

BEFORE THE
ENVIRONMENTAL QUALITY BOARD
OF PENNSYLVANIA

* * * * *

IN RE: PROPOSED RULEMAKING BENEFICIAL USE OF COAL ASH
25 PA CODE, CHAPTERS 287 & 290
PUBLIC HEARING

* * * * *

BEFORE: DANIEL L. LAPATO, Chair

HEARING: Thursday, December 10, 2009
6:01 p.m.

LOCATION: Pennsylvania Department of
Environmental Protection
Southcentral Regional Office
909 Elmerton Avenue
Harrisburg, PA 17110

WITNESSES: Douglas Biden, Wendy Taylor

DEPARTMENT OF ENVIRONMENTAL PROTECTION
REGULATORY PROGRAMS DIVISION

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NONE OFFERED

P R O C E E D I N G S

CHAIR:

I'd like to welcome you to the Environmental Quality Board, EQB, public hearing on the proposed regulations regarding the beneficial use of coal ash. My name is Dan Lapato. I am an executive policy specialist with the Department of Environmental Protection's policy office in Harrisburg. I am representing the EQB at this evening's hearing. I officially call this hearing to order at six o'clock.

The purpose of this hearing is for the EQB to formally accept testimony on the proposed regulations concerning the beneficial use of coal ash. In addition to this hearing, the EQB held hearings on this proposal on Monday, December 7th, 2009 in Pittsburgh, Tuesday, December 8th, 2009 in Ebensburg, and Wednesday, December 9th, 2009 in Pottsville.

This proposed rulemaking, which was approved by the EQB on July 21st, 2009, includes amendments to 25 Pa.Code Chapter 287 and an addition of Chapter 290 for the establishment of standards, procedures and requirements applicable to the beneficial use of coal ash. Provisions of this

1 proposal address the operating requirements necessary
2 for the beneficial use of coal ash including
3 certification guidelines for the chemical and physical
4 properties of coal ash, water quality monitoring at
5 sites where coal ash is beneficially used,
6 requirements for storage of coal ash in piles and
7 surface impoundments and improvements in reporting
8 requirements to track volumes and locations of sites
9 where coal ash is beneficially reused.

10 The Department initiated extensive
11 outreach in the development of this proposed
12 rulemaking, including presenting the rulemaking for
13 review and comment to the Solid Waste Advisory
14 Committee in March 2009 and the Mining and Reclamation
15 Advisory Board in April 2009.

16 In order to give everyone an equal
17 opportunity to comment on this proposal, I would like
18 to establish the following ground rules. I will first
19 call upon the witnesses who have pre-registered to
20 testify at this hearing. After hearing from these
21 witnesses, I will provide any other interested parties
22 with the opportunity to testify as time allows.
23 Testimony is limited to ten minutes for each witness.
24 Organizations are requested to designate one witness
25 to present testimony on its behalf. Each witness is

1 asked to submit three written copies of his or her
2 testimony to aid in the transcribing of the hearing.
3 Please hand me your copies prior to presenting your
4 testimony. Please state your name, address and
5 affiliation for the record prior to presenting your
6 testimony. The EQB would appreciate your help by
7 spelling any names and terms that may not be generally
8 familiar so the transcript can be as accurate as
9 possible. Because the purpose of this hearing is to
10 receive comments on the proposal, EQB or DEP staff may
11 question witnesses. However, the witnesses may not
12 question the EQB or the DEP staff.

13 In addition to or in place of oral
14 testimony presented at today's hearing, interested
15 persons may also submit written comments on the
16 proposal. All comments must be received by the EQB on
17 or before December 22nd, 2009. Comments should be
18 addressed to the Environmental Quality Board, P.O. Box
19 8477, Harrisburg, Pennsylvania, 17105-8477. Comments
20 may also be e-mailed to RegComments@state.pa.us. All
21 comments received at this hearing, as well as written
22 comments received by December 22nd, 2009, will be
23 considered by the EQB and will be included in a
24 comment response document which will be prepared by
25 the Department and reviewed by the EQB prior to the

1 Board taking its final action on this regulation.

2 Anyone interested in receiving a copy of
3 the transcript of today's hearing may contact the EQB
4 for further information.

