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## INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

January 21, 2010

Honorable John Hanger, Chairman  
Environmental Quality Board  
Rachel Carson State Office Building  
400 Market Street, 16th Floor  
Harrisburg, PA 17101

Re: Regulation #7-442 (IRRC #2808)  
Environmental Quality Board  
Beneficial Use of Coal Ash

Dear Chairman Hanger:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us). If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman  
Executive Director

wbg  
Enclosure

cc: Honorable Mary Jo White, Majority Chairman, Senate Environmental Resources and Energy Committee  
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee  
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee  
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee  
Robert A. Mulle, Esq., Office of Attorney General  
Andrew Clark, Esq., Office of General Counsel

# Comments of the Independent Regulatory Review Commission



## Environmental Quality Board Regulation #7-442 (IRRC #2808)

### Beneficial Use of Coal Ash

January 21, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the November 7, 2009 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (EQB) to respond to all comments received from us or any other source.

**1. General – Protection of the public health, safety and welfare; Effect on this Commonwealth’s natural resources; Economic impact; Need; Reasonableness.**

*Need for the regulation*

The Pennsylvania Chamber of Business and Industry commented in support of the beneficial use of coal ash, but at the same time asks the EQB to review the proposed regulation to make sure the requirements are necessary and warranted. It expresses concern that the regulatory requirements could deter beneficial coal ash use activities. It suggests that the regulatory balance be properly drawn.

ARIPPA directly questions the need for the regulation, given that the current framework for beneficially using coal ash is working and nationally recognized. Also, it believes that problems with coal ash disposal have been isolated incidents.

We recognize the benefits the EQB explained in the Preamble, including the explanation that “most costs that would be associated with the regulations are already part of the Department’s program.” However, we are also concerned that commentators believe that the regulatory requirements could deter beneficial coal ash use activities. Therefore, we request further explanation from the EQB regarding the need to establish requirements in regulation rather than continuing with the current program which appears to be successful.

*Protection of the public health, safety and welfare; Economic impact*

The regulation specifies many limits for the content and placement of coal ash. These limits include Sections:

- 290.101(d) which only requires water quality monitoring if more than 10,000 tons of coal ash per acre is placed or more than 100,000 tons in total.
- 290.101(e) which specifies coal ash may not be placed within eight feet of a water table.
- 290.102(d)(1) and 290.105(e)(1) which requires a pH in the range of six to nine.
- 290.102(d)(6) which states coal ash shall be covered by 12 inches of soil.
- 290.104(f)(2) and 290.105(e)(3) which require placement of coal ash to be accomplished by mixing with spoil material or by spreading in horizontal layers no greater than two feet thick.
- 290.104(f)(3) and 290.105(e)(3) which requires coal ash to be spread and compacted within 24 hours of its site delivery.
- 290.105(e)(9) which specifies distances from streams, water supplies, sinkholes and wetlands.
- 290.202 which includes several certification standards.
- 290.301 which specifies sampling and the number of years water quality has to be monitored.
- 290.302 which specifies the number, location and depth of monitoring points.
- 290.305(c) and (d) which specify standards with distance limits at and beyond 500 feet from the perimeter of the permitted coal ash placement area or the property boundary.
- 290.404 which specifies several areas where coal ash is prohibited.
- 290.405(b) which specifies that stored coal ash shall be separated from the water table by at least four feet.
- 290.410 which specifies standards for liners and leachate detection zones.
- 290.411(a) which requires at least eight feet between the liner and the water table.

Some commentators representing the industries that produce the coal ash believe the limits are too restrictive and costly, and suggest lesser regulation of them. On the other hand, some commentators believe the limits are too lax and could result in pollution. The EQB should explain how it selected these limits and how they protect the public health, safety and welfare. We will

review the EQB's response in our consideration of whether the final-form regulation is in the public interest.

