

BEFORE THE RECLAMATION COMMISSION

JOHN I. BRAVER,

Appellant,

-vs-

DIVISION OF MINERAL RESOURCES
MANAGEMENT,

Appellee.

Case No. RC-13-005

Review of Phase III Bond Release;
Permit D-2013 (Valley Mining)

FINDINGS, CONCLUSIONS & ORDER OF THE COMMISSION

Appearances: John I. Braver, Appellant, *pro se*; Kristina Tonn, Brian Ball, Assistant Attorneys General, Counsel for Appellee
Division of Mineral Resources Management.

Date Issued: May 9, 2014

BACKGROUND

On March 4, 2013, Appellant John I. Braver filed with the Reclamation Commission a notice of appeal from a decision of the Division Chief. This Chief's decision approved a request for the final release of all financial security associated with reclamation on the Year 5 Segment of coal mining and reclamation permit D-2013. Mr. Braver owns land affected by this mining and reclamation operation. The concerns raised by Mr. Braver specifically address the reclamation of seeps and ground slips located on his property.

Permit D-2013 is held by Valley Mining, Inc. ["Valley Mining" or "Valley"], and Valley Mining is responsible for the reclamation of lands affected under this permit. Valley Mining has not intervened into this appeal, and did not participate in any manner in this proceeding.

On September 18, 2013, a site view was conducted by the Commission. Mr. Braver and representatives of the Division participated in the site view. The Commission and the parties walked the Year 5 Segment of permit D-2013, and observed features relevant to this appeal.

The merits of this case were heard by the Reclamation Commission on October 16, 2013. At hearing, the parties presented evidence, and examined witnesses appearing for and against them.

On January 23, 2014, the Commission **issued** an *Order Reopening Hearing for Additional Evidence on Limited Issues*. Through this order, the Commission requested additional evidence regarding the reclamation, and the timing of the security release, relative to two stream channels. The reopened hearing was conducted on March 19, 2014.

After a review of the Record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Mr. Braver has a long history with the property at issue in this appeal [the "Braver Property"]. Approximately 50 years ago, the Braver family purchased a large tract of land in the vicinity of Irish Run Road, Union Township, Tuscarawas County, Ohio. This property was acquired as a family retreat, and Mr. Braver has been familiar with the property since his boyhood. While Mr. Braver resides in the Akron area, he frequently visits the Braver Property.

2. Coal mining and reclamation permit D-2013 was issued to Valley Mining on October 5, 1999. This permit allowed the surface mining of coal on 274.6 acres of land, located in Tuscarawas County, Ohio. Actual mining of coal occurred on only 99.8 of these permitted acres, and security was required to be posted on only the 99.8 acres actually affected by mining. Permit D-2013 allowed Valley to remove the Upper Freeport #7 Coal Seam by the contour mining method. The area affected by Valley's mining is a winding, narrow strip of land, following the #7 coal outcrop along the hillside, at an elevation of approximately 990 feet mean sea level. During mining and reclamation, the affected area was served by a perimeter diversion ditch, utilized to control surface drainage on the mine site. The perimeter diversion ditch was removed as part of the reclamation of permit D-2013.

3. The permit D-2013 area included some naturally-occurring streams. As part of the permitting process, Valley submitted to the Division a buffer zone variance request, seeking permission to disturb areas within legally-established stream buffer zones.¹ On October 18, 2000, the Division approved Valley's stream buffer zone variance request. The Division's approval allowed Valley to disturb areas within 100 feet of certain identified streams on the permit D-2013 area, including intermittent streams C and D.

4. Permit D-2013 was divided into several segments, based upon the years in which mining occurred. The Year 5 Segment of permit D-2013 is 36 acres in size. Mr. Braver has ownership interests in 34.4 of these acres. The approved postmining land use for the Year 5 Segment is identified as grazing land.

5. The topography of the Year 5 Segment of permit D-2013 is relatively steep, with the reclaimed area showing an approximate slope of 18°. The ground generally slopes from the east (the ridgetop area) to the west (the woods/valley-bottom area). Soils in this area are prone to seasonal wetness, shrink-swell potential and slippage hazards.

¹ Pursuant to O.A.C. §1501:13-9-04(E)(1):

No land within one hundred feet of a perennial or intermittent stream shall be disturbed unless the chief specifically authorizes coal mining operations closer to or through such a stream.

6. Prior underground mining of the Middle Kittanning #6 Coal Seam occurred beneath portions of the Year 5 Segment. This mining was conducted by Midvale Coal Company. Approximately 140 - 190 feet of material separates the #6 coal (deep mined by Midvale) from the #7 coal (surface mined by Valley). The Midvale mine was closed in 1971. There is no evidence that surface subsidence has occurred, or is occurring, as a result of Midvale's previous underground mining.

7. Valley commenced its surface mining on the Year 5 Segment of permit D-2013 in early 2001, and continued mining on this segment until 2004. Mining on the Year 5 Segment progressed from the south to the north.

8. Following mining, Valley backfilled and graded the affected areas. In October 2005, Valley seeded the Year 5 Segment with an approved mixture of grasses.

9. On December 20, 2005, Valley filed its final map for the permit D-2013 area, indicating that all mining pursuant to permit D-2013 had concluded.

10. In November and December of 2006, the Division approved Phase I and Phase II security releases for the Year 5 Segment of permit D-2013. The Phase I approval released 50% of the performance security held in support of this 36-acre segment, and reflected the Division's approval of backfilling and grading on this yearly segment. The Phase II approval released an additional 35% of the original performance security amount, and reflected the Division's approval of resoiling and revegetative seeding on the Year 5 Segment.

11. On August 14, 2012, Valley seeded the Stream Channels C and D areas with approved grasses for a second time (following reconstruction). On December 13, 2012, Valley re-planted trees in the Stream Channels C and D buffer zones. On January 24, 2013, the Division inspected, and verified, Valley's tree plantings in these stream buffer zones.²

² Stream Channels C and D were initially seeded in October 2005, with the rest of the Year 5 Segment. These channels were initially planted with trees on May 3, 2010. The second seeding and planting of these channels are addressed in Findings of Fact No. 40.

12. On September 21, 2012, Valley submitted a request for Phase III (final) security release for the Year 5 Segment. Through this submission, Valley requested release of the remaining security posted in support of the Year 5 Segment (\$13,500, or 15% of the originally-posted amount).

13. After 2005, but before October 25, 2012, the Year 5 Segment of permit D-2013 was evaluated twice to determine if hay yields on this ground met the established county averages. During these evaluations, it was determined that the hay yields on this area exceeded the ten-year county average of 2.97 tons of hay per acre.

14. On October 25, 2012, the Division conducted a Phase III security release inspection of the Year 5 Segment of permit D-2013. Representatives of Valley Mining and the federal Office of Surface Mining ["OSM"], as well as Mr. Braver, accompanied the Division on this inspection. During this inspection, the Division reviewed the condition of all reclamation, including the success of Valley's revegetative efforts. A second evaluation of vegetative success was conducted on November 16, 2012.

15. On February 6, 2013, Division District Manager Michael Kosek issued a letter to Mr. Braver, informing him that the Division had determined that the Year 5 Segment of permit D-2013 had been successfully reclaimed, and that the Division had approved the final security release for this 36-acre segment. This notification stated, in part:

The Division conducted a performance security release inspection on October 25, 2012 and found the areas designated as mining year 5 met the performance standards for release. Specifically, that all surface coal mining and reclamation operations have been successfully completed in accordance with the approved reclamation plan and [have] met the Phase III revegetation success standards in accordance with Rule 1501:13-9-15 of the Ohio Administrative Code. In addition, soil productivity has been returned to the level of yields required by current standards and the applicable period of responsibility for revegetation has expired.

16. On March 4, 2013, Mr. John Braver filed an appeal to the Reclamation Commission from the Division's February 6, 2013 decision approving final security release on the Year 5 Segment of permit D-2013. This is the appeal now under consideration. In his notice of appeal, and at hearing, Mr. Braver identified several concerns relative to the reclamation of the Year 5 Segment.

