

Regulatory Analysis Form		This space for use by IRRC
<p>(1) Agency</p> <p style="text-align: center;">Environmental Protection</p>		<p>RECEIVED</p> <p>2001 MAY -8 AM 10:08</p> <p>REVIEW COMMISSION</p> <p>IRRC Number: 2123</p>
<p>(2) I.D. Number (Governor's Office Use)</p> <p style="text-align: center;">7-352</p>		
<p>(3) Short Title</p> <p style="text-align: center;">Coal Refuse Disposal</p>		
<p>(4) PA Code Cite</p> <p style="text-align: center;">25 Pa. Code Chapters 88 & 90</p>	<p>(5) Agency Contacts & Telephone Numbers</p> <p style="text-align: center;">Primary Contact: Sharon Trostle, 783-1303</p> <p style="text-align: center;">Secondary Contact: Barbara Sexton, 783-1303</p>	
<p>(6) Type of Rulemaking (Check One)</p> <p><input type="checkbox"/> Proposed Rulemaking</p> <p><input checked="" type="checkbox"/> Final Order Adopting Regulation</p> <p><input type="checkbox"/> Final Order, Proposed Rulemaking Omitted</p>	<p>(7) Is a 120-Day Emergency Certification Attached?</p> <p><input checked="" type="checkbox"/> No</p> <p><input type="checkbox"/> Yes: By the Attorney General</p> <p><input type="checkbox"/> Yes: By the Governor</p>	
<p>(8) Briefly explain the regulation in clear and nontechnical language.</p> <p style="text-align: center;">These final-form regulations will serve to update 25 Pa. Code Chapters 90 and 88 by incorporating changes to the Coal Refuse Disposal Control Act (CRDCA) as amended by Act 114 of 1994. The rulemaking therefore includes regulations that address: siting of coal refuse disposal operations on land previously disturbed by coal mining activities, authorizing the issuance of modified permits for coal refuse disposal on areas with preexisting discharges, establishing a robust site-selection process to steer operators to preferred coal refuse disposal sites, and granting variances for coal refuse disposal within 100 feet of a stream in certain circumstances.</p>		
<p>(9) State the statutory authority for the regulation and any relevant state or federal court decisions.</p> <p style="text-align: center;">The Coal Refuse Disposal Control Act (52 P.S. §§ 30.51 <u>et seq.</u>), Section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20), the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1 <u>et seq.</u>).</p>		

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- (10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes. The rulemaking integrates the 1994 CRDCA amendments into 25 Pa. Code Chapters 90 and 88. CRDCA was amended by Act 114 of 1994 and signed into law by the governor on December 7, 1994. The amended act became effective on February 5, 1995. In addition, the rulemaking includes provisions required by the Federal Office of Surface Mining when it conditionally approved the statutory amendments.

- (11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulations serve to clarify the 1994 changes to the statute and act as a template for the Department's day-to-day regulatory obligations under CRDCA. The regulations provide a mechanism for the establishment of water quality standards needed to implement section 6.2 of CRDCA and provide a procedure for granting variances to the 100-foot stream buffer zone currently in the regulations.

- (12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

CRDCA, the enabling statute, has been amended and the new language is needed to ensure uniform implementation of, and compliance with, the statute. The regulations will result in the improvement of water quality in streams that now receive pollutional discharge and in increased reclamation of abandoned mine lands. The regulations promote: backfilling of open cuts, elimination of unsafe highwalls, and installation of erosion and sedimentation control features. The rulemaking will, therefore, lessen risks to public health and safety, and improve the environment.

- (13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Act 114 was self-implementing; therefore, the regulated community has been complying with its requirements since 1994. This rulemaking benefits the regulated community, DEP staff, and the public by providing a more detailed outline of the Department's requirements under Act 114. This clarification of Act 114 directly benefits approximately 26 coal refuse disposal site operators who are potential applicants for coal refuse disposal permits. Operators also benefit from the Act's incentives for using sites with existing pollutive discharges and by its provisions allowing the use of experimental practices that encourage advances in coal refuse disposal technology. This rulemaking furthers the stated mission of the Act 114 amendments by promoting the reuse of previously affected areas for coal refuse disposal, minimizing the number of coal refuse sites, and providing incentives for reusing sites with existing discharges.

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- (14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

The revisions are not expected to have any adverse impacts upon the regulated community or the public. Act 114 steers applicants to certain "preferred" coal refuse sites and, therefore, may limit site options or increase documentation required of applicants proposing to use alternative sites. Act 114 also requires coal refuse sites to include systems to prevent adverse groundwater and surface water impacts and systems to prevent precipitation from contacting the refuse. However, these requirements have been in place since Act 114 took effect in 1995. The rulemaking essentially codifies the self-implementing provisions of Act 114.

- (15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

A minimal number (5-10) of new coal refuse disposal site applications are anticipated to be received over the next 20 years. This is based on current disposal site capacity, coal production, and discussions with operators regarding their permitting needs and plans.

- (16) Describe the communications with and inputs from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The rulemaking package has been prepared with input from the Mining and Reclamation Advisory Board. The proposed rulemaking was published in the *Pennsylvania Bulletin* on June 17, 2000 following adoption by the EQB on April 18, 2000. A comment period ran from June 17 to August 16, 2000. In addition, two public hearings were held on July 19 and July 26, 2000 to receive public input. Comments were received from the U.S. Fish and Wildlife Service, U.S. Office of Surface Mining, Pennsylvania Coal Association, Pennsylvania Game Commission, and the Independent Regulatory Review Commission. All comments were considered and written responses were prepared. In 1998, the Department developed a technical guidance document to facilitate implementation of the Act 114 requirements. Comments received during the development of that technical guidance were considered in the drafting of this rulemaking. Input was received from OSM, the U.S. Fish and Wildlife Service, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, U.S. EPA and the regulated community.

- (17) Provide a specific estimate of the cost and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Act 114 of 1994 was self-implementing; therefore, the regulated community will not realize any new costs or savings due to this proposed rulemaking. The site-selection provisions of the statute have been fully implemented for several years, supported by a customized technical guidance document (estimated costs regarding site selection evaluation are on the order of \$50,000-\$70,000 per site). Under Act 114, where an operator proposes to engage in coal refuse disposal activities on an area with a preexisting discharge, the applicant bears additional information

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(17) CONTINUED

requirements regarding background monitoring. Essentially, six additional samples, with flow data, are needed to characterize existing discharges. Costs for additional sampling would be less than \$500/discharge based on a cost of \$25/sample for six additional samples and for labor costs associated with the required flow monitoring.

The stream barrier variance provisions of Act 114 and the regulations enable operators to develop larger coal refuse disposal sites. This promotes a limited number of large facilities while reducing the design and permitting costs associated with multiple, small sites.

The experimental permit provisions of the rulemaking will enable operators to develop more cost effective coal refuse disposal methods.

The Act 114 amendments added a new requirement to include systems to limit groundwater and surface water recharge to coal refuse piles. This rulemaking does not add new requirements beyond the statutory requirements and does not prescribe the types of systems to be incorporated. However, the costs of designing and installing systems at large coal refuse disposal sites may be substantial.

(18) Provide a specific estimate of the cost and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

There will be no costs or savings to local governments associated with this rulemaking.

(19) Provide a specific estimate of the cost and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

These regulations are driven by 1994 amendments to the CRDCA. These regulations will not place additional costs on state government above and beyond those associated with the six-year old statute. The minimal number of applications has allowed existing permitting staff to absorb the work.

Subchapter F amendments will serve to implement Section 6.2 of CRDCA. These provisions are intended to encourage the use and reclamation of areas previously affected by mining. Sites reclaimed by operators as a result of Subchapter F incentives will reduce the state's abandoned mine reclamation obligation.

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(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	---	---	---	---	---	---
Local Government	---	---	---	---	---	---
State Governments	---	---	---	---	---	---
Total Savings	---	---	---	---	---	---
COSTS:*						
Regulated Community	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
Local Government	---	---	---	---	---	---
State Governments	---	---	---	---	---	---
Total Cost	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
REVENUE LOSSES:						
Regulated Community	---	---	---	---	---	---
Local Government	---	---	---	---	---	---
State Governments	---	---	---	---	---	---
Total Revenue Losses	---	---	---	---	---	---

(20a) Explain how the cost estimates listed above were derived.

Costs to regulated community - contacts were made with coal operators and consultants to determine the number of expected applications and to assess costs of preparing the site selection* evaluation.

Number of expected applications over six-year period = 3
 Cost/application for site selection evaluation = \$60,000
 Total cost to regulated community over six years = \$180,000

If an operator chooses to take advantage of the remaining incentives under Subchapter F, then he or she will incur an additional cost per discharge relating to the expanded monitoring requirements for preexisting discharges. It is estimated that the additional cost of characterizing preexisting discharges will be less than \$500/discharge. The total costs will be related to the number of discharges.

* Site selection characterization costs have been in place since enactment of the Act 114 amendments in 1995. This rulemaking will add no additional costs related to subchapter E. (See response to item 19.) Additional, and potentially substantial costs, result from the Act 114 requirement to incorporate groundwater and surface water protection systems and systems to prevent precipitation from contacting the refuse. Act 114 and the regulations are non-prescriptive regarding the type of systems to be used; therefore, specific costs have not been estimated. The regulations do not add new costs related to these systems.

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(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
Mining - federal OSM portion	\$10,631,000	\$10,396,000	\$10,811,000	\$10,400,000
State matching expenditures	\$10,763,000	\$12,148,000	\$12,694,000	\$10,400,000

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and cost.

These regulations should result in substantial benefits to the Commonwealth. Although these costs and benefits cannot be calculated with precision, the Department has developed estimates that provide a means of gauging the significance of these regulations. The site selection provisions of the regulations are designed to steer potential coal refuse site operators to previously disturbed areas. The regulations help to ensure the health and safety of the citizens of Pennsylvania's coal fields by providing incentives for the reuse of previously affected areas for coal refuse disposal, thereby minimizing the total number of disposal sites.

Prior to the Act 114 amendments to CRDCA, operators were exposed to potentially unlimited liability concerning post-disposal treatment of any preexisting discharges that would remain after disposal was complete. This potential liability discouraged operators from re-entering sites and thus limited the amount of operator driven reclamation. Subchapter F (relating to activities on areas with preexisting discharges) will impose no new costs on private entities. This is because the regulation merely creates an option for operators to use if they so choose. If they choose to use the regulation, the operators will bear slightly higher costs in preparing permit applications than they would incur for other permit applications. The higher costs will be related to the development of abatement plans, as well as implementation of the abatement plans and certification of completion of such plans. Costs will vary based on the number of discharges and the degree of pollution at the site as well as the technology needed to achieve a predicted improvement. The regulation will be used where operators perceive that the economic benefits of coal refuse disposal outweigh the additional costs required to characterize the preexisting discharges.

The site selection provisions of Act 114 were self-implementing; therefore, the regulated industry has been living with the requirements since the statute was enacted in 1995. The additional up-front site characterization and alternatives analysis required by the act and the regulations can result in significant costs to the operator (\$50,000-\$70,000) per site.

The benefits of the regulations outweigh the costs for two reasons. First, the regulations present the operator with an option. No operator will use the Subchapter F option unless the operator is convinced that he can conduct coal refuse disposal activities on the site and obtain release of bond with the procedure. In addition the regulations will result in a reduction of water pollution from areas that have been previously mined, lead to additional reclamation of areas that have been previously mined, and benefit the Commonwealth and landowners by promoting the reuse of previously disturbed areas as opposed to virgin sites.

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- (22) Describe the nonregulatory alternative considered and the cost associated with those alternatives. Provide the reasons for their dismissal.

Nonregulatory alternatives were not considered. The need to promulgate regulations is driven by amendments to Pennsylvania law. The regulations are needed to support the statute and to consolidate and clarify requirements currently scattered among the statute, existing regulations, and an existing technical guidance document relating to site selection. The regulations are also needed to address conditions imposed by OSM when it approved the statutory amendments.

- (23) Describe alternative regulatory schemes considered and the cost associated with those schemes. Provide the reasons for their dismissal.

No alternative regulatory schemes were considered. (See item 22 above.)

- (24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The regulations will serve to clarify and implement the provisions of Act 114 of 1994 which amended CRDCA. Act 114 contains some provisions, such as site selection, which have no federal counterparts. The General Assembly, in passing Act 114, determined that there was a compelling interest to: provide incentives for coal refuse disposal activities on affected areas; have a few large coal refuse disposal sites as opposed to numerous small sites; protect aquatic and terrestrial wildlife and their habitats during site selection and operation; and require upgraded surface water and groundwater management systems at coal refuse disposal sites.

- (25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The General Assembly of Pennsylvania determined that there was a compelling need to amend the CRDCA to promote the siting of coal refuse disposal activities on previously mined areas and to require alternatives analyses of potential sites to ensure that the most suitable site is selected. The regulations primarily serve to update Chapters 88 and 90 to conform with the statutory changes. Regardless, all states are subject to the same federal standards covering permitting and siting of coal refuse facilities. No state can promulgate regulations that are less stringent than the federal requirements.

- (26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The regulations will not affect existing or proposed regulations of other state agencies but will modify existing DEP regulations to be consistent with CRDCA.

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- (27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

Two public hearings were held for the purpose of accepting comments. The hearings were held on July 19 and July 26, 2000 in Pottsville, Pennsylvania, and New Stanton, Pennsylvania, respectively. The hearings were advertised in the notice of proposed rulemaking published in the June 17, 2000 *Pennsylvania Bulletin*.

- (28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

Act 114 of 1994 was self-implementing; therefore, the reporting and record keeping have been absorbed into the regulatory program over the past five years. Also, the minimal number of expected future disposal sites will add little additional paperwork requirements. These regulations do not impose additional reporting requirements on the regulated community.

- (29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

None

- (30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The anticipated effective date of the regulation is August 1, 2001. The regulated community has been complying with the amended statute for five years; compliance with the regulations will be required upon notice of final rulemaking in the *Pennsylvania Bulletin*.

- (31) Provide the schedule for continual review of the regulation.

The regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

2123

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>_____ (DEPUTY ATTORNEY GENERAL)</p> <p>_____ DATE OF APPROVAL</p> <p>Check if applicable copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>DEPARTMENT OF ENVIRONMENTAL PROTECTION ENVIRONMENTAL QUALITY BOARD</p> <p>_____ (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>7-352</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u>David E. Hess</u></p> <p>TITLE: <u>DAVID E. HESS, ACTING SECRETARY</u> (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies</p> <p>BY: <u>[Signature]</u></p> <p><u>4/20/01</u> DATE OF APPROVAL</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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ORDER ADOPTING REGULATIONS

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

25 Pa. Code, Chapters 88 & 90

Coal Refuse Disposal

Title 25 – ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD [25 PA. CODE CH. 88 AND 90] Coal Refuse Disposal

Preamble

The Environmental Quality Board (Board) by this order amends Chapters 88 and 90 (relating to anthracite coal and coal refuse disposal). The amendments address permitting and performance standards for coal refuse disposal operations.

This order was adopted by the Board at its meeting of April 17, 2001.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact J. Scott Roberts, P.G., Director, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel-Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Joseph Pizarchik, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 voice (users). This rulemaking is available electronically through the Department of Environmental Protection's (Department) Web site (<http://www.dep.state.pa.us>).

C. Statutory Authority

The amendments are adopted under the authority of section 4.2 of the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P.S. § 1396.4b(a)); section 3.2 of the Coal Refuse Disposal Control Act (CRDCA) (52 P.S. § 30.53b); and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20).

D. Background and Summary

This rulemaking is necessary to update Chapters 88 and 90 to bring them into conformance with CRDCA as amended by Act 114 of 1994. Act 114 was signed into law on December 7, 1994 and became effective on February 5, 1995.

Subsequent to Act 114 becoming law, the Department developed a supporting technical guidance document, titled "Coal Refuse Disposal – Site Selection." The technical guidance document clarified the Act 114 site selection process and outlined information needed

to apply for, and receive, a stream barrier variance under section 6.1 of CRDCA. The technical guidance document was circulated for comment to the regulated community, Pennsylvania Fish and Boat Commission, Pennsylvania Game Commission, the federal Office of Surface Mining, Reclamation and Enforcement (OSM), the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers.

Prior to the development of the proposed regulations, the Department submitted the Act 114 amendments to OSM for approval as a program amendment. On April 22, 1998 OSM published a conditional approval of the Act 114 amendments in the *Federal Register* (Vol. 63, No. 77, April 22, 1998). In the conditional approval OSM found that the word "significant" in section 6.1(h)(5) of CRDCA, as it pertains to granting variances to the 100-foot stream buffer zone, was inconsistent with federal law. The Department took action to address this matter by suspending implementation of the term "significant" in section 6.1(h)(5). This matter was announced in 28 Pa.B. 2544 (May 30, 1998). Consequently, the proposed rulemaking regarding stream buffer zone variances was based on language communicated to the Department by OSM in its conditional approval of the Act 114 amendments. The proposed language included a requirement that each stream variance must be accompanied by a demonstration that "*the activities will not cause or contribute to the violation of state or federal water quality standards, and will not adversely affect water quality and quantity, or other environmental resources of the stream.*" That requirement differed from the precise language of section 6.1(h)(5) of CRDCA, which requires a demonstration that "*there will be no adverse hydrologic or water quality impacts as a result of the variance.*" In the final-form version, § 90.49(c)(1) has been revised to more closely follow the statutory language by including the "as a result of the variance" phrase.