### *Implementation procedures*

In the Preamble, the EQB explains that prior to this proposed rulemaking, the beneficial use of coal ash was managed through existing residual waste regulations and technical guidance documents. The Preamble mentions coal ash placement going back 25 years or more. Commentators questioned the effect of the regulation on past placement of coal ash. The commentators included concerns with water quality monitoring, the regulation's effect on circulating fluidized bed ash and the impact of escalating compliance costs. The EQB should explain how it will transition previously approved coal ash sites and operations that depend on disposal of ash to the requirements in the final-form regulation.

### *Out-of-state coal ash*

In the Preamble, the EQB states that:

- This Commonwealth has hundreds of thousands of acres of mine lands that need to be reclaimed;
- More than two billion tons of waste coal piles are scattered across the Anthracite and Bituminous Coal Regions of this Commonwealth; and
- The Department [of Environmental Protection] has observed numerous instances where removal of the piles and reclamation has significantly reduced pollutant loads for metals, such as arsenic, zinc, nickel, iron and manganese.

The Preamble explains that the burning of waste coal piles from Pennsylvania mines serves several purposes, including the aesthetics of removing the piles, removal of the pollutant runoff from piles, fuel for power plants, reduction of the piles into ash, and the ultimate reclamation of the lands at reduced pollutant loads. However, in the response to Regulatory Analysis Form Question 25, the EQB mentions certification of out-of-state coal ash.

We are concerned with importing waste coal and coal ash into Pennsylvania. Importing waste coal and coal ash could effectively compromise the environmental benefits for Pennsylvania by slowing the reduction of coal piles within Pennsylvania while another state receives the environmental benefits. Therefore, we request an explanation of whether out-of-state waste coal and coal ash will be imported into Pennsylvania and the impact on the benefits of beneficial use of coal ash if waste coal and coal ash is imported.

## *Bonds*

Several commentators believe bonds should be required to address long-term water quality problems and to protect taxpayers from potentially expensive clean up costs. They believe these bonds should be required before a permit is issued to place the coal ash. The EQB should explain how the regulation adequately protects the Commonwealth from any long-term financial obligations if the placement of coal ash causes water quality problems.

## *Comment of the United States Department of the Interior*

By letter dated January 8, 2010, the United States Department of Interior (USDI) submitted comment on this proposed regulation to this Commission. It is our understanding that the USDI attempted to submit these comments to the EQB during the public comment period, but due to an error the comments were not received by the EQB. Upon review of the USDI comment, we believe it has provided many beneficial comments and suggestions to the EQB that should be considered. Therefore, we incorporate the USDI comment in our comments for purposes of the EQB's consideration and response. We will consider the EQB's responses to the USDI as part of our consideration of whether the final-form regulation is in the public interest.

## **CHAPTER 287. RESIDUAL WASTE MANAGEMENT – GENERAL PROVISIONS**

### **2. Section 287.1. Definitions. – Reasonableness; Clarity.**

#### *Coal ash*

The EQB is amending its existing definition of this term to more closely match the statutory definition found in the Solid Waste Management Act (35 P.S. Sections 6018.101 – 6018.1003) (SWMA). Some commentators have suggested that the definition be expanded to include blended fuels. Other commentators believe a separate definition of circulating fluidized bed coal ash is needed to recognize the different characteristics of this type of material. We ask the EQB to explain why the revised definition of coal ash is adequate to address the various types of ash that can be generated and possibly used for a beneficial purpose as outlined Chapter 290.

#### *Structural fill*

A commentator believes that the revised definition of this term will prevent the use of coal ash as valley fill or for filling open pits and that the prohibition is contrary to the intent of this regulation. Why has the EQB decided to prohibit the use of coal as valley fill or for filling open pits?

## **CHAPTER 290. BENEFICIAL USE OF COAL ASH**

### **Subchapter B. BENEFICIAL USE OF COAL ASH**

#### **3. General. – Reasonableness; Need.**

Several commentators have stated that coal ash that will be incorporated into a product should not be assessed in the same manner as coal ash being placed on the ground. For example, they believe coal ash used for the production of concrete does not pose the same risk to public health as coal ash placed in abandoned mines. In the Preamble to the final-form regulation, the EQB should explain why all coal ash, regardless of its potential beneficial use, has to be assessed in the same manner.

