

NOTICE OF INTENTION TO SUE PURSUANT TO 30 U.S.C. § 1270(a)(2)

To: Ken Salazar, Secretary of the Interior
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Pursuant to 30 U.S.C. § 1270(b) and 30 C.F.R. § 700.13, Citizens Coal Council ("CCC"), notifies you of its intention to initiate a civil action against you under Section 520 of the Surface Mining Control and Reclamation Act of 1977, as amended ("SMCRA"), 30 U.S.C. § 1270, based on your failure to perform acts or duties under SMCRA which are not discretionary with you. Your failure to perform these acts or duties constitutes a violation of SMCRA that immediately affects the CCC's legal interests so as to allow the organization to file the intended civil action immediately after providing this notice. In the event that CCC elects to withhold the filing of the intended action for any reason, or in the event that any court determines that CCC may not commence proceedings against you immediately after providing this notice, this notice shall serve the alternate purpose of informing you that CCC intends to commence the intended action 60 days from the date of this notice or as soon thereafter as counsel may file the necessary documents.

CCC is a national grassroots organization of groups and individuals, headquartered in Washington, Pennsylvania. Founded in 1989 and incorporated in Pennsylvania as a non-profit charitable organization, CCC works for social and environmental justice. Among other activities, CCC strives to protect people, homes, farms, communities, water, and the environment from coal mining damage.

CCC also is dedicated to enforcing SMCRA and other state and federal environmental protection laws. Those laws include the Pennsylvania Constitution, Art. I, § 27 ("Natural

Resources and the Public Estate”), which expressly provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”

Pennsylvania is one of the original thirteen states with a vast array of unique national historic properties, including many with existing structures in Western Pennsylvania dating from the times of the French & Indian War and the Revolutionary War periods, and including existing historic cultural landscapes and traditional cultural properties. Pennsylvania also has a documented prehistoric human occupation dating back to over 16,000 years before the present era. See, *e.g.*, <http://www.heinzhistorycenter.org/meadowcroft.aspx>. Also prominent among the historic properties of Pennsylvania and its people are the historic drinking water and livestock watering sources and delivery systems, including but not limited to the aquifers, springs and surface waters of the Commonwealth and the United States.

I. THE PROVISIONS OF SMCRA THAT IMPOSE THE MANDATORY ACTS OR DUTIES THAT YOU HAVE NOT PERFORMED.

SMCRA imposes on the Secretary the mandatory, non-discretionary duty to ensure that any State’s program comply with SMCRA and its implementing regulations prior to approval of that State’s program. Furthermore, SMCRA imposes on you the mandatory, non-discretionary duty to promulgate a federal program if any State fails to implement, enforce, or maintain an approved State program as provided for in SMCRA. 30 U.S.C. § 1254(a)(3). The Department of Interior, Office of Surface Mining Regulations and Enforcement (“OSMRE”), has failed to require that the Commonwealth of Pennsylvania’s SMCRA program comply with 30 C.F.R. 733.5 which mandates, among other requirements, that a State program shall provide that review and issuance of surface coal mining and reclamation permits is coordinated with applicable

requirements of the National Historic Preservation Act (“NHPA”).

The provisions of the NHPA expressly apply to state mining regulatory programs and mining permits issued pursuant to SMCRA and its implementing regulations at 30 C.F.R. Part 773. 30 C.F.R. Part 773, “Requirements for permits and permit processing” expressly states therein:

733.5 Regulatory coordination with requirements under other laws.

Each regulatory program shall, to avoid duplication, provide for the coordination of review and issuance of permits for surface coal mining and reclamation operations with applicable requirements of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.); the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661 et seq.); the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. 703 et seq.); The National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.); the Bald Eagle Protection Act, as amended (16 U.S.C. 668a); for Federal programs only, the Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 et seq.); and the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa et seq.) where Federal and Indian lands covered by that Act are involved.

30 C.F.R. § 773.5 (July 1, 2003)(52 FR 4262, Feb. 10, 1987; Redesignated at 65 FR 79663, Dec. 19, 2000)(emphasis added).

The National Historic Preservation Act (“NHPA”), 16 U.S.C. § 470, et seq., contains among other significant provisions that:

A. [16 U.S.C. § 470] (b) The Congress finds and declares that –

- (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
- (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
- (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
- (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans....

B. Declaration of policy of the Federal Government, 16 U.S.C. §470-1 –

It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to -

- (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;
- (2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments....
- (4) contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means;
- (5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment....

C. Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation, 16 U.S.C. §470f –

“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking.”

D. Definitions, 16 U.S.C. §470w – As used in this subchapter, the term –

- (5) "Historic property" or "historic resource" means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.
- (6) "National Register" or "Register" means the National Register of Historic Places established under section 470a of this title.
- (7) "Undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including -

- (A) those carried out by or on behalf of the agency;
- (B) those carried out with Federal financial assistance;
- (C) those requiring a Federal permit license, or approval; and
- (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” (emphasis added).