5 I'd like to now call the first witness,
6 Doug Biden.

7 MR. BIDEN:

8 Biden (changes pronunciation).

9 CHAIR:

10 Biden. Please, if you wouldn't mind
11 please coming up here.

12 MR. BIDEN:

13 Up there?

14 CHAIR:

15 Uh-huh (yes).

16 MR. BIDEN:

17 Sure. Here are extra copies if anybody
18 wants a copy.

19 Good evening. My name is Doug Biden.
20 I'm president of the Electric Power Generation
21 Association. EPGA is a regional trade association of
22 electric generating companies with headquarters in
23 Harrisburg. Our 14 generating members own and operate
24 a diverse mix of more than 145,000 megawatts of
25 electric generating capacity in the United States,

1 approximately half of which is located in Pennsylvania
2 and surrounding states. Our members own and operate
3 more than 20,000 megawatts of coal and waste coal
4 capacity in the Commonwealth and have decades of
5 experience managing and beneficially using millions of
6 tons of coal combustion products annually, including
7 coal ash in an environmentally responsible manner.

8 EPGA appreciates the opportunity to
9 express its views to the Environmental Quality Board
10 on the proposed coal ash rulemaking.

11 Let me begin with an observation, that
12 we've come a long way with regard to the beneficial
13 use of coal combustion products in general, and coal
14 ash in particular in Pennsylvania. Those of us in the
15 electric power industry can recall the time when
16 beneficial use of coal ash was an elusive goal because
17 a solid waste disposal permit was required for each
18 and every use, which frustrated many potential
19 worthwhile projects.

20 In the mid-1980s, however, it was
21 recognized by the Pennsylvania General Assembly that
22 as electricity demand grew and air quality regulations
23 trended ever more stringent, the volume of coal ash
24 would grow as the generation industry removed more and
25 more particulates from the air. Also, available green

1 field space was becoming increasingly scarce. And as
2 environmentally sound uses for these materials were
3 being developed by industry it made far more sense
4 from a public policy perspective to funnel these large
5 volume byproducts to beneficial use applications
6 rather than to disposal sites where they consume land
7 that could be put to better use.

8 And for a state like Pennsylvania, where
9 the material derived from a fuel that was homegrown,
10 provided reliable and low-cost energy and thousands of
11 jobs, and the byproduct, coal ash, could be safely
12 used in a number of applications including addressing
13 the most chronic water quality problem in the state;
14 namely acid mine drainage. It was clear to the
15 General Assembly that encouraging beneficial use of
16 this material was in the public interest.

17 So in 1986, after hearings in the House
18 of Representatives, House Bill 2274, commonly referred
19 to as the Coal Ash Bill, emerged. This bill removed
20 coal ash that is beneficially used in certain common
21 applications from the definition of solid waste. It
22 had widespread bipartisan support, passed what was
23 then called the House Mines and Energy Management
24 Committee by a vote of 24 to nothing, passed the full
25 House by a vote of 195 to 2, passed the Senate

1 Committee on Environmental Resources and Energy and
2 the full Senate by unanimous votes. After thorough
3 legal and environmental research by his staff,
4 Governor Thornburgh passed the bill into law as Act
5 168 of 1986.

6 From the bill sponsorship memo, through
7 the legislative hearings, committee and floor
8 discussions, and a special all-day seminar on
9 beneficial use that was held prior to consideration of
10 this bill, the record is crystal clear regarding the
11 intent of this legislation, to remove unnecessary
12 impediments to the beneficial use of coal ash.

13 Many of the issues that have been raised
14 over the years by opponents to beneficial use, and
15 continue to be raised by some to this day --- for
16 example, the potential for possible groundwater
17 contamination --- were raised at the hearings in 1986,
18 and in forums conducted since then, and have been
19 answered repeatedly to legislators' and other
20 policymakers' satisfaction. The sponsors of that
21 legislation never contemplated the sham disposal of
22 coal ash throughout the state masquerading as
23 beneficial use. In fact, language was inserted in the
24 bill granting the Department the discretion to
25 establish siting criteria, design and operating

1 standards, certification standards. The very subject
2 of many of the provisions that are already in the
3 residual waste regulations and additional provisions
4 that are being adopted into the regulations with this
5 proposed rulemaking.

