

Original: 2269
IRRC

From: Stanley Geary [sgeary@att.net]
Sent: Thursday, July 15, 2004 3:09 PM
To: IRRC
Cc: Phenderson@pasen.gov; 'Joseph Deklinski'; Joe Pizarchik
Subject: Emailing: PCA COMMENTS ON FINAL RULE 86.6

From: Pennsylvania Coal Association
 To: John R. McGinley, Jr., Chairman
 Subject: EQB Final-Form Regulation #7-376 (#2269), Coal Mining
 Date: July 15, 2004

COMMENTS OF THE PENNSYLVANIA COAL ASSOCIATION ON FINAL RULE 25 PA. CODE §86.6

On June 15, 2004, the EQB approved proposed 25 Pa. Code §86.6. The final rule is currently before the Independent Regulatory Review Commission. Although PCA commented on the draft rule and requested a copy of the final rule, PCA was not provided with a copy of the final rule.

The final rule varies significantly from the draft rule as the result of addition of a new subsection 86.6(a) (5). This subsection contains one of the criteria for coal extraction to be exempt from the permitting requirements of the Surface Mining Conservation and Reclamation Act and the mining regulations at 25 Pa. Code Chapters 86, 87 and 88. Subsection 86.6(a)(5) provides:

(5) The construction or reclamation is performed under a **bond**, contract and specifications that substantially provide for and require protection of the environment, reclamation of the affected area, and handling of excavated materials **in a manner consistent with a the acts and regulations implementing the acts.** (Emphasis added.)

"Acts" is a defined term in Section 86.1. The "acts" included in the Section 86.1 definition are the:

- Surface Mining Conservation and Reclamation Act
- Air Pollution Control Act
- Clean Streams Law
- Coal Refuse Disposal Control Act
- Article XIX-A of The Administrative Code
- Bituminous Mine Subsidence and Land Conservation Act
- Dam Safety and Encroachment Act
- Solid Waste Management Act.

In Section 8 of the Regulatory Analysis Form, DEP explains the regulation as "This rulemaking will ... exclude the extraction of coal incidental to government-financed construction or reclamation from the requirements of the coal mining regulations." Also, in explaining why the regulation is needed, DEP stated in Section 11 of the Regulatory Analysis Form "Proposed Section 86.6 is needed so that government-financed construction and reclamation involving the incidental extraction of coal are not regulated as coal mining activities in addition to the other environmental approvals typically required for such activities." Given that subsection 86.6(a)(5) requires that to qualify to be exempt from regulation as surface mining a project must be "performed under a bond, contract and specifications that substantially provide for and require protection of the environment, reclamation of the affected area, and handling of excavated materials in a manner consistent with a the acts and regulations implementing the acts" and the "acts" include the Surface Mining Conservation and Reclamation Act and the Clean Streams Law (the acts under which mining permits are issued), subsection 86.6(a)(5) effectively consumes the exception. If a contractor has to do everything consistent with the acts listed in the definition of "acts" in Section 86.1 and the regulations implementing those "acts," there is no exemption. PCA does not know if this is the intended impact of subsection 86.6(a)(5), but it certainly is not consistent with the manner in which DEP described the regulation in the Regulatory Analysis Form. If subsection 86.6(a)(5) is not intended to make government financed construction and reclamation involving the incidental extraction of coal subject to the coal mining acts and regulations, then the subsection needs to be revised. If it is so intended, the regulation should be reopened for public comment because it is significantly different than the proposed regulation.

7/15/2004

If subsection 86.6(a)(5) is not intended to make government financed construction and reclamation involving the incidental extraction of coal subject to the coal mining acts and regulations, then there is no authority for the requirement in subsection 86.6(a)(5) that the contractor post a bond. If the bonding requirements of the Surface Mining Conservation and Reclamation Act and the Cleans Streams Law are not applicable because the activity is not a coal mining activity, the other acts listed in the definition of "acts" either do not have bonding requirements or their bonding requirements are not applicable to the type of activities associated with coal extraction incidental to government financed construction or reclamation. The Air Pollution Control Act does not have any provision for bonds. The Coal Refuse Disposal Control Act would most likely not be applicable because it regulates disposal of coal refuse, an activity which is not likely with coal extraction incidental to government financed construction or reclamation. Article XIX-A of The Administrative Code deals with DEP's powers and duties in a broad sense. It does not contain specific provisions about bonding. The Subsidence Act would not be applicable. The Dam Safety and Encroachment Act and the regulations under it only provide for bonds for categories of dams, water obstructions and encroachments which may present a substantial risk to life or property. See, 32 P.S. § 693.13 and 25 Pa. Code § 105.20. That situation is not likely to exist with coal extraction incidental to government financed construction or reclamation.

Cc: Senate Environmental Resources and Energy Committee
House Environmental Resources and Energy Committee
Joseph Pizarchik