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Environmental Quality Board
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Re: Notice of Proposed Rulemaking: General Provisions and Areas Unsuitable for Mining, *Pennsylvania Bulletin Feb. 14, 1998*

Members of the Board:

The Pennsylvania Coal Association (PCA) submits the following written comments in response to the above-referenced Notice of Proposed Rulemaking ("NPR"). PCA is a trade association representing 36 Pennsylvania surface and underground bituminous coal operators, as well as nearly 80 businesses with an interest in Pennsylvania coal mining. PCA's members therefore have a direct and substantial interest in the procedures for designating areas as unsuitable for mining ("UFM") and the other issues addressed in the NPR.

General Comments

UFM Procedure

PCA is disappointed that the Environmental Quality Board ("EQB") has disregarded the recommendation of the Mining and Reclamation Advisory Board ("MRAB"). The MRAB recommended adopting an adjudicatory process proposed by DEP for resolving UFM petitions. Instead, the proposed regulations would continue to address UFM petitions through the rulemaking process.

As the Department of Environmental Protection ("DEP" or "the Department") has conceded, it will not be possible to finally resolve UFM petitions within 12 months, as the law requires. In fact, a review of UFM petitions reveals that it has never taken less than 19 months to resolve one, and that the average time from receipt of a complete petition to a final decision has been 34 months. One petition took nearly five years to resolve.

Delay is both a natural product of the rulemaking process and the result of specific requirements imposed on UFM petitions. *See* 25 Pa. Code §§86.124(e) (DEP required to

prepare a detailed statement of resources, economic and environmental impacts of decision prior to designating lands as UFM); 86.125(a) (local hearing required unless all parties agree not to have one; 10 month time frame allowed for holding hearing).

While delay in resolving UFM petitions may be understandable, it is unacceptable because state and Federal law require UFM petitions to be resolved within 12 months after receipt of a complete petition. Section 522(a)(1) of the federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §1272(a)(1)) requires states to establish a process for designating areas as UFM. Section 503 of SMCRA (30 U.S.C. §1253(a)(5),(7) requires the state's regulations pertaining to UFM to be consistent with SMCRA and federal regulations.

The federal regulations governing UFM designation require a public hearing with 10 months of receipt of a complete application. 30 C.F.R. §764.17(a). A final decision is required within 60 days of the public hearing, or within 12 months of receipt of a complete petition where there has been no public hearing. 30 C.F.R. §764.19(b).

The same deadlines are imposed under Pennsylvania law. *See* 52 P.S. §1396.4e(f). Thus, under both state and federal law a *final* decision is required not later than 12 months after receipt of a complete petition (unless the hearing date is continued beyond the 10 month limit). While DEP has identified a number of other provisions in the UFM regulations which are inconsistent with federal law, and has proposed appropriate revisions, this is a glaring omission.

The deadlines must be considered as any other OSM program requirement, i.e., Pennsylvania's program can be no less effective than the federal program in serving the purposes of SMCRA. One of those purposes, expressed in clear and unambiguous language after much debate, is the prompt resolution of UFM petitions. The DEP could make an argument about effectiveness if its process gave UFM petitions a "fighting chance" of resolution within 12 months; however, this is inconceivable as long as UFM petitions are addressed through the rulemaking process.

There are other considerations, aside from the inconsistency with state and federal law, which should compel the EQB to adopt an adjudicatory process for resolving UFM petitions. First, the rulemaking process requires an intensive administrative and technical effort.

Second, while the effort might be justified if public participation were fostered by the rulemaking process, there is no true benefit in this regard. An adjudicatory process would allow public concerns to be directly addressed in an appropriate fact-finding forum.

Finally, the EQB should consider that rulemaking is generally not subject to challenge until there has been an action implementing the rule and an appeal therefrom. This promises to further delay final resolution of UFM petitions. The DEP should therefore

adopt an adjudicatory procedure meeting the requirements of state and federal SMCRA, as it originally proposed.

Metric Distances

PCA is concerned with the inclusion of metric equivalent measurements in the PRM. The metric equivalencies add nothing to the regulations, but could cause confusion. Any party which wishes to convert to metric distances can do the math. If the Department wants to publish a conversion table as technical guidance, that would be preferable. But inclusion of metric equivalents in the body of the regulations will likely lead to confusion among permit reviewers if there is an actual or perceived need to choose one measurement or the other in making a decision.

