



COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA GAME COMMISSION

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HARRISBURG, PA 17110-9797

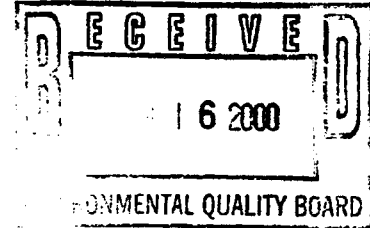
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Original: 2123

August 15, 2000

Ms. Sharon Freeman, Director
Environmental Quality Board
Rachel Carson State Office Building
15th Floor, 400 Market Street
Harrisburg, PA 17101-2301

In re: E.Q.B. Comment Submission
PA Bulletin Vol. 30 No. 25
Coal Refuse Disposal Regulations
Proposed Rule Making



Dear Ms. Freeman:

The following are the Pennsylvania Game Commission's comments and suggested revisions with regard to Chapter 90, of Draft Title 25. Revised Coal Refuse Disposal Regulations:

Reference Section 90.49 Stream buffer zone variance: (c)(2) (ii) *"The Department will also consider information or comments submitted by the Pennsylvania Fish and Boat Commission prior to taking any action on any variance request"*

This noted section 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.

Reference Section 90.201 Definitions: "Preferred site"

The definition 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."

Reference Section 90.201 Definitions: "Search area"

The definition does not require that neither the 1-mile search radius nor the 25 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.

Reference Section 90.202 General requirements: (a) & Section 90.204 Proposing an alternate site: (a)(3)

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 Section 90.202 (c)(1) & 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 Section 90.202 (a). Likewise, geology and engineering criteria have been noted in Section 90.202 (a) but are not made part of Section 90.204 (a)(3).

Reference Section 90.202 General requirements: (d) *The Department will not approve a site, unless it is a preferred site ...*

The Commission recommends that the wording "*unless it is a preferred site*" be deleted. Again, reference is made to the above noted definition of "preferred site" found in Section 90.201. Additionally, the criteria as noted in Section 90.202 (d) would allow for the Department to minimize important environmental factors, such as exceptional value watersheds, wetlands, and Commonwealth listed threatened and endangered species, for sites that meet the "preferred site definition." Ironically, in Section 90.203 (Proposing a preferred site), the applicant must demonstrate to the Department that the attendant adverse environmental impacts will not clearly outweigh the public benefits, subject to only Section 90.202 (c) and **not** as per the criteria established in Section 90.202 (d).

Reference Section 90.205 Alternative analysis: "The alternative analyses required by Section 90.202 (b) and 90.204 satisfies the requirements for an alternative analysis under the Dam Safety and Encroachments Act....."

This regulation 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 alternative 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 Section 90.202 (d) would avoid addressing these habitats in "preferred sites."

Thank you for allowing us the opportunity to review and submit these comments and suggested revisions. If you should have any questions concerning this matter, please feel free to contact me directly at (717) 783-4919. Our office address is PA Game Commission, 2001 Elmerton Ave., Harrisburg, PA 17110-9797.

Very truly yours,



William A. Capouillez, Chief
Section of Oil/Gas & Mineral Development
Bureau of Land Management

WAC/pfb

cc: Grabowicz
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Pennsylvania Coal Association

212 North Third Street • Suite 102 • Harrisburg, PA 17101

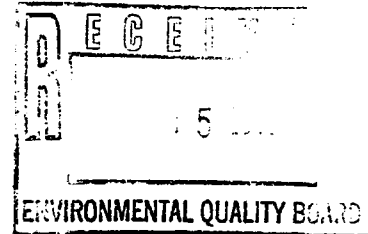
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(717) 231-7610 Fax

GEORGE ELLIS
President

August 15, 2000

Original: 2123

Environmental Quality Board
P.O. Box 8477
Rachel Carson State Office Building
Harrisburg, PA 17105-8477



Re: Notice of Proposed Rulemaking: Coal Refuse Disposal, 25 Pa. Code Chapters 88 and 90, *Pennsylvania Bulletin*, June 17, 2000

Members of the Board:

Thank you for giving the Pennsylvania Coal Association (PCA) an opportunity to submit written comments on above-referenced Notice of Proposed Rulemaking (the "Proposed Rulemaking"). PCA represents 28 bituminous coal producers and 88 associate member companies who work with and support the mining industry. PCA submits the following written comments in response to the above-referenced Notice of Proposed Rulemaking.

Specific Comments

§90.1. Definitions. The CRDCA Coal Refuse Disposal Control Act (CRDCA) and the Proposed Rulemaking distinguish between "coal refuse disposal" and "coal refuse disposal operations." Definitions of these terms would be helpful in construing the regulations.