OSM's published approval also recognized that the Department's technical guidance document had satisfied the concerns of the U.S. Fish and Wildlife Service regarding compliance with Section 7 of the Endangered Species Act. On May 2, 1998, the Department submitted a letter to OSM outlining its approach to addressing the required conditions through rulemaking. This rulemaking includes those clarifications.

These regulatory changes were reviewed and discussed with the Mining and Reclamation Advisory Board (MRAB). The MRAB is the Department's advisory body for regulations pertaining to surface coal mining, including coal refuse disposal. A draft of the proposed rulemaking was reviewed and discussed with the MRAB's Regulation, Legislation and Technical Committee on November 17, 1999. The MRAB concurred with the proposed rulemaking at its meeting on January 6, 2000. The proposed rulemaking was adopted by the Board at its April 18, 2000 meeting and published in the June 17, 2000 *Pennsylvania Bulletin*. The MRAB reviewed and discussed the draft final rulemaking at meetings on January 4 and February 21, 2001. The MRAB concurred with the final rulemaking at its meeting on February 21, 2001.

The rulemaking adds § 90.5 and amends § 88.281. These sections reflect section 4.1 of CRDCA (52 P.S. § 30.54a), which outlines a comparative analysis process for evaluating potential sites for coal refuse disposal. CRDCA and the proposed regulations establish a two-step process for the permitting of coal refuse disposal sites. The first step is a pre-application site selection process intended to steer applicants to areas previously disturbed by mining. In the

absence of previously disturbed sites the site selection process requires an evaluation of nearby candidate sites with the goal of choosing the site that results in minimal adverse impacts. Following the Department's approval of the applicant's site selection, the applicant proceeds to the second step which involves preparing and submitting a permit application for the selected site. Section 90.5 outlines the need to conduct the mandatory site selection step prior to applying for a permit for coal refuse disposal activities.

The rulemaking amends § 90.12 (relating to geology) to request geologic information that is needed to review a permit application for coal refuse disposal activities. The existing language in § 90.12 is borrowed from Chapter 87 and was written to gather information relating to sites where coal will be mined. The new language solicits information on surficial geology, soils, and characteristics of joints and fractures. This information is more useful in evaluating sites that will be used for coal refuse disposal activities. Based on comments received from the MRAB, § 90.12(b) was added to the final-form regulations to address certification requirements regarding submission of geologic information.

The rulemaking adds language to § 90.13 (relating to groundwater information) regarding groundwater flow as it relates to groundwater and surface water protection, and language describing requirements relating to preventing precipitation from contacting the coal refuse during temporary cessation. Section 90.13 sets forth the requirements of section 6.1(i) of CRDCA. Under the Act 114 amendments all new coal refuse disposal areas must include systems to prevent adverse impacts to surface and groundwater. Section 90.13 is intended to solicit collection of the information needed to allow a complete technical evaluation of the proposed groundwater and surface water protection system.

The rulemaking adds a new § 90.49. This new section reflects section 6.1(h)(5) of CRDCA, which gives the Department authority to grant a variance to dispose of coal refuse within 100 feet (30.48 meters) of the bank of a stream and to relocate or divert streams for the purpose of coal refuse disposal. Language is included to ensure that coal refuse disposal operations, which fall outside the scope of § 90.49, comply with the stream buffer zone provisions of Chapter 86, § 86.102(12). Section 90.49 requires the Department to issue the variance as a written order and operators to give public notice of the application for the variance. It also requires the Department to conduct a public hearing when any person files an exception to the proposed variance.

The rulemaking adds § 90.50 and amends § 90.122. The new language outlines design and performance standards for systems to prevent adverse impacts to surface and groundwater and to prevent precipitation from contacting the coal refuse. This language reflects section 6.1(i) of CRDCA. The phrase "*...prevent precipitation from coming into contact with the coal refuse*" in § 90.50(b) is based on section 6.1(i) of the statute. This statutory requirement was intended to ensure that precipitation contacting the coal refuse is kept to a minimum, thereby reducing the volume of water needing treatment after the site is closed. The system must be designed and installed in a manner that minimizes the amount of time coal refuse is exposed to precipitation. The objective is to have the system installed incrementally as refuse disposal progresses. The

final system, in conjunction with the groundwater and surface water diversion systems, will result in greatly reduced postdisposal outflows.

Section 90.116a (relating to hydrologic balance: water rights and replacement) is added to provide a cross-reference to the water supply replacement provisions of the current surface mining regulations in Chapter 87 (relating to surface mining of coal). The requirement in § 87.119 applies to all surface mining activities, one of which is coal refuse disposal. These requirements have been historically used to address water supply impacts at coal refuse sites. The new regulation clarifies that coal refuse disposal site operators are required to replace water supplies that are impacted by their operations.

The rulemaking adds a new Subchapter F to implement section 6.2 of CRDCA for coal refuse disposal activities on areas previously affected by mining. CRDCA postponed implementation of the section 6.2 provisions pending the promulgation of regulations governing the use of sites with preexisting pollutional discharges. The new Subchapter F is designed to provide incentives for operators to enter, conduct coal refuse disposal activities, and reclaim areas that were previously affected by coal mining activities that have pollutional discharges. The language is modeled on the existing re-mining incentive provisions of Chapters 87 and 88. These provisions have been in effect since 1985 and have been successful in encouraging operators to enter sites with preexisting pollutional discharges. The result has been new and innovative technology for the control and treatment of mine drainage, improvement to water quality, recovery of coal reserves that would otherwise remain unmined, and reclamation of abandoned sites at operator cost instead of state cost.

At the present time, coal refuse disposal site operators who re-affect areas with existing pollutional discharges are not eligible for bond release unless they eliminate those discharges. As a result, operators typically develop coal refuse disposal operations on virgin sites. Section 6.2 of CRDCA was intended to provide incentives to encourage operators to reclaim previously disturbed land by creating a limited exception to the existing regulations. These exceptions provide for special permits and release of bonds at areas with preexisting pollutional discharges. The new Subchapter F regulations are expected to encourage reclamation of abandoned mine lands.

Finally, the rulemaking adds Subchapter G to Chapter 90. The new Subchapter G reflects the requirements of section 6.3 of CRDCA. Section 90.401 is designed to encourage advances in coal refuse disposal practices and advances in technology that will enhance environmental protection. Federal regulations require substantial coordination during review of experimental practice applications between the state regulatory agency and OSM. Therefore, federal counterpart language relating to experimental practices is fully incorporated by cross-reference at § 90.401(b) to ensure that the language is consistent with the federal requirements.

E. Summary of Comments and Responses on the Proposed Rulemaking and Changes Made in the Final Rulemaking

At its meeting on April 18, 2000, the Board approved publication of the proposed amendments. The proposed amendments were published at 30 Pa.B. 3053 (June 17, 2000). Comments were accepted from June 17 to August 16, 2000. Two public hearings were held on July 19 and July 26, 2000 to accept comments regarding the proposed rulemaking.

Comments were received from 5 parties during the course of the public comment period. Commentators included the U.S. Fish and Wildlife Service, the U.S. Office of Surface Mining (OSM), the Pennsylvania Game Commission, the Pennsylvania Coal Association (PCA), and the Independent Regulatory Review Commission (IRRC).

The following is a discussion of comments received on the proposed rulemaking and changes made in the final rulemaking.

§ 88.310 Coal refuse disposal: general requirements.

The term “test results” was inadvertently left out of § 88.310(k) of the proposed rulemaking, and has been inserted in the final version.

§ 90.1. Definitions.

One comment was received regarding the term “business necessity,” which is used in §§ 90.167 and 88.310 (relating to temporary cessation of operations). Sections 90.167 and 88.310 address extensions to time limits for temporary cessation at coal refuse facilities for reasons of labor strike or business necessity. The commentator recommended that the term “business necessity” be defined in the regulations.

The Board realizes that the term “business necessity” is broad. However, there is benefit to the regulated community and to the Department in using a broad term. The term, left undefined, gives a degree of flexibility to the industry and the Commonwealth. It allows for unforeseen factors to be considered when entertaining requests for extensions based on business necessity. Therefore, the term has not been defined.

One comment was received regarding the definition of “public recreational impoundment.” The commentator indicated that since the definition is taken directly from the statute, the Board should simply reference the statute.

The Board believes that repeating statutory definitions in the regulations increases the readability and clarity of the regulations. The practice serves to make the regulation more user-friendly by making definitions of important terms readily available to the reader. The definition remains in the final-form regulation.

A comment was received concerning the term “operator.” The commentator pointed out that the term is used throughout the regulations, but is not defined. The commentator suggested referencing the definition of “operator” contained in the Coal Refuse Disposal Control Act.

The Board concurred that the term should be defined in the regulations. The suggested statutory definition has therefore been inserted in § 90.1 (relating to definitions).

Two comments were received requesting definitions of the terms “coal refuse disposal operations” and “coal refuse disposal activities.”

The Board agrees that there was need for clarification. A definition of “coal refuse disposal” was added to § 90.1 (relating to definitions). The term “coal refuse disposal operations” has been deleted from § 90.49. New language has been added at § 90.49(b) to better define the subset of activities that is subject to § 86.102(12). The term “coal refuse disposal activities” is defined in § 90.301 of Subchapter F.

§ 90.5. Site selection and permitting.

One commentator suggested that § 90.5 be revised to clarify when a site selection decision is appealable. The commentator indicated that the regulation should reflect that disapproval of a selected site is a final appealable action while approval of a selected site is not.

The Board agrees with the spirit of the comment. However, clarifying language was not necessary. The site selection process outlined in § 90.5 is the prerequisite to the permitting process. Since the process continues following approval of a selected site, the approval of a site is not an appealable action. Appeals may be appropriately filed at the time of permit issuance. However, when the Department disapproves a site, the operator is precluded from moving to the next step in the process. Disapproval is therefore a final appealable action of the Department.

Additionally, the final-form regulation includes a cross-reference to an existing technical guidance document that will be relied upon during the site selection process.

§ 90.12. Geology.

A commentator suggested two changes to § 90.12 (relating to geology). One suggestion was to add the phrase “as appropriate” after requirements for test borings, geologic information, and groundwater information. The second suggested change was to exclude non-use aquifers from the description requirements.

The Board disagrees with the suggested changes. The term “as appropriate” obfuscates the regulation, where currently it is quite clear. The non-use aquifer concept flows from Act 2 provisions of the Land Recycling and Remediation program. However, Act 2 specifically excludes mining. Inclusion of the non-use aquifer concept in the mining program would run counter to the current mining statutes and regulations. These statutes and regulations require that mining activities be conducted to ensure protection of the hydrologic balance, including

measures to protect the quality and quantity of surface water and groundwater within the permit and adjacent areas.

The final wording of § 90.12 has been revised to include subsection (b). This revision addresses the need for certification of geologic information and was added based on comments from the MRAB.

§ 90.13. Groundwater information.

One comment was received regarding language of proposed § 90.13(2). The commentator suggested that the phrase “specific attention” was vague and that the Board consider revising this subsection to require a description of the groundwater flow system.

The Board agrees. The final-form regulation has been modified as suggested.

§ 90.49. Stream buffer zone variance.

One comment was received regarding specific wording proposed in § 90.49(c)(1). The commentator indicated that the term “coal refuse disposal activities” should be used rather than the term “coal refuse disposal.”

The Board disagrees. Section 90.49 reflects provisions of Section 6.1(h)(5) of the Coal Refuse Disposal Control Act as amended by Act 114. Section 6.1(h)(5) clearly enumerates the operations that are subject to that section’s variance provision. These specific operations are the disposal of coal refuse and the related stream diversions or relocations. Requests for variances for other mining operations fall under the variance provisions of § 86.102(12) of Chapter 86. Section 86.102(12) covers activities listed under the term “surface mining operations” as defined in § 86.101. A reference to § 86.102(12) was included in the proposed rulemaking at § 90.49(b). In the final-form regulation, § 90.49(c)(1) has been modified to include the phrase “as a result of the variance.” This new language was added for clarification and to ensure consistency with the statute.

Two comments were received regarding the variance criteria under § 90.49(c). The commentators recommended that language regarding stream relocations and diversions be inserted. The language would then more closely track the statutory language.

The Board agrees with this recommendation, and the language has been revised as suggested.

One commentator requested that § 90.49(a) and (c) be modified to only apply to “perennial or intermittent streams.” The commentator argued that the language would then be consistent with stream buffer zone provisions in §§ 86.101 and 86.102, and SMCRA.

The Board disagrees. Section 90.49 follows the statutory language of the CRDCA and will remain unchanged. Furthermore, the CRDCA buffer zone provision was amended after

§§ 86.101 and 86.102 were promulgated and after the buffer zone provision of SMRCA was enacted. Under the rules of statutory construction the language of the CRDCA will control because it is later in time and more specific, applying only to coal refuse disposal.

One commentator argued that language should be included in § 90.49(c)(1) to explicitly state that adverse water quality impacts must be prevented downstream of the fill area, not within the reach of the stream contained within or diverted through the fill.

The Board recognizes that, as a practical matter, adverse impacts will be assessed downstream of the site's discharge. However, the regulatory language is consistent with the statutory language and will remain unchanged.

One comment addressed the need to include a reference to the Pennsylvania Game Commission in § 90.49(c)(2)(ii). The commentator suggested that the regulation explicitly reference the Game Commission due to its obligations under the Game and Wildlife Code to protect riparian and wetland areas.

The Board believes it is unnecessary to include the suggested reference. Section 90.49(c)(2)(ii) includes a reference to the Pennsylvania Fish and Boat Commission because the Commission is explicitly mentioned in the statute. The Pennsylvania Game Commission will be given an opportunity to review and comment on stream barrier variances. The existing Technical Guidance Document covering stream barrier variances at coal refuse sites specifically directs the Department to provide the Pennsylvania Game Commission with a copy of the variance application and to consider its comments.

One commentator suggested that § 90.49(c)(2)(ii) be revised to require the Department to consider "timely" information submitted by the Pennsylvania Fish and Boat Commission.

The Board believes the revision is unnecessary. The Department's existing Technical Guidance Document regarding stream buffer variances already limits the comment period to 30 days. Inclusion of the word "timely," which is not a precise term, would not improve the regulation.

One commentator noted that the phrase "coal refuse disposal operations other than coal refuse disposal," as used in § 90.49(b), was unclear.

The Board agrees. The phrase has been deleted and the subsection has been modified to clarify the subset of activities that are subject to the stream buffer zone provisions in § 86.102(12). Additionally, the term "coal refuse disposal," which is part of the new language inserted in the final-form version of § 90.49(b), has been defined in § 90.1.

One commentator noted that it is unclear how an operator can make the demonstration, required by § 90.49(c)(1), that "coal refuse disposal will not adversely affect water quality and quantity" The commentator suggested that the final-form regulation include the criteria the Department will use to judge if an operator has made an adequate demonstration.

The Board believes the broad statutory language used in § 90.49(c)(1) is sufficient. The broad language allows Department technical staff the flexibility to consider site-specific factors when assessing stream buffer zone proposals and mitigation plans. Permits issued under CRDCA are conditioned to maintain downstream uses.

Minor modifications were also made to §§ 90.49(a) and (c)(3) at final rulemaking for clarity.

§ 90.50. Groundwater and surface water protection systems.

One comment was received regarding § 90.50(c). The commentator questioned the meaning of the phrase “other physical or chemical process.” Additionally, the comment focused on the vagueness of the phrase “particular attention.”

The Board agrees that the subsection needed to be improved. The final-form version of § 90.50(c) has been revised. The term “particular attention” has been deleted, and examples of processes that could potentially deteriorate groundwater and surface water protection systems have been included.

§ 90. §116(a). Hydrologic balance: water rights and replacement.

Language at § 90.116(a) was modified at final rulemaking to incorporate the newly defined terms at §90.1, including “operator” and “coal refuse disposal.”

§ 90.122. Coal refuse disposal.

Language was added at final rulemaking to address the MRAB’s comments that the proposed language could be misinterpreted to require that all coal refuse be sheltered from precipitation during the operational life of the disposal area.

Subchapter E. Site Selection.

§ 90.201. Definitions.

One commentator recommended that the definition of “search area” under § 90.201 be modified to require that the delineated area be entirely within Commonwealth boundaries. The argument was made that an operator could intentionally exclude preferred sites in Pennsylvania by locating large portions of the search area in adjacent states.

The Board believes this change is unnecessary. The CRDCA does not limit the search area to Pennsylvania. The Department will have the final say on the configuration of the 25-mile search area. In circumstances where an applicant has designed the search area to deliberately exclude preferred sites, the Department will require the search area to be reconfigured.

One comment addressed the fact that the proposed definition of “search area” contained a substantive provision better suited for inclusion in § 90.202, relating to general requirements.

The Board decided to move the last sentence of the definition, which contains the substantive provision, to § 90.202(b).

One comment was received regarding the definition of “preferred site” under § 90.201. The commentator pointed out that the definition does not include specific criteria for determinations regarding preferred sites.

The Board finds that additional criteria are not needed in the regulation. The Department’s existing Technical Guidance, titled Coal Refuse Disposal – Site Selection, contains criteria for identifying preferred sites. Considerations such as in-stream water quality, length of polluted stream segment, and the percent of disturbed land in relation to the size of the watershed are addressed. While not absolutes, these criteria serve as a guide to operators and Department staff conducting “preferred site” assessments.

§ 90.202. General requirements.