The Commonwealth of Pennsylvania has failed to implement, enforce, or maintain its approved State program, 30 C.F.R. Part 938 (2008) in accordance with the federal mandate of 30 C.F.R. 733.5 in regard to providing statutes and regulations consistent with and minimally equivalent to the NHPA, including but not limited to the Congressional declarations of policy and purpose, and Section 106 (16 U.S.C. § 470f) of that Act, as amended, and thus has violated an ongoing and enforceable federal obligation pursuant to 30 C.F.R. § 733.11 and 733.15(k) (2008). The Commonwealth of Pennsylvania has no statutory or regulatory minimal equivalent to NHPA, especially Section 106. Countless national historic properties have been adversely affected as a result of, and including but not limited to, the following:

1. The state regulatory authority for Pennsylvania – the Pennsylvania Department of Environmental Protection (“PADEP”) – is engaged in a pattern and practice of failing to perform its non-discretionary duty to establish minimally adequate state equivalents to the applicable provisions of the NHPA.

2. The state regulatory authority for Pennsylvania – the Pennsylvania Department of Environmental Protection (“PADEP”) – is engaged in a pattern and practice of failing to perform its non-discretionary duty to withhold approval of permit applications that request an undertaking decision or authorization to mine coal but do not contain accurate or complete information prior to the undertaking concerning (a) the location, identity and evaluation of historic properties that may be adversely affected by the proposed surface coal mining activities, including subsidence

effects and damages and (b) consultations in accordance with the NHPA, or its legal equivalent, and its implementing regulations at 36 C.F.R. Part 800, for good faith consultation on avoiding, minimizing or mitigating any such adverse effects to historic properties listed or eligible for listing in the National Register of Historic Places.

3. In each of the foregoing ways, PADEP has failed and continues to fail to implement, administer, enforce and maintain its approved state regulatory program in accordance with SMCRA and the federal regulations that implement that statute, despite its non-discretionary duty to do so pursuant to 30 C.F.R. § 733.11.

II. FACTS THAT DEMONSTRATE YOUR FAILURE TO CARRY OUT THE APPLICABLE MANDATORY, NON-DISCRETIONARY DUTY.

You have failed to prepare, promulgate, or implement a federal program for Pennsylvania pursuant to your non-discretionary duty under 30 U.S.C. § 1254(a)(3) despite a host of readily ascertainable facts which establish Pennsylvania's failure to implement, enforce, or maintain its approved State program as provided for in SMCRA.

In a Notice of Intent to Sue dated February 25, 2002 and sent to Secretary of the Interior Gale A. Norton, Acting OSM PA State Director Beverly Brock, and PA DEP Secretary David E. Hess, those responsible officials were formally notified of the SMCRA State program deficiencies described herein above regarding 30 C.F.R. 733.5, etc. That notice was incorporated into a formal legal pleading filed by Roy and Diane Brendel in defense of their historic farmhouse in the litigation then ongoing in the U.S. District Court for the Western District of Pennsylvania, in which the Department of the Interior Office of Surface Mining Reclamation and Enforcement was a third-party defendant (Consolidation Coal Company v. U.S. Department of the Interior, et al., and Brendel v. U.S. Department of the Interior OSMRE, et al.,

Case No. 00-2120). The claims against OSMRE included specific claims as outlined herein above for failure to comply with SMCRA and its implementing regulations, including but not limited to 30 C.F.R. 733.5. That February 25, 2002 Notice of Intent to Sue stated:

1. PADEP has engaged in a pattern and practice of failing to perform the non-discretionary duties imposed by 16 U.S.C. §470 et seq. (including but not limited to §§470f and 470k), 30 U.S.C. § 1260(b), 30 C.F.R. Part 784, 52 Pa.C.S. §1396, et seq., and 25 Pa.Code, Chapter 86. to withhold approval of any application for a surface mining permit or for a significant permit revision unless and until the application affirmatively demonstrates and the PADEP Director finds in writing -- on the basis of the information set forth in the application or from information otherwise available which he documents in his approval papers -- that, among other things (a) the permit application is accurate and complete; (b) all the requirements of the Pennsylvania program have been complied with; and (c) that the proposed mining activities "will not adversely affect any...places included on [sic] the National Register of Historic Places."

You have failed to prepare, promulgate, implement or oversee a federal program for Pennsylvania pursuant to your non-discretionary duties pursuant to SMCRA despite the Brendels' notification to DOI, OSM and PA DEP sent August 23, 2000 and November 3, 2000 , and a host of other readily ascertainable facts which establish Pennsylvania's failure to implement, enforce, or maintain its approved State program as provided for in SMCRA.