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

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.

§90.12. Geology. 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 recognize that some aquifers are not useable.

§90.49. Stream Buffer Zone Variance. The CRDCA expressly provides for authorization to grant a variance "to dispose of coal refuse and to relocate or divert streams within the one hundred foot stream buffer zone . . ." 52 P.S. §30.56a(h)(5). Language regarding stream relocations and diversions was included in 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.

Subsections (a) and (c) should be revised to apply to a "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 operations" subject to the buffer zone, which applies to perennial and intermittent streams.

Subsection (c)(1) should also be revised by adding "downstream of the system installed, pursuant to §6.1(i) 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.

Subsection (c)(2)(ii) should be revised to apply to "consider timely information submitted by the Fish and Boat Commission" to avoid unnecessary delays and uncertainty.

§90.201. Definitions. PCA suggests that the definition of "search area" be clarified by adding the following language to the end of the definition:

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.

§90.202. General Requirements. Subsection (a) should be revised to require the use of a preferred site "unless the operator demonstrates to the Department, based on reasonable available data, that an alternate site is more suitable . . ." This would avoid uncertainty about the level of data collection required by the operator to satisfy this requirement.

PCA objects to the provision in subsection (c)(2) which would prohibit the selection of preferred sites which are "known or *likely to contain* federally listed threatened or endangered plants or animals" unless DEP and USFWS concur that the proposed use of the site would be unlikely to affect those species.

DEP initially inserted the language at issue in a final Technical Guidance Document as a "minor revision" without public notice or comment. According to DEP, the change in policy was made in response to concerns raised by the USFWS to OSM. However, a review of the Endangered Species Act, OSM's regulations pertaining to the protection of endangered and threatened species and the discussion of these authorities in the April 22, 1998 *Federal Register* does not provide a basis for requiring the language.

The *Federal Register* notice reveals that USFWS and OSM were concerned about statutory and regulatory requirements pertaining to activities which are "likely to jeopardize the *continued existence* of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of *designated critical habitats* of such species." 63 F.R. 19804-06. Substantively similar language expressing the relevant restrictions is found in both the Endangered Species Act and OSM's regulations at 30 CFR 816.97 and 817.97.

The Endangered Species Act provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") *is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species* which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. §1536 (a)(2) (emphasis added).

OSM's regulations state that no surface and underground coal mining activity may be conducted which:

is likely to jeopardize the continued existence of endangered or threatened species listed by the Secretary or which is likely to result in the destruction or adverse modification of designated critical habitats of such species in violation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). The operator shall promptly report to the regulatory authority any State- or federally-listed endangered or threatened species within the permit area of which the operator becomes aware. Upon notification, the regulatory authority shall consult with appropriate State and Federal fish and wildlife agencies and, after consultation, shall identify whether, and under what conditions, the operator may proceed.

30 CFR §§816.97(b), 817.97(b) (emphasis added; quoted language appears in both sections).

The quoted provisions make clear that the *existence* of the species is a prerequisite to the restrictions. The focus is on preventing activities which are "likely to jeopardize the continued existence of the species." 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 regulations, 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.

Nothing in the preamble indicates that the federal agencies required DEP to restrict sites which "are likely to contain" endangered species, nor does the preamble provide a federal statutory or regulatory basis for such a requirement.

Including the language at issue in the regulations 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.

§90.202(d). PCA has suggested a definition for "coal refuse disposal." This is a section where a definition or other clarification may be necessary to ensure the regulations are consistent with the statute. The CRDCA states that "*coal refuse disposal shall not occur*" in the areas designated in subsections 90.202(d)(1)-(6). 52 P.S. §30.54a(b). 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 the other listed resources.

§90.203. Proposing a Preferred Site. Given Act 114's purpose of encouraging the use of preferred sites, PCA questions why the burden is on the applicant to demonstrate that adverse impacts will not clearly outweigh the public benefits. This should be the Department's burden.

§90.303. Applicability of Subchapter F. The CRDCA provides that DEP "may grant special authorization" if the conditions in the Act are met. 52 P.S. §30.56b(b). The draft regulations state that authorization "may not be granted" unless the conditions are met. The language in the regulations 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.

§90.306. Operational Requirements. Subsection (4) 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.

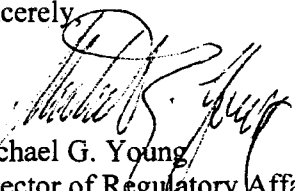
§90.307. Treatment of Discharges. Subsection (c) should be revised by replacing "may not be construed" with "shall not be construed." This is the language used in the CRDCA. See 52 P.S. §30.56b(g)(3).