Two comments were received regarding the proposed language in § 90.202(c)(2) limiting coal refuse disposal at sites “likely to contain” federally listed threatened or endangered plants or animals. One commentator argued that restricting sites which are “known to contain” listed species is consistent with the CRDCA and fully complies with the federal statutes and regulations, because consultation and concurrence are required where those species are known to exist, and where their continued existence may therefore be jeopardized. In contrast to the clear language of the CRDCA, the proposed language contains no standard for determining whether a site is “likely to contain” an endangered or threatened species. The second commentator pointed out that the “likely to contain” language is inconsistent with the enabling statute. Both commentators recommended that the “likely to contain” phrase be deleted.

The Board has determined there is no need to reference sites that are “likely to contain” threatened or endangered species in § 90.202(c)(2). The language regarding sites that are “likely to contain” threatened or endangered species was originally included to address a concern raised by OSM in regard to the Department’s technical guidance on coal refuse disposal site selection. In response to a recent Department inquiry, OSM found that the requirement to consider sites that are likely to contain threatened or endangered species is not needed in § 90.202(c)(2) because the requirement currently exists in § 90.18. Accordingly, the “likely to contain” phrase has been deleted from § 90.202(c)(2).

One commentator suggested revising § 90.202(a) to restrict information gathered to make the required preferred site demonstration to “reasonably available data.”

The Board did not adopt this recommendation. The proposed regulatory language follows the statutory language. The considerations regarding “reasonably available data” only

come into play after the preferred site issue had been resolved under Section 4.1(a) of the CRDCA.

One comment was received regarding the evaluation criteria concerning review of an alternate site versus an existing preferred site. The commentator points to the different criteria spelled out in §§ 90.202 and 90.204 as proof of an inconsistent approach to assessing alternate and preferred sites.

The Board disagrees with the underlying premise of the comment. The criteria spelled out in the regulations is consistent with the statutory intent. Section 4.1 of the CRDCA spells out certain criteria to be considered when evaluating preferred versus alternate sites. The criteria under § 90.202(a) reflects Section 4.1(a) of CRDCA and is to be used to evaluate an applicant's demonstration that an alternate site is more suitable than a preferred site. Section 90.204 is designed to reflect Section 4.1(c) and (d) of CRDCA, which addresses circumstances where an applicant is comparing various alternate sites. Section 90.204 comes into play when a preferred site does not exist within the search area or when the applicant has already made the demonstration, required under § 90.202(a), that an alternate site is more suitable. In the final rulemaking, the phrase "using criteria in § 90.202(a)" has been added for clarity at § 90.204(a)(1).

One commentator suggested deleting the phrase "unless it is a preferred site" from § 90.202(d). The commentator argues that the language allows the Department to minimize important environmental factors, such as exceptional value wetlands, wetlands, and state listed threatened or endangered species for sites that meet the preferred site definition.

The Board did not accept this recommendation. Section 4.1(a) and (b) of CRDCA explicitly address criteria for preferred sites. Section 4.1(b) exempts preferred sites from the absolute exclusions listed under § 90.202(d). Regardless of the site's status as alternate or preferred, the regulations and CRDCA require that a site can only be approved where the adverse environmental impacts will not clearly outweigh the public benefits. Additionally, the wetland encroachment issues will be addressed during the permitting process, which requires a detailed site assessment following the site selection process.

A commentator noted that language in § 90.202(e) unnecessarily deviates from its statutory counterpart language.

In order to more closely track the statute, the Board has revised language in § 90.202(e).

One commentator pointed out that § 90.202(c)(2) appears to be inconsistent with Section 4.1(b) of CRDCA in that it allows the approval of coal refuse disposal on non-preferred sites known to contain the federally listed species where the Department concludes and the USFWS concurs that the proposed use of the site would be unlikely to adversely affect these species. The commentator noted that Section 4.1(b) of CRDCA provides an absolute prohibition for using non-preferred sites for refuse disposal on sites known to contain federal threatened or endangered plants or animals, or state threatened or endangered animals. Additionally, the

commentator observed that § 90.202(c)(2) does not contain the complete text of the Department's Technical Guidance, titled Coal Refuse Disposal – Site Selection, regarding restrictions at sites containing federally listed threatened or endangered species.

The Board concurs with the comments. Section 90.202(c)(2) was inadvertently misplaced and has been moved to § 90.202(e)(7). The missing portion of the text in the Technical Guidance language, "...or result in the 'take' of federally listed threatened or endangered species in violation of Section 9 of the Endangered Species Act," has been added to the new § 90.202(e)(7).

One commentator pointed out that § 90.202(d)(3) is inconsistent with Section 4.1(b) of CRDCA. The paragraph refers to state threatened or endangered plants; the statute does not.

The Board concurs with the comment. The reference to state threatened or endangered plants has been deleted from § 90.202(e)(3) in the final rulemaking.

Section 90.202(b) has been expanded due to the inclusion of language moved from the definition of the term "search area" at § 90.201.

§ 90.203. Proposing a preferred site.

One comment was received indicating that § 90.203 should be deleted since it reiterates the requirements in § 90.202.

The Board disagrees that § 90.203 simply reiterates the requirements of § 90.202. Section 90.203 implements Section 4.1(a)(5) of CRDCA. Section 90.202 implements section 4.1(c) and (d) of CRDCA.

§ 90.205. Alternatives analysis.

One commentator argued that § 90.205, as written, circumvents the alternatives analysis required by Pa. Code Chapter 105, relating to dam safety and waterway management.

The commentator did not make a recommendation for changing the wording of § 90.205. Regardless, the Board sees little room for change. Section 90.205 tracks the exact language of Section 4.1(e) of the statute. The Act 114 revisions to CRDCA do address Chapter 105 requirements. Section 4.1(e) of CRDCA explicitly states that the alternatives analysis outlined under section 4.1 of CRDCA satisfies the requirement for an alternatives analysis under the Dam Safety and Encroachments Act.

Subchapter F. Coal Refuse Disposal Activities on Areas with Preexisting Pollutational Discharges.

§ 90.302 Definitions.

One commentator recommended simply cross-referencing the definitions of “actual improvement,” “coal refuse disposal activities,” and “pollution abatement area” since they are taken directly from the statute.

As stated previously, the Board believes that repeating statutory definitions in the regulations increases the readability and clarity of the regulations. The practice serves to make the regulation more user-friendly by making definitions of important terms readily available to the reader.

§ 90.303 Applicability.

Two commentators pointed out that § 90.303(a) differs from the statutory language for no clear reason. They recommended revising the subsection to include the statutory language.

The Board agrees that the language should mirror the statute where possible. Section 90.303(a) has been revised as suggested.

§ 90.304 Application for authorization.

One commentator questioned the criteria the Department will use to determine the “other water quality parameters...” outlined under § 90.304(a)(2)(ii).

The Board does not feel any revision is needed. Additional water quality parameters may need to be assessed if warranted based on site-specific knowledge regarding historical uses or problems at a given mine site. The operator will be made aware of additional monitoring requirements during the review of the permit application.

§ 90.306. Operational requirements.

One comment was received indicating that § 90.306(a)(4) should be revised to delete the requirement that the operator provide a notarized statement regarding the progress of the abatement plan.

The Board concurs. The requirement to submit a notarized statement has been deleted.

§ 90.309. Criteria and schedule for release of bonds on pollution abatement areas.

One comment was received regarding the inclusion of the term “planting” in both §§ 90.309(a)(2) and 90.309(b)(1).

The Board has determined that the term should be limited to § 90.309(b)(1). The term was inadvertently included in § 90.309(a)(2) and has been deleted in the final-form version.

F. Benefits, Costs and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the final-form regulations. The final-form regulations should result in substantial benefits to the Commonwealth. Although costs and benefits cannot be calculated with precision, the Department has developed some estimates that provide a means of gauging the significance of these regulations. The benefits and costs are as follows:

Benefits

This rulemaking benefits the regulated community, Department staff, and the public by providing a more detailed outline of the requirements under Act 114. This clarification of the statute directly benefits approximately 26 coal refuse disposal site operators who are potential applicants for coal refuse disposal permits.

The site selection provisions of the regulations are designed to steer operators who are evaluating prospective coal refuse disposal sites to areas previously disturbed by mining. The regulations are also designed to minimize the total number of disposal sites. The limited number of sites serves to minimize the likelihood of citizens being exposed to the effects of coal refuse disposal. In order to make the use of sites with preexisting discharges more palatable to operators, Act 114 included provisions for modified discharge limits and alternative reclamation standards. Unlike the other sections of Act 114, these provisions were not self-implementing. They are contingent on this rulemaking. This final rulemaking will therefore fulfill the intent of Act 114.

Sites reclaimed by operators as a result of Subchapter F incentives will reduce the Commonwealth's abandoned mine reclamation obligation. Prior to the Act 114 amendment to CRDCA, operators were exposed to potentially unlimited liability for treatment of preexisting discharges that would remain after coal refuse disposal was complete. This potential liability has discouraged operators from re-entering sites and thus limited the amount of operator reclamation. The regulations will result in a reduction of water pollution from areas that have been previously mined, will lead to additional reclamation of areas that have been previously mined, and will benefit the Commonwealth and landowners by promoting the reuse of previously disturbed areas as opposed to virgin sites.

The site-selection provisions of Subchapter E, in conjunction with surface and groundwater protection systems, will result in improved water quality and disposal of coal refuse at the most environmentally suitable site available.

The experimental practice provisions outlined in Subchapter G will enable operators to develop more cost effective coal refuse disposal methods.

Compliance Costs

Subchapter F (relating to activities on areas with preexisting discharges) will impose additional site characterization costs. If operators choose to use sites with preexisting discharges, they will bear slightly higher costs in preparing permit applications than they would incur for other permit applications. Costs will be related to the development of abatement plans, as well as implementation of the abatement plans and certification of completion of such plans. Costs will vary based on the number of discharges and the degree of pollution at the site as well as the technology needed to achieve a predicted improvement. Costs for characterization of discharge quality and quantity are estimated to be approximately \$500 per discharge. These additional costs will only come into play in cases where operators perceive that the economic benefits for disposing of coal refuse in an area previously affected by mining outweigh the additional costs required to characterize the preexisting discharges.

The Subchapter E (relating to site selection) provisions mirror the self-implementing provisions of Act 114. The regulated industry has been complying with the requirements since Act 114 became effective in 1995. The additional up-front site characterization and alternatives analysis required by Act 114 and proposed Subchapter E can result in significant costs to the operator (\$50,000 - \$70,000 per site).

Act 114 and the final-form regulations require coal refuse disposal sites to incorporate systems to prevent adverse impacts to surface and groundwater and to prevent precipitation from contacting the coal refuse. The regulated community has been following these self-implementing Act 114 provisions since 1995. The regulations do not add new requirements beyond those in the statute. The regulation covering the types of systems to be installed is not prescriptive; therefore, the costs related to design and construction can vary considerably depending on the systems proposed. However, the costs of designing and installing systems at large coal refuse disposal sites may be substantial. The economic impact is partly mitigated due to the limited number of anticipated sites. Additionally, since the required systems will reduce groundwater and surface water recharge to the coal refuse pile, the costs will be offset by the long-term savings realized due to reduced water treatment costs.

Compliance Assistance Plan

There is no compliance assistance plan specifically designed to assist coal refuse disposal applicants. The limited number of expected applications allows the Department the opportunity to provide customized technical assistance on each application.

Paperwork Requirements

Act 114 was largely self-implementing; therefore, the reporting and recordkeeping have been absorbed into the regulatory program over the past five years. The Subchapter F regulations impose no additional paperwork because they merely create an option for operators to disturb areas that contain preexisting pollutional discharges. If an operator exercises this option, Subchapter F does require increased background water quality information that is not ordinarily

required in permit applications. This information is necessary to ensure accurate information about the quantity and quality of preexisting pollutional discharges from the site, so that any changes in background data caused by the proposed activities may be more completely and accurately understood. Subchapter G (relating to experimental practices) will require an applicant to submit a substantial amount of additional paperwork. The additional paperwork will only apply to sites where an operator chooses to propose experimental practices.

G. Sunset Review

These final-form regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

H. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), the Department submitted a copy of the proposed rulemaking on May 31, 2000, to the Independent Regulatory Review Commission (IRRC) and the Chairperson of the Senate and House Environmental Resources and Energy Committees.

In compliance with Section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of comments as well as other documentation. In preparing these final-form regulations, the Department has considered the comments received from IRRC and the public. The Committee did not submit comments.

Under Section 5.1(d) of the Regulatory Review Act, these final-form regulations were deemed approved by the House Environmental Resources and Energy Committee and by the Senate Environmental Resources and Energy Committee on _____. IRRC met on _____ and approved the final-form regulations in accordance with Section 5.1(e) of the Regulatory Review Act.

I. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under Sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated there under at 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) These final-form regulations do not enlarge the proposal published at 30 Pa.B. 3053.

- (4) These final-form regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department, 25 Pa. Code Chapters 88 and 90, are amended to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

DAVID E. HESS
Chairperson
Environmental Quality Board

Annex A

PENNSYLVANIA CODE
TITLE 25. ENVIRONMENTAL PROTECTION
DEPARTMENT OF ENVIRONMENTAL PROTECTION
CHAPTER 88. ANTHRACITE COAL

Subchap.		Sec.
A.	GENERAL PROVISIONS.....	88.1
B.	SURFACE ANTHRACITE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS.....	88.81
C.	ANTHRACITE BANK REMOVAL AND RECLAMATION: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS	88.181
D.	ANTHRACITE REFUSE DISPOSAL: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS.....	88.281
E.	COAL PREPARATION ACTIVITIES.....	88.381
F.	ANTHRACITE UNDERGROUND MINES	88.481
G.	ANTHRACITE SURFACE MINING ACTIVITIES AND ANTHRACITE BANK REMOVAL AND RECLAMATION ACTIVITIES: MINIMUM REQUIREMENTS FOR REMINING AREAS WITH POLLUTIONAL DISCHARGES	88.501

§ 88.281. Requirements.

A person who conducts coal refuse disposal activities shall comply with the performance standards and design requirements of this Subchapter, §§ 90.5, 90.49, 90.50 AND SUBCHAPTERS E - G OF CHAPTER 90.

(1) Disposal of coal refuse in an active surface mine shall comply with the performance standards set forth in Subchapter B (relating to surface anthracite coal mines: minimum environmental protection performance standards); and § 88.315 (relating to coal refuse disposal: active surface mines).

(2) Disposal of coal refuse in an active bank removal operation shall comply with the performance standards of Subchapter C (relating to anthracite bank removal and reclamation: minimum environmental protection performance standards).

(3) Disposal of coal refuse in an abandoned or active underground coal mine shall comply with the performance standards set forth in Subchapter F (relating to anthracite underground mines).

§ 88.310. Coal refuse disposal: general requirements.

(a) Coal refuse shall be hauled or conveyed to and placed in designated disposal areas authorized for such purposes. The refuse shall be placed in a controlled manner to ensure the following:

(1) That the land mass designated as the disposal area is suitable for reclamation and revegetation compatible with the natural surroundings.

(2) Stability of the disposal area.

(3) That leachate and surface runoff from the disposal area will not degrade surface waters or groundwaters or exceed the established effluent limitations.

(b) The disposal area shall be designed using recognized professional standards and approved by the Department. The design shall be certified by a registered professional engineer.

(c) All trees, grasses, shrubs and other organic materials shall be removed for a distance of 50 feet from the current disposal area concurrent with the placement of refuse.

(d) Slope protection shall be provided to minimize surface erosion at the site. All disturbed areas, including diversion ditches that are not riprapped, shall be vegetated upon completion of construction.

(e) The coal refuse to be placed in [full] THE FILL shall be hauled or conveyed and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered and graded to allow surface and subsurface drainage to be compatible with the natural surroundings, and ensure a long-term static safety factor of 1.5 and seismic safety factor of 1.2.

(f) The final configuration of the disposal must be suitable for the approved postmining land uses.

(g) Terraces may be utilized to control erosion and enhance stability if approved by the Department.

(h) If the disposal area contains springs, natural or manmade water-courses, or wet-weather seeps, an underdrain system consisting of durable rock shall be constructed from the wet areas in a manner that prevents infiltration of the water into the spoil material. The underdrain system shall be designed and constructed using standard geotechnical engineering methods.

(i) Coal refuse may be returned to underground mine workings, but only in accordance with a disposal program approved by the Department and MSHA.

(j) THE SYSTEM TO PREVENT ADVERSE IMPACTS TO THE SURFACE WATER AND GROUNDWATER SHALL BE CONSTRUCTED IN ACCORDANCE WITH DESIGN SCHEMATICS, TEST RESULTS, DESCRIPTIONS, PLANS, MAPS, PROFILES OR

CROSS-SECTIONS APPROVED IN THE PERMIT AND SHALL FUNCTION TO PREVENT ADVERSE IMPACTS TO SURFACE WATER AND GROUNDWATER.

(k) THE SYSTEM TO PREVENT PRECIPITATION FROM COMING IN CONTACT WITH THE COAL REFUSE SHALL BE CONSTRUCTED IN ACCORDANCE WITH DESIGN SCHEMATICS, TEST RESULTS, DESCRIPTIONS, PLANS, MAPS, PROFILES AND CROSS-SECTIONS APPROVED IN THE PERMIT AND SHALL FUNCTION TO PREVENT PRECIPITATION FROM CONTACTING THE COAL REFUSE. THE SYSTEM SHALL BE INSTALLED AS PHASES OF THE DISPOSAL AREA REACH CAPACITY, AS SPECIFIED IN THE PERMIT, WHEN THE OPERATION TEMPORARILY CEASES FOR A PERIOD IN EXCESS OF 90 DAYS (UNLESS THE DEPARTMENT APPROVES A LONGER PERIOD, NOT TO EXCEED ONE YEAR) OR WHEN THE OPERATION PERMANENTLY CEASES. THE SYSTEM SHALL BE DESIGNED TO ALLOW FOR REVEGETATION OF THE SITE IN ACCORDANCE WITH THE STANDARD OF SUCCESS UNDER § 88.330 (RELATING TO REVEGETATION: STANDARDS FOR SUCCESSFUL REVEGETATION) AND FOR PREVENTION OF EROSION.