17. For ease in discussing Mr. Braver's concerns, the Commission has divided the area under consideration into three separate sections (see Attachment A, Demonstrative Diagram). **Area A** encompasses land between the southern boundary of the Year 5 Segment and the northernmost side of Pond 6 (and includes Pond 6, Slip A, Seep A and Barren Area A). **Area B** is located between the northernmost side of Pond 6 and the northernmost side of Pond 3 (and includes Pond 3, Slip B-1, Slip B-2, Slip B-3 and Seep B). **Area C** is located between the northernmost side of Pond 3 and the northern boundary of the Year 5 Segment (just south of Pond 7) (and includes Pond 4, Slip C-1, Slip C-2, Seep C, Stream Channel C, a portion of Stream Channel D and 0.6 acre of property owned by Carl McPeak).

Concerns in Area A.

18. Area A consists of the southernmost portion of the Year 5 Segment. A ground slip, **Slip A**, occurred in backfilled material in this area sometime after mining concluded, possibly in 2006 or 2007.³ Slip A occurred on the affected area of permit D-2013. Slip A was repaired by Valley in late 2007 or early 2008 through grading and the installation of drainage tiles⁴ forming a "crescent" around the scarp (or top) of the slip. These tiles directed water away from the slip area. The area of Slip A is currently stable.

19. Simultaneous with the repair of Slip A, Valley graded a small portion of a downslope crop field, located outside the affected area (*i.e.*, outside the area subject to performance security) and downslope of the permit's perimeter diversion ditch. This crop field has been historically used for farming. In 2011, this field was enrolled in the United States Department of Agriculture's Conservation Reserve Program. Grading on the edge of the crop field created a barren area, **Barren Area A**, on a small portion of this field.⁵

³ All areas of concern are depicted on Attachment A, Demonstrative Diagram.

⁴ Although referred to as "tile," the drainage piping is actually flexible plastic pipe.

⁵ Barren Area A has approximate dimensions of 140 feet by 20 feet (scaled from Division's Exhibit 2), which is equal to 2,800 square feet or 0.06 acre.

20. The area where Barren Area A is located was not disturbed by Valley's mining operations. Barren Area A is not associated with Slip A, which slip was located upslope of the crop field. The Division determined that grading at the edge of the crop field was done as a "good will gesture," and was not related to Valley's mining operations. As Barren Area A is not mining-related, the Division determined that Valley Mining was not required to take any corrective actions regarding this feature.⁶

21. Division Inspector Greg Hoffman began inspecting permit D-2013 in January of 2011, replacing another Division inspector as the responsible inspector for this permit.

22. Mr. Braver had raised concerns regarding seeps on the Year 5 area. Topographic maps of this area show that springs existed on these hillsides prior to mining. (See Division's Exhibit 5.) Inspector Hoffman testified that as early as March 2011, he observed seeps on the Year 5 Segment of permit D-2013. There was a concern that seeps could negatively impact the stability of backfilled materials (could cause slips in the backfilled materials). By March 2012, Inspector Hoffman suggested that Valley tile three seeps on the Year 5 Segment, including **Seep A**. Seep A was located approximately 300 feet north of the southernmost boundary of the Year 5 Segment. In July 2012, Valley attempted to tile Seep A, but could not locate any water in this area. The Division did not require Valley to attempt any further tiling of Seep A.

23. In Area A, Mr. Braver testified that he would like Valley to "finish the grade" so that this area could be more readily accessed by equipment. He would also like Valley to re-establish a soil profile in Barren Area A that would be productive and capable of supporting crops.

⁶ During the Phase III release inspection on October 25, 2012, barren areas totaling 922 square feet (or 0.02 acre) were recorded on the Year 5 Segment. As Barren Area A is not located on the Year 5 affected area, it was not included in these calculations. However, even if Barren Area A were included as a barren area on the Year 5 Segment, the addition of Barren Area A to the vegetative calculations would not render the Year 5 Segment non-compliant with the limits set for either total, or individual, "barren area" under the law. (*See O.A.C. §1501:13-9-15(G)(3)*, and discussion on page 20.)

Concerns in Area B.

24. Area B is located between Pond 6 and Pond 3. Mr. Braver has raised concerns regarding three incidents of ground slippage in this area. These three slips were addressed in an Engineering Report, authored by Division Engineer Scott McDiffitt, who was qualified as an expert in land slips at hearing.

25. **Slip B-1** developed in the reclaimed backfill south of Pond 3 in or around 2005. Slip B-1 occurred on the affected area of permit D-2013. Slip B-1 had approximate dimensions of 150 feet by 120 feet. Valley first repaired Slip B-1 in 2006 or 2007. Slip B-1 was initially repaired through grading and the installation of perforated drainage tile around one side of the slip. The tile was intended to direct water downslope, and away from the slip area. Valley's first attempted repair of Slip B-1 failed, as grass roots clogged the perforated drainage tile.

26. The clogging of the drainage tile at Slip B-1 necessitated a second repair of this slip, which entailed exposing the buried tile, placing straw over the tile, then replacing and regrading the backfill material. This second repair was also unsuccessful. By 2011, Slip B-1 had redeveloped. In May 2011, Valley submitted a repair plan to the Division, which included the installation of new drainage tile in a "crescent" shape around the top of Slip B-1 to direct drainage away from the slip. Slip B-1 was successfully repaired in the Spring of 2011, and is now stable.

27. By 2011, another slip developed in Area B. **Slip B-2** developed slightly north of the B-1 slip. Slip B-2 developed in backfilled material, and was located on the affected area of the Year 5 Segment. Slip B-2 had approximate dimensions of 150 feet by 115 feet. The Division required Valley to repair Slip B-2, and this repair took place in the Spring of 2011. To repair Slip B-2, Valley installed perforated drainage tiles in a "crescent" shape around the scarp of Slip B-2, directing drainage away from the slip area. The perforated tile connected to unperforated tile below the slip area and towards the tile outlets. Slip B-2 has been repaired, and is currently stable.

28. As early as 2006, Mr. Braver identified concerns with a third slip in Area B. **Slip B-3** is located on the permit D-2013 area, but beyond the affected area (*i.e.*, beyond the area subject to performance security) and downslope of the reclaimed perimeter diversion ditch. Slip B-3 is situated in a wooded area that was not disturbed by Valley's operations. Slip B-3 has approximate dimensions of 200 feet by 90 feet, and is downslope from repaired Slips B-1 and B-2. Mr. Braver testified that he first noticed Slip B-3 in 2006, after Slip B-1 had developed on the affected area. Mr. Braver contends that Slip B-3 is "an extension" of Slip B-1.

29. At hearing, Mr. Braver produced a 2006 photograph showing freshly sloughed material in the wooded area downslope of the Year 5 affected area (Appellant's Exhibit L). Division Engineer Scott McDiffitt confirmed that the sloughed material depicted in Mr. Braver's photograph appeared to be freshly exposed at the time that the photograph was taken. While the Record at hearing was, initially, unclear regarding the material depicted in Appellant's Exhibit L, the Record was clarified through the testimony of Mr. McDiffitt on recall by the Commission. Mr. McDiffitt identified the B-3 slip as situated in a location other than the location depicted in Appellant's Exhibit L. Mr. McDiffitt testified that the area shown in Appellant's Exhibit L is associated with, and located downslope of, Slip B-1 (which initially developed in 2005).

30. The area depicted in Mr. Braver's 2006 photograph (Appellant's Exhibit L) is not the same area as the B-3 slip that was reviewed as part of the Division's engineering investigation.⁷ Slip B-3 is located downslope, and to the north and west, of the area depicted in Appellant's Exhibit L.