6 We cite this history of some of the
7 issues surrounding beneficial use so that the Board is
8 aware of the overwhelming support demonstrated for
9 beneficial use of coal ash by the General Assembly,
10 and to highlight some of the environmental, economic
11 and political issues that converge in this proposed
12 rulemaking. Although we will have some suggested
13 changes to the proposed rule, in general we believe
14 the Department has struck a fair balance of the many
15 issues involved.

16 The Department clearly recognizes that
17 the largest volume beneficial use of coal ash by far
18 is in mine reclamation projects. The language in the
19 proposed rule's background and purpose section very
20 persuasively states the environmental, economic and
21 safety benefits associated with using coal ash at
22 abandoned mines.

23 With proper regulation and oversight by
24 DEP, beneficial use of coal ash at abandoned mines is
25 a sound environmental solution to the hundreds of

1 thousands of acres of mine lands that need to be
2 reclaimed. This task, as DEP notes, is so large that
3 it cannot be accomplished with federal and state
4 funding alone. Thus, beneficial use of coal ash helps
5 fill the gap between available and needed resources.
6 Also, use of coal ash at abandoned mines is one way to
7 help eliminate the dangers associated with open pits
8 and dangerous highwalls which have claimed the lives
9 of hunters, hikers and other outdoor enthusiasts over
10 the years.

11 Although mine reclamation is the dominant
12 beneficial use of coal ash in the Commonwealth, EPGA
13 members have also beneficially used coal ash in other
14 applications such as in the manufacture of concrete,
15 as an asphalt additive, in structural fills, as an
16 anti-skid material, in the development of grouts for
17 mine subsidence control, to control underground mine
18 fires, in road and airport runway sub-base
19 construction, and in various other highway and
20 construction applications. Many of the beneficial
21 uses of coal ash have saved taxpayers and/or
22 contractors millions of dollars in construction or
23 reclamation costs per project over the cost of using
24 alternative materials.

25 These uses represent only a sample of the

1 potential beneficial uses of coal ash. Although we
2 are generally supportive of the proposed rulemaking,
3 EPGA believes the provisions should be risk-based
4 where possible. For example, the certification
5 provisions should reflect the actual intended use.
6 Certainly, ash being incorporated into a product, such
7 as concrete, should not be assessed in the same manner
8 as ash being placed directly on the ground as in large
9 structural fills and mine reclamation projects.

10 We support the Department's incorporation
11 of the recommendations of the National Academy of
12 Sciences from its 2006 report, Managing Coal
13 Combustion Residues in Mines. The Academy report
14 concluded that use of coal combustion products for
15 mine reclamation is appropriate with adequate
16 safeguards, and that its main advantages are in
17 remediation of abandoned mine lands and avoiding the
18 need relative to landfills and impoundments to disrupt
19 undisturbed sites.

20 Key required elements in the oversight of
21 beneficial use at mines include improved
22 characterization of the ash before it is placed into
23 abandoned mines, improved characterization of
24 abandoned mine sites to understand groundwater flow
25 paths, robust monitoring of mine sites, including

1 groundwater monitoring, and site-specific management
2 plans.

3 EPGA also supports the proposed changes
4 in Chapter 290 that are designed to address the
5 Academy recommendations, and where necessary, to
6 strengthen the existing beneficial use regulations.
7 However, again, this should be done in a manner that
8 recognizes the specific characteristics of the ash to
9 be beneficially used, how the ash is to be used and
10 the specific characteristics of the site where the
11 material is to be placed.

12 For example, the need for assessment and
13 abatement at a particular site should allow for
14 consideration of whether an overall improvement in
15 site conditions has occurred. Also, there should be
16 a provision in the proposed certification exemptions
17 for ashes that meet the primary MCL but not the
18 secondary MCL parameters.

19 EPGA appreciates the considerable efforts
20 of the Department in developing the beneficial use
21 regulations. We believe this represents an overall
22 management approach that makes sense and can be
23 accomplished in a manner that is protective of human
24 health and the environment.

25 Again, thank you for the opportunity to

1 present our views on this proposed rulemaking.