§90.309. Criteria and Schedule for Release of Bonds. "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.

Thank you for considering these comments. We would like a copy of the final form rulemaking when it is available. Please feel free to call me if you have any questions.

Sincerely,


Michael G. Young
Director of Regulatory Affairs

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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.



United States Department of the Interior

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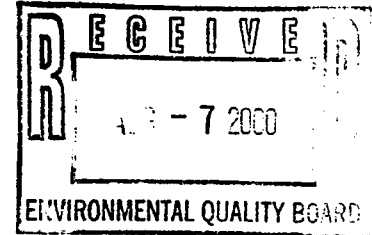
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FISH AND WILDLIFE SERVICE
Pennsylvania Field Office
INDEPENDENT REGULATORY 315 South Allen Street, Suite 322
REVIEW COMMISSION State College, Pennsylvania 16801-4850



Original: 2123

August 3, 2000

Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477



Dear Board Members:

The Fish and Wildlife Service has reviewed the Environmental Quality Board's proposed rulemaking (June 17, 2000, *Pennsylvania Bulletin*) to amend Chapters 88 and 90 of the Pennsylvania Code to address permitting and performance standards for coal refuse disposal operations. The following comments have been prepared pursuant to the Fish and Wildlife Coordination Act (48 Stat. 401, 16 U.S.C. 661 *et seq.*).

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, or other environmental resources of the stream and will not cause or contribute to the violation of applicable State or Federal water quality standards." Although this language closely mirrors the Office of Surface Mining regulation at 30 CFR 816.57 ("Surface mining *activities* will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream" (emphasis added), 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 ...".

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" (emphasis added). This provision is contrary to Section 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 Section 90.49(c)(3) and in the associated technical guidance document (563-2113-660).

Thank you for the opportunity to comment. Please direct any questions regarding these comments to Cindy Tibbott of my staff at 814-234-4090, ext. 226.

Sincerely,

David Densmore
Supervisor

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BEFORE THE
PENNSYLVANIA ENVIRONMENTAL
QUALITY CONTROL BOARD
OF
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

* * * * *

IN RE: COAL REFUSE DISPOSAL
ACTIVITIES

BEFORE: Richard Fox, Chairman

HEARING: Wednesday, July 19, 2000
7:00 p.m.

Quality Hotel
100 South Centre Street
Pottsville, PA

ORIGINAL

REPORTER: SHARON MARSH

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3	STATEMENT BY MR. FOX	4-7
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Number Description Page
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1 P R O C E E D I N G S

2 -----
3 MR. FOX:4 Welcome to this
5 Environmental Quality Board (EQB)
6 public hearing on proposed
7 regulations pertaining to coal refuse
8 disposal activities. This proposal
9 was approved by the EQB on April 18,
10 2000.11 My name is Richard Fox.,
12 I represent Senator Raphael Musto,
13 who is a member of the EQB.14 With me today from the
15 Department of Environmental
16 Protection, Bureau of Mining and
17 Reclamation are: Harold Miller,
18 Chief Underground Mining Section; Tom
19 Callaghan, Hydrogeologist.20 Notice of today's hearing was
21 printed in the Pennsylvania Bulletin
22 on June 17, 2000. In addition,
23 notices were published in major
24 newspapers throughout the
25 Commonwealth.

1 This proposal updates
2 existing regulations in Chapters 88
3 and 90 by incorporating provisions of
4 the Coal Refuse Disposal Control Act
5 as amended by Act 114 of 1994. The
6 proposal incorporates new provisions
7 and requirements relating to
8 selection of sites for coal refuse
9 disposal activities; activities
10 conducted within 100 feet of a
11 stream; special water quality
12 standards and other incentives
13 designed to promote the use and
14 reclamation of previously mined
15 areas; experimental practices for
16 environmental protection; and
17 upgraded surface water and
18 groundwater management systems. The
19 proposal adds language in Chapter 90
20 that cross-references the water
21 supply replacement provisions for
22 permitting and operating a coal
23 refuse disposal activity into
24 Chapters 88 and 90. These
25 requirements currently exist in

1 statute, regulations, and technical
2 guidance pertaining to site
3 selection.

4 The Mining and
5 Reclamation Advisory Board (MRAB)
6 reviewed drafts of the proposal at
7 meetings in November 1999 and January
8 2000 and recommended approval of the
9 proposed amendments.

10 Interested persons may
11 submit written comments in addition
12 to or in place of oral testimony
13 presented here. All comments must be
14 received by the EQB by August 16,
15 2000. Comments should be addressed
16 to the Environmental Quality Board,
17 P.O. Box 8477, Harrisburg, PA 17105-
18 8477. Comments may also be
19 transmitted electronically to
20 regcomments@dep.state.pa.us.

21 Anyone interested in a
22 transcript of this hearing may
23 contact the reporter here today to
24 arrange to purchase a copy.

25 Is there anyone here who

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would like to comment on this
proposed rulemaking?

Seeing none, I hereby
adjourn this hearing at 7:15 p.m.

* * * * *

HEARING CONCLUDED AT 7:15 P.M.

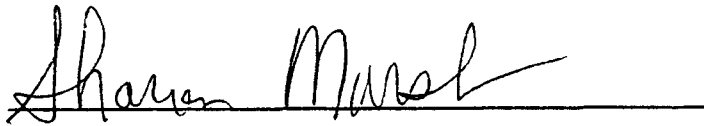
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C E R T I F I C A T E

I HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS
WERE REPORTED STENOGRAPHICALLY BY ME AND THEREAFTER
REDUCED TO TYPEWRITING AND THAT THIS TRANSCRIPT
IS A TRUE AND ACCURATE RECORD THEREOF.

SARGENT'S COURT REPORTING SERVICE, INC.



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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL QUALITY BOARD

* * * * *

IN RE: PROPOSED RULEMAKING
COAL REFUSE DISPOSAL
ACTIVITIES

BEFORE: Thomas Callaghan, P.G.

HEARING: July 26, 2000

7:00 p.m.

Days Inn

127 West Byers Avenue

New Stanton, PA

Reporter: Susan M. Harshell

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I N D E X

STATEMENT BY MR. CALLAGHAN	4 - 7
CERTIFICATE	8

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Number Description Page
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P R O C E E D I N G S

MR. CALLAGHAN:

Welcome to this Environmental quality Board (EQB) public hearing on proposed regulations pertaining to coal refuse disposal activities. This proposal was approved by the EQB on April 18, 2000.

My name is Thomas Callaghan, Department of Environmental Protection. I am chairing this hearing due to the unavailability of any EQB members this evening.

Notice of today's hearing was printed in the Pennsylvania Bulletin on June 17, 2000. In addition, notices were published in major newspapers throughout the Commonwealth.

This proposal updates existing regulations in Chapters 88 and 90 by incorporating provision of the Coal Refuse Disposal Control Act as amended by Act 114 of 1994. The

1 proposal incorporates new
2 provisions and requirements
3 relating to selection of sites for
4 coal refuse disposal activities;
5 activities conducted within 100
6 feet of a stream; special water
7 quality standards and other
8 incentives designed to promote the
9 use and reclamation of previously
10 mined areas; experimental practices
11 for environmental protection; and
12 upgraded surface water and
13 groundwater management systems.
14 The proposal adds language in
15 Chapter 90 that cross-references
16 the water supply replacement
17 provisions of the current surface
18 mining regulations. The proposal
19 also consolidates the requirements
20 for permitting and operating a coal
21 refuse disposal activity into
22 Chapters 88 and 90. These
23 retirements currently exist in
24 statute, regulations, and technical
25 guidance pertaining to site

1 selection.

2 The Mining and Reclamation
3 Advisory Board (MRAB) reviewed
4 drafts of the proposal at meetings
5 in November 1999 and January 2000
6 and recommended approval of the
7 proposed amendments.

8 Interested persons may submit
9 written comments in addition to or
10 in place of oral testimony
11 presented here. All comments must
12 be received by the EQB by August
13 16, 2000. Comments should be
14 addressed to the Environmental
15 Quality Board, P.O. Box 8477,
16 Harrisburg, PA, 17105-8477.
17 Comments may also be transmitted
18 electronically to
19 regcomments@dep.stat.pa.us.

20 Anyone interested in a
21 transcript of this hearing may
22 contact the reporter here today to
23 arrange to purchase a copy.

24 Is there anyone here who would
25 like to comment on this proposed

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rulemaking?

Seeing none, I hereby adjourn
this hearing at 7:15 p.m.

* * * * *

HEARING ADJOURNED AT 7:15 P.M.

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COMMONWEALTH OF PENNSYLVANIA:
: SS
COUNTY OF WESTMORELAND :

C E R T I F I C A T E

I, Susan M. Harshell, Notary Public in and for the Commonwealth of Pennsylvania, do hereby certify:

That the witness was hereby first duly sworn to testify to the truth, the whole truth, and nothing but the truth; that the foregoing deposition was taken at the time and place stated herein; and that the said deposition was taken in Stenotype by me and reduced to typewriting, and constitutes a true and correct record of the testimony given by the witness.

I further certify that the reading and signing of said deposition were (not) waived by counsel for the respective parties and by the witness.

I further certify that I am not a relative, employee or attorney of any of the parties, nor a relative or employee of counsel, and that I am in no way interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and stamp this

7th day of August, 2000

Susan M. Harshell

NOTARIAL SEAL
SUSAN M. HARSHELL, Notary Public
Greensburg, Westmoreland County, PA
My Commission Expires May 31, 2002

• PITTSBURGH, PA • ERIE, PA • INDIANA, PA • PHILADELPHIA, PA
• CLEARFIELD, PA • OIL CITY, PA • GREENSBURG, PA • SOMERSET, PA
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United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

Harrisburg Field Office

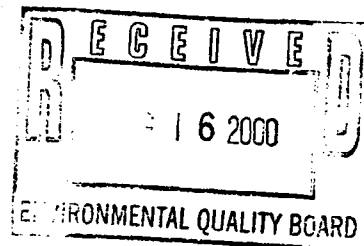
Third Floor, Suite 3C

Harrisburg Transportation Center

4th and Market Streets

Harrisburg, PA 17101

August 16, 2000



Original: 2123

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FOR THE
REVIEW COMMISSION

Environmental Quality Board

P. O. Box 8477

Harrisburg, Pennsylvania 17105-8477

Dear Board Members:

The Office of Surface Mining Reclamation and Enforcement (OSM) has reviewed the Environmental Quality Board's proposed rulemaking (Volume 30, *Pennsylvania Bulletin*, page 3053, June 17, 2000), to amend Chapters 88 and 89 of the *Pennsylvania Code* to implement Act 114 that amended Pennsylvania's Coal Refuse Disposal Control Act. OSM's comments are listed below.

Section 90.202(c)(2) prohibits the approval of a site for coal refuse disposal activities if:

The site is known or is likely to contain Federally listed threatened or endangered plants or animals unless the Department concludes and the United States Fish and Wildlife Service concurs that the proposed use of the site would be unlikely to adversely affect those species.

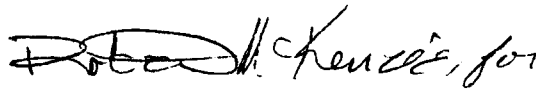
In the preamble of the *Federal Register* final rule for OSM's approval of Act 114 (63 FR 19802-19821, April 22, 1998, - PA 837.71), there is a discussion on threatened and endangered species findings and the United States Fish and Wildlife Service's (USFWS) required concurrences. The Pennsylvania Department of Environmental Protection (PADEP) had revised its Technical Guidance Document, Coal Refuse Disposal-Site Selection, 563-2113-660, to clarify how PADEP intended to implement section 4.1(b) of Act 114. This revision states that:

With respect to preferred sites, the Department will not approve (via the site selection process) or permit (via the permitting process) a site that is known or likely to contain federally listed threatened or endangered species, unless 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.*

63 FR at 19805. (Emphasis added) Section 90.202(c)(2) does not contain the italicized language from the policy revision. Since the Technical Guidance Document contains a disclaimer as to its legal effect, PADEP may wish to consider adding the italicized language to Section 90.202(c)(2), to assuage any concerns that may be raised by the USFWS when these proposed regulations are submitted for OSM's consideration as a program amendment.¹

Section 4.1(b) 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) of CRDCA in that it allows the approval of coal refuse disposal on *non-preferred* sites known to contain Federally listed threatened or endangered plants or animals where the Department concludes and the United States Fish and Wildlife Service concurs that the proposed use of the site would be unlikely to adversely affect these species. There also appears to be an inconsistency in section 90.202(d)(3) and section 4.1(b), in that 90.202(d)(3) bans approval of coal refuse disposal activities on sites containing state threatened or endangered plants or animals, whereas section 4.1(b) extends the ban only to sites containing state threatened or endangered animals. Finally, section 90.202(d) does not provide non preferred sites with the absolute protection of section 4.1(d) for Federal threatened or endangered plants or animals.

Sincerely,



Robert J. Biggi
Director
Harrisburg Field Office

cc: S. Barclay

¹ The disclaimer states as follows:

The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework, within which the Department will exercise its administrative discretion in the future. The Department reserves the discretion to deviate from this policy statement if circumstances warrant.