

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-545 (IRRC #3245)

Water Supply Replacement for Coal Surface Mining

January 2, 2020

We submit for your consideration the following comments on the proposed rulemaking published in the November 2, 2019 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (Act) (71 P.S. § 745.5b). Section 5.1(a) of the Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (Board) to respond to all comments received from us or any other source.

1. **Section 87.47. Alternative water supply information.**
Section 88.27. Alternative water supply information. – Implementation procedures; Protection of the public health, safety and welfare.

Under these sections, the Department of Environmental Protection (Department) is required to “notify the **owner** of any potentially affected supply.” [Emphasis added.] In the Preamble, the Board states that “the Department will give **advance notice** to water supply owners **and water supply users**.” [Emphasis added.] A public commentator states that limiting “notice to owners . . . would severely undercut the stated goal of this amendment” and that advance notice “will help enable residents to know their rights and protect their water.” Why is a timeframe not specified in the regulation for notice, and why are water supply users omitted? We ask the Board to amend the notification requirements to clarify implementation procedures and to ensure protection of the public health, safety and welfare. We also ask the Board to explain in the Preamble to the final-form regulation the implementation procedures for notification and how the procedures adequately protect the public health, safety and welfare. Finally, the Department should review the entire final regulation to ensure that water supply users are included in all relevant provisions.

2. **Section 87.119a. Hydrologic balance: water rights and replacement.**
Section 88.107a. Hydrologic balance: water rights and replacement. – Fiscal impacts; Implementation procedures; Clarity; Reasonableness; Timetables for compliance.

This comment relates to the parallel provisions in Sections 87.119a and 88.107a (relating to hydrologic balance: water rights and replacement).

Under Subsection (a) (relating to water supply surveys), Paragraph (1) states that the survey must include certain information to the extent that it can be collected without “excessive

inconvenience to the water supply owner or water supply user.” In the Preamble, the Board explains that “[t]hese exceptions address situations such as when an operator or mine owner would have to excavate or remove a structure to gain access to a well or spring, or, for supplies with existing treatment, when there is no reasonable option to collect untreated water without risking contamination of the supply (that is, no port in the piping to obtain the water).” Further, the Board states that the Department will make its determination that a scenario constitutes an excessive inconvenience or that collection is infeasible on a case-by-case basis. Since the term “excessive inconvenience” is not regulatory language and does not set a binding norm that could be predicted by the regulated community, we ask the Board to clarify this term in the final-form regulation.

Also under Subsection (a), Paragraph (1)(vi) requires the survey to include “[s]ufficient sampling and other measurements to document the seasonal variation in hydrologic conditions of the water supply.” Is an operator or mine owner required to survey water during