2 CHAIR:

3 Thank you.

4 MR. BIDEN:

5 You're welcome. Did I make it in ten
6 minutes?

7 CHAIR:

8 You did.

9 MR. BIDEN:

10 Probably just barely, huh? Good? Thank
11 you.

12 CHAIR:

13 Thank you. Next, Wendy Taylor. If you
14 would, please?

15 MS. TAYLOR:

16 Good evening. I'm Wendy Taylor. I live
17 at 435 Parkview Court, Camp Hill, Pennsylvania 17011.
18 I appreciate the opportunity to provide comments on
19 the proposed amendments to Chapters 287 and 290 of the
20 residual waste management code.

21 I come before you not as an expert or a
22 scientist, but just as a citizen, who as a member of
23 the Sierra Club is concerned about what I have seen
24 and read about the disposal of coal ash.

25 I do understand that coal ash is a huge

1 disposal problem for companies that burn coal to
2 produce electricity. About half of the country's
3 electricity is generated by coal, which leaves about
4 120 million tons of coal ash to dispose of each year.
5 If coal ash were declared a hazardous waste, the
6 industry estimates it would cost \$12 billion to
7 dispose of it properly. That would increase the cost
8 of producing electricity, which would be passed on to
9 consumers. No one wants to pay more for electricity,
10 but neither does anyone want to go without water that
11 they can --- that is not safe to drink or to use.

12 Therefore, we must use some common sense.
13 We know that as the restrictions on air emissions
14 increase releasing less of the toxins to the air, that
15 more of the toxins end up in the fly ash and the
16 bottom ash, making the ash more toxic.

17 For years, Pennsylvania has allowed coal
18 combustion waste to be dumped into abandoned coal
19 mines to reduce acid mine drainage, to fill holes and
20 pits, and to fertilize the soil. Are these areas that
21 were ruined by coal mining now being ruined again by
22 coal ash? Evidence seems to be mounting that it is.

23 Both Pennsylvania's administrative law
24 judges and the United States Department of Interior's
25 Board of Land Appeals have found Pennsylvania's coal

1 combustion waste mine filling programs deficient.

2 The Pennsylvania Environmental Hearing
3 Board invalidated DEP's coal combustion waste
4 monitoring plan, saying the system is simply not
5 capable of detecting contaminants that leave the site.
6 If the projects result in groundwater pollution, no
7 one will know it. The monitoring plan merely creates
8 the illusion of a protection, which is arguably worse
9 than no monitoring at all. This is truly
10 unacceptable, and the Department acted unreasonably
11 and in violation of the law in concluding otherwise.

12 Likewise, the U.S. Interior Department's
13 Board of Land Appeals ruled that the Department of
14 Environmental Protection's failure to properly monitor
15 ash contamination threatened the public water supply
16 wells in the Borough of Tremont, Pennsylvania.

17 This indicates to me that the coal
18 combustion waste is contaminating water sources in
19 Pennsylvania.

20 Examining the Pennsylvania Department of
21 Environmental Protection's own monitoring data, the
22 Clean Air Task Force found that coal ash contaminated
23 groundwater and streams at ten of the 15 mine-fill
24 sites that it studied. In only one of the 15 sites
25 did the data show that filling in mines with coal ash

1 accomplished the goal of improving the water quality
2 in the area. The Clean Air Task Force only evaluated
3 12 percent of the estimated 120 mine-fill sites in the
4 state.

5 And the 2006 National Academies of
6 Science report took a look at the practice of mine
7 filling and concluded in managing coal ash residue in
8 mines that certain safeguards that are not required by
9 Pennsylvania's beneficial use program need to be added
10 in order to protect the health of the people who live
11 near these sites and to protect the environment. They
12 recommend that the site be adequately monitored, the
13 ash be isolated from water, the public have a role in
14 the permitting process and that the law include
15 standards for cleanup.

16 The federal Environmental Protection
17 Agency urged that the geology, hydrology and waste
18 chemistry be taken into account for each site before
19 coal ash is dumped into mines. EPA said that without
20 ideal conditions, the practice of mine filling could
21 degrade rather than improve groundwater and pose a
22 threat to human health and the environment. To date,
23 EPA has left regulating mine filling to the states.
24 And other states are copying Pennsylvania's practices.