§ 88.332. Cessation of operations: temporary.

(a) As soon as it is known that the operation will temporarily cease for more than 30 days, the operator shall submit a notice of intention, in writing, to temporarily cease the operation. The notice shall include a statement of the exact number of acres which will have been affected in the permit area, the extent and kind of reclamation of those areas, and identification of the backfilling, regrading, revegetation, monitoring and water treatment activities that will continue during the temporary cessation. THE SYSTEM FOR PREVENTING PRECIPITATION FROM CONTACTING THE COAL REFUSE SHALL BE INSTALLED WHEN THE TEMPORARY CESSATION EXCEEDS 90 DAYS. THE DEPARTMENT MAY APPROVE A LONGER PERIOD, NOT TO EXCEED ONE YEAR, UNDER SUBSECTION (b).

(b) Temporary cessation of an operation may not exceed 90 days unless the Department approves a longer period for reasons of seasonal shutdown or labor strike.

(c) Temporary cessation shall not relieve the operator of the obligation to comply with any provisions of the permit.

PENNSYLVANIA CODE
TITLE 25. ENVIRONMENTAL PROTECTION
DEPARTMENT OF ENVIRONMENTAL PROTECTION
CHAPTER 90. COAL REFUSE DISPOSAL

Subchap.	Sec.
A. GENERAL PERMIT AND APPLICATION REQUIREMENTS FOR COAL REFUSE DISPOSAL	90.1
B. MINIMUM ENVIRONMENTAL RESOURCES INFORMATION REQUIRED IN PERMIT APPLICATIONS FOR COAL REFUSE DISPOSAL.....	90.11
C. MINIMUM OPERATION AND RECLAMATION PLAN INFORMATION REQUIRED IN APPLICATIONS FOR COAL REFUSE DISPOSAL.....	90.31
D. PERFORMANCE STANDARD FOR COAL REFUSE DISPOSAL	90.91
E. <u>SITE SELECTION</u>	<u>90.201</u>
F. <u>COAL REFUSE DISPOSAL ACTIVITIES ON AREAS WITH PREEXISTING POLLUTIONAL DISCHARGES</u>	<u>90.301</u>
G. <u>EXPERIMENTAL PRACTICES.....</u>	<u>90.401</u>

**A. GENERAL PERMIT AND APPLICATION REQUIREMENTS
FOR COAL REFUSE DISPOSAL**

§ 90.1. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

* * * * *

COAL REFUSE DISPOSAL - THE STORAGE, PLACEMENT OR DISPOSAL OF COAL REFUSE. THE TERM INCLUDES ENGINEERED FEATURES INTEGRAL TO THE PLACEMENT OF THE COAL REFUSE INCLUDING RELOCATIONS OR DIVERSIONS OF STREAM SEGMENTS CONTAINED WITHIN THE PROPOSED FILL AREA AND THE CONSTRUCTION OF REQUIRED SYSTEMS TO PREVENT ADVERSE IMPACTS TO SURFACE WATER AND GROUNDWATER AND TO PREVENT PRECIPITATION FROM CONTACTING THE COAL REFUSE.

* * * * *

OPERATOR - A PERSON OPERATING A COAL REFUSE DISPOSAL AREA, OR PART THEREOF.

* * * * *

PUBLIC RECREATIONAL IMPOUNDMENT - A CLOSED BASIN, NATURALLY FORMED OR ARTIFICIALLY BUILT, WHICH IS DAMMED OR EXCAVATED FOR THE RETENTION OF WATER AND WHICH IS OWNED, RENTED OR LEASED BY THE FEDERAL GOVERNMENT, THE COMMONWEALTH OR A POLITICAL SUBDIVISION OF THE COMMONWEALTH AND WHICH IS USED FOR SWIMMING, BOATING, WATER SKIING, HUNTING, FISHING, SKATING OR OTHER SIMILAR ACTIVITIES.

* * * * *

§ 90.5. SITE SELECTION AND PERMITTING.

(a) **PRIOR TO APPLYING FOR A PERMIT TO CONDUCT COAL REFUSE DISPOSAL ACTIVITIES, THE APPLICANT SHALL COMPLY WITH SUBCHAPTER E (RELATING TO SITE SELECTION). THE DEPARTMENT'S TECHNICAL GUIDANCE DOCUMENT NUMBER 563-2113-660, TITLED *COAL REFUSE DISPOSAL - SITE SELECTION*, SHALL BE USED AS GUIDANCE FOR SELECTING A COAL REFUSE DISPOSAL SITE.**

(b) **AFTER THE DEPARTMENT HAS APPROVED A SITE IN ACCORDANCE WITH SUBCHAPTER E, THE APPLICANT MAY APPLY FOR A PERMIT FOR COAL REFUSE DISPOSAL ACTIVITIES IN ACCORDANCE WITH CHAPTERS 86 AND 88 (RELATING TO SURFACE AND UNDERGROUND COAL MINING: GENERAL; AND ANTHRACITE COAL) AND THIS CHAPTER.**

§ 90.12. Geology.

[(a)] (a) The application shall include a description of the areal and structural geology within the proposed permit and adjacent area, including the lithology of the strata that influence the occurrence, availability, movement and quality of groundwater that may be affected by the coal refuse disposal[,].
[including the following:

(1)] For lands within the proposed permit and adjacent areas, the applicant shall provide a description of the geology with complementing maps and cross sections and the results of test borings[, and coal samplings. The description shall include the stratum immediately beneath the coal seam to be mined and all overlying strata, or, where an aquifer or existing deep mine below the lowest coal to be mined may be affected, the aquifer or existing deep mine and all overlying strata for mines underlain by existing deep mines and greater than 200 feet below surface drainage throughout the proposed mine, the description need only include the strata down to and including the stratum immediately below the coal seam to be mined]. **THE DESCRIPTION SHALL INCLUDE THE**

STRATA DOWN TO AND INCLUDING ANY AQUIFER THAT MAY BE AFFECTED. At a minimum, the description shall include:

[(i)] (1) Location and quality of subsurface water.

[(ii)] (2) Depth, lithology and structure [of overburden or underlying strata.]

OF NEAR-SURFACE BEDROCK.

[(iii)] (3) Location, identification and status of mining and coal refuse disposal operations within or adjacent to the proposed permit area.

(2) For any portion of a permit area in which the strata will be removed, test borings or core samples shall be collected down to and including the stratum immediately below the lowest coal seam to be mined or stratum to be removed and analyzed to provide the following data:

(i) Logs of drill holes that show the lithologic characteristics, including physical characteristics and thickness of each stratum, and location and quality of groundwater.

(ii) Chemical analyses of each stratum with the overburden and the stratum immediately below the coal seam to be mined to identify those strata that contain acid-forming, toxic-forming or alkalinity-producing materials.

(iii) Chemical analyses for acid-forming and toxic-forming substances of the coal seam, including the total sulfur content.

(b) An application may request that the requirements for a statement of the results of the test borings or core samplings, as required under subsection (a)(2), may be waived in part or in its entirety by the Department.]

(4) A DESCRIPTION OF ANY GLACIAL, ALLUVIAL, OR COLLUVIAL DEPOSITS OR OTHER UNCONSOLIDATED DEPOSITS THAT ARE PRESENT WITHIN OR BENEATH THE PROPOSED PERMIT AREA, INCLUDING THEIR THICKNESS AND LOCATION.

(5) A DESCRIPTION OF ANY MINE WORKINGS THAT ARE PRESENT BENEATH THE PROPOSED PERMIT AREA.

(6) THE ATTITUDE AND CHARACTERISTICS OF JOINTS, CLEATS, FRACTURE ZONES, AND FAULTS WITHIN THE PERMIT AND ADJACENT AREAS.

(7) THE LOCATION AND IDENTIFICATION OF ALL COAL SEAM CROPLINES WITHIN THE PERMIT AREA.

(8) A DESCRIPTION OF THE PHYSICAL CHARACTERISTICS OF SOILS WITHIN THE PERMIT AREA.

(9) A DESCRIPTION OF AQUIFERS THAT ARE PRESENT BENEATH THE PROPOSED PERMIT AREA.

(b) MAPS, CROSS-SECTIONS, AND GEOLOGIC DESCRIPTIONS REQUIRED BY THIS SECTION SHALL BE PREPARED AND CERTIFIED BY A QUALIFIED REGISTERED PROFESSIONAL GEOLOGIST.

§ 90.13. Groundwater information.

The application shall contain a description of the premining or baseline groundwater hydrology of the proposed permit and adjacent area, including the following:

(1) The results of a groundwater inventory of existing wells, springs and other valuable groundwater resources, providing information on location, quality, quantity, depth to water and usage of the groundwater for the proposed permit and potentially impacted offsite areas. Information on water availability and occurrence, and alternate water supplies shall be emphasized and water quality information relating to suitability for existing predisposal use shall be provided. At a minimum, water quality descriptions shall include total dissolved solids or specific conductance corrected to 25°C, pH, total iron, total manganese, alkalinity, acidity and sulfates.

(2) Other information on the baseline hydrogeologic properties of the groundwater system shall be included with the application. The Department may require information on indicator parameters such as pumping test, lithologic and piezometer data or THAT other appropriate information be provided. **[SPECIFIC ATTENTION SHALL BE GIVEN TO DESCRIBING] THE APPLICATION SHALL INCLUDE A DESCRIPTION OF THE GROUNDWATER FLOW SYSTEM AS IT RELATES TO THE DESIGN AND OPERATION OF THE PROPOSED GROUNDWATER AND SURFACE WATER PROTECTION SYSTEM AS DESCRIBED IN § 90.50 (RELATING TO DESIGN CRITERIA: GROUNDWATER AND SURFACE WATER PROTECTION SYSTEM).**

§ 90.34. Reclamation: postdisposal land use.

(a) An application shall contain a description of the proposed land use, following reclamation, of the lands to be affected within the proposed permit area by coal refuse disposal activities, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land use policies and plans. This description shall explain THE FOLLOWING:

(1) How the proposed postdisposal land use is to be achieved, and the necessary support activities which may be needed to achieve the proposed land use.

(2) [When pastureland is the postdisposal land use, the] THE detailed management plan to be implemented WHEN PASTURELAND IS THE POSTDISPOSAL LAND USE.

(3) [When a land use different from the predisposal land use is proposed, materials] MATERIALS needed for approval of the alternative use under § 90.166 (relating to postdisposal land use).

(4) The consideration given to making all of the proposed coal refuse disposal activities consistent with surface owner plans and applicable Commonwealth and local land use plans and programs.

(b) If an alternate land use is proposed, the description shall be accompanied by a copy of the comments concerning the proposed use from the legal or equitable owner of record of the surface areas to be affected by coal refuse disposal activities within the proposed permit area, and from this Commonwealth and local government agencies which would have to initiate, implement, approve or authorize the proposed use of the land following reclamation.

§ 90.45. Prime farmland.

A person who conducts, or intends to conduct, coal refuse disposal activities on prime farmlands historically used for cropland, IN ACCORDANCE WITH SUBCHAPTER E (RELATING TO SITE SELECTION), shall submit a plan, as part of the permit application, for the disposal and restoration of the land. The plan shall contain, at a minimum:

- (1) The proposed method and type of equipment to be used for removal, storage, and replacement of the soil in accordance with §§ 90.161–90.165.
- (2) The proposed measures to be taken during soil reconstruction to prevent excessive compaction and achieve soil bulk densities which will result in the restored area returned to equivalent or higher levels of yield as nonmined prime farmland in the surrounding area under equivalent levels of management.
- (3) The location of areas to be used for the separate stockpiling of soil and plans for soil stabilization before redistribution.
- (4) Documentation, if applicable, such as agricultural school studies or other scientific data from comparable areas, that supports the use of other suitable material, instead of the B or C soil horizon, to obtain on the restored area equivalent or higher levels of yield as nondisposal prime farmlands in the surrounding area under equivalent levels of management.
- (5) Plans for seeding or cropping the final graded disturbed land and the conservation practices to be used to adequately control erosion and sedimentation and restoration of an adequate soil

moisture regime, during the period from completion of regrading until release of the performance bond or equivalent guarantee under Chapter 86 Subchapter E (relating to coal exploration). Proper adjustments for seasons shall be proposed so that final graded land is not exposed to erosion during seasons when vegetation or conservation practices cannot be established due to weather conditions.

(6) Available agricultural school studies or other scientific data for areas with comparable soils, climate and management—including water management—that demonstrate that the proposed method of reclamation will achieve, within a reasonable time, equivalent or higher levels of yield after mining as existed before mining.

(7) A soil survey with description of soil mapping units and representative soil profile under § 90.22 (relating to prime farmland investigation). The soil profile description shall include, but not be limited to, soil horizon depths, pH and range of soil densities for each prime farmland soil unit within the proposed permit area. The Department may require the applicant to provide information on other physical and chemical soil properties as needed to make a determination that the operator has the technological capability to restore the prime farmland within the permit area to the soil reconstruction standards of §§ 90.161–90.165.

§ 90.49. STREAM BUFFER ZONE VARIANCE.

(a) **STREAM BUFFER ZONE RESTRICTION. COAL REFUSE DISPOSAL [OPERATIONS] MAY NOT OCCUR WITHIN 100 FEET (30.48 METERS) OF THE BANK OF A STREAM. THE DEPARTMENT MAY GRANT A VARIANCE FOR DISPOSAL OF COAL REFUSE UNDER SUBSECTION (c) IF CONSISTENT WITH SUBCHAPTER E.**

(b) **COMPLIANCE REQUIRED. SURFACE MINING OPERATIONS SUPPORTING COAL REFUSE DISPOSAL [COAL REFUSE DISPOSAL OPERATIONS OTHER THAN COAL REFUSE DISPOSAL] SHALL COMPLY WITH § 86.102(12) (RELATING TO AREAS WHERE MINING IS PROHIBITED OR LIMITED).**

(c) **VARIANCE. THE DEPARTMENT MAY GRANT A VARIANCE FROM THE 100-FOOT (30.48-METER) STREAM BUFFER ZONE TO DISPOSE OF COAL REFUSE AND TO**

RELOCATE OR DIVERT STREAMS IN THE 100-FOOT (30.48-METER) STREAM BUFFER ZONE. THE STREAM BUFFER ZONE IS THE AREA WITHIN 100 FEET (30.48 METERS) MEASURED HORIZONTALLY FROM THE BANK OF ANY STREAM.

(1) STREAM BUFFER ZONE VARIANCES WILL ONLY BE GRANTED IF THE OPERATOR DEMONSTRATES TO THE SATISFACTION OF THE DEPARTMENT THAT [THE], AS A RESULT OF THE VARIANCE, COAL REFUSE DISPOSAL WILL NOT ADVERSELY AFFECT WATER QUALITY AND QUANTITY, OR OTHER ENVIRONMENTAL RESOURCES OF THE STREAM AND WILL NOT CAUSE OR CONTRIBUTE TO THE VIOLATION OF APPLICABLE STATE OR FEDERAL WATER QUALITY STANDARDS.

(2) PRIOR TO GRANTING A VARIANCE, THE OPERATOR SHALL BE REQUIRED TO GIVE PUBLIC NOTICE OF THE APPLICATION IN TWO NEWSPAPERS OF GENERAL CIRCULATION IN THE AREA ONCE A WEEK FOR TWO SUCCESSIVE WEEKS.

(i) IF A PERSON FILES AN EXCEPTION TO THE PROPOSED VARIANCE WITHIN 20 DAYS OF THE LAST PUBLICATION OF THE NOTICE, THE DEPARTMENT WILL CONDUCT A PUBLIC HEARING WITH RESPECT TO THE APPLICATION WITHIN 30 DAYS OF RECEIPT OF THE EXCEPTION.

(ii) THE DEPARTMENT WILL ALSO CONSIDER INFORMATION OR COMMENTS SUBMITTED BY THE PENNSYLVANIA FISH AND BOAT COMMISSION PRIOR TO TAKING ACTION ON A VARIANCE REQUEST.

(3) THE VARIANCE WILL BE ISSUED AS A WRITTEN ORDER SPECIFYING THE METHODS AND TECHNIQUES THAT SHALL BE EMPLOYED TO PREVENT OR MITIGATE ADVERSE IMPACTS. MITIGATION CAN INCLUDE, BUT IS NOT LIMITED TO, COMPENSATORY RESTORATION AND ENHANCEMENTS OF NEARBY STREAMS OR STREAM SEGMENTS.

§ 90.50. DESIGN CRITERIA: GROUNDWATER AND SURFACE WATER PROTECTION SYSTEM.

(a) THE APPLICATION SHALL INCLUDE A DESCRIPTION OF THE SYSTEM THAT WILL BE INSTALLED TO PREVENT ADVERSE IMPACTS TO GROUNDWATER AND SURFACE WATER. THE DESCRIPTION SHALL INCLUDE MAPS, PLANS, AND OTHER INFORMATION NECESSARY TO EVALUATE THE DESIGN OF THE SYSTEM.