31. Slip B-3 has been observed by representatives of both the Division and OSM. Slip B-3 was also the subject of the McDiffitt Engineering Report (Division's Exhibit 21). The evidence established that the wooded area west and downslope of the Year 5 Segment has experienced a slip, or multiple slips, at previous points in time. However, the weathered condition of the soils currently in this area, and the existence of large trees within the slip accumulation zone, establish that Slip B-3 occurred well before Slip B-1 developed in 2005, and likely developed before Valley began mining in this area (*i.e.*, before 2001).

⁷ Notably, the area investigated as Slip B-3 by Mr. McDiffitt is the same area that Mr. Braver identified to OSM Inspector Hiscar as a slip of concern during the October 25, 2012 Phase III release inspection (compare photo 5 in the McDiffitt Report [Division's Exhibit 21, page 11] to the bottom photograph on page 5 of OSM's Mine Site Inspection Report [Division's Exhibit 10]).

32. Division Engineer Scott McDiffitt estimated that Slip B-3 developed in the late 1970's or early 1980's. OSM's mine site inspection report from October 25, 2012 supports this conclusion. As this slip is not related to Valley's mining or reclamation operations, the Division did not require Valley to take any corrective actions with regard to Slip B-3. Slip B-3 continues to exist in the wooded area, but is stable. Any earthwork at Slip B-3 would significantly disturb a large area of wooded ground that was not affected by Valley's mining operations.

33. A seep, **Seep B**, occurred in Area B, emerging from the hillside northwest of Pond 6, and south of Slip B-1, on the heavy equipment access path. In July 2012, at the suggestion of Inspector Hoffman, Valley installed drainage tile at Seep B to transmit water to a lower elevation on the hillside. Division Inspector Hoffman testified that he was satisfied with Valley's actions relative to this seep.

34. Regarding Area B, Mr. Braver testified that he would like the Commission to forfeit Valley's remaining performance security in his favor, so that these funds (1) would be available to him if slip repair on the Year 5 Segment is necessary in the future, and (2) to compensate him for bearing the risk of future ground instability on the reclaimed slopes.

Concerns in Area C.

35. Area C is located between Pond 3 and the northernmost limits of the Year 5 Segment. Mr. Braver has raised concerns regarding two incidents of ground slippage in this area. **Slip C-1** developed in the reclaimed backfill (south of pond 7) prior to 2011, and possibly around 2007. Slip C-1 was located partially on the Year 5 affected area and partially on the Year 4 affected area of permit D-2013. This slip was repaired by the installation of three "crescent-shaped" drainage tiles. These tiles direct water downslope, and away from the slip. This area is now stable.

36. **Slip C-2** consists of "slumps" in the wooded area located downslope of the Year 5 Segment, and downslope of the reclaimed perimeter diversion ditch. Slip C-2 is located in a well-established woods that was not disturbed by Valley's mining operations. Division Inspector Hoffman testified that Slip C-2 pre-dates Valley's mining in this area, and, therefore, the Division did not require Valley to take any corrective actions regarding this feature. Slip C-2 continues to exist, but appears stable. Regarding Slip C-2, Mr. Braver testified that he is satisfied to leave this area "as is," as any earthwork at Slip C-2 would significantly disturb a large area of wooded ground that was not affected by Valley's mining operations.

37. **Seep C** occurred at a location approximately mid-way between Pond 3 and Pond 4, and in close proximity to the Braver / McPeak property line. In July 2012, at the suggestion of Inspector Hoffman, Valley installed drainage tile at Seep C to transmit water to a lower elevation on the hillside. Division Inspector Hoffman testified that he was satisfied with Valley's actions relative to this seep.

38. Area C also contains two stream channels, **Stream Channel C** and a small portion of **Stream Channel D**. Valley had received from the Division a stream buffer zone variance, allowing Valley to disturb ground within the 100-foot buffer zones surrounding these channels (*see* Finding of Fact No. 3). Disturbances within stream channels are also regulated by the United States Army Corps of Engineers ["USACE"] and by the Ohio Environmental Protection Agency ["OEPA"].

39. Disturbances within a stream channel may only be conducted subject to a Section 401 certification and a Section 404 permit.⁸ Such permits and certifications were in place for Stream Channels C and D.

⁸ The federal Clean Water Act governs water pollution within the United States (33 U.S.C. §§1251). If a project is planned that will impact a body of water, the operator must obtain a permit from the USACE. If the project includes the "discharge of dredged or fill material" into waters of the United States, the operator must obtain a Section 404 permit from the USACE. (A "404 permit" refers to Section 404 of the federal Clean Water Act, 33 U.S.C. §1344.) Mining operations that propose to affect streams must seek, and obtain, a Section 404 permit from the USACE. Section 404 permits are administered by the USACE, but are overseen locally by the OEPA. If such a project is planned to occur within the State of Ohio, the operator must also obtain a Section 401 Water Quality Certification from the OEPA (33 U.S.C. §1341). The purpose of a water quality certification is to confirm that disturbances to a body of water will be undertaken in compliance with applicable state water quality standards.

40. Stream Channels C and D were initially reclaimed concurrent with Valley's overall reclamation of the Year 5 Segment of permit D-2013. However, the reclamation of these channels did not meet the requirements of Valley's 401/404 certification/permit issued by the OEPA and USACE, respectively. As a result of Valley's non-compliance with its 401/404 certification/permit, during the Summer of 2012, Valley was required to reconstruct Stream Channels C and D. The reconstruction of these channels was required by: (1) the USACE, in order to bring these channels into compliance with Valley's Section 404 permit, and (2) the OEPA, in order to bring these channels into compliance with Valley's Section 401 certification. As part of the reconstruction of these channels, the stream buffer zones were reseeded with grasses on August 14, 2012, and planted with trees on December 13, 2012.

41. During the October 25, 2012 Phase III inspection, riparian vegetation along Stream Channels C and D was counted as "sparse."⁹ The portions of Stream Channels C and D located within the Year 5 Segment comprise approximately 80,000 square feet of ground (or 1.8 acres).¹⁰ Valley's December 13, 2012 tree plantings in the Stream Channels C and D buffer zones was inspected, and verified, by the Division on January 24, 2013. Repairs in the Stream Channels C and D buffer zones did not re-start the Year 5 Segment's vegetative maintenance period.¹¹

⁹ *See* discussion of "sparse" vegetation on page 22, *infra*.

¹⁰ During the October 25, 2012 Phase III inspection, the Division and OSM incorrectly identified the combined square footage of the stream channels as 117,374 square feet (or 2.7 acres). This measurement incorrectly included the entire length of re-constructed Stream Channel D, although only a small portion of this stream channel is actually located on the Year 5 Segment (*see* OSM Mine Site Inspection Report for October 25, 2012, pages 3 & 4, Division's Exhibit 10). Thus, the Division and OSM initially overestimated the amount of "sparsely-vegetated areas" on the Year 5 Segment of permit D-2013 attributed to these stream channels.

¹¹ O.R.C. §1513.16(A)(19) and O.A.C. §1501:13-9-15(F) impose a five-year period of extended responsibility for revegetative success. This five-year period begins at the last augmented seeding of an area. (*See* O.A.C. §1501:13-9-15(F)(3).) O.A.C. §1501:13-9-15(F)(4) describes circumstances where reseeding is not considered "augmentative," and thus does not restart the five-year vegetative maintenance period. The reseeding of Stream Channels C and D in August of 2012 was not considered "augmentative" by the Division.

DISCUSSION

The effect of final security release.

Coal mining operations are permitted and regulated by the Chief of the Division of Mineral Resources Management under the authority of Ohio Revised Code Chapter 1513. Ohio's mining law requires that mining and reclamation activities proceed in accordance with the requirements of Chapter 1513, and consistent with the provisions of reclamation plans approved by the Division in a mining permit. (*See O.R.C. §1513.02; O.R.C. §1513.07.*)

Ohio's mining and reclamation law requires that performance security be posted on all affected areas, at a rate of \$2,500 per acre. (*See O.R.C. §1513.08.*)¹² The performance security is intended to provide a guarantee that funds will be available to complete the reclamation of a site, in the event that the mine operator fails to properly reclaim an area. Performance security is released to the mine operator upon the successful accomplishment of various phases of reclamation. Failure of a mine operator to reclaim a mine site results in the forfeiture of performance security.