#### **4. Section 290.101. General requirements for the beneficial use of coal ash. – Protection of the public health, safety and welfare; Effect on this Commonwealth’s natural resources; Reasonableness; Need; Implementation procedures.**

##### *Subsection (a)*

This subsection allows coal ash to be beneficially used without a permit if the person proposing the use complies with this Chapter. A commentator has suggested that the public health would be better protected if a permit is required for activities such as using coal ash as structural fill or a soil substitute. In the Preamble to the final-form regulation, we ask the EQB to explain how this proposed regulation adequately protects the public health.

##### *Subsection (d)*

This subsection would allow the Department to waive or modify the water quality monitoring requirements for uses listed under Section 290.106(b)(1)-(6). How would a person request such a waiver? How will the Department evaluate and administer such a request? The process for requesting a waiver should be included in the final-form regulation.

##### *Subsection (f)*

This subsection states that coal ash may not be used in a way that causes water pollution. What is meant by the phrase “causes water pollution”?

**5. Section 290.102. Use of coal ash as structural fill. – Protection of the public health, safety and welfare; Effect on this Commonwealth’s natural resources; Implementation procedures; Clarity**

*Subsection (a)*

This section requires a person proposing to use coal ash as structural fill to submit a written notice to the Department 60 days before its use. Commentators have suggested that the 60-day notification requirement only be applicable to new projects or active projects that extend beyond two years of the effective date of the regulation. As noted above in our general comments on the effective date of the regulation, how will the Department administer this provision?

In addition, Section 290.103, relating to use of coal ash as a soil substitute or soil additive, contains a similar notification requirement but also requires the Department to inform the person that the proposed use is consistent with that section. Has the EQB considered adding a similar requirement to Subsection(a) of Section 290.102? If the EQB does add a similar requirement, we ask that it specify how and when a response will be provided.

*Subsection (b)*

When will the Department publish the notice that coal ash will be used as structural fill, before or after it is actually used?

*Subsection (c)*

This subsection imposes public notification requirements when more than 10,000 tons of coal ash per acre is to be used on a project or more than 100,000 tons of coal ash in total will be used at a project. How did the EQB determine that the threshold limits listed in this subsection and Section 209.105(b)(6), relating to the use of coal ash at abandoned coal surface mine sites, adequately protect the public health?

Also, can internet addresses be used in addition to the public offices under Subsection (c)(3)?

*Subsection (d)*

Subsection (d)(4) states that surface runoff from the fill area shall be “minimized.” This term is also used throughout the proposed regulation, including:

§ 209.102(d)(8)	§ 209.104(g)(4)	§ 209.303(a)(3)(iii)
§ 209.102(e)(3)	§ 209.104(h)(2)	§ 209.403(a)
§ 209.103(d)(8)	§ 209.105(e)(4)	§ 209.403(b)
§ 209.104(f)(9)	§ 209.105(e)(8)	§ 209.404(a)(4).

The term “minimize” does not establish a binding standard that can be evenly applied to all members of the regulated community or give enough guidance to the regulated community so that they know how to comply. The EQB should amend these provisions to provide a standard that can be clearly understood.

*Subsection (e)*

Subsection (e)(2) and Sections 290.103(e)(3) and 290.105(e)(9)(ii) prohibit the placement of coal ash within 300 feet of a water supply unless a written waiver from the owner of the water supply is obtained. A commentator believes this provision does not provide enough protection to the owner. For example, will the owner understand the science of ash placement? However, another commentator believes the consent requirement is inconsistent with SWMA, the Hazardous Sites Cleanup Act (35 P. S. Sections 6020.101—6020.1305) and The Land Recycling and Environmental Remediation Standards Act (35 P.S. Sections 6026.101 – 6026.908) because beneficially used coal ash is not a waste. The Department should explain how this provision adequately protects the public health and why it is consistent with other regulations and environmental statutes.

The phrase “in a form acceptable to the Department” found in Subsection(e)(2) is vague. How will members of the regulated community know what is appropriate? This phrase also appears in Sections 290.103 (e)(3) and 290.105(e)(9)(ii).

**6. Section 290.103. Use of coal ash as a soil substitute or soil additive. – Protection of the public health, safety and welfare; Need; Implementation procedures; Clarity.**

*Public notice*

This section does not contain public notification requirements found in Section 290.102. Would the public health be better protected if similar notification requirements were included in this section?

*Subsection (a)*

This is general information that is already addressed under Section 290.101(a), which pertains to general requirements. What is the need to duplicate that language in this subsection?

*Subsection (c)*

Similar to our second concern on Section 290.102(a), we recommend that this subsection specify how and when the Department will inform the person proposing to beneficially use coal ash that the use is consistent with this section.

*Subsection (d)*

Subsection (d)(5) states, “Coal ash shall be applied at a rate per acre that will protect public health, public safety and the environment.” This requirement is vague. Who makes this determination? What criteria will be used to make this determination? The phrase also appears in Section 290.105(e)(10)(i), relating to the beneficial use of coal ash at abandoned coal surface mine sites.

*Reporting of the use of coal ash*

Other sections of the proposed rulemaking require certain information to be reported to the Department by January 31<sup>st</sup> of each year. See Sections 290.102(f), 290.104(j) and 290.105(f). Is there a need to report any information pertaining to this section to the Department?

**7. Section 290.104. Beneficial use of coal ash at coal mining activity sites. – Protection of the public health, safety and welfare; Implementation procedures; Fiscal impact; Clarity.**

*Subsection (a)*

The reference to “other applicable environmental statutes and regulations promulgated thereunder” under Subsection (a)(1) is vague. Similar language appears in Sections 290.105(a)(1) and 290.409(1). We recommend that more specific references be included in the final-form regulation.

*Subsection (b)*

This section requires a person proposing to use coal ash at coal mining activity sites to obtain a permit from the Department. How soon before coal ash is used must a person request permission from the Department? In what form must the request be made? How and when will the Department respond to the request? Can coal ash be used before Department approval occurs? These issues should be addressed in the final-form regulation. Alternatively, if this permit process is guided by other Department regulations, an appropriate cross-reference should be included in this subsection.

Subsection (b)(2) makes reference to a “certification number.” This is the first time this term is used in Chapter 290. We are aware that Section 290.201(d) identifies what this term is. However, we believe the regulated community would benefit from a definition of this term. We note that the term also appears in Subsection (j) and the term “certification *identity* number” is used in Sections 290.105(b)(2) and(f) and 290.201(d).

*Subsection (c)*

Commentators who presumably will be paying this fee believe it is excessive and unnecessary. The EQB should further explain how the fee was derived and why it is needed.

*Subsection (e)*

In Subsection (e), the phrases “overall improvement” and “prevent the degradation” are vague. In addition, the phrase “overall improvement” could be interpreted to only require a degree of improvement. For example, if the polluting acid drainage from waste coal is the baseline standard, either of these provisions could allow further pollution, even though they may meet the regulation’s requirement to be an overall improvement and prevent degradation. The EQB should explain how it intends for these requirements to be implemented and consider amending them.

*Subsection (f)*

This subsection addresses additional operating requirements for the placement of coal ash at coal surface mining and coal refuse reprocessing sites. We have six concerns. First, what is meant by the terms “coal surface mining” and “coal refuse reprocessing sites” and what is meant by the term “coal refuse disposal sites” under Subsection (h)?

Second, a commentator is concerned that the volume limitations set forth in Subsection (f)(1) could be a disincentive to re-mining activities taking place in the anthracite region and that rules should be written to account for volumes that were removed decades ago. How will the Department administer this provision? Will this provision allow volumes previously removed to be counted towards the volume limitations?

Third, a commentator believes the costs associated with this regulation and the volume limitations of this subsection will not make it economical to reclaim existing small coal refuse piles. We ask the EQB to explain how these regulations will not have a negative impact on the reclamation activities taking place throughout the Commonwealth.

Fourth, according to a commentator, coal mining and sales activities are accounted for on a tonnage basis, not a volume basis. Has the Department considered allowing either a volume or tonnage measurement?

Fifth, Subsection (f)(4) imposes compaction standards on coal ash. It requires coal ash from each source to be tested individually. Commentators have noted that coal ash placed at a site can come from more than one source. What is the need for testing each source of coal ash?

Sixth, commentators are concerned that the prohibition on placing coal ash on coal refuse processing sites under Subsection (f)(5) would eliminate this activity in the future. They believe the regulation should allow for the controlled reconstruction of these sites. What is the basis for this prohibition?

*Subsection (i)*

This subsection requires a person using coal ash at a coal mining activity site to sample the ash on a quarterly basis. Commentators have two concerns with this provision. First, since generators of coal ash are required to perform chemical analysis of the ash, what is the need for this provision?

Second, if the ash source and the ash placement are located at the same site and the only ash being placed comes from that generator, what is the need for the additional sampling?

**8. Section 290.105. Coal ash beneficial use at abandoned coal surface mine sites. – Implementation procedures; Clarity.**

*General*

We have three general concerns with this section. First, this section replaces Section 287.664, titled “Coal ash beneficial use at abandoned and **non-coal surface mines.**” (Emphasis added.) Is the Department eliminating the placement of coal ash at non-coal mining sites, such as quarries? If so, what is the reason for this change of policy?

Second, to be consistent with the three previous sections, the title of this section should be amended to “Beneficial use of coal ash at abandoned coal surface mine sites.”

Third, what specifically is meant by the term “abandoned coal surface mine sites”? Can a cross-reference be added to a definition of this term?

*Subsection (a)*

This subsection requires written approval from the Department before coal ash can be beneficially used at abandoned coal surface mine sites. We question how the approval process will work. How soon before coal ash is beneficially used must a person seek approval from the Department? In what manner must the request be made? How and when will the Department respond to the request? What criteria will the Department use to determine if coal ash can be placed at a site? The final-form regulation should provide more direction on how this process will work.

*Subsection (b)(5)*

Who determines if a water quality monitoring plan is needed under this subsection?

**9. Section 290.106. Other beneficial uses of coal ash. – Implementation procedures; Clarity.**

*Subsection (b)*

We have two concerns with Subsection (b). First, Subsections (b)(3)(i), (b)(6) and (b)(7)(i) require a person wishing to use coal ash for certain purposes to provide advance written notice to the Department before using the coal ash. How far in advance must the notice be given?

Second, Subsection (b)(4) requires bottom ash or boiler slag used as antiskid material or road surface preparation material to be consistent with “Department of Transportation specifications or other applicable specifications.” This requirement is vague. The final-form regulation should specify what specifications would be acceptable.

**Subchapter C. COAL ASH CERTIFICATION**

**10. Section 290.201. Coal ash certification. – Protection of the public health, safety and welfare; Effect on this Commonwealth’s natural resources; Implementation procedures; Fiscal impact; Clarity.**

*Subsection (c)*

Commentators have questioned the need for all of the tests required under this subsection. For example, what is the need for certification if the coal ash does not come into contact with the ground? Is it appropriate to test for moisture content for all material? What is the need for testing for permeability if the coal ash is not being used as low-permeability material? Why is it necessary to determine the neutralization potential of coal ash when that might not be its intended use? In the Preamble to the final-form regulation, the Department should further explain why all of the tests contained in this subsection are appropriate.

In addition, once a request for coal ash certification is made under Subsection (c), how long will the Department have to either certify the coal ash or reject it?

*Subsection (e)*

How will the Department determine what the exact monitoring requirements are for each generator of certified coal ash under Subsection (e)? How will the generator be notified of what their specific monitoring requirements are? Can

the provisions of this section be uniformly applied to all generators of coal ash seeking to beneficially use it?

In addition, a commentator has questioned the reliability of annual reporting to the Department of the volume in cubic yards of coal ash produced for beneficial use. They note that ash can be compacted and believe the tonnage requirements in Subsection (e)(3) would provide the Department with the required data. Given this statement, what is the need for the volume reporting requirement?

*Subsection (f)*

This subsection requires the coal ash generator and the person using the coal ash to notify the Department of any changes to the information filed in the certification application or of any evidence that the coal ash may not meet certification requirements. We have two questions. First, how would the person beneficially using the coal ash know if any information contained in the certification application filed by the generator has changed? Second, what is the need for both parties to notify the Department of any changes?

**11. Section 290.202. Revocation of certification. – Clarity.**

The term “consistently” used in Subsection (a)(2) is vague. It does not establish a binding standard that could be evenly applied to all members of the regulated community. This provision should be clarified in the final-form regulation.

**Subchapter D. WATER QUALITY MONITORING**

**12. Section 290.301. Water quality monitoring. – Protection of the public health, safety and welfare; Effect on this Commonwealth’s natural resources; Implementation procedures; Fiscal impact; Clarity.**

*Subsection (a)*

This subsection requires a person to submit a water quality monitoring plan to the Department for approval before the placement or storage of coal ash at certain sites. We have several concerns. First, what is a “water quality monitoring plan”? How will the approval process work? Does a form need to be submitted? How soon before using coal ash must the application be filed? How long will the Department have to review the application? How will the applicant be notified of the Department’s decision? The final-form regulation should address these questions.

*Subsection (g)*

Several commentators have concerns with this section and the monitoring requirements required after final placement or storage of coal ash. Some

commentators have recommended that the time frame for monitoring be tied to Phase III bond release requirements of Chapters 86-90. In addition, some believe the monitoring requirements are not warranted while others believe the requirements do not adequately protect the environment and the public health. In the Preamble to the final-form regulation, we ask the EQB to explain why the time frames of this subsection are appropriate and how the requirement will work with other Department regulations.

**13. Section 290.302. Number, location and depth of monitoring points. – Protection of the public health, safety and welfare; Implementation procedures; Need; Fiscal impact; Clarity.**

*Scientific basis*

Several commentators have questioned the science behind the requirements of this section. They note that the quality of a particular monitoring point is more important than a preset number of points and that the number of wells should be a factor of the specific placement, location and volume of the coal ash that is to be placed. In the Preamble to the final-form regulation, the EQB should explain why the regulatory requirements contained in this section are appropriate.

**14. Section 290.304. Assessment plan. – Protection of the public health, safety and welfare; Implementation procedures; Clarity.**

*Subsection (a)*

This subsection requires an assessment plan to be submitted to the Department within 60 days under certain circumstances. We have four concerns. First, what is an assessment plan? We recommend that this term be defined.

Second, an assessment plan is required under Subsection (a)(1) if a “significant change” in the quality of water has occurred. This standard is vague. How could a member of the regulated community know what constitutes a “significant change”? The final-form regulation needs to include a measurable standard.

Third, would an assessment plan be required if the “significant change” is a change that improved the quality of the water?

Fourth, are the changes that will require an assessment plan tied to actual risks to public health?

*Subsection (c)*

Under this subsection, how would one know if a person is an “expert” in the field of hydrogeology? We recommend that a more precise standard be included in the final-form regulation. We have a similar concern with § 290.305(b).

**15. Section 290.305. Abatement plan. – Clarity.**

Subsection (c)(3)(ii) references “Department guidelines for assessing the health risks of environmental pollutants.” A more specific reference to the guidelines would assist the regulated community in complying with the regulation.

**Subchapter E. COAL ASH STORAGE**

**16. General. – Clarity.**

There are three general concerns. First, a commentator questioned whether this Subchapter applies to all coal ash storage or just large scale producers and users of coal ash. We agree that it is not clear what specifically triggers the requirements within Subchapter E. We note, for example, that Subsection 290.402(d) states that the Department will presume that a person storing coal ash contrary to the regulation is operating a waste disposal facility. Subchapter E should clearly state what actions require compliance with the regulation.

Second, several commentators believe that the beneficial uses of coal ash will not be used by smaller construction projects if the material has to be stored in compliance with Subchapter E. The EQB should explain the impact of Subchapter E on the beneficial use of coal ash.

Finally, the distinctions provided within this subchapter are confusing. For example, what is the difference between Section 209.401(a) that affects “a person storing coal ash...” and Section 209.405(a) that affects “a person storing coal ash in piles...”? What volume constitutes a pile? We recommend that the EQB review Subchapter E and amend it to clearly state when its requirements apply.

**17. Section 290.401. Design and operation. – Clarity.**

*Subsection (a)*

It is not clear what standard is set by requiring the person to “employ best engineering design and construction practices.” If the design and operation practices must be certified by a registered professional engineer, the regulation should directly state that requirement. We recommend that the EQB review Subsection (a) and amend it to provide a clear standard.

*Subsection (d)*

This subsection states that a person storing coal ash shall “routinely” inspect facilities and equipment. This requirement is vague. A more precise inspection requirement is needed so the regulated community can comply and the Department can enforce the regulation.

**18. Section 290.402. Duration of storage. – Clarity.**

*Subsection (b)*

The term “significant quantity” used in Subsection (b)(1) is vague. Reference to a more precise amount should be included in the final-form regulation.

*Subsection (e)*

The phrase “operational records that are sufficiently detailed to demonstrate to the Department” is subjective and vague. The regulation should be amended to provide a clear standard for compliance and enforcement.

*Subsection (f)*

Under this subsection, what “other requirement” does the regulation refer to? This is vague and may allow enforcement of provisions not in regulation. We recommend deleting this phrase.

**19. Section 290.404. Areas where coal ash storage is prohibited. – Implementation procedures; Economic impact; Clarity.**

*Existing coal ash storage areas*

A commentator questioned how this regulation will be administered for existing coal ash storage areas and impoundments. We believe the commentator raises a legitimate concern which could involve considerable costs. The EQB should explain how it will implement Section 290.404.

*Subsection (b)*

Under Paragraph (6), how can it be determined whether a particular geologic study is “competent”? Would certification by a licensed geologist qualify? The regulation should be amended to set a clear standard.

Paragraphs (9) and (10) allow waivers relating to public water supplies and properties. We suggest requiring public notice of the intent to allow these waivers so that the people who may be affected have the opportunity to provide their input or consent prior to placement of the coal ash.

**20. Section 209.407. Storage piles – leachate and runoff control. – Reasonableness.**

A commentator suggested that Subsection (a) should recognize that leachate and runoff can also be directed to a treatment system. If this is accurate, we recommend adding this clarification.

**21. Section 290.410. Storage impoundments – design requirements. – Clarity.**

*Paragraph (4)*

Subparagraph (i) uses the vague term “rapidly.” We recommend replacing this term with a clear standard.

*Paragraph (5)*

Subparagraph (i) states the liner must prevent the migration of leachate through the liner “to the greatest degree that is technologically possible.” It is not clear how this standard would be applied to existing storage impoundments. We suggest adding the phrase “at the time of construction.”

**22. Section 290.412. Storage impoundments – failure. – Protection of the public health, safety and welfare.**

*Subsection (a)*

This subsection requires several actions upon failure of an impoundment, including notice to the Department, but does not require public notice. Should the public be notified if a storage impoundment fails and could cause problems beyond its boundaries?

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REVIEW COMMISSION



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**Date:** January 21, 2010  
**Pages:** 18

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-442 (IRRC #2808). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

**Accepted by:** Karen Gordy **Date:** 1-21-10