25 Millions of tons of toxic coal combustion

1 wastes are dumped directly on lands near waters
2 throughout the Commonwealth of Pennsylvania. Research
3 using DEP's own data show that the contamination to
4 ground and surface water is increasing as a result of
5 the dumping of coal ash. Yet, DEP so far refuses to
6 acknowledge that the pollution is being caused by
7 leaching of toxic metals under its beneficial use
8 program. Instead, DEP is attempting to attribute the
9 problems to the mines rather than the coal combustion
10 waste being dumped in them.

11 Pennsylvania needs enforcement
12 regulations that are clear and free of the loopholes
13 that provide too much discretion. We don't need
14 technical guidance for the placement of coal
15 combustion ash at mine sites. We need hard and fast
16 rules which would benefit everyone involved. First,
17 the industry would know the exact requirements, and
18 therefore the exact cost, before it applies for a
19 permit. DEP would benefit because its staff would not
20 have to engage in endless hours of negotiation to come
21 to terms with each applicant. Without discretionary
22 authority, DEP could use its staff to work on
23 enforcement rather than negotiating. And the public
24 would benefit by knowing that all the sites are being
25 properly monitored by the watchful eye of public

1 servants with an eye on the public's safety.

2 Failure to adopt enforceable regulations
3 specific to coal combustion waste and coal ash
4 disposal will continue to restrict the ability of the
5 citizens and the communities to protect their rights
6 to clean water. Only enforceable regulations can
7 provide the important checks and balances that can
8 ensure that responsible --- the responsibility by all
9 parties involved with this method of disposal of coal
10 combustion waste.

11 We urge DEP to adopt regulations with
12 substantial citizen enforcement provisions by
13 eliminating all of the loopholes that give DEP the
14 discretion to relax its regulations. We join other
15 conversation and citizens' groups in calling for the
16 issuance of regulations that include thorough and
17 accurate characterizations of coal combustion waste,
18 thorough and accurate characterizations of candidate
19 coal combustion waste disposal sites, isolation of the
20 coal from all water sources, long-term comprehensive
21 monitoring of all ash sites, clear standards for
22 corrective action written into all permits, bonds
23 sufficient for monitoring and cleanup, lessening the
24 barriers to public involvement in the permitting
25 decisions, transparency in decision-making and full

1 disclosure of the public's right to know.

2 The National Research Council of the
3 National Academies' report, Managing Coal Combustion
4 Residues in Mines, emphasized the need for careful
5 selection of the locations where coal combustion waste
6 is dumped. The report noted, pre-placement
7 characterization and careful site management are also
8 important considering that the placement of the coal
9 combustion residue in mines is effectively
10 irreversible, because removal of the CCRs from a mine
11 is not likely to be a practical remediation solution.

12 One of the mantras of the environmental
13 movement is to first do no harm. Thus, before coal
14 combustion waste is dumped into a mine, we must be
15 sure that the proposed site is an appropriate
16 location.

17 The Sierra Club is submitting a summary
18 of technical amendments. I have also attached some of
19 the amendments to my testimony.

20 In closing, advocates would generally be
21 willing to accept the regulations as proposed if all
22 loopholes are stricken from the draft.

23 We urge the Department to seriously
24 consider the thoughtful and detailed factual evidence,
25 analysis and suggestions and comments that other

1 citizens' groups and representatives have submitted.

2 Thank you for your kind attention.

3 CHAIR:

4 Thank you. At this time, I would like to

5 open the floor to anyone who is interested in

6 presenting testimony. Is there anybody interested?

7 No? All right. With no other witnesses present, on

8 behalf of the EQB, I hereby adjourn this hearing at

9 6:27 p.m. Thank you.

10

11

* * * * *

12

HEARING CONCLUDED AT 6:27 P.M.

13

* * * * *

14

CERTIFICATE

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I hereby certify that the foregoing

16

proceedings, hearing held before Chair was reported by

17

me on 12/10/2009 and that I Brian D. O'Hare read this

18

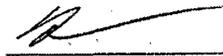
transcript and that I attest that this transcript is a

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true and accurate record of the proceeding.

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Court Reporter

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