The posted security is released in three "phases." Phase I release occurs after the Division determines that the operator has successfully completed backfilling and regrading of an affected area. A Phase I release returns 50% of the posted security to the operator. Phase II release occurs after the Division determines that the operator has successfully completed resoiling and revegetative seedings on an affected area. A Phase II release returns 35% of the posted security to the operator. A Phase III, or final, security release occurs after the Division determines that all other requirements of the operator's reclamation plan have been met and determines that vegetation has been successfully established for a designated "maintenance period." While vegetative success is the primary focus of a Phase III release, the Division must also inspect the property to ensure that all other aspects of reclamation have been accomplished. A Phase III release returns the remaining 15% of the posted security to the operator. (*See §O.R.C. 1513.16(F).*)

¹² Ohio law also provides for other forms of performance security, which forms are not applicable to this matter. (*See O.R.C. §1513.08*)

In this appeal, Mr. Braver is contesting the Division's approval of Valley's Phase III security release on a 36-acre segment of permit D-2013. The final security release is significant, as it marks the termination of an operator's reclamation responsibilities for an affected area. Once the operator achieves final security release, the operator will not be required to return to the property for any further reclamation or repair. The final release of security also marks the termination of the Division's jurisdiction over a permitted site. When final security is released, Mr. Braver, or future landowners, will be solely responsible for the maintenance of this area.

Land Slips on the Year 5 Segment of Permit D-2013.

One of Mr. Braver's concerns regarding Valley's reclamation of the Year 5 Segment is with the occurrence of land slips. Several slips have occurred in the Year 5 reclaimed backfilled material (Slip A, Slip B-1, Slip B-2 and Slip C-1). Mr. Braver has identified two additional slips (Slip B-3 and Slip C-2), which are located downslope of the reclaimed ground, and downslope of the area affected by mining.

Division Engineer Scott McDiffitt, who was qualified as an expert in land slips at hearing, testified that the soils on the Year 5 area are slip-prone, and that the potential for ground slippage is particularly high on the Year 5 area because of the area's naturally steep slopes. Mr. McDiffitt estimated slopes in this area to be as steep as 18°. Indeed, several ground slips did occur on the Year 5 affected area, which slips Valley was responsible to repair. The Division required Valley to repair all of the slips that occurred on ground affected by Valley's mining (*i.e.*, on ground covered by performance security as part of the permit D-2013 affected area). On the Year 5 Segment, these slips have been identified as Slip A, Slip B-1, Slip B-2 and Slip C-1.

Land slips involve the downward movement of ground material. Slips may occur in reclaimed backfilled materials, as the original configuration of rock and soil is significantly altered during the mining process. Slips are more common in areas that are naturally steep, whether or not mining has occurred. The presence of ground or surface waters can also contribute to ground instability, particularly in steep-slope areas.

Repair of slips in the Year 5 affected area was accomplished by regrading and the installation of drainage tiles. These tiles direct water away from the slip areas. Repair of the slips on the Year 5 affected area was monitored, inspected and approved by the Division.

The Division determined that all mining-related land slips on the affected area of permit D-2013 were successfully repaired. No evidence was presented to establish that the mining-related slips were not properly repaired. Nor was evidence presented to refute that the ground in the slip areas is now stable.

Mr. Braver, however, has concerns regarding two additional slips (Slip B-3 and Slip C-2), which were determined by the Division to be **non**-mining-related. These features consist of "slumps" of ground material, located in wooded areas, downslope of areas affected by Valley under permit D-2013.¹³ Valley's mining operations did not disturb these wooded areas.

Mr. Braver notes that Slips B-3 and C-2 (located on permitted ground, but below the affected area) are both situated directly downslope of areas where slips occurred in the Year 5 backfilled materials. Mr. Braver contends that these downslope slips are "extensions" of the slips that occurred in the Year 5 backfilled materials. However, Mr. McDiffitt testified that downslope slips (such as Slips B-3 and C-2) are more likely to **cause** slips at a higher elevation, and not vice versa. In his expert report, Mr. McDiffitt concluded:

Generally a landslide at a higher elevation does not typically cause a separate landslide directly below it. It is more likely that a landslide at a lower elevation, providing a weak foundation, would cause a slide directly above it at the higher elevation.

(*See McDiffitt Report, page 13, Division's Exhibit 21*). Mr. McDiffitt's conclusion is consistent with the fact that Slips B-3 and C-2 (the downslope slips) appear to be significantly "older" than the slips that occurred in the Year 5 backfilled material.

¹³ When an operator obtains a mining permit, the operator may permit a larger area than will actually be affected by mining operations. However, the operator is only required to post performance security, and reclaim, the ground actually affected, or disturbed, by mining. In this case, Valley permitted 274.6 acres, but only affected (and posted security on) 99.8 acres (36 acres of which are located on the Year 5 Segment at issue in this appeal). "Permit area" and "affected area" are separately defined under the mining regulations at O.A.C. §1501:13-1-02(MMMM) and O.A.C. §1501:13-1-02(F), respectively.

Slip B-3 was investigated by Division Engineer McDiffitt. Mr. McDiffitt testified that, based upon the weathered ground conditions, and the size of trees growing in the "slumped" material of Slip B-3, this slip pre-dates Valley's mining. Mr. McDiffitt testified that he believes that Slip B-3 likely developed in the late 1970's or early 1980's.¹⁴ Mr. McDiffitt's conclusion was supported by the testimony of Division Inspector Hoffman, who is also familiar with ground movement associated with mining and reclamation operations.

The evidence at hearing established that Slip B-3 was not caused by Valley's operations and pre-dates Valley's mining operation. Mr. McDiffitt, Division Inspector Hoffman and a representative of OSM (*see Division's Exhibit 10*) all concluded that Slip B-3 is currently stable. Testimony also established that any attempted earthwork at this feature would disturb unaffected ground, and be more destructive than beneficial.

There was little evidence presented at hearing regarding Slip C-2. However, this slip also occurred in a wooded area, downslope from the area affected by Valley's mining operations. Division Inspector Hoffman testified that the current condition of Slip C-2 suggests that this slip also developed before Valley mined in this area. As regards Slip C-2, Mr. Braver acknowledged that it would be preferable to leave this area "as is," rather than disturb this wooded ground.

The law requires that reclaimed ground be "shaped and graded in such a way as to prevent slides, erosion and water pollution." (*See O.R.C. §1513.16(A)(3).*) All slips located on the affected area of permit D-2013, and thus attributed to Valley's operations, were successfully repaired, and are currently stable.

¹⁴ At hearing, Mr. Braver presented a photograph, Appellant's Exhibit L, which purportedly showed Slip B-3 as freshly developed in 2006. However, the Commission has found that the ground depicted in photograph L is not the same area as Slip B-3. (*See Findings of Fact 29 and 30.*)

Seeps on the Year 5 Segment of Permit D-2013.

The evidence established that in 2011, Division Inspector Hoffman identified three seeps in the backfilled material of the Year 5 Segment. Topographic maps, created before mining, show that springs naturally existed in this area prior to mining.¹⁵ After ground is disturbed by mining, springs that were "mined through" may reappear in different locations.

While an operator has the responsibility to control drainage on a site during mining and reclamation, there is no prohibition against the existence of seeps in reclaimed ground. The appearance of seeps on the Year 5 Segment is not a violation of any law, and such seeps are not required to be "corrected" or "repaired." However, in this case, Division Inspector Hoffman suggested that Valley tile the three identified seeps to lower elevations on the reclaimed hillsides.¹⁶ The tiling of these seeps had the potential to enhance the stability of the reclaimed ground in this slip-prone area. Two of the three seeps were successfully tiled (Seep B and Seep C). During excavation of Seep A, Valley's equipment operator contacted Inspector Hoffman and informed the inspector that water could not be located in the area where Seep A had previously been observed. Based upon this reality, Inspector Hoffman withdrew his directive to tile Seep A.

