributed letters announcing the filing of the petition to approximately 400 people or entities. This petition generated great community interest from the Barnesville area, and the high attendance at the public hearing supports the fact that the public was encouraged to participate in the petition process, and that public opinion was definitely heard by the Division.

The Appellant alleges that the Chief improperly imposed a burden of proof upon the Petitioners in this matter. The regulations at O.A.C. §1501:13-3-07(C)(1)(d) states that no burden of proof shall be imposed at the public hearing conducted by the Division. There has been no evidence produced to establish that any burden was, in fact, imposed at the Division's public hearing. Rather this public hearing was non-adversarial and was conducted in a manner that allowed any member of the public to express an opinion regarding the petition.

The statute at O.R.C. §1513.073(B) requires that a lands unsuitable petition contain: "allegation of facts with supporting evidence that would tend to establish the allegations." Thus, while it is improper to impose a burden of proof at the Division's public hearing, it is not inappropriate for the Division Chief to expect the Petitioners, through their petition, to produce supporting evidence when alleging the need for an unsuitability designation.

Once the Chief's unsuitability decision was rendered, Appellant appealed to the Reclamation Commission. The Commission appeal proceeded under the Commission's procedural rules, with the burden of proof being carried by the Appellant.

There is no evidence that any procedural errors relating to the burden of proof were applied against the Petitioners by the Division.

The Appellant also suggests that the threat of a "takings claim" has colored the Chief's consideration of this petition. The issue of whether a "takings claim" may follow from a designation of unsuitability is not a consideration for either the Division Chief or this Commission. Neither entity has any authority to address constitutional "takings," and such considerations are not relevant to this appeal. Appellant's allegation that the petition process has been tainted by the fear of a "takings claim" has not been substantiated and is beyond the scope of the unsuitability process.

The Appellants have also asked that the Commission require that any mining allowed within the petition area be reclaimed utilizing the "Appalachian Region Reforestation Initiative [ARRI]." The ARRI is a reclamation method, which encourages re-forestation. Application of a reclamation methodology suggests that mining has occurred, not that it has been prohibited. Thus a consideration of ARRI is not germane to the lands unsuitability process. Moreover, the Commission has no authority to order the application of any reclamation method to mining permits which are theoretical, and have not yet been either applied for or issued. Appellant's desire to see ARRI methods utilized in the Barnesville/Greenbelt area, can be addressed through public participation in the permitting process, should mining permits be sought in this area.

**5. THE APPELLANTS HAVE NOT ESTABLISHED THAT THE CHIEF
ACTED ARBITRARILY, CAPRICIOUSLY OR IN A MANNER INCONSISTENT WITH
LAW IN DENYING THE REQUESTED DESIGNATION OF UNSUITABILITY.**

The Law: O.R.C. §1513.13(B) addresses appeals taken to the Reclamation Commission and states:

The commission shall affirm the . . . order . . . of the chief unless the commission determines that it is arbitrary, capricious, or otherwise inconsistent with law . . .

Discussion: Pursuant to O.A.C. §1513-3-16(B), the "ultimate burden of persuasion [in the Commission's appeal] rest[s] with the appellant," who in this appeal is the Greenbelt Advocates. Their burden is to establish that the Division Chief acted arbitrarily, capriciously or in a manner inconsistent with law, in denying the lands unsuitable petition. See O.R.C. §1513.13(B).

The Commission has reviewed the evidence presented at the merit hearing, and the legal arguments of both the Appellant and the Appellee. As the petition did not establish that reclamation pursuant to the requirements of Chapter 1513 of the Revised Code is not technologically or economically feasible in the petition area, a designation of unsuitability was not mandated by law. Thus, the question of whether to grant or deny the petition rested within the Chief's discretion. The evidence revealed that the Division Chief conducted a thorough investigation, which included review of the petition, analysis of information contained in the coal resources report, analysis of information and opinions generated by the Division's staff, consideration of the comments and relevant information received during the petition process from local, state and federal agencies, from the industry and from the public. The Chief also relied upon the Division's experience with mining both in the Barnesville area and throughout the State of Ohio in reviewing the petition. Following this investigation, the Chief exercised his discretion to deny the lands unsuitable petition. Based upon the evidence presented in this matter, the Commission cannot find that the Chief's decision to deny the unsuitability designation was arbitrary, capricious or inconsistent with law.