Furthermore, PA DEP has engaged in the pattern and practice – with the knowledge and unlawful tacit consent of OSMRE – to deliberately misinterpret the words “not adversely affect” in the plain language prohibition of 25 PA Code §86.37(a)(6) to mean “not irreparably harm.” In other words, adversely affecting a protected historic property is deemed by PA DEP to be permissible if the damage can be repaired. That is in direct contradiction to the plain language of the state regulation:

Criteria for permit approval or denial, §86.37 – “(a) A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or

from information otherwise available, which is documented in the approval, and made available to the applicant, that the following apply:

(1) The permit application is accurate and complete and that the requirements of the acts and this chapter have been complied with.

(6) The proposed activities will not adversely affect any publicly owned parks or places included on the National Register of Historic Places, except as provided for in Subchapter D. The effect of the proposed coal mining activities on properties listed on or eligible for listing on the National Register of Historic Places has been taken into account by the Department....”

See also:

1. Fitch, Antoinette, *Coal company sues over house's historic status*, Pittsburgh Post-Gazette (November 12, 2000);¹
2. *Coal Firm Sued*, South Briefs (Greene County), Pittsburgh Post-Gazette (November 22, 2001);²
3. Hopey, Don, *Mining tolerated as history crumbles*, Pittsburgh Post-Gazette (November 23, 2003);³
4. Hopey, Don, *Sinking History: Longwall mines put holes in the past – Historic structures in Greene and Washington counties shift and crack as coal is dug from far below (First of a series)*, Pittsburgh Post-Gazette (November 23, 2003);⁴

¹ <http://www.post-gazette.com/regionstate/20001112landmark2.asp>

² http://www.post-gazette.com/neigh_south/20011122sburbs1122p9.asp

³ <http://www.post-gazette.com/pg/03327/242926.stm>

⁴ <http://www.post-gazette.com/pg/03327/242932.stm> (Notable excerpt: *Michael Nixon, an environmental attorney and consultant who does historic preservation work nationwide, said that for properties that are already on the national historic register, the state mining bureau's policies also violate a state law that prohibits activities that would adversely affect such sites.*

Instead, the bureau's policy is to prohibit mining under a historic property only if the subsidence will cause "irreparable damage." And it almost never makes that determination.

Nixon, who represents the owners of the historic Ernest Thralls House, said the "irreparable damage" term isn't found anywhere else in state regulations.

"The mining bureau made that up. The bureau has to interpret the regulation as requiring no irreparable harm -- otherwise it can't allow what it has allowed," Nixon said. "It's like the Wizard of Oz with the curtain pulled back. The mining bureau is saying pay no attention to the [state] law prohibiting damages. Instead, listen to what we're saying.

"That's something different and much, much less.").

5. Hopey, Don, *Sinking History: Federal review process fails in longwall mining (Second of a series)*, Pittsburgh Post-Gazette (November 24, 2003);⁵

6. Hopey, Don, *Sinking History: Historic designation does little to help this house (Third of a series)*, Pittsburgh Post-Gazette (November 25, 2003).⁶

7. Williams, Ted, *That Sinking Feeling*, Audubon Magazine (March 2005).⁷

8. Hopey, Don, *Historic house ruined by mining to be demolished*, Pittsburgh Post-Gazette (November 23, 2006).⁸

In the February 17, 2006 order of the federal court in Brendel v. OSMRE, W.D. Pa., Case No. 00-2120, while disallowing the third-party plaintiff's claims directly asserted under the NHPA's Section 106, the court having reviewed memoranda of law submitted by the parties, expressly ruled that the same claims being made pursuant to SMCRA and 30 C.F.R. 733.5, could proceed pursuant to a contested motion to amend the pleadings for that purpose. The case was subsequently settled through court-ordered mediation later that year in which OSMRE participated through its counsel.

For its part, your Office of Surface Mining Reclamation and Enforcement has publicly done little, if anything, to fully identify the problem within the State program regarding protection and preservation of national historic properties and cultural resources, assess the scope of the systemic problem, or persuade PADEP and the government of the Commonwealth to take effective corrective action. Accordingly, CCC intends to institute a civil action to compel you to perform your mandatory, non-discretionary duty under the circumstances to promulgate a complete federal regulatory program for the Commonwealth of Pennsylvania to provide for the protection and preservation of its precious nationally historic resources.

⁵ <http://www.post-gazette.com/pg/03328/243242.stm>

⁶ <http://www.post-gazette.com/pg/03329/243644-113.stm>

⁷ <http://www.audubonmagazine.org/incite/incite0503.html>

III. ADDITIONAL REQUIRED INFORMATION.

CCC's address is c/o Aimee Erickson, Council Coordinator, Post Office Box 964, Washington, Pennsylvania 15301. The names, addresses, and telephone numbers of CCC's legal counsel are shown below. CCC requests that any person receiving this notice direct all inquiries to the undersigned legal counsel.

CITIZENS COAL COUNCIL

-By Counsel-

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Dated October 7, 2009
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⁸ <http://www.post-gazette.com/pg/06327/740753-85.stm>