PCA also is opposed to requirements that metric distances be calculated or used by applicants in submitting information to the DEP or the public. The regulations at hand are not well-suited to another flirtation with metric conversion (note that some of the conversions refer to distances as "approximate," where the unit of measurement -- on a surface mining site -- is expressed in *centimeters.*)

PCA therefore recommends deleting the metric equivalencies from the PRM. At a minimum, the preamble should clearly state that metric equivalents are included solely for the covenience of persons who wish to use the metric system and are not to be construed as imposing additional requirements on the applicant.

Specific Comments

§86.101 (Definition of "fragile lands"): The last clause of the definition (". . . and areas where surface mining operations are prohibited under Section 4.5(h) of the [Pennsylvania] Surface Mining Conservation and Reclamation Act (52 P.S. §1396e(h)) should be deleted. There is no corresponding provision in the federal regulations (30 C.F.R. §762.5). Nor is there any need for the proposed language, since the referenced statutory provisions and the enabling regulations at Section 86.102 already restrict mining in the areas referred to. Incorporating those areas in the definition of "fragile lands" produces absurd results, such as the designation of lands within 100 feet of a road as "fragile," even those lands may not meet the criteria in the first clause of the definition.

§86.101 (definition of "historic lands"): The reference to lands "eligible for listing on a State or National Register of Historic Places" should be deleted in accordance with the revision to Section 86.102(3).

§86.101 (definition of "surface mining operations"): The definition follows the statutory model set forth in Section 3 of Pa. SMCRA, as referred to Section 4(e) (pertaining to designating areas unsuitable for surface mining) and is comparable to the relevant federal definition and consistent with federal interpretation.

§86.102(9)(ii): A subpart "C" should be added to conform to federal regulations at 30 C.F.R. §761.12(e)(2):

> (C) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver prior to August 3, 1977, from the owner of an occupied dwelling to mine within 300 feet of such dwelling, a new waiver shall not be required.

Absent this additional language, the PRM fails to address situations in which waivers were obtained before the effective date of SMCRA. Such waivers are unlikely to satisfy the requirement that the owner knowingly waived the 300-foot limitation in the statute.

§86.125(b) (Procedures; hearing requirements): If an adjudicatory procedure is adopted -- as should be done -- this section of the regulations should permit the cross-examination of expert witnesses, in accordance with the corresponding federal regulation at 30 C.F.R. §764.17(a). PCA also opposes the deletion of the requirement that a verbatim transcript be prepared. At a minimum, the proposed regulations should permit any or all parties to arrange for a transcript to be made at the expense of that party; however, any party wishing to have a copy of a private transcript should share the expense with the party arranging for the transcript.

Thank you for your attention to these comments.

Sincerely,

Michael G. Young
Director of Regulatory Affairs

One-Page Summary: Comments of Pennsylvania Coal Association To Proposed Rulemaking: Chapter 86 General Provisions and Areas Unsuitable for Mining

- The DEP should adopt an adjudicatory process, rather than a rulemaking procedure, to resolve unsuitable for mining (UFM) petitions. The DEP has acknowledged that it is impossible to resolve a petition through rulemaking within 12 months of receipt, as required by both state and federal law. In fact, the record shows that the *average* time between submission and final decision is nearly three years.

- An adjudicatory process would provide for active public participation and input and would at least permit the possibility of resolution within 12 months. Finality and expedited review would also be enhanced.

- Metric units of measurement should be deleted or explained in the pre-amble as a convenient reference which imposes no substantive requirements.

- The definition of "fragile lands" should be revised to eliminate the inconsistent and/or redundant inclusion of areas where surface mining is excluded under Section 4.5(h) of the Pennsylvania Surface Mining Conservation and Reclamation Act.

- The definition of "historic lands" should be revised to delete reference to lands "eligible for inclusion on the National Register of Historic Places" in conformance with the revision to Section 86.102(3).

- Proposed Section 86.102(9)(e)(2) should be revised to match the corresponding federal provision. The proposed language does not provide an exception so that waivers obtained prior to the effective date of the federal Surface Mining Control and Reclamation Act do not require a knowing waiver of the 300 foot restriction contained in SMCRA.

- If an adjudicatory procedure is selected (and it should be), procedures at Section 86.125(b) should be revised to allow cross-examination of expert witnesses, as the federal program does. PCA also opposes the deletion of the requirement that a verbatim transcript be prepared.