The Commission recognizes that the concerns raised by the Greenbelt Advocates in this matter are genuine and significant. The Advocates' interest in protecting and preserving the character of their Village and the quality of their water supply is both understandable and laudable. The Commission is confident that these goals can be achieved through the regulatory and permitting programs administered by the Division under Chapter 1513 of the Revised Code.

ORDER

Based upon the findings of fact and conclusions of law, the Commission hereby **AFFIRMS** in full the decision of the Division Chief denying the Lands Unsuitable Petition filed by the Village of Barnesville and the Warren Township Trustees.

8/3/06
DATE ISSUED

Wanda F. Stratton
WANDA F. STRATTON
Vice Chair, Reclamation Commission

INSTRUCTIONS FOR APPEAL

This decision may be appealed to the Court of Appeals, within thirty days of its issuance, in accordance with Ohio Revised Code §1513.14 and Ohio Administrative Code §1513-3-22. If requested, copies of these sections of the law will be provided to you from the Reclamation Commission at no cost.

DISTRIBUTION:

John Preston Bailey, Via FAX [304-232-9897] & Certified Mail #: 7000 0600 0027 4783 9663
Mark G. Bonaventura, Holly Deeds Martin, Via FAX [614-268-8871] & Inter-Office Certified Mail #: 6248
Otto A. Jack, Jr., Via FAX [740-282-5397] & Certified Mail #: 7000 0600 0027 4783 9656

Geoffrey B. Mosser
Michael B. Gardner
Cravat Coal Company
Capstone Holding Company
Marietta Coal Company

BEFORE THE RECLAMATION COMMISSION

GREENBELT ADVOCATES,

Appellant,

-VS-

DIVISION OF MINERAL RESOURCES,
MANAGEMENT,

Appellee,

AND

JEFFCO RESOURCES, INC.,

Intervenor.

Case No. RC-05-039

Review of Decision on Lands
Unsuitable Petition

INDEX OF EVIDENCE PRESENTED AT HEARING

Before: Wanda F. Stratton

In Attendance: Richard Cochran, James McWilliams, Earl Murphy, John Velej and
Hearing Officer Linda Wilhelm Osterman.

Appearances: John Preston Bailey, Counsel for Appellant Greenbelt Advocates; Mark
G. Bonaventura, Holly Deeds Martin, Assistant Attorneys General,
Counsel for Appellee Division of Mineral Resources Management; Otto
A. Jack, Jr., Counsel for Intervenor Jeffco Resources, Inc.

WITNESS INDEX

Appellant's Witnesses:

Susan Schwartz
Constantine Evangelinos
Dennis Hunkler
Thomas J. Jefferies, Jr.

Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination

Appellant's Witnesses (continued):

Julie P. Weatherington-Rice
William Knox
Jeff Thatcher
Ronald Preston
L. Patrick Hunkler

Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination

Appellee's Witnesses:

Scott Stiteler
Jeffrey Reichwein
Michael Mann
Vanessa Tolliver
Thomas Hines

Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination
Direct Examination; Cross Examination

EXHIBIT INDEX

Commission Exhibits:

Commission Exhibit 1
(same as Joint Exhibit 1)

ADMITTED: Village of Barnesville's Lands Unsuitable Petition, filed February 5, 2004; with Appendices identified as Attachments A through Z; with Petition Maps [contained in one three ringed binder, 298 pages]

Commission Exhibit 2

ADMITTED: Village of Barnesville's Lands Unsuitable Record, including Division Information, Government Agency Information & Public Information; with coal resource maps & two CDs from Public Hearing [contained in one three ringed binder, 470 pages]

Commission Exhibit 3

ADMITTED: Village of Barnesville's Lands Unsuitable Record, including Pat Hunkler's Additional Information, with Hunkler's VHS Tape *{Reforestation: Building A Forest for the Future}* & DVD *{Technology Transfer}* [contained in one three ringed binder, 116 pages]

Joint Exhibits:

Joint Exhibit 1

ADMITTED: Village of Barnesville's Lands Unsuitable Petition, filed February 5, 2004; with Appendices identified as Attachments A through Z; with Petition Maps [contained in one three ringed binder, 298 pages]

Joint Exhibit 2

ADMITTED: Map, Village of Barnesville Petition Area; displayed & referenced during hearing; prepared February 2003

Appellants' Exhibits:

Appellant's Exhibit 1

ADMITTED: Resolution #2075, Barnesville Village Council, passed October 20, 1997, with attached map (2 pages)

Appellant's Exhibit 2

ADMITTED: Record of Proceedings, Board of Warren Township Trustees, for meeting held October 29, 1997 (1 page)

Appellant's Exhibit 3

ADMITTED: Lists of mining violations; Marietta Coal (2 pages), Oxford Mining Company (11 pages)

Appellant's Exhibit 4

ADMITTED: *Curriculum Vitae*, Dr. Julie P. Weatherington-Rice, PhD (12 pages)

Appellant's Exhibit 5

ADMITTED with Stipulation (re: conservation easements not being relevant to this proceeding): Preliminary Expert Report on the issues relating to the Greenbelt Advocates appeal of the ODNR DMRM Chief's decision not to grant Barnesville's "Lands Unsuitable" petition; from Bennett & Williams to John Preston Bailey, dated September 30, 2005 (18 pages)

Appellant's Exhibit 6

ADMITTED: Letter, Baker (OEPA) to Stiteler (DMRM), dated May 17, 2004 (2 pages); with attached Drinking Water Source Assessment for the Village of Barnesville, dated December 2003 (18 pages)

Appellant's Exhibit 7

ADMITTED: Village of Barnesville Resolution No. 3224, Council of the Village of Barnesville, passed July 11, 2005 (1 page)

Appellant's Exhibit 8

ADMITTED: Drawing by Weatherington-Rice (1 oversized sheet)

Appellant's Exhibit 9

ADMITTED: Excerpt from Southeast Ohio Water Plan, pages 56 - 65 (9 pages)

Appellant's Exhibit 10

ADMITTED: Excerpt from Southeast Ohio Water Plan, pages 81 - 84 (4 pages)

Appellant's Exhibit 11

ADMITTED: Excerpt from Southeast Ohio Water Plan, page 323 (1 page)

Appellant's Exhibit 12

ADMITTED: Excerpt from Addendum to Southeast Ohio Water Plan, pages 29, 30, 33 - 38, 21 - 23 (11 pages)

Appellant's Exhibit 13

Proffered, not admitted; Memorandum of Understanding, dated May 19, 1972 (2 pages); with letter from Hatch (Hanna Coal) to Nye (ODNR), dated May 19, 1972 (2 pages); with press release (Gilligan), dated June 20, 1972 (1 page)

Appellant's Exhibit 14

ADMITTED: Greenbelt Plan - Barnesville, Ohio, Barnesville Planning Commission, dated May 1973, marked as pages 128, 129, 131 - 133, 135 - 137, 139, 140, 142, 143, 145 - 151, 153 (20 pages)

Appellant's Exhibit 15

ADMITTED: Proof of Publication, The Times Leader, Martins Ferry, Ohio, notarized on December 8, 2004, with copy of Public Notice (1 page)

Appellant's Exhibit 16

Proffered, not admitted; Article, *Land Unsuitability Criteria in the Department of Interior's Coal Leasing Program*, by Stewart, Gulliver & Towle, marked as pages 67 - 78, 81 (13 pages)

Appellant's Exhibit 17

ADMITTED: Summary of Coal Mining Variances and Revisions Impacting Barnesville, dated February 9, 2006 (1 page)

Appellant's Exhibit 18

ADMITTED: Appalachian Regional Reforestation Initiative, U.S. Department of Interior, Office of Surface Mining (5 pages)

Appellant's Exhibit 19

ADMITTED: Office of Surface Mining News Release, dated December 20, 2004 (2 pages)

Appellant's Exhibit 20

ADMITTED: Effects of reclamation technique on white pine productivity and stand value at 30 years; table and photo (2 pages)

Appellee's Exhibits:

Appellee's Exhibit 1

ADMITTED: Motion to Amend Notice of Appeal and Memorandum in Support, case no. RC-05-039, filed by Greenbelt Advocates on February 2, 2006, with attached map (9 pages)

Appellee's Exhibit 2

ADMITTED: Stipulations of Appellant, Appellee, and Intervenors The Ohio Valley Coal Company, American Energy Corporation and Consolidated Land Company, case no. RC-05-039, jointly filed August 1 & 2, 2005 (8 pages)

Appellee's Exhibit 3-A

ADMITTED: Lands Unsuitable Petition Worksheet for Village of Barnesville Petition, received March 30, 2001 (1 page, two-sided)

Appellee's Exhibit 3-B

ADMITTED: Letter, Sponsler (DMRM) to Morgan Carpenter, Hissom & Markovich (Barnesville), dated April 14, 2003, re: Completeness Review (3 pages)

Appellee's Exhibit 3-C

ADMITTED: Letter, Sponsler (DMRM) to Morgan Carpenter, Hissom & Markovich (Barnesville), dated December 16, 2003, re: Completeness Review (2 pages)

Appellee's Exhibit 3-D

ADMITTED: Letter, Sponsler (DMRM) to Morgan Carpenter, Hissom & Markovich (Barnesville), dated March 5, 2003, re: Completeness Review (2 pages), with attached copies of Certified Mail green cards & receipts (3 pages)

Appellee's Exhibit 3-D-2

ADMITTED: Inter-Office Communication, Stiteler (DMRM) to Emmons (DMRM), dated March 16, 2004 (1 page)

Appellee's Exhibit 3-E

ADMITTED: Letter, Sponsler (DMRM) to The Times Leader (Martins Ferry), dated March 19, 2004, re: Legal Notice (1 page)

Appellee's Exhibit 3-F

ADMITTED: Proof of Publication, The Times Leader, Martins Ferry, Ohio, notarized on April 2, 2004, with copy of Public Notice (1 page)

Appellee's Exhibit 3-G

ADMITTED: Form Letter, Sponsler (DMRM) to all landowners, interested persons and governmental agencies, dated March 26, 2005 (1 page)

Appellee's Exhibit 3-H

ADMITTED: Form Letter, Sponsler (DMRM) to persons requesting a copy of the Village of Barnesville's Lands Unsuitable Petition, dated April 5, 2004 (1 page)

Appellee's Exhibit 3-H-2

ADMITTED: Letter, Sponsler (DMRM) to Morgan, Carpenter, Hissom & Markovich (Barnesville), dated June 11, 2004, re: Lands Unsuitable Petition Hearing (1 page)

Appellee's Exhibit 3-I

OPEN

Appellee's Exhibit 3-J

ADMITTED: Letter, Sponsler (DMRM) to Blanco (Martins Ferry Time Leader), dated November 15, 2004, re: Legal Notice (1 page)

Appellee's Exhibit 3-K

ADMITTED: Public Hearing Notice, Village of Barnesville Lands Unsuitable Petition, set for December 15, 2004 (1 page)

Appellee's Exhibit 3-L

ADMITTED: Proof of Publication, The Times Leader, Martins Ferry, Ohio, notarized on December 8, 2004, with copy of Public Notice (1 page)

Appellee's Exhibit 3-M

ADMITTED: Memo, Hines (DMRM) to Reichwein, Tolliver, Mann & Johannes (DMRM), dated November 22, 2004 (2 pages)

Appellee's Exhibit 3-N

ADMITTED: Reichwein's Final Report: Comments on Barnesville Lands Unsuitable Petition, dated February 10, 2005 (7 pages)

Appellee's Exhibit 3-O

ADMITTED: Tolliver's Barnesville Lands Unsuitable Petition Analyses, Hydrology Considerations of the Public Water System, undated (4 pages)

Appellee's Exhibit 3-P

ADMITTED: Mann's Comments on Barnesville Lands Unsuitable Petition, Relative to Blasting, dated February 11, 2005 (7 pages)

Appellee's Exhibit 3-Q

ADMITTED: Letter, Sponsler (DMRM) to Morgan, Carpenter, Hissom & Markovich (Barnesville), dated February 15, 2005, re: Denial of Petition to Designate Lands Unsuitable for Mining (3 pages), with attached Statement of Reasons (14 pages)

Appellee's Exhibit 3-R

ADMITTED: Map, Barnesville Area, Abandoned Deep Mines and C & D Permits Bond Released Prior to 12/31/2002

Appellee's Exhibit 4

ADMITTED: *Curriculum Vitae*, Dr. Jeffrey Charles Reichwein, PhD, dated September 2005 (6 pages)

Appellee's Exhibit 5

ADMITTED: Three Photographs, historic structure [Price House], (Oxford 10121) (2 pages)

Appellee's Exhibit 6	ADMITTED: Writing made by Reichwein during testimony (1 oversized sheet)
Appellee's Exhibit 7	ADMITTED: <i>Blasting Vitae</i> , Michael J. Mann, dated July 2005 (4 pages)
Appellee's Exhibit 8	ADMITTED: Alternative Blasting Level Criteria [Z curve] (1 oversized sheet)
Appellee's Exhibit 9-A	ADMITTED: Photograph, Barnesville Hospital, Emergency Wing, taken January 15, 2006
Appellee's Exhibit 9-B	ADMITTED: Photograph, Barnesville Hospital, close-up of corner, taken January 15, 2006
Appellee's Exhibit 10-A	ADMITTED: Photograph, valley with hospital and homes in background, taken January 15, 2006
Appellee's Exhibit 10-B	ADMITTED: Photograph, valley with homes in background, taken January 15, 2006
Appellee's Exhibit 11	ADMITTED: Map, Barnesville area, with ODNR/DMRM seismograph locations noted
Appellee's Exhibit 12	ADMITTED: Summary of seismographic data recorded by the DMRM's self-triggering seismographs in Barnesville, Ohio (1 oversized sheet)
Appellee's Exhibit 13	ADMITTED: Letter, Honish (Oxford Mining) to Doan (Barnesville Hospital), dated November 12, 1999 (2 pages)
Appellee's Exhibit 14	ADMITTED: Excerpt from Blast Design Application, Boswell Adjacent Area Application, Permit D-0676-1 (3 pages)
Appellee's Exhibit 15	ADMITTED: <i>Curriculum Vitae</i> , Vanessa Tolliver, dated October 7, 2005 (3 pages)
Appellee's Exhibit 16	ADMITTED: Portions of Coal Mining Permit Application, addressing geology and/or hydrology, marked as pages 13 - 15, 17 - 19, 26 - 29, 31 & 32, Attachment 12, Attachment 14A, Attachment 14B, Attachment 14C, Attachment 14D, Attachment 18 (18 pages)

Appellee's Exhibit 17

ADMITTED: Article, *The Impact on Water Quality of Surface Mining for Coal*, by Dick, Bonta & Haghiri, published November – December 1983, Ohio Report, Vol. 28, No. 2 (4 pages)

Appellee's Exhibit 18

ADMITTED: *Curriculum Vitae*, Thomas J. Hines (5 pages)

Appellee's Exhibit 19

ADMITTED: Photographs, Oxford 10121, Top Photo: view from ridge west of TH 99027; Bottom Photo: #9 highwall south of TH 99025 (2 photographs on 1 page)

Appellee's Exhibit 20

ADMITTED: Photographs, Oxford 10121, Top Photo: spoil ridge south of TH 99024; Bottom Photo: W1-5 (2 photographs on 1 page)

Appellee's Exhibit 21

ADMITTED: Photograph, Barnesville area, abandoned building

Appellee's Exhibit 22

ADMITTED: Photograph, Barnesville area, abandoned building

Appellee's Exhibit 23

ADMITTED: Photograph, Barnesville area, R. Blon Trucking

Appellee's Exhibit 24

ADMITTED: Photograph, Barnesville area, tower

Appellee's Exhibit 25

ADMITTED: Photograph, Barnesville area, partially reclaimed area

Appellee's Exhibit 26

ADMITTED: Photograph, Barnesville area, unreclaimed ground & spoil pile

Appellee's Exhibit 27

ADMITTED: Photograph, Barnesville area, top of watershed of reservoir #1

Appellee's Exhibit 28

ADMITTED: Photograph, Barnesville area, curve in road

Appellee's Exhibit 29

ADMITTED: Photograph, Barnesville area, curve in road

Appellee's Exhibit 30	ADMITTED: Photograph, Barnesville area, curve in road
Appellee's Exhibit 31	ADMITTED: Photograph, Barnesville area, curve in road, school bus sign
Appellee's Exhibit 32	ADMITTED: Photograph, Barnesville area, hillside
Appellee's Exhibit 33	ADMITTED: Photograph, Barnesville area, garage
Appellee's Exhibit 34	ADMITTED: Photograph, Barnesville area, garage
Appellee's Exhibit 35	ADMITTED: Photograph, Barnesville area, corrugated metal building
Appellee's Exhibit 36	ADMITTED: Photograph, Barnesville area, corrugated metal building
Appellee's Exhibit 37	ADMITTED: Photograph, Barnesville area, Oxford Mining Company's reclamation west of Barnesville (Bates: p. 767E)
Appellee's Exhibit 38	ADMITTED: Photograph, Barnesville area, Oxford Mining Company's reclamation west of Barnesville (Bates: p. 767B)
Appellee's Exhibit 39	ADMITTED: Photograph, Barnesville area, Oxford Mining Company's reclamation west of Barnesville (Bates: p. 767C)
Appellee's Exhibit 40	ADMITTED: Photograph, Barnesville area, Oxford Mining Company's reclamation west of Barnesville (Bates: p. 767D)
Appellee's Exhibit 40	ADMITTED: Photograph, Barnesville area, Oxford Mining Company's reclamation west of Barnesville (Bates: p. 767F)