(b) THE APPLICATION SHALL INCLUDE A DESCRIPTION OF THE SYSTEM THAT WILL BE INSTALLED TO PREVENT PRECIPITATION FROM COMING INTO CONTACT WITH THE COAL REFUSE. THE DESCRIPTION SHALL INCLUDE MAPS, PLANS, AND OTHER INFORMATION NECESSARY TO EVALUATE THE DESIGN OF THE SYSTEM. THE COAL REFUSE DISPOSAL OPERATION SHALL BE DESIGNED IN PHASES TO MINIMIZE THE AMOUNT OF TIME THE ENTIRE COAL REFUSE AREA IS EXPOSED TO PRECIPITATION PRIOR TO THE INSTALLATION OF THE SYSTEM TO PREVENT PRECIPITATION FROM CONTACTING THE COAL REFUSE. THE APPLICATION SHALL DESCRIBE THE DESIGN OF THE SYSTEM FOR PREVENTING PRECIPITATION FROM CONTACTING COAL REFUSE AND HOW THE SYSTEM WILL BE INSTALLED IN ACCORDANCE WITH THE FOLLOWING:

(1) DURING ROUTINE COAL REFUSE DISPOSAL AS PHASES OF THE COAL REFUSE DISPOSAL AREA REACH CAPACITY.

(2) DURING PERIODS OF TEMPORARY CESSATION AS DIRECTED UNDER § 90.167(d) (RELATING TO CESSATION OF OPERATIONS: TEMPORARY).

(3) WHEN THE OPERATION PERMANENTLY CEASES.

(c) THE DEPARTMENT'S TECHNICAL GUIDANCE DOCUMENT NUMBER 563-2112-656, TITLED *LINERS - IMPOUNDMENTS, STOCKPILES, AND COAL REFUSE DISPOSAL AREAS*, SHALL BE USED AS GUIDANCE FOR DESIGNING COAL REFUSE DISPOSAL SITES INCORPORATING EARTHEN, ADMIXED OR SYNTHETIC LINERS OR

CAPS FOR PREVENTING ADVERSE IMPACTS TO GROUNDWATER AND SURFACE WATER AND FOR PREVENTING PRECIPITATION FROM CONTACTING COAL REFUSE.

[(c)] (d) THE APPLICATION SHALL INCLUDE A DESCRIPTION OF THE [SITE'S SUSCEPTIBILITY TO MINE SUBSIDENCE AND THE POTENTIAL IMPACTS OF MINE SUBSIDENCE ON THE SYSTEMS DESCRIBED IN SUBSECTIONS (a) AND (b). THE DESCRIPTION SHALL INCLUDE THE] MEASURES TO BE TAKEN TO ENSURE THE LONG-TERM FUNCTIONALITY OF THE SYSTEMS DESCRIBED IN SUBSECTIONS (a) AND (b) [WITH PARTICULAR ATTENTION TO SUBSIDENCE-INDUCED IMPACTS OR OTHER PHYSICAL OR CHEMICAL PROCESSES THAT COULD ADVERSELY AFFECT THE OPERATION OF THE SYSTEMS]. THE DESCRIPTION SHALL ADDRESS THE SITE'S SUSCEPTIBILITY TO MINE SUBSIDENCE AND THE POTENTIAL IMPACTS OF MINE SUBSIDENCE ON THE SYSTEMS DESCRIBED IN SUBSECTIONS (a) AND (b). THE DESCRIPTION SHALL ALSO ADDRESS THE POTENTIAL FOR DETERIORATION OF COMPONENTS OF THE SYSTEMS DESCRIBED IN SUBSECTIONS (a) AND (b) DUE TO OTHER PHYSICAL OR CHEMICAL PROCESSES INCLUDING BUT NOT LIMITED TO ATTACK FROM SULFATE-LADEN OR ACIDIC GROUNDWATER AND/OR LEACHATE.

§ 90.101. Hydrologic balance: general requirements.

(a) Coal refuse disposal activities shall be planned and conducted to minimize disturbances to the prevailing hydrologic balance in the permit and adjacent areas and to prevent material damage to the hydrologic balance outside the permit area. The Department may require additional preventive, remedial or monitoring measures to assure that material damage to the hydrologic balance outside the permit area is prevented.

(b) Coal refuse disposal activities shall be planned and conducted to prevent pollution of [the water] GROUNDWATER AND SURFACE WATER and prevent, to the maximum extent possible, changes to the water quantity, depth to groundwater and location of surface water drainage channels so that the approved postdisposal land use of the permit is not adversely affected.

(c) In no case shall the treatment requirements and effluent limitations established under § 90.102 (relating to hydrologic balance: water quality standards, effluent limitations and best management practices) be violated.

(d) Operations shall be conducted to prevent water pollution and, when necessary, treatment methods shall be used.

(e) A person who conducts coal refuse disposal activities shall conduct the disposal and reclamation operation to prevent water pollution and, when necessary, operate and maintain the necessary water treatment facilities until applicable treatment requirements and effluent limitations established under § 90.102 are achieved and maintained.

§ 90.116a. HYDROLOGIC BALANCE: WATER RIGHTS AND REPLACEMENT.

AN OPERATOR [A PERSON] WHO CONDUCTS COAL REFUSE DISPOSAL [ACTIVITIES] AND ADVERSELY AFFECTS A WATER SUPPLY BY CONTAMINATION, POLLUTION, DIMINUTION, OR INTERRUPTION SHALL COMPLY WITH § 87.119 (RELATING TO WATER RIGHTS AND REPLACEMENT).

§ 90.122. Coal refuse disposal.

(a) Coal refuse shall be transported and placed in designated disposal areas approved by the Department for this purpose. These areas shall be within the permit area. The coal refuse disposal area shall be designed, constructed and maintained to ensure:

(1) The leachate and surface runoff from the permit area will not degrade surface water or groundwater or exceed the effluent limitations of § 90.102 (relating to hydrologic balance: water quality standards, effluent limitations and best management practices).

(2) Prevention of combustion.

(3) Prevention of public health hazards.

(4) Stability of the fill.

(5) That the land mass designated as the coal refuse disposal area is suitable for reclamation and revegetation compatible with the natural surroundings.

(b) The fill shall be designed using recognized professional standards, certified by a qualified registered professional engineer, and approved by the Department.

(c) The foundation and abutment of the fill shall be stable under all conditions of construction and operation. Sufficient foundation investigations and laboratory testing of foundation materials and coal refuse shall be performed to determine the design requirements for stability of the facility. Analyses of foundation conditions shall include the effect of underground mine workings, if any, upon the stability of the structure.

(d) The coal refuse disposal fill shall be designed to attain a minimum long-term static factor of safety of 1.5 and a minimum seismic factor of safety of 1.2, based upon data obtained from subsurface exploration, geotechnical testing, foundation design, fill design and accepted engineering analyses.

[(e) The coal refuse disposal area shall be located on the most moderately sloping and naturally stable areas available as approved by the Department. Fill materials suitable for disposal shall be placed upon or above a natural terrace, bench or berm to provide additional stability and prevent mass movement.

(f) (e) When the average slope of coal refuse disposal area exceeds 1v:2.8h-36%, or such lesser slopes as may be designated by the Department based on local conditions, key way cuts, or excavation into stable bedrock or bedrock toe buttresses shall be constructed to stabilize the fill. When the toe of the fill rests on a downslope, stability analysis shall be performed in accordance with § 90.39 (relating to ponds, impoundments, banks, dams, embankments, piles and fills) to determine the size of rock toe buttresses and key way cuts.

[(g) The coal refuse disposal area should be located in areas where groundwater discharge and surface water flows are minimal.

(h) (f) If the disposal area contains springs, natural or manmade watercourses, or wet-weather seeps, the Department may approve an underdrain/subdrainage system, consisting of durable rock or other materials, designed and placed in a manner that prevents infiltration of the water into the fill material and ensures continued free drainage from the wet areas.

(g) THE DISPOSAL AREA SHALL BE PROVIDED WITH A SYSTEM TO PREVENT ADVERSE IMPACTS TO THE SURFACE WATER AND GROUNDWATER. THE SYSTEM SHALL BE CONSTRUCTED IN ACCORDANCE WITH DESIGN SCHEMATICS, TEST RESULTS, DESCRIPTIONS, PLANS, MAPS, PROFILES OR CROSS-SECTIONS APPROVED IN THE PERMIT AND SHALL FUNCTION TO PREVENT ADVERSE IMPACTS TO SURFACE WATER AND GROUNDWATER.

(h) WHEN A PHASE OF THE COAL REFUSE DISPOSAL AREA REACHES CAPACITY, THE OPERATOR SHALL INSTALL [THE DISPOSAL AREA SHALL BE PROVIDED WITH] A SYSTEM TO PREVENT PRECIPITATION FROM COMING IN CONTACT WITH THE COAL REFUSE IN THE COMPLETED PHASE. THE SYSTEM SHALL BE CONSTRUCTED IN ACCORDANCE WITH DESIGN SCHEMATICS, TEST RESULTS, DESCRIPTIONS, PLANS, MAPS, PROFILES OR CROSS-SECTIONS APPROVED IN THE PERMIT [AND SHALL FUNCTION TO PREVENT PRECIPITATION FROM CONTACTING THE COAL REFUSE. THE SYSTEM SHALL BE INSTALLED AS PHASES OF THE DISPOSAL AREA REACH CAPACITY, AS SPECIFIED IN THE PERMIT, WHEN THE OPERATION TEMPORARILY CEASES FOR A PERIOD IN EXCESS OF 90 DAYS (UNLESS THE DEPARTMENT APPROVES A LONGER PERIOD, NOT TO EXCEED ONE YEAR) OR WHEN THE OPERATION PERMANENTLY CEASES]. DURING NORMAL COAL REFUSE DISPOSAL, THE SYSTEM IS NOT REQUIRED TO PREVENT PRECIPITATION FROM COMING IN CONTACT WITH THE COAL REFUSE BEING PLACED IN PHASES OF THE OPERATION THAT HAVE NOT REACHED CAPACITY. THE SYSTEM SHALL BE DESIGNED TO ALLOW FOR REVEGETATION OF THE SITE IN ACCORDANCE WITH THE STANDARD OF SUCCESS UNDER § 90.159 (RELATING TO REVEGETATION) AND FOR THE

PREVENTION OF EROSION. IN THE EVENT THE OPERATOR TEMPORARILY CEASES OPERATION OF THE COAL REFUSE DISPOSAL AREA FOR A PERIOD IN EXCESS OF 90 DAYS (UNLESS THE DEPARTMENT, FOR REASONS OF LABOR STRIKE OR BUSINESS NECESSITY, APPROVES A LONGER PERIOD NOT TO EXCEED ONE YEAR) OR WHEN THE OPERATION PERMANENTLY CEASES, THE OPERATOR SHALL INSTALL THE SYSTEM FOR PREVENTING PRECIPITATION FROM CONTACTING THE COAL REFUSE.

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§ 90.167. Cessation of operations: temporary.

(a) As soon as it is known that the operation will temporarily cease for a period of more than 30 days, the operator shall submit a notice of intention, in writing, to temporarily cease the operation. The notice shall include a statement of the exact number of acres that will have been affected in the permit area, the extent and kind of reclamation of those areas, and identification of the disposal, regrading, revegetation, monitoring and water treatment activities which will continue during the temporary cessation.

(b) Temporary cessation of an operation [shall] MAY not exceed 90 days unless the Department approves a longer period for reasons of seasonal shutdown or labor strike.

(c) Temporary cessation shall not relieve the operator of the obligation to comply with any provisions of the permit.

(d) **THE OPERATOR SHALL INSTALL THE SYSTEM FOR PREVENTING PRECIPITATION FROM CONTACTING THE COAL REFUSE WHEN THE TEMPORARY CESSATION EXCEEDS 90 DAYS. THE DEPARTMENT MAY APPROVE A LONGER PERIOD, NOT TO EXCEED ONE YEAR, FOR REASONS OF A LABOR STRIKE OR BUSINESS NECESSITY.**

(Editor's Note: Subchapters E - G are proposed to be added. They are printed in regular type to enhance readability.)

SUBCHAPTER E. SITE SELECTION

§ 90.201. Definitions.

The following words and terms, when used in this Subchapter, have the following meanings, unless the context clearly indicates otherwise.

Preferred Site – A watershed polluted by acid mine drainage; a watershed containing an unreclaimed surface mine but which has no mining discharge; a watershed containing an unreclaimed surface mine with discharges that could be improved by the proposed coal refuse disposal operation; unreclaimed coal refuse disposal piles that could be improved by the proposed coal refuse disposal operation; or other unreclaimed areas previously affected by mining activities.

Search area – [For a proposed coal refuse disposal site associated with an existing coal mining activity, it is the] **THE** geographic area within a one-mile radius of [the] **AN** existing coal preparation facility[. For a proposed coal refuse disposal site associated with a proposed coal mining activity, it is a] **OR THE** 25-square mile geographic area [around the] **ENCOMPASSING A PROPOSED** coal preparation facility. [In defining the 25-square mile area, consideration shall be given to environmental, technical, transportation, economic, and social factors.]

Selected Site – A location selected by the applicant and approved by the Department under this Subchapter for which the applicant can then apply for a permit to conduct coal refuse disposal activities.

§ 90.202. General requirements.

(a) A preferred site shall be used for coal refuse disposal unless the applicant demonstrates to the Department that an alternate site is more suitable based upon engineering, geology, economics, transportation systems, and social factors and is not adverse to the public interest.

(b) THE APPLICANT IS REQUIRED TO DETERMINE WHETHER THE SEARCH AREA CONTAINS A PREFERRED SITE.

(1) FOR A NEW COAL REFUSE DISPOSAL AREA THAT WILL SUPPORT AN EXISTING COAL PREPARATION FACILITY, THE APPLICANT SHALL EXAMINE THE GEOGRAPHIC AREA WITHIN A 1-MILE RADIUS OF THE EXISTING COAL PREPARATION FACILITY.

(2) FOR A PROPOSED COAL REFUSE DISPOSAL AREA THAT WILL SUPPORT A PROPOSED COAL PREPARATION FACILITY, THE APPLICANT SHALL EXAMINE A 25-SQUARE MILE GEOGRAPHIC AREA ENCOMPASSING THE PROPOSED COAL PREPARATION FACILITY. IN DEFINING THE 25-SQUARE MILE AREA, CONSIDERATION SHALL BE GIVEN TO ENVIRONMENTAL, TECHNICAL, TRANSPORTATION, ECONOMIC, AND SOCIAL FACTORS WHERE APPLICABLE.

[(b)] **(c)** Where there are no preferred sites located within the search area, the applicant must conduct a comparative analysis of the potential coal refuse disposal sites in accordance with § 90.204(b) (relating to Proposing an Alternate Site).

[(c)] **(d)** The Department will not approve a site proposed by the applicant for coal refuse disposal activities when the Department finds [one of the following:] **THAT** [(1)] the adverse environmental impacts of using the site for coal refuse disposal activities would clearly outweigh the public benefits.

[(2)] The site is known or is likely to contain federally listed threatened or endangered plants or animals unless the Department concludes and the U.S. Fish and Wildlife Service concurs that the proposed use of the site would be unlikely to adversely affect those species.]

[(d)] **(e)** [The Department will not approve a site, unless it is a preferred site, proposed by the applicant for coal refuse disposal if the site contains one or more of the following:] **EXCEPT**

ON PREFERRED SITES, THE DEPARTMENT SHALL NOT APPROVE COAL REFUSE DISPOSAL ON OR WITHIN ANY OF THE FOLLOWING AREAS:

- (1) Prime Farmlands.
- (2) An exceptional value watershed as defined under 25 Pa. Code Chapter 93 (Relating to Water Quality Standards).
- (3) **SITES KNOWN TO CONTAIN** threatened or endangered [plants or] animals listed exclusively under Pennsylvania's protection programs.
- (4) An area that **IS HYDROLOGICALLY CONNECTED TO AND** contributes at least five percent of the drainage to wetlands designated as exceptional value under 25 Pa. Code Chapter 105 (relating to Dam Safety and Waterway Management) unless a larger percentage contribution is authorized by the Department after consultation with the Pennsylvania Fish and Boat Commission.
- (5) A watershed less than four square miles in area upstream of the intake of a public water supply .
- (6) A watershed less than four square miles in area upstream of the upstream limit of a public recreational impoundment.
- (7) **SITES KNOWN TO CONTAIN FEDERALLY LISTED THREATENED OR ENDANGERED PLANTS OR ANIMALS. AT PREFERRED SITES KNOWN TO CONTAIN FEDERALLY LISTED THREATENED OR ENDANGERED SPECIES, APPROVAL WILL BE GRANTED ONLY WHERE THE DEPARTMENT CONCLUDES AND THE U.S. FISH AND WILDLIFE SERVICE CONCURS THAT THE PROPOSED ACTIVITY IS NOT LIKELY TO ADVERSELY AFFECT FEDERALLY LISTED THREATENED OR ENDANGERED SPECIES OR RESULT IN THE TAKE OF FEDERALLY LISTED THREATENED OR ENDANGERED SPECIES IN VIOLATION OF SECTION 9 OF THE ENDANGERED SPECIES ACT.**

[(e)] **(f)** As part of the site selection process an applicant may request approval for more than one site. The Department will evaluate each site proposed for coal refuse disposal and, where the Department finds that a proposed site meets the requirements of this Subchapter, it will designate it as an approved site. The applicant will then have the option of choosing a selected site from among the approved sites and submitting an application for coal refuse disposal for that site.

§ 90.203. Proposing a preferred site.

If the applicant proposes to use a preferred site, the Department will approve the proposed site subject to § 90.202(c) (relating to General Requirements) provided the applicant demonstrates that the attendant adverse environmental impacts will not clearly outweigh the public benefits.

§ 90.204. Proposing an alternate site.