¹⁵ Division's Exhibit 5, the Final Map for permit D-2013, shows pre-existing features on this property, such as springs.

¹⁶ While Inspector Hoffman suggested the tiling of these seeps, he also appears to acknowledge that Valley was not **legally required** to address these seeps. Inspector Hoffman testified:

Attorney Ball: We were talking about, earlier, seeps. Did Mr. Braver raise any concerns over seeps with you?

Inspector Hoffman: Yes.

Attorney Ball: What are seeps?

Inspector Hoffman: Seeps are a poorly-defined area where the water literally comes to the surface of the earth.

Attorney Ball: In general, is a seep or a wet spot a violation?"

Inspector Hoffman: Generally, a seep or a wet spot, is not a violation. There's a couple of exceptions. Actually, one exception. And that would be if it would be a poor quality water seep, AMD [acid mine drainage] seep, that would be a violation. But, just a small amount of seepage is not a violation. If you had a large amount of water with overland flow, you would have the potential of erosion. But, normally when the Division talks about seeps, we're talking about two gallon per minute or less.

The existence of seeps **within a mining area** is not a violation of the law. This is true even if the seep's discharge is acidic. A violation does not occur unless acid drainage **leaves the permitted area**. (*See Oxford Mining Company, Inc. vs. Division, RC-08-005 (January 22, 2009).*) However, in this case, the Commission understands that slope stability was a concern on the Year 5 Segment of permit D-2013, because of steep slopes and slip-prone soils.

Mr. Braver argued that Valley should be required to tile Seep A, and that the fact that Valley could not locate water in July of 2012 should not excuse Valley from being required to take this "corrective action."

As Inspector Hoffman withdrew his directive to tile Seep A, and as the existence of seeps on reclaimed ground does not constitute a violation of law, no corrective action with regard to Seep A is required, and the existence of this un-tiled seep on the Year 5 Segment does not preclude the approval of a Phase III security release for this area.

Revegetative Success on the Year 5 Segment of Permit D-2013.

A primary focus during the evaluation of reclamation for a Phase III security release is a determination that revegetation of the reclaimed area has been successfully accomplished. At the point in time of a Phase III security release, the operator must demonstrate that vegetation on the bulk of the reclaimed ground has been established and maintained for a five-year period. Seeding on the Year 5 Segment occurred in October of 2005. Therefore, by the October 2012 Phase III inspection, this area had seven years of growth.

Success standards for revegetation differ depending upon the postmining land use identified for the property. The success of revegetative efforts will be "judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area," and the establishment of a diverse, effective and permanent vegetation, capable of self-regeneration and plant succession. (*See O.A.C. §1501:13-9-15(F)(1) and O.A.C. §1501:13-9-15(B) and (C).*)

The Year 5 Segment of permit D-2013 was reclaimed to a land use of grazing land. With regards to grazing land, O.A.C. §1501:13-9-15(G) provides:

(3) Revegetation shall be determined to be successful for a phase III performance security release when:

* * *

(b) For the last year of the period of extended responsibility and one additional year, except the first year, the ground cover shall equal or exceed ninety per cent and no single area with less than thirty per cent cover shall exceed the lesser of three thousand square feet or 0.3 per cent of the land affected.

The law acknowledges that revegetative efforts can be successful, even if some isolated areas exist where growth is not well-established. Under the law, successful establishment of ground cover is defined as 90% coverage, with no single area - having less than 30% coverage - exceeding the lesser of 3,000 square feet or 0.3% of the land affected. (*See O.A.C. §1501:13-9-15(G)(3)(b).*) In this case, no single "barren area" (area with less than 30% ground coverage) on the Year 5 Segment can exceed 3,000 square feet.¹⁷ In the immediate case, 922 square feet (or 0.02 acre) of revegetated ground was counted as "barren." However, this fact also establishes that 35.98 acres, or over 99.9% of the Year 5 Segment, was successfully revegetated.¹⁸

On October 25, 2012, during the Phase III inspection of the Year 5 Segment, the Division, a representative of OSM, a representative of Valley Mining and Mr. Braver walked the Year 5 Segment, and physically measured any areas identified as "barren." On November 16, 2012, as a result of questions raised by Mr. Braver, the Division again evaluated vegetation on the Year 5 Segment. During this second evaluation, the Division applied the Rennie-Farmer evaluation method. Under both evaluation approaches, Valley's revegetation of the Year 5 Segment was found to be successful. Indeed, the Rennie Farmer evaluation found that 95.9% of the entire yearly segment had successfully-established ground cover. (*See Division's Exhibit 7, pages 1006, 1020; Division's Exhibit 3, page 1376.*)

¹⁷ The law provides that no single barren (*i.e.*, an area with less than 30% coverage) may exceed the **lesser** of 3,000 square feet or 0.3% of the land affected. In this case, 0.3% of the land affected is 4,704 square feet. 3,000 square feet is less than 4,704 square feet. Thus, the 3,000 square-foot maximum applies in this case.

¹⁸ The Year 5 Segment encompasses 36 acres, or 1.568 million square feet of ground. During the October 25, 2012 Phase III inspection, the total of all observed areas with less than 30% coverage on the Year 5 Segment covered 922 square feet of ground or 0.02 acre.

Barren Area A, was not included within the Division's vegetative calculations. Barren Area A was not located on affected ground and was not directly disturbed as part of Valley's mining and reclamation operations. However, even if Barren Area A **were** added to the vegetative calculations, this small area covered only approximately 2,800 square feet of ground, which is still below the 3,000 square feet allowable for any individual barren area. Also, the inclusion of Barren Area A in the overall calculations would still result in successful vegetative cover over 99.8% of the Year 5 affected area.¹⁹ Thus, even with the inclusion of Barren Area A, Valley's vegetative efforts still qualify for a Phase III release under the law.

Areas along Stream Channels C and D were re-disturbed in 2012, to bring these stream channels into compliance with 401/404 permits issued and administrated by the USACE and OEPA. Testimony established that the stream channels were initially reclaimed in accordance with Ohio's mining law, and were determined to have been successfully reclaimed consistent with the approved stream buffer zone variances for permit D-2013. Yet, in 2012, the stream channels were reconstructed under the direction of the USACE and OEPA. This reconstruction was undertaken to bring these channels into compliance with Valley's 401/404 permits.²⁰

Under O.R.C. §1513.16(A)(19) and O.A.C. §1501:13-9-15(F)(3), an operator is generally responsible to maintain vegetation on reclaimed ground for a five-year "period of extended responsibility." This five-year vegetative maintenance period generally begins on the "date of the last augmented seeding." Typically, a Phase III security release will not be approved until this five-year vegetative maintenance period has passed.

¹⁹ During the Phase III inspection 922 square feet of "barren area" was counted on the Year 5 Segment. If the 2,800 square feet attributed to Barren Area A **were** added to this calculation, the total barren area would amount to 3,722 square feet, or a total of 0.08 acre of "barren area." This would indicate that 35.92 acres, or approximately 99.8% of the affected ground, was successfully revegetated.

²⁰ 401 certifications and the 404 permits are not administered by the Division. Valley's work to bring these channels into compliance with the 401/404 requirements was outside the Division's jurisdiction, and did not impact the Division's evaluation of Valley's security release. (*See* Findings of Fact 38 – 41.)