(a) Where a preferred site(s) exists within the search area, but the applicant proposes an alternate site, the applicant must:

(1) Demonstrate that the alternate site is more suitable, **USING CRITERIA IN § 90.202(a) (RELATING TO GENERAL REQUIREMENTS)**, than all preferred sites within the search area.

(2) Identify other alternate sites considered and provide the basis for the rejection of these sites.

(3) Based on reasonably available data, demonstrate that it is the most suitable site based on environmental, economic, technical, transportation and social factors.

(b) If a preferred site does not exist within the search area, the applicant shall:

(1) Identify all the sites considered within the search area and provide the basis for their consideration.

(2) Provide the basis for the rejection of considered sites.

(3) Based on reasonably available data, demonstrate to the Department that the proposed site is the most suitable based on environmental, economic, technical, transportation, and social factors.

§ 90.205. Alternatives analysis.

The alternatives analysis required by §§ 90.202(b)[,] AND 90.204 (relating to general requirements; and proposing an alternate site) [and 90.205] satisfies the requirement for an alternatives analysis under the act of November 26, 1978 (P.L. 1375, No. 325), known as the “Dam Safety and Encroachments Act” and regulations promulgated pursuant to the Dam Safety and Encroachments Act.

§ 90.206. Disapproval of a proposed site.

If the Department disapproves the applicant’s proposed site, the applicant may submit a new proposal supporting the selection of another site located either within or outside of the search area.

§ 90.207. Approval of a selected site.

Department approval of a selected site does not indicate the Department will approve an application for coal refuse disposal activities for the selected site.

**SUBCHAPTER F. COAL REFUSE DISPOSAL ACTIVITIES ON AREAS
WITH PREEXISTING POLLUTIONAL DISCHARGES**

§ 90.301. Scope.

(a) This Subchapter specifies procedures and rules applicable to those who seek authorization to engage in coal refuse disposal activities on an area on which there are preexisting pollutional discharges resulting from previous mining and describes the terms and conditions under which the Department may release bonds to operators who have received authorization.

(b) Chapter 86 (relating to Surface and Underground Coal Mining: General) and Subchapters A – D apply to authorizations to mine areas with preexisting pollutional discharges except as specifically modified by this Subchapter.

§ 90.302. Definitions.

The following words and terms, when used in this Subchapter, have the following meanings, unless the context clearly indicates otherwise:

Abatement Plan – Any individual technique or combination of techniques, the implementation of which will result in reduction of the base line pollution load. Abatement techniques include but are not limited to: Addition of alkaline material, special plans for managing toxic and acid-forming material, regrading, revegetation and relocating coal refuse to a coal refuse disposal area that includes systems to prevent adverse impacts to surface and groundwater and to prevent precipitation from contacting the coal refuse.

Actual Improvement – The reduction of the baseline pollution load resulting from the implementation of the approved abatement plan; except that any reduction of the baseline pollution load achieved by water treatment may not be considered as actual improvement provided, however, that treatment approved by the Department of the coal refuse before, during or after placement in the coal refuse disposal area shall not be considered to be water treatment.

Baseline Pollution Load – The characterization of the pollutional material being discharged from or on the pollution abatement area, described in terms of mass discharge for each parameter deemed relevant by the Department, including seasonal variations and variations in response to precipitation events. The Department will establish in each authorization the specific parameters it deems relevant for the baseline pollution load, including, at a minimum, iron and acid loadings.

Best Professional Judgment – The highest quality technical opinion forming the basis for the terms and conditions of the treatment level required after consideration of all reasonably available and

pertinent data. The treatment levels shall be established by the Department under Sections 301 and 402 of the Federal Water Pollution Control Act, Act of June 30, 1948 (33 U.S.C.A. §§ 1311 and 1342).

Best Technology – Measures and practices which will abate or ameliorate, to the maximum extent possible, discharges from or on the pollution abatement area. These measures include engineering, geochemical or other applicable practices.

Coal Refuse Disposal Activities – The storage, dumping or disposal of any waste coal, rock, shale, slurry, culm, gob, boney, slate, clay, underground development wastes, coal processing wastes, excess soil and related materials, associated with or near a coal seam, that are either brought above ground or otherwise removed from a coal mine in the process of mining coal or are separated from coal during the cleaning or preparation operations. The term shall not include the removal or storage of overburden from surface mining activities.

Excess Soil and Related Material – Rock, clay or other material located immediately above or below a coal seam and which are extracted from a coal mine during the process of mining coal. The term does not include topsoil or subsoil.

Pollution Abatement Area – The part of the permit area that is causing or contributing to the baseline pollution load. It shall include adjacent and nearby areas that must be affected to bring about significant improvements of the baseline pollution load and may include the immediate locations of the discharges.

§ 90.303. Applicability.

(a) Authorization may [not] be granted under this Subchapter **WHEN** [unless] the authorization is part of the following:

(1) A permit issued after February 6, 1995, but only if the authorization request is made during one of the following periods:

(i) At the time of the submittal of the permit application for the coal refuse disposal activities, including the proposed pollution abatement area.

(ii) Prior to a Department decision to issue or deny that permit.

(2) A permit revision under § 86.52 (relating to permit revisions), but only if the operator affirmatively demonstrates to the satisfaction of the Department that:

(i) The operator has discovered polluttional discharges within the permit area that came into existence after its permit application was approved.

(ii) The operator has not caused or contributed to the polluttional discharges.

(iii) The proposed pollution abatement area is not hydrologically connected to an area where coal refuse disposal activities have been conducted under the permit.

(iv) The operator has not affected the proposed pollution abatement area by coal refuse disposal activities.

(v) The Department has not granted a bonding authorization and mining approval for the area under § 86.37(b) (relating to Criteria for Permit Approval or Denial).

(b) Notwithstanding Subsection (a), no authorization may be granted under this Subchapter for repermitting under §§ 86.12 and 86.14 (relating to continued operation under interim permits; and permit application filing deadlines), permit renewals under § 86.55 (relating to Permit Renewals: General Requirements) or permit transfers under § 86.56 (relating to Transfer of Permit).

§ 90.304. Application for authorization.

(a) An operator who requests authorization under this Subchapter shall comply with the permit application requirements of Chapter 86 (relating to Surface and Underground Coal Mining:

General) and Subchapters A – D, except as specifically modified by this Subchapter. The operator shall also:

(1) Delineate on a map the proposed pollution abatement area, including the location of the preexisting discharges.

(2) Provide a description of the hydrologic balance for the proposed pollution abatement area that includes:

(i) Results of a detailed water quality and quantity monitoring program, including seasonal variations, variations in response to precipitation events and modeled baseline pollution loads using this monitoring program.

(ii) Monitoring for pH alkalinity, acidity, total iron, total manganese, aluminum, sulfates, total suspended solids and other water quality parameters the Department deems relevant.

(3) Provide a description of the abatement plan that represents best technology and includes the following:

(i) Plans, cross-sections and schematic drawings describing the abatement plan proposed to be implemented.

(ii) A description and explanation of the range of abatement level that is anticipated to be achieved, costs and each step in the proposed abatement plan.

(iii) A description of the standard of success for revegetation necessary to ensure success of the abatement plan.

(b) The operator seeking this authorization shall continue the water quality and quantity monitoring program required by paragraph (2) after making the authorization request. The operator shall

submit the results of this continuing monitoring program to the Department on a monthly basis until a decision on the authorization request is made.

§ 90.305. Application approval or denial.

(a) Authorization may not be granted under this Subchapter unless the operator seeking the authorization affirmatively demonstrates the following to the satisfaction of the Department on the basis of information set forth in the application:

(1) Neither the operator, nor an officer, principal shareholder, agent, partner, associate, parent corporation, subsidiary or affiliate, sister corporation, contractor or subcontractor, or a related party as defined in § 86.1 (relating to Definitions) has either of the following:

(i) Legal responsibility or liability as an operator for treating the water pollution discharges from or on the proposed pollution abatement area.

(ii) Statutory responsibility or liability for reclaiming the proposed pollution abatement area.

(2) The proposed abatement plan will result in significant reduction of the baseline pollution load and represents best technology.

(3) The land within the proposed pollution abatement area can be reclaimed.

(4) The coal refuse disposal activities on the proposed pollution abatement area will not cause additional surface water pollution or groundwater degradation.

(5) The standard of success for revegetation will be achieved. The standard of success for revegetation for sites previously reclaimed to the standards of Chapters 87, 88 and 90 shall be the standards set forth in § 90.159 (relating to Revegetation: Standards for Successful Revegetation). The standard of success for revegetation for sites not previously reclaimed to the standards of Chapters 87, 88 and 90 shall be, at a minimum, the following, provided the site is not a bond forfeiture

site where the forfeited money paid into the fund is sufficient to reclaim the forfeited site to the applicable standards:

(i) A ground cover of living plants not less than can be supported by the best available topsoil or other suitable material in the reaffected area.

(ii) A ground cover no less than that existing before disturbance of the area by coal refuse disposal activities.

(iii) Adequate vegetation to control erosion. Vegetation may be no less than that necessary to ensure the success of the abatement plan.

(6) The coal refuse disposal activities on permitted areas other than the proposed pollution abatement area will not cause surface water pollution or groundwater degradation.

(7) Requirements of § 86.37(a) (relating to Criteria for Permit Approval or Denial) that are consistent with this section have been met.

(b) An authorization may be denied under this Subchapter if granting the authorization will, or is likely to, affect a legal responsibility or liability under the Clean Streams Law (35 P.S. §§ 691.1 – 691.1001), the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1 – 1396.19a), Chapter 86 (relating to Surface and Underground Coal Mining: General) or Subchapters A – D, for the proposed pollution abatement area or other areas or discharges in the vicinity of the proposed pollution abatement area.

(c) Authorization may not be granted under this Subchapter unless there are one or more preexisting discharges from or on the pollution abatement area.

(d) The authorization allowed under this Subchapter is only for the pollution abatement area and does not apply to other areas of the permit.

§ 90.306. Operational requirements.

(a) An operator who receives an authorization under this Subchapter shall comply with the requirements of Chapter 86 (relating to Surface and Underground Coal Mining: General) and Subchapters A –D except as specifically modified by this Subchapter. The operator shall also:

(1) Implement the approved water quality and quantity monitoring program for the pollution abatement area until the requirements of § 90.309 (relating to Criteria and Schedule for Release of Bonds on Pollution Abatement Areas) are met.

(2) Implement the approved abatement plan.

(3) Notify the Department immediately prior to the completion of each step of the abatement plan.

(4) Provide a progress report to the Department within 30 days after the completion of each step of the abatement program that includes a [notarized] statement signed by the operator, and if required by the Department, a statement signed by the supervising engineer, that all work has been performed in accordance with the terms and conditions of the pollution abatement authorization, the approved maps, plans, profiles and specifications.

§ 90.307. Treatment of discharges.

(a) Except for preexisting discharges that are not encountered during coal refuse disposal activities or the implementation of the abatement plan, the operator shall comply with § 90.102 (relating to Hydrologic Balance: Effluent Standards).

(b) The operator shall treat the preexisting discharges that are not encountered during coal refuse disposal activities or implementation of the abatement plan to comply with the effluent limitations established by best professional judgment. The effluent limitations established by best professional judgment may not be less than the baseline pollution load. If the baseline pollution load, when expressed as a concentration for a specific parameter, satisfies the effluent limitation at § 90.102 for that

parameter, the operator shall treat the preexisting discharge for that parameter to comply with either effluent limitations established by best professional judgment or the effluent limitations at § 90.102.

(c) For purposes of subsections (a) and (b), the term encountered may not be construed to mean diversions of surface water and shallow groundwater flow from areas undisturbed by the implementation of the abatement plan that would otherwise drain into the affected area, as long as the diversions are designed, operated and maintained under § 90.104 (b) – (h) (relating to Hydrologic Balance: Diversions).

(d) An operator required to treat preexisting discharges will be allowed to discontinue treating the discharges under subsection (b) when the operator affirmatively demonstrates the following to the Department's satisfaction:

(1) The preexisting discharges are meeting the effluent limitations established by Subsection (b) as shown by groundwater and surface water monitoring conducted by the operator or the Department.

(2) Coal refuse disposal activities under the permit – including the pollution abatement area – are being or were conducted under the requirements of the permit and the authorization, and Chapter 86 (relating to Surface and Underground Mining: General) and this Chapter except as specifically modified by this Subchapter.

(3) The operator has implemented each step of the abatement plan as approved in the authorization.

(4) The operator did not cause or allow additional surface water pollution or groundwater degradation by re-affecting the pollution abatement area.

(e) If after discontinuance of treatment of discharges under subsection (d) the discharges fail to meet the effluent limitations established by subsection (b), the operator shall reinstitute treatment of the discharges under subsection (b). An operator who reinstates treatment under this subsection will be allowed to discontinue treatment if the requirements of subsection (d) are met.

(f) Discontinuance of treatment under Subsection (d) may not be deemed or construed to be or to authorize a release of bond under § 90.309 (relating to Criteria and Schedule for Release of Bonds on Pollution Abatement Areas).

§ 90.308. Request for bond release.

Sections 86.172(c) and 90.309 (relating to Criteria for Release of Bond; and Criteria and Schedule for Release of Bonds on Pollution Abatement Areas) apply to the release of bonds for pollution abatement areas authorized by this Subchapter. Section 86.172(a), (b) and (d) shall not be applicable to the release of bonds.

§ 90.309. Criteria and schedule for release of bonds on pollution abatement areas.

(a) The Department will release up to 50% of the amount of bond for the authorized pollution abatement area if the applicant demonstrates and the Department finds the following:

(1) The coal refuse disposal activities were conducted on the permit area, including the pollution abatement area, under the requirements of the permit and the authorization, Chapter 86 (relating to Surface and Underground Mining: General) and this Chapter except as specifically modified by this Subchapter.

(2) The Operator has satisfactorily completed backfilling, [planting,] grading, installing the water impermeable cover and drainage control in accordance with the approved reclamation plan.

(3) The Operator has properly implemented each step of the pollution abatement plan approved and authorized under this Subchapter.

(4) The Operator has not caused degradation of the baseline pollution load at any time during the 6 months prior to the submittal of the request for bond release under this subsection and until the bond release is approved as shown by all groundwater and surface water monitoring conducted by

the permittee under § 90.306(a)(1) (relating to Operational Requirements) or conducted by the Department.

(5) The Operator has not caused or contributed to surface water pollution or groundwater degradation by re-affecting the pollution abatement area.

(b) The Department will release up to an additional 35% of the amount of bond for the authorized pollution abatement area but retain an amount sufficient to cover the cost to the Department of reestablishing vegetation if completed by a third party if the operator demonstrates and the Department finds the following:

(1) The Operator has replaced the topsoil or material conserved under § 90.97 (relating to Topsoil: Removal), completed final grading, planting and established revegetation under the approved reclamation plan and achieved the standards of success for revegetation in § 90.305(a)(5) (relating to Approval or Denial).

(2) The Operator has not caused or contributed to groundwater or surface water pollution by re-affecting the pollution abatement area.

(3) The Operator has achieved the following standards:

(i) Achieved the actual improvement of the baseline pollution load described in the approved abatement plan as shown by groundwater and surface water monitoring conducted by the permittee for the time provided in the abatement plan after completion of backfilling, final grading, drainage control, topsoiling and establishment of revegetation to achieve the standard for success in § 90.305(a)(5).

(ii) Achieved the following:

(A) At a minimum has not caused degradation of the baseline pollution load as shown by groundwater and surface water monitoring conducted by the operator or the Department for one of the following:

(I) For a period of 12 months from the date of initial bond release under subsection (a), if backfilling, final grading, drainage control, placement of impermeable cover, topsoiling and establishment of revegetation to achieve the standard of success for revegetation in § 90.205(a)(5) have been completed.

(II) If treatment has been initiated at any time after initial bond release under subsection (a) and § 90.307(e) (relating to Treatment of Discharges), for 12 months from the date of discontinuance of treatment under § 90.307(d) (relating to Treatment of Discharges), if backfilling, final grading, drainage control, placement of impermeable cover, topsoiling and establishment of revegetation to achieve the standard of success for revegetation in § 90.305(a)(5) have been completed.

(B) Conducted all the measures provided in the approved abatement plan and additional measures specified by the Department in writing at the time of initial bond release under subsection (a) of this section for the area requested for bond release.

(C) Caused aesthetic or other environmental improvements and the elimination of public health and safety problems by engaging in coal refuse disposal activities and re-affecting the pollution abatement area.

(D) Stabilized the pollution abatement area.

(c) The Department will release the remaining portion of the amount of bond on the authorized pollution abatement area if the operator demonstrates and the Department finds the following:

(1) The Operator has successfully completed the approved abatement and reclamation plans, and the pollution abatement area is capable of supporting the postdisposal land use approved under § 90.166 (relating to Postdisposal Land Use).

(2) The Operator has complied with the permit and the authorization, Chapter 86 and this Chapter, except as specifically modified by this Subchapter.

(3) The Operator has not caused degradation of the baseline pollution load from the time of bond release under subsection (b) of this Section or, if treatment has been initiated after bond release under subsection (b) of this Section in accordance with § 90.307(e) for 5 years from the discontinuance of treatment under § 90.307(d).

(4) The applicable liability period has expired under § 86.151 (relating to period of liability).

SUBCHAPTER G. EXPERIMENTAL PRACTICES

§ 90.401. General.

(a) To encourage advances in coal refuse disposal practices, coal refuse site reclamation, and advances in technology or practices that will enhance environmental protection with respect to coal refuse disposal activities, the Department may grant permits approving experimental practices and demonstration projects. The Department may grant these permits under the following circumstances:

(1) The environmental protection provided will be potentially more protective or at least as protective as required by this Chapter, the Coal Refuse Disposal Control Act (52 P.S. §§30.51-30.66) and Chapter 86 (relating to Surface and Underground Coal Mining: General).

2) The coal refuse disposal activities approved under the permits are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practices or demonstration projects.

(3) The experimental practices or demonstration projects do not reduce the protection afforded public health and safety below that provided by this Chapter, the Coal Refuse Disposal Control Act, and Chapter 86.

(b) Experimental practice permits issued under this Subchapter shall meet all the provisions, standards, and information requirements of the federal 30 CFR Part 785, Section 785.13 (relating to Experimental Practices Mining).

ENVIRONMENTAL QUALITY BOARD

25 PA. CODE CHAPTERS 88 AND 90

COAL REFUSE DISPOSAL

COMMENT AND RESPONSE DOCUMENT

Comments were received from the following parties. Comments have been ordered by section. The commentator(s) are referenced by corresponding number at the end of each comment.

- 1. U.S. Fish and Wildlife Service**
- 2. Pennsylvania Coal Association**
- 3. Pennsylvania Game Commission**
- 4. Independent Regulatory Review Commission**
- 5. United States Office of Surface Mining**

§ 88.310. Coal refuse disposal: general requirements and § 90.167. Cessation of operations: temporary.

Comment: Section 88.310(k) requires installation of a system to prevent precipitation from contacting the coal refuse when an operation temporarily ceases for more than 90 days “unless the Department approves a longer period...” Under 52 P.S. § 30.56a(i), the Department may approve a longer period “for reasons of a labor strike or business necessity.” For improved clarity, the EQB should specify the conditions under which the Department will extend the 90-day period, and the criteria it will use to determine a “business necessity.”

Section 90.167(d) states that, “The department may approve a longer period, not to exceed 1 year, for reasons of a labor strike or *business necessity*.” The EQB should specify what it considers to be a “business necessity.” (4)

Response: The term “business necessity” can cover a multitude of circumstances including equipment failure, loss of coal contract, weather related delays, and fires or explosions at the source mine. The term “business necessity” is broad. However, there is benefit to the regulated community and the Department in using a broad term. In this instance, neither the regulated industry nor the Commonwealth benefits from losing flexibility due to incorporation of restrictive criteria into the regulation. The district mining office staff will assess the request for an extension on a case-by-case basis. This allows for a common sense approach, which can better address unforeseen problems at a given mine site.

§ 90.1. Definitions. and § 90.5. Site selection and permitting.

Comment: The definition of “public recreational impoundment” is taken directly from the statute. Rather than repeating the definition, the EQB should consider simply referencing the statute. Also, the term “operator” is used throughout the regulation, but is not defined. For clarity, the EQB should include a reference to the definition of “operator” in 52 P.S. § 30.53(8). (4)

Response: Repeating statutory definitions in the regulations increases the readability and clarity of the regulations. It serves to make the regulation more user-friendly by making definitions of important terms readily available to the reader. Simply cross-referencing definitions forces the public and the regulated community to constantly rely on multiple, hard-to-procure publications in order to make sense of the regulations.

The suggested statutory definition of the term “operator” has been inserted under § 90.1.

Comment: Section 90.5 should be revised to clarify when a DEP decision is final and appealable. PCA suggests adding the following language to the end of subsection 90.5(b):

“...The Department’s disapproval of a selected site shall be a final decision of the Department. However, approval of a selected site is not a final decision...”

This change will avoid premature appeals of site approvals, which are not final because the Department must still consider an application and issue a permit for the selected site. Conversely, disapproval of a selected site will finally preclude the operator from obtaining a permit for the site. (2)

Response: The Department agrees with the spirit of the comment. However, clarifying language is not necessary. The site selection process outlined in § 90.5 is the prerequisite to the permitting process. Since the process continues following approval of a selected site, the approval of a site is not an appealable action. Appeals may be appropriately filed at the time of permit issuance. However, when the Department disapproves a site, the operator is precluded from moving to the next step in the process. Disapproval is therefore a final appealable action.

Comment: Subsection (a) of § 90.5 refers to “coal refuse disposal activities.” The term “coal refuse disposal operations” is used in the preamble and in other sections of the regulation, such as § 90.49. In the Act and Subchapter F, “coal refuse disposal activities” is the defined term. If these terms have the same meaning, “coal refuse disposal activities” should be used consistently and exclusively throughout the regulation. If these terms have different meanings, each term should be separately defined. (4)

Definitions of the terms *coal refuse disposal* and *coal refuse disposal operations* would be helpful in construing the regulation. (2)

Response: Unfortunately, terms such as *coal refuse disposal operation(s)*, *coal refuse disposal activities*, *coal refuse disposal areas*, and *coal refuse disposal* have been used indiscriminately throughout the implementing statutes and regulations. It is beyond the scope of this rulemaking to address that issue. However, §§ 90.1 and 90.49 have been rewritten to help clarify the proposed regulation. A definition of *coal refuse disposal* has been added at § 90.1. *Coal refuse disposal operations* has been deleted from § 90.49. New language has been inserted at § 90.49(b) to clarify the subset of activities that is subject to § 86.102(12).

§ 90.12. Geology

Comment: PCA suggests adding the phrase “as appropriate” at the end of the first paragraph and after “borings” at the end of the first sentence of the second paragraph. Not all sites will require all of the information, and including an absolute requirement may result in appeals for failure to provide information that is not necessary to the Department’s review of the application. PCA also suggests that non-use aquifers be excluded from the description requirements. This is consistent with other programs, such as the Land Recycling and Remediation program, which recognizes that some aquifers are not useable. (2)

Response: The Department disagrees. The term “as appropriate” obfuscates the regulation, where currently it is quite clear. As noted in the comment, the non-use aquifer concept flows from Act 2 provisions of the Land Recycling and Remediation program. However, Act 2 specifically excludes mining. Inclusion of the non-use aquifer concept in the mining program would run counter to the current mining statutes and regulations. These require that mining activities be conducted to ensure protection of the hydrologic balance, including measures to protect the quality and quantity of surface water and groundwater within the permit and adjacent areas.

§ 90.13. Groundwater information.

Comment: Subsection (2) of § 90.13 requires “...Specific attention shall be given to describing the groundwater flow system....” The phrase “specific attention” is vague. The EQB should consider revising this provision to simply require a description of the groundwater flow system. (4)

Response: The wording has been changed as suggested.

§ 90.49. Stream buffer zone variance.

Comment: Section 90.49(c)(1) should be changed to mirror 30 CFR 816.57. Pennsylvania’s provision is missing the word “activities.” To be consistent with the intent of the federal regulation, the Department of Environmental Protection should change this section to read “...if the operator demonstrates to the satisfaction of the Department that the coal refuse disposal *activities* will not adversely affect...” (1)

Response: The Department disagrees. Section 90.49 reflects provisions of section 6.1(h)(5) of the Coal Refuse Disposal Control Act as amended by Act 114. Section 6.1(h)(5) clearly enumerates the operations that are subject to that section’s variance provision. These specific operations are the disposal of coal refuse and the related stream diversions or relocations. Requests for variances for other mining operations fall under the variance provisions of § 86.102(12) of Chapter 86. Section 86.102(12) covers activities listed under the term “surface mining operations” as defined in § 86.101. A reference to § 86.102(12) is included in the proposed rulemaking at § 90.49(b).

Comment: Section 90.49(c)(3) states that, “the stream buffer zone variance will be issued as a written order specifying the methods and techniques that shall be employed to prevent *or mitigate* adverse impacts.” This provision is contrary to § 90.49(c)(1), which states that adverse impacts are not allowed. It follows that if something is not allowed, there is no need to mitigate it. All references to mitigating adverse impacts should be eliminated, both in § 90.49(c)(3) and in the associated technical guidance document. (1)

Response: The regulatory language is based on statutory language that initially included prevention of “significant adverse hydrologic or water quality impacts.” Subsequently, the word “significant” was dropped at the direction of OSM. The statute does not explicitly require prevention of adverse impacts. It allows the Department to review the

proposed site with consideration for mitigation measures with the ultimate goal being no resultant adverse water quality impacts. Therefore, the word “mitigate” will remain in the proposed regulation and in the technical guidance in order to maintain consistency with the statute.

Comment: Language regarding stream relocations and diversions was included in § 90.49 of the draft Proposed Rulemaking reviewed and approved by the Mining and Reclamation Advisory Board (MRAB), but was removed from the proposed rulemaking as published in the *Pennsylvania Bulletin*. The language should be replaced to conform to the statute and the MRAB’s approval of the draft. (2)

Response: The term *coal refuse disposal*, as used in §90.49, has been defined (see § 90.1. *Definitions*) to include stream relocations and diversions as well as other engineered features integral to the placement of the fill. By using a broadly defined term, *coal refuse disposal*, problems associated with not referencing each individual engineering feature can be avoided. Additionally, in order to adhere as closely as possible to the statutory language, the “stream relocations and diversions” wording has been inserted at § 90.49(c).

Comment: Subsections (a) and (c) of § 90.49 should be revised to apply to “perennial or intermittent stream” and “any perennial or intermittent stream,” respectively. This is consistent with §§ 86.102 and 86.101, which includes coal refuse disposal in the definition of “surface mining operation” subject to the buffer zone, which applies to perennial and intermittent streams. (2)

Response: Section 90.49 follows the statutory language of the CRDCA and will remain unchanged. Furthermore, the CRDCA buffer zone provision was amended after §§ 86.101 and 86.102 were promulgated and after the buffer zone provision of SMCRA was enacted. Under the rules of statutory construction the language of the CRDCA will control because it is later in time and more specific, applying only to coal refuse disposal.

Comment: Subsection (c)(1) of § 90.49 should be revised by adding “downstream of the system installed pursuant to § 6.1(i) of the Coal Refuse Disposal Control Act and § 90.50(a) of this Chapter, to prevent adverse impacts to groundwater and surface water.” Act 114 clearly contemplated the diversion and relocation of streams, including the piping of streams through the disposal area. This change would simply reflect that “adverse water quality impacts” must be prevented downstream of the fill area, not within the reach of the stream contained within or diverted through the fill. (2)

Response: The regulatory language is consistent with the statutory language. However, as a practical matter adverse impacts will be assessed downstream of the site’s discharge. The proposed language will remain unchanged.

Comment: Section 90.49(c)(2)(ii) relates to “other environmental uses of the stream,” which would include riparian and wetland areas affiliated with the stream. Because of the Commission’s obligation to protect such critical/unique wildlife habitats under Title 34 of

the *Game and Wildlife Code*, it is highly suggested that the last sentence include the consideration of comments submitted by the Pennsylvania Game Commission. (3)

Response: The Pennsylvania Fish and Boat Commission is referenced in § 90.49 because it is explicitly mentioned in the CRDCA. The Pennsylvania Game Commission will be given an opportunity to review and comment regarding stream barrier variances. The Technical Guidance Document covering stream barrier variances at coal refuse sites specifically directs the Department to provide the Game Commission with a copy of the variance application and to consider their comments.

Comment: Subsection (c)(2)(ii) of § 90.49 should be revised to “consider timely information submitted by the Fish and Boat Commission” to avoid unnecessary delays and uncertainty. (2)

Response: The suggested wording is not necessary. The existing technical guidance document already restricts the comment period to 30 days. Any comment submitted within the comment period is considered timely.

Comment: Section 90.49(a) and (c) - Under 52 P.S. §30.56a(h)(5), a variance can be granted under certain circumstances “to dispose of coal refuse *and to relocate or divert streams in the stream buffer zone.*” (Emphasis added) Subsections (a) and (c) do not include the statutory variance to relocate or divert streams. For consistency with the statute, the EQB should revise Subsection (c) to address stream relocation or diversion. (4)

Response: Language regarding the relocation and diversion of streams has been added to § 90.49 (c) as suggested.

Comment: Section 90.49(b) uses the phrase “[c]oal refuse disposal operations other than coal refuse disposal.” What are “coal refuse disposal operations other than coal refuse disposal”? (4)

Response: The phrase “coal refuse disposal operations other than coal refuse disposal” has been deleted. New language has been inserted, which clarifies the subset of activities that are subject to § 86.102(12).

Comment: Section 90.49(c)(1) states “Stream buffer zone variances will only be granted if the operator demonstrates to the satisfaction of the Department that the coal refuse disposal will not adversely affect water quality and quantity...” (Emphasis added) It is unclear how an operator can make the required demonstration. The final-form regulation should include the criteria the Department will use to judge if an operator has made an adequate demonstration. (4)

Response: Adverse water quality and quantity impacts would include the following affects at any point downstream of the site’s discharge: accelerated stream channel erosion, conditions leading to increased stream channel instability, substrate damage or

increased flooding potential, and changes in stream chemistry resulting in or contributing to a violation of an applicable state or federal water quality standards. Permits issued under CRDCA are conditioned to maintain downstream uses. Due to variable conditions encountered at coal refuse sites, a list of “adverse impact” criteria was not included in the proposed regulation. Instead, the broad statutory language was used in § 90.49(c)(1). This approach allows Department technical staff the flexibility to consider site-specific factors when assessing stream buffer zone proposals and mitigation plans.

§ 90.50. Design criteria: groundwater and surface water protection system.

Comment: Section 90.50, subsection (c) requires a permit application to include a description of the site’s susceptibility to mine subsidence. The description must include “particular attention to subsidence-induced impacts or other physical or chemical processes that could adversely affect the operation of the systems.” The regulation does not specify the physical or chemical processes that must be addressed. As a result, the party submitting the permit application may not know exactly what information must be included in the application.

In the final-form regulation, the EQB should clarify the meaning of “other physical or chemical processes.” Additionally, the phrase “particular attention” is vague and should be clarified. (4)

Response: Section 90.50 (c) has been revised to clarify the informational requirements. The term “particular attention” has been dropped.

§ 90.122. Coal refuse disposal.

Comment: In the Pennsylvania Bulletin publication of the proposed rulemaking, the right bracket showing the deletion of subsection (g) was inadvertently omitted. This bracket should be included in the final-form regulation. (4)

Response: The correction has been made.

§ 90.201. Definitions.

Comment: The definition of “search area” at § 90.201 should be clarified by adding the following language:

“An applicant may propose a different location for the center of the search area as an alternative to a coal preparation facility, provided the operator can demonstrate that this is appropriate, using the factors to be considered in defining the search area.”

Although the coal preparation facility is the most logical single point for defining the center of the search area, there may be unusual circumstances at a given site which would make the definition of the area surrounding a point other than the coal preparation facility more appropriate. (2)

Response: The existing language in § 90.201 provides considerable flexibility regarding the delineation of a “search area.” Because the suggested change would not provide additional flexibility, it will not be added.

Comment: The definition of “search area” under § 90.201 does not require that either the one-mile search radius or the 25-mile square mile search area be entirely conducted within the borders of the Commonwealth. The definition as proposed would allow for a portion of the search area to include other states’ jurisdictional areas, and still meet the defined criteria of the search. In truth, an operator could have an existing coal preparation facility located in West Virginia, apply for a coal refuse disposal permit in Pennsylvania, feasibly reduce the search area conducted in Pennsylvania, and ultimately exclude a “preferred site” which would have otherwise been within the search area of Pennsylvania. (3)

Response: The CRDCA does not limit the search area to Pennsylvania. However, the Department has the final say on the configuration of the 25-mile search area. In circumstances where an applicant has designed the search area to deliberately exclude preferred sites, the Department will require the search area to be reconfigured.

Comment: The definition of “preferred site” under § 90.201 does not stipulate how much of a watershed must be impacted before it becomes a preferred site. At one time, the Department was considering to impose that a minimum of 25% of the watershed had been accumulatively impacted by either acid mine drainage, unreclaimed surface mine, or unreclaimed coal refuse disposal piles. The definition as proposed would allow for a one acre unreclaimed surface mine which has no mining discharge, contained within a 500-acre watershed area, to qualify as a “preferred site.” (3)

Response: The Department’s technical guidance document, titled Coal Refuse Disposal – Site Selection, contains criteria for identifying preferred sites. Considerations such as in-stream water quality, length of stream segment polluted, and the percent of disturbed land in relation to the size of the watershed are addressed. While not absolutes, these criteria serve as a guide to operators and Department staff conducting “preferred site” assessments.

Comment: The definition of “search area” contains a substantive provision in the last sentence. The EQB should move the last sentence to § 90.202(b). (4)

Response: The definition of “search area” at § 90.201 has been revised. The substantive provision was relocated to §90.202(b).

§ 90.202. General requirements.

Comment: Section 90.202(c)(2) states “[t]he site is known or is likely to contain Federally listed threatened or endangered plants or animals...” The phrase “or is likely

to” does not appear in 52 P.S. §30.54a(b). The EQB should delete the phrase “or is likely to.” (4)

The Endangered Species Act and OSM’s regulations (16 U.S.C. § 1536 (a)(2)) make clear that the existence of the species is a prerequisite to the restrictions. Furthermore, the statutory and regulatory language refers to designated critical habitats. Restricting sites which are “known to contain” listed species is consistent with the CRDCA and fully complies with the federal statutes and regulation, because consultation and concurrence will be required where those species are known to exist, and where their continued existence may therefore be jeopardized. In contrast to the clear language of the CRDCA, the Proposed Rulemaking contains no standard for determining whether a site is “likely to contain” an endangered or threatened species.

Including the language at issue in the regulation would essentially codify a provision that is inconsistent with the CRDCA, without any federally mandated rationale. The proposed rulemaking should therefore be amended to strike the words “or is likely” from § 90.202(c)(2).