However, O.A.C. §1501:13-9-15(F)(4) describes specific circumstances and practices, where reseeding of an area will not be considered "augmentative," and thus will not restart the five-year vegetative maintenance period. Among the activities, circumstances or practices viewed as "non-augmentative" are:

(c) Reseeding and adding soil amendments when necessary to repair damage to land and/or established permanent vegetation, that is unavoidably disturbed in order to meet the reclamation standards of this chapter, provided that:

(i) The damage is not caused by a lack of planning, design, or implementation of the mining and reclamation plan, inappropriate reclamation practices on the part of the permittee, or the lack of established permanent vegetation; and

(ii) The total acreage of repaired areas under paragraph . . . (F)(4)(c) of this rule does not exceed ten percent of the total land affected, with no individual area exceeding three acres.

Notably, the reconstruction of Stream Channels C and D was accomplished in order to bring channels C and D into compliance with permits **other than** Valley's mining permit. Valley's 2012 reseeding of the Stream Channels C and D buffer zones was not required by Valley's permit D-2013, and was not necessary to bring the permit D-2013 area into compliance with the reclamation standards of Revised Code Chapter 1513. Thus, the 2012 reseeding of Stream Channels C and D is not considered "augmentative" under O.A.C. §1501:13-9-15(F)(4)(c)(i).

The reconstruction of Stream Channels C and D disturbed about 80,000 square feet (or 1.8 acres) of the Year 5 Segment of permit D-2013. The reseeding of these stream channels in August 2012 affected less than 10% of the Year 5 reclamation area, and affected less than three acres of ground. Therefore, the 2012 reseeding of the stream channels is not considered "augmentative" under O.A.C. §1501:13-9-15(F)(4)(c)(ii).

In accordance with O.A.C. §1501:13-9-15(F), the reseeding of the Stream Channels C and D buffer zones in August 2012 did not re-start the five-year vegetative maintenance period for the Year 5 Segment of permit D-2013.

O.A.C. §1501:13-9-15(F)(6) provides that:

For the purposes of paragraph (F)(4)(c) ... of this rule, permanent vegetation that is established or reestablished on [areas addressed under paragraph (F)(4)(c)] must have been seeded a minimum of twelve months prior to the request for phase III performance security release.

The reseeded of the buffer zones of Stream Channels C and D occurred less than three months prior to the October 25, 2012 Phase III inspection of the Year 5 Segment. However, as this reseeded was not conducted pursuant to O.A.C. §1501:13-9-15(F)(4)(c), Valley was not required to wait twelve months before seeking a Phase III security release for these areas.

The newly-seeded vegetation in the stream channel buffer zones was characterized as "sparse - "but not "barren" - during the October 25, 2012 Phase III inspection. "Sparse" vegetation was previously defined in O.A.C. §1501:13-9-15, and applied to areas with more than 30% ground cover, but less than 75% coverage. All references to "sparse" vegetation have been removed from O.A.C. §1501:13-9-15 since at least December 10, 1998. The identification of "sparsely-vegetated ground" is not an applicable standard under current law, and adds confusion to the revegetative evaluation of the Year 5 Segment. The essential point is that the 80,000 square feet of newly-seeded ground in the channel areas was not characterized as "barren" by the Division or by the federal OSM inspector during the Phase III inspection of the Year 5 Segment.

The stream channel buffer zones were replanted with trees on December 13, 2012. Valley's tree planting was inspected, and verified, by the Division on January 24, 2013. Pursuant to the Division's policy directive relative to stream buffer zones, tree plantings must be verified, but no survivability standard is applied. (*See PD Inspection & Enforcement 94-1.*)²¹

²¹ Procedure Directives ["PDs"] are developed by the Division to provide information and guidance to the Division staff, the regulated industry and the public. PDs describe the manner in which the Division will interpret and apply Ohio law. PDs do not carry the weight of enacted statutes or promulgated rules. However, these directives provide useful information to operators and citizens, and strive to ensure consistent application and enforcement of Ohio law. (*See Brad Fisher v. Division & American Energy Corp., case no. RC-09-012 [August 5, 2010], at page 12; Murray Energy Corp., et al. vs. Division & Oxford Oil Company, case no. RC-11-006 [October 6, 2011], at page 12.*)

At hearing, Mr. Braver expressed his desire that Valley's remaining bond (\$13,500) be forfeited to him, so that these funds would be available to him if the Braver Property requires additional work in the future. Mr. Braver's suggestion is not allowable by law. Under no circumstances does the Commission have authority to provide Mr. Braver with the remaining security funds. The Commission is authorized only to determine if the Division acted in compliance with the law in its determination that reclamation was successfully accomplished on the Year 5 Segment of permit D-2013. If reclamation has been accomplished in accordance with Valley's permit and Ohio law, the posted security must be released to Valley Mining.

CONCLUSIONS OF LAW

1. The ultimate burden of persuasion in this matter is placed upon the Appellant John I. Braver to prove by a preponderance of the evidence that the Division's decision to approve final security release for the Year 5 Segment of permit D-2013 was arbitrary, capricious or otherwise inconsistent with law. (*See O.R.C. §1513.13(B).*)

2. O.R.C. §1513.16(F)(3)(c) sets forth the performance standards for final security release on mining operations, and provides:

(c) When the operator has completed successfully all coal mining and reclamation activities, ... the chief shall release all or any of the remaining portion of the performance security for all or part of the affected area under a permit, but not before the expiration of the period specified for operator responsibility in this section, ... provided that no performance security shall be fully released until all reclamation requirements of this chapter are fully met.

3. O.R.C. §1513.16(A)(3) requires, in part, that during reclamation of an affected area:

The overburden or spoil shall be shaped and graded in such a way as to prevent slides, erosion, and water pollution and shall be revegetated in accordance with this chapter.

4. O.R.C. §1513.16(A)(18) requires that, as part of the reclamation of an affected area, an operator must:

Establish, on the regraded areas and all other lands affected, a diverse, effective, and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area,

5. O.R.C. §1513.16(A)(19) requires that the operator:

Assume the responsibility for successful revegetation, as required by division (A)(18) of this section, for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, or other work in order to ensure compliance with that division,

6. In measuring the success of revegetation on reclaimed ground, O.A.C. §1501:13-9-15(F) provides:

(F) General requirements for measuring success of revegetation.

(1) Success standards will differ depending on the approved postmining use of an area. In all revegetation efforts, the general requirements of this rule shall be met and the success of revegetation shall be judged on the effectiveness of the vegetation for the approved postmining land use, the extent of cover compared to the cover occurring in natural vegetation of the area, and the requirements of paragraphs (B) and (C) of this rule. * * * The statistical sampling techniques shall use a ninety per cent confidence interval ...

Paragraphs (B) and (C) of O.A.C. §1501:13-9-15 (referenced in the above-quoted language of O.A.C. §1501:13-9-15(F)(1)), provide in part:

(B) General requirements. The permittee shall establish on regraded areas and on all other disturbed area except water areas and the surface areas of roads that are approved as part of the postmining land use, and other small incidental areas where revegetation would conflict with the postmining land use and no environmental harm would result, a vegetative cover that is in accordance with the approved permit and reclamation plan and that is:

- (1) Diverse, effective, and permanent;
- (2) Comprised of species native to the area, or of introduced species where desirable and necessary to achieve the approved postmining land use and approved by the chief;
- (3) At least equal in extent of cover to the natural vegetation of that area; and
- (4) Capable of stabilizing the soil surface from erosion.

(C) Use of native and introduced species.

- (1) The reestablished plant species shall;
 - (a) Be compatible with the approved postmining land use;
 - (b) Have the same seasonal characteristics of growth as the original vegetation;
 - (c) Be capable of self-regeneration and plant succession;
 - (d) Be compatible with the plant and animal species of the area; and
 - (e) Meet the requirements of applicable state and federal seed, poisonous and noxious plant, and introduced species laws or regulations.

7. Regarding revegetation of areas affected by mining, and with an identified postmining land use of grazing land, O.A.C. §1501:13-9-15(G) requires:

(3) Revegetation shall be determined to be successful for a phase III performance security release when:

- (a) The period of extended responsibility has expired and the species planted in accordance with the approved reclamation plan, including natural succession and non-noxious volunteer species consistent with the reclamation plan, equal or exceed the county average yield for hay for any two years of the period of extended responsibility except the first year; and
- (b) For the last year of the period of extended responsibility and one additional year, except the first year, the ground cover shall equal or exceed ninety per cent and no single area with less than thirty per cent cover shall exceed the lesser of three thousand square feet or 0.3 per cent of the land affected.

8. Evidence presented at hearing established that the reclamation of the Year 5 Segment of permit D-2013 complies with Ohio law and with Valley Mining's approved mining and reclamation plan and permit, as all slips associated with mining and reclamation have been successfully repaired and all slopes on the reclaimed ground are stable.

9. Evidence presented at hearing established that the Year 5 Segment of permit D-2013 has been successfully revegetated, and that the vegetation meets the standards of Ohio law. The evidence established that any "barren areas" on the Year 5 Segment of permit D-2013 are of such a size to be compliant with Ohio law.

10. Evidence presented at hearing established that reclamation of the Year 5 Segment of permit D-2013 complies with Ohio law and with Valley Mining's approved mining and reclamation plan and permit. The evidence established that all areas of the Year 5 Segment of permit D-2013 that were affected by Valley's mining and reclamation operations, and that were covered by performance security, have been successfully reclaimed.

11. Appellant John I. Braver did not establish by a preponderance of the evidence that the reclamation on the Year 5 Segment of permit D-2013 has not been successfully completed. Appellant John I. Braver did not present sufficient evidence to refute the Division's finding that reclamation on the Year 5 Segment of permit D-2013 was successfully completed in accordance with Valley's mining and reclamation permit or with Ohio law.

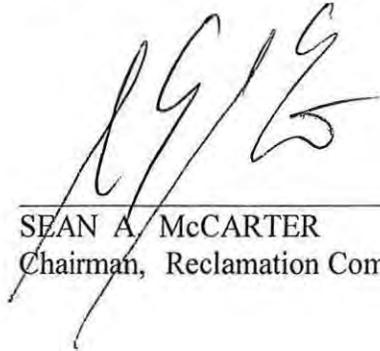
12. Appellant John I. Braver did not establish by a preponderance of the evidence that the Chief's determination to release all remaining performance security associated with the Year 5 Segment of Valley Mining's permit D-2013 was arbitrary, capricious or inconsistent with law.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commission hereby **AFFIRMS** the Division Chief's February 6, 2013 decision, approving a Phase III performance security release request for the Year 5 Segment of mining and reclamation permit D-2013.

5/9/2014

DATE ISSUED



SEAN A. McCARTER
Chairman, 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 I. Braver, Via E-Mail [john.braver@case.edu] & Certified Mail #: 91 7199 9991 7030 3939 0622
Kristina Tonn, Brian Ball, Via E-Mail [kristina.tonn@ohioattorneygeneral.gov; brian.ball@ohioattorneygeneral.gov] &
Inter-Office Certified Mail #: 6722
Valley Mining, Via Regular Mail

ATTACHMENT A

Demonstrative Diagram showing the Year 5 Segment of permit D-2013



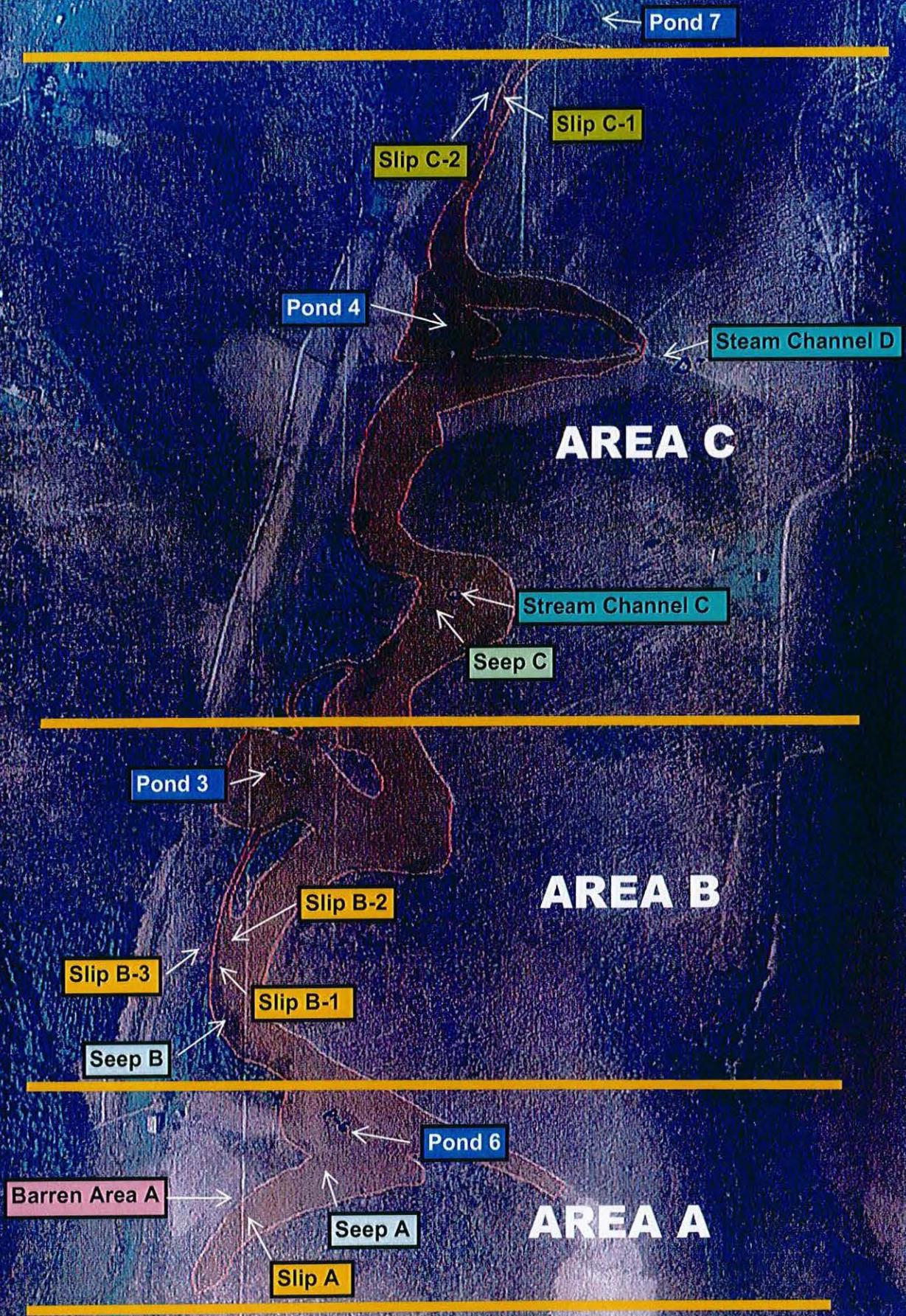
This diagram is based upon Division's Exhibit 6. Division's Exhibit 6 is an aerial photograph upon which the Division has marked the boundaries of the Year 5 Segment of permit D-2013.

The diagram shows the three "areas" of the Year 5 Segment, as described by the Commission in Finding of Fact # 17.

The locations of features at issue in this appeal, or features referenced in the Commission's decision, are indicated by arrows. The arrows point to the general location where a feature is, or was, located. These locations are not exact, and the size of specific features have not been depicted on this diagram.

This diagram is intended only as an aid to those reading the Commission's decision.

**Ohio Reclamation Commission
Demonstrative Diagram
Case RC-13-005 (Braver vs. ODNR DMRM)**



**BEFORE THE
RECLAMATION COMMISSION**

JOHN I. BRAVER,	:	Case No. RC-13-005
	:	
Appellant,	:	
	:	Review of Phase III Bond Release;
-vs-	:	Permit D-2013 (Valley Mining)
	:	
	:	
DIVISION OF MINERAL RESOURCES	:	
MANAGEMENT,	:	
	:	<u>INDEX OF EVIDENCE</u>
	:	<u>PRESENTED AT HEARING</u>
Appellee.	:	

Before: Sean A. McCarter.

In Attendance: A. Thomas Althausser, Richard Cappell, Fred Dailey, James McWilliams, Craig Porter and Hearing Officer Linda Wilhelm Osterman.

Appearances: John I Braver, Appellant *pro se*; Kristina Tonn, Brian Ball, Assistant Attorneys General, Counsel for Appellee Division of Mineral Resources Management.

WITNESS INDEX
Hearing on October 16, 2013

Appellee's Witnesses:

John I. Braver	Cross Examination
Greg Hoffman	Direct Examination; Cross Examination
Scott McDiffitt	Direct Examination; Cross Examination; Re-Called by Commission

Appellant's Witnesses:

John I. Braver	Statement on the Record; Cross Examination
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Appellee's Exhibit 7	Request for Approval of Successful Reclamation; Year 5 Segment of Permit D-2013; submitted by Valley Mining on September 21, 2012, with attachments (18 pages)
Appellee's Exhibit 8	Reclamation Completion Report, signed October 3, 2011 (2 pages)
Appellee's Exhibit 9	Division Inspection Report, dated October 25, 2012 (3 pages)
Appellee's Exhibit 10	OSM Inspection Report, inspection date October 25, 2012 (7 pages)
Appellee's Exhibit 11	Bond Release Evaluation Worksheet, dated January 29, 2013 (3 pages)
Appellee's Exhibit 12	Division Inspection Report, dated January 24, 2013 (2 pages)
Appellee's Exhibit 13	Letter from Michael Kosek (Division) to John Braver, re: Phase III security release for the Year 5 Segment of Permit D-2013 (1 page)
Appellee's Exhibit 14	Division Inspection Report, dated May 23, 2011 (1 page)
Appellee's Exhibit 15	Division Guidelines for Landslide Repair, effective date February 8, 2000 (2 pages)
Appellee's Exhibit 16	Division Inspection Report, dated April 15, 2011 (2 pages)
Appellee's Exhibit 17	Letter from John Braver to Gregory Hoffman (Division), dated November 10, 2011 (1 page)
Appellee's Exhibit 18	Division Inspection Report, dated July 25, 2011 (1 page)
Appellee's Exhibit 18	Division Inspection Report, dated July 25, 2011 (1 page)
Appellee's Exhibit 19	Aerial Photograph of the Braver Property and the Year 5 Segment of Permit D-2013, with seeps marked (1 page)

Appellee's Exhibit 20	Resume of Scott McDiffitt (2 pages)
Appellee's Exhibit 21	Engineering Report; Permit D-2013; Braver Appeal; Scott McDiffitt, PE; dated August 14, 2013 (14 pages)
Appellee's Exhibit 22	Photograph; Diversion Ditch in Area B; taken April 1, 2006 (1 page)

Appellant's Exhibits:

Appellant's Exhibit A	Letter from Terry Clarke (Army Corps of Engineers) to Valley Mining, dated March 11, 2011 (1 double-sided page)
Appellant's Exhibit B	Division Inspection Report, dated May 19, 2011 (1 double-sided page)
Appellant's Exhibit C	Portion of a Steep Slope Mining Underdrain Detail; permit D-2013-1; Addendum to Part 4(C); prepared June 29, 2000 (1 page)
Appellant's Exhibit D	Plan for Slip Repair (Slip B-2); with oversized Slip Repair Area Palm View and Details; prepared May 4, 2011, submitted May 5, 2011 (3 pages and one oversized drawing)
Appellant's Exhibit E	Division Inspection Report, dated June 13, 2008 (1 double-sided page)
Appellant's Exhibit F	Three Division Inspection Reports, dated October 23, 2007, November 15, 2007 and May 15, 2008 (2 double-sided pages)
Appellant's Exhibit G	Division Inspection Report, dated October 19, 2004 (1 double-sided page)
Appellant's Exhibit H	Nine Photographs; Braver Property; printed October 15, 2013; taken various dates (1 double-sided page and 1 single-sided page)
Appellant's Exhibit I	E-Mail Communication between Wayne Schalk (Division) and Gregory Hoffman (Division) and others; dated July 12, 2012 (1 page)

Appellant's Exhibit J	E-Mail Communication between Wayne Schalk (Division) and Gregory Hoffman (Division); dated January 20, 2012 (1 page)
Appellant's Exhibit K	Landslide Types and Processes. U.S. Geological Survey, Fact Sheet 2004-3072; July 2004 (2 double-sided pages)
Appellant's Exhibit L	Photograph of Slip in Area B, taken in April 2006 (1 page)
Appellant's Exhibit M	Ten Photographs of Braver Property and Features, taken after September 18, 2013 Site View (2 double-sided pages)
Appellant's Exhibit N	Letter from John Braver to Jerry Piccin (Valley Mining); dated August 26, 2007 (1 double-sided page and 1 single-sided page)

EXHIBIT INDEX

Re-Opened Hearing on March 19, 2014

Appellee's Exhibits:

Appellee's Exhibit A	Letter from John Braver to Gregory Hoffman; dated November 10, 2011 (1 page)
Appellee's Exhibit B	Memo to File; Greg Hoffman; dated December 27, 2011 (2 pages)
Appellee's Exhibit C	Non-Compliance Resolution; from Mark A. Taylor (Department of the Army); dated September 12, 2011 (2 pages)
Appellee's Exhibit D	Letter from Terry Clarke (Department of the Army) to Valley Mining; dated March 11, 2011 (2 pages)
Appellee's Exhibit E	Coal Mining & Reclamation Permit D-2013 cover sheet (dated October 20, 2000) and Permit Summary Sheet (dated October 18, 2000); (2 pages)

Appellee's Exhibit F	Addendum to Part 3(E)(2), Valley Mining Permit AAA D-2013-1; Approved Buffer Zone Variance Request; approved October 18, 2000 (6 pages)
Appellee's Exhibit G	Division of Reclamation Planting Report; permit D-2013; verified January 20, 2006 (1 page)
Appellee's Exhibit H	Division Inspection Report, dated September 8, 2010 (2 pages)
Appellee's Exhibit I	Verification of Proper Planting of Tree Seedlings/Posts; permit D-2013; verified May 24, 2010 (1 page)

Appellant's Exhibits:

Appellant's Exhibit 1	Addendum to Part 3(E)(2), Valley Mining Permit AAA D-2013-1; Approved Buffer Zone Variance Request; approved October 18, 2000 (3 double-sided pages) (similar to Appellee's Exhibit F, but with highlighting)
Appellant's Exhibit 2	OPEN
Appellant's Exhibit 3	Request for Stream Buffer Zone Variance; dated November 6, 2009 (7 double-sided pages)
Appellant's Exhibit 4	OSM Partial Mine Site Inspection Report; dated May 19, 2011 (1page)
Appellant's Exhibit 5	Photograph of Stream Channel C, taken March 27, 2012 (1page)
Appellant's Exhibit 6	Photograph of Stream Channel D, taken May 19, 2011 (1page)
Appellant's Exhibit 7	Division Memo; Coal Permit Tree Planting Schedules; dated November 17, 1995 (1page)
Appellant's Exhibit 8	Streams A, C, D, E, & U-6/D-6 Onsite Natural Stream Restoration Plans for D-2013; prepared June 2011 (3 double-sided pages)
Appellant's Exhibit 9	Ohio Stream Management Guide; prepared by Ohio Department of Natural Resources, Division of Engineering (1 double-sided page)

JOHN I. BRAVER
RC-13-005

Appellant's Exhibit 10

E-Mail from Nathan Slonaker (Sr. Legislative Aide to Representative Batchelder) to John Braver; dated April 19, 2010 (1 double-sided page)