The Board should also bear in mind that this provision applies only to preferred sites – i.e., those in previously affected areas. Requiring investigating previously affected areas on speculation that they “are likely to contain” threatened or endangered species will increase costs and administrative burdens for operators and the Department, and excluding areas where such species have not been confirmed as present is not sound environmental policy. (2)

Response: The language containing the “likely to contain” phrase was required by OSM in consultation with the USFWS during their combined review of the Department’s technical guidance document on the site selection process. The need for this precise language was reinforced during OSM’s conditional approval of the Act 114 program amendments (April 22, 1998 *Federal Register*, page 19805). Subsequently, PCA questioned inclusion of the “likely to contain” phrase during the Mining and Reclamation Advisory Board’s (MRAB) review of this proposed rulemaking. As a result, the Department made a commitment to the MRAB to solicit a legal interpretation from OSM regarding their authority to impose restrictions in situations where sites are considered “likely to contain” federally listed threatened or endangered species. On February 16, 2000, the Department wrote to OSM to request that legal clarification. The Department followed that request with phone calls and a second written request, dated September 12, 2000. In response, OSM has recently clarified that the precise “likely to contain” language is not necessary due to the fact that the requirement to consider sites likely to contain listed threatened or endangered species is already present at § 90.18(2). Therefore, in order to remain true to the statutory wording, the “likely to contain” phrase has been dropped. (A copy of OSM’s November 21, 2000 response is attached.)

Comment: Subsection (a) of § 90.202 should be revised to require the use of a preferred site “unless the operator demonstrates to the Department, based on reasonably available

data, that an alternative site is more suitable... ." This would avoid uncertainty about the level of data collection required by the operator to satisfy this requirement. (2)

Response: The Department disagrees. The proposed regulatory language follows the statutory language. The general assembly apparently contemplated using the "reasonably available data" approach after the preferred site issue had been resolved under section 4.1(a) of the CRDCA.

Comment: The evaluation criteria should be consistent with respect to the Department's review of an acceptable "alternate site" rather than an existing "preferred site." In §§ 90.202(c)(1) and 90.204(a)(3) the Department notes that one of its reviewing criteria for approval is "environmental factors" associated with the proposed alternate site. However, the applicant is not required to submit that information in § 90.202(a). Likewise, geology and engineering criteria have been noted in § 90.202(a) but are not part of § 90.204(a)(3). (3)

Response: The Department disagrees. The criteria are consistent with the statutory intent. Section 4.1 of the CRDCA spells out certain criteria to be considered when evaluating preferred versus alternate sites. The criteria under § 90.202(a) reflects section 4.1(a) of CRDCA and is to be used to evaluate an applicant's demonstration that a alternate site is more suitable than a preferred site. Section 90.204 is designed to reflect section 4.1(c) and (d) of CRDCA, which addresses circumstances where an applicant is comparing various alternate sites. Section 90.204 comes into play when a preferred site does not exist within the search area or when the applicant has already made the demonstration, required under § 90.202(a), that an alternate site is more suitable. The phrase "*using criteria in § 90.202(a)*" has been added for clarity at § 90.204(a)(1).

Comment: The section 90.202(d) wording, "unless it is a preferred site," should be deleted. The language allows the Department to minimize important environmental factors, such as exceptional value wetlands, wetlands, and Commonwealth listed threatened and endangered species for sites that meet the "preferred site" definition. (3)

Response: The Department disagrees. Sections 4.1(a) and (b) of CRDCA explicitly address criteria for preferred sites. Section 4.1(b) exempts preferred sites from the absolute exclusions listed under § 90.202(d). Regardless of the site's status as non-preferred or preferred, CRDCA and proposed regulations (§ 90.202 (c)) require that a site can only be approved where the adverse environmental impacts will not clearly outweigh the public benefits. Additionally, the wetland encroachment issues will be addressed during the permitting process, which requires a detailed site assessment following the site selection process.

Comment: The CRDCA states that "*coal refuse disposal shall not occur*" in the areas designated in subsections 90.202(d)(1)-(6). However, the proposed rulemaking mandates that a *site* may not be approved if it *contains* any of these areas. This could result in the exclusion of sites that include incidental or support areas that will not be used for coal refuse disposal. PCA therefore recommends that subsection (d) be revised as follows:

(d) Except on preferred sites, the Department shall not approve the coal refuse disposal on or within any of the following areas....

In support of this, PCA further notes that the CRDCA contemplates that prime farmland may be affected by coal refuse disposal activities under some circumstances. (See 52 P.S. § 30.55(h).) Furthermore, the requirement that adverse hydrologic consequences be avoided and the state's antidegradation regulations will prevent harm to other listed resources. (2)

Response: The Department agrees. The suggested language more closely tracks the statutory language and has been incorporated. Additionally, revisions were made to § 90.202(d)(4) to more closely track the statutory language.

Comment: Section 90.202(c)(2) does not contain the complete text of the Department's Technical Guidance Document entitled, Coal Refuse Disposal- Site Selection regarding restrictions at sites containing federally listed threatened or endangered species. The guidance was intended to clarify how PADEP intended to implement section 4.1(b) of Act 114. Since the Technical Guidance contains a disclaimer as to its legal effect, the Department may wish to consider adding the complete text to the regulation to assuage any concerns that may be raised by the USFWS when these proposed regulations are submitted to OSM as a program amendment. (5)

Response: The missing portion of the text in the Technical Guidance language, "*...or result in the 'take' of federally listed threatened or endangered species in violation of Section 9 of the Endangered Species Act,*" has been added to § 90.202(d)(7).

Comment: Section 4.1(b) of CRDCA provides an absolute prohibition for using non-preferred sites for refuse disposal on sites known to contain federal threatened or endangered plants or animals, or state threatened or endangered animals. Section 90.202(c)(2) appears to be inconsistent with section 4.1(b) in that it allows the approval of coal refuse disposal on non-preferred sites known to contain the federally listed species where the Department concludes and the USFWS concurs that the proposed use of the site would be unlikely to adversely affect these species. (5)

Response: The provision was inadvertently misplaced and has been moved to § 90.202(d)(7), which addresses restrictions at preferred sites.

Comment: There appears to be an inconsistency in § 90.202(d)(3) and section 4.1(b) of CRDCA, in that § 90.202(d)(3) bans approval of coal refuse disposal activities on sites containing state threatened or endangered plants and animals, whereas section 4.1(b) extends the ban only to sites containing state threatened or endangered animals. (5)

Response: The Department agrees. The reference to state threatened or endangered plants has been deleted.

Comment: Section 90.202(d) does not provide non-preferred sites with the absolute protection of section 4.1(d) of CRDCA for federally listed threatened or endangered species. (5)

Response: Section 90.202 has been revised. The provision that allows coal refuse disposal on sites containing federally threatened or endangered species has been moved to new paragraph (7) that bans such practice unless the site is a preferred site where the Department concludes that the proposed activity is not likely to adversely impact federally listed species.

§ 90.203. Proposing a preferred site.

Comment: Regarding § 90.203, given Act 114's purpose of encouraging the use of preferred sites, PCA questions why the burden is on the applicant to demonstrate that the adverse impacts will not clearly outweigh the public benefits. This should be the Department's burden. (2)

Response: The burden is shared by the Department and the applicant. Where a preferred site is considered for coal refuse disposal, the applicant identifies any adverse environmental impacts and any public benefits that might occur as a result of the coal refuse disposal, including any environmental impacts that result from a stream barrier variance. The Department must then determine if the adverse impacts clearly outweigh the public benefits.

Comment: This section appears to reiterate the requirements listed in § 90.202. If § 90.203 does not add new requirements, it should be deleted. (4)

Response: Section 90.203 implements section 4.1(a)(5) of CRDCA. Section 90.202 implements section 4.1(c) and (d) of CRDCA.

§ 90.205. Alternatives analysis.

Comment: Section 90.205 would entail that an alternative analyses need not be completed on "preferred sites" and that the criteria as set forth in Chapter 105 has been circumvented with respect to the criteria for alternatives analyses on "alternate sites." However, Title 25 Chapter 105, is explicit in the requirement for an alternative analyses which includes designs to avoid or minimize adverse environmental impacts as they would relate to all streams and wetlands within the Commonwealth to include those which may be contained within the "preferred site" or "alternate site" locations. Further, Chapter 105 sets definitive criteria for exceptional value watersheds and wetlands, whereas the proposed § 90.202(d) would avoid addressing these habitats in "preferred sites." (3)

Response: Section 90.205 tracks the exact language of section 4.1(e) of the statute. Essentially, the Act 114 revisions to CRDCA do address Chapter 105 requirements. Section 4.1(e) of CRDCA explicitly states that the alternatives analysis outlined under

section 4.1 of CRDCA satisfies the requirement for an alternatives analysis under the Dam Safety and Encroachments Act.

§ 90.302. Definitions.

Comment: The definitions of “actual improvement,” “coal refuse disposal activities,” and “pollution abatement area” are taken directly from 52 P.S. § 30.53. Rather than repeating these definitions, the EQB should consider simply referencing the statute.

Best professional judgment - The phrase “reasonably available data” is not clear. The EQB should specify what it considers “reasonably available data.” (4)

Response: Repeating statutory definitions into the regulations adds value by increasing the readability and clarity of the regulations. It serves to make the regulation more user-friendly by making definitions of important terms readily available to the reader. Simply cross-referencing definitions forces the public and the regulated community to constantly rely on multiple, hard-to-procure publications in order to make sense of the regulations.

The definition of the term “best professional judgment” along with the phrase “reasonably available data” were imported directly from the existing remaining (Chapter 87, subchapter F) provisions of the surface coal mining regulations. The remaining provisions of Chapter 87 were reviewed and approved by OSM, and the regulated community has operated under those regulations for the past 16 years. To promote continuity across the mining program and to avoid confusion to the public and the regulated community, the regulation uses the same terminology as the existing Chapter 87 regulations.

“Reasonably available data” is information that can be collected without extraordinary effort or the expenditure of excessive sums of money.

§ 90.303. Applicability.

Comment: Regarding § 90.303, the CRDCA provides that DEP “may grant special authorization” if the conditions in the Act are met. The draft regulations state that authorization “may not be granted” unless the conditions are met. The language in the regulation should be changed to mirror the statutory language. There is no clear reason for varying from the statutory language, and the regulations should remain as faithful as possible to an Act which was intended to be self-implementing. PCA therefore recommends using the statutory language. (2)

Subsection (a) rephrases the parallel statutory language at 52 P.S. § 30.56b(b). The EQB should explain the need to alter the statutory language. (4)

Response: The Department agrees that the language should mirror the statute, and subsection (a) has been changed as suggested.

§ 90.304. Application for authorization.

Comment: Section 90.304 (a)(2)(ii) - what criteria will the EQB use to determine “other water quality parameters the Department deems relevant”? How will the operator be informed? (4)

Response: Additional parameters may need to be assessed if warranted based on site-specific knowledge regarding historical uses or problems at a given mine site. The operator will be made aware of additional monitoring requirements during the review of the permit application. Module 26 of the permit application is designed to characterize baseline conditions at sites with preexisting discharges.

§ 90.306. Operational requirements.

Comment: Subsection (4) of § 90.306 should be revised to delete the requirement that the operator provide a *notarized* statement and to specify the circumstances in which a supervising engineer’s signature may be required. PCA does not see what purpose is served by a notarized statement, and specifying when an engineer’s statement is required will avoid confusion and delays. (2)

Why must statements from operators under paragraph (4) be notarized? Additionally, the phrase “if required by the Department is unclear.” When would a statement signed by the supervising engineer be required? Does this statement also have to be notarized? (4)

Response: The provision requiring notarized statements has been deleted. The statement signed by the supervising engineer will be required in circumstances where the work being completed requires engineering expertise as defined under the provisions of the Pennsylvania’s Engineer, Land Surveyor, and Geologist Registration Act. There is no requirement for the engineer’s statement to be notarized.

§ 90.307. Treatment of discharges.

Comment: Subsection (c) of § 90.307 should be revised by replacing “may not be construed” with “shall not be construed.” This is the language used in the CRDCA. (2)

Response: The wording has not been changed. The Legislative Reference Bureau insists on the use of “may not” because it carries a stronger prohibition. “Shall not” eliminates the duty to act, while “may not” eliminates the permission to act.

§ 90.309. Criteria and schedule for release of bonds on pollution abatement areas.

Comment: “Planting” is included in both § 90.309(a)(2) and (b)(1). The latter reference to planting should be deleted from subsection (b)(1), since planting will have been required to obtain release of the first bond percentage in (a).

We also suggest that the words “at any time” be deleted from subsection (a)(4). A one-time event caused by unusual circumstances should not be grounds for withholding bond release where there is no indication of a continuing problem, and there is no provision for exceptions which do not indicate a potential for a continuing problem. (2)

Response: “Planting” was inadvertently included in § 90.309 (a)(2), but has been deleted in the final regulation. The “at any time” language in (a)(4) remains. This subsection addresses degradation caused by the operator, not degradation caused by severe weather conditions or other unforeseen or uncontrollable events.

**One-Page Summary of Comments by Pennsylvania Coal Association
To Proposed Rulemaking, Coal Refuse Disposal,
25 Pa. Code Chapters 88 and 90**



- **§90.1:** Definitions of "coal refuse disposal" and "coal refuse disposal operations" should be added for clarity.
- **§90.5:** The Proposed Rulemaking should clarify the finality and appealability of approval and disapproval of selected coal refuse disposal sites.
- **§90.12:** The requirement to provide geological information should be limited to information appropriate to the application.
- **§90.49:** Statutory language relating to relocation and diversion of streams, which was included in the Draft reviewed by the Mining and Reclamation Advisory Board, has been omitted and should be added. The stream buffer zone should be limited to perennial and intermittent streams, in accordance with 25 Pa. Code §§86.101 and 86.102. This section should also be clarified to limit the prevention of adverse water quality impacts to those areas downstream of the system installed under the regulations to prevent those impacts. Consideration of information and comments submitted by the Fish and Boat Commission should be limited to comments that are timely provided by the Commission.
- **§90.201:** The definition of search area should be clarified to allow some flexibility in determining the center of the search area.
- **§90.202:** Demonstrations on the appropriateness of an alternative to a preferred site should be based on reasonably available data. Also, the prohibition on preferred sites if they are "likely to contain" threatened or endangered species has no foundation in federal law and is inconsistent with the statute. There are no standards for determining when a site is "likely to contain" such species. Finally, the statutory prohibition on coal refuse disposal in certain areas has been expanded improperly to preclude a site from containing those areas, even if coal refuse disposal is not proposed within them.
- **§90.203:** The burden of establishing that the environmental harm of a preferred site clearly outweighs its public benefits should be on the DEP, not the applicant.
- **§90.303:** The regulatory language should be the same as the language in the statute.
- **§90.306:** The requirement for notarized statements should be deleted and the provision allowing DEP to request an engineer's signature should specify the circumstances when this will be required.
- **§90.307:** The definition of the term "encountered" should be revised to conform to the statute.
- **§90.309:** The requirement that planting be complete is included in two stages of bond release. Also, the phrase "at any time" should be deleted from the requirement that bond release be withheld if there is a degradation of the baseline pollution load. This should not be an absolute requirement where there is no indication of a potential for continued adverse consequences.



Pennsylvania Department of Environmental Protection

Rachel Carson State Office Building
P.O. Box 2063
Harrisburg, PA 17105-2063
May 8, 2001

The Secretary

717-787-2814

Mr. Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown II
Harrisburg, PA 17101

RE: Final Rulemaking: Coal Refuse Disposal (#7-352)

Dear Bob:

Pursuant to Section 5.1(a) of the Regulatory Review Act, enclosed is a copy of a final-form regulation for review by the Commission. This final rulemaking was approved by the Environmental Quality Board (EQB) on April 17, 2001.

This rulemaking updates Chapters 88 and 90 for conformance with provisions of the Coal Refuse Disposal Control Act as amended by Act 114 of 1994. It incorporates new provisions and requirements relating to selection of sites for coal refuse disposal activities; activities conducted within 100 feet of a stream; special water quality standards and other incentives designed to promote the use and reclamation of previously mined areas; experimental practices for environmental protection; and upgraded surface water and groundwater management systems. The amendments also cross-reference the water supply replacement provisions of the existing surface mining regulations.

The proposed rulemaking was adopted by the EQB on April 18, 2000, and published on June 17. Two public hearings were held during a 60-day public comment period, and comments were received from five entities. The MRAB endorsed the draft final rulemaking at its February 21, 2001, meeting.

The Department will provide the Commission with any assistance required to facilitate a thorough review of this final-form regulation. Section 5.1(e) of the Act provides that the Commission shall, within ten days after the expiration of the committee review period, approve or disapprove the final-form regulation.



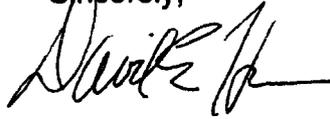
Mr. Robert E. Nyce

- 2 -

May 8, 2001

For additional information, please contact Sharon Trostle, Regulatory Coordinator,
at 783-8727.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Hess". The signature is fluid and cursive, with a long horizontal stroke at the end.

David E. Hess
Acting Secretary

Enclosures

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 7-352
 SUBJECT: Coal Refuse Disposal
 AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

RECEIVED
 2001 MAY -8 AM 10:08
 REGULATORY REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
5/8/01	<i>[Signature]</i>	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
5-8-01	<i>[Signature]</i>	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
5-8-01	<i>[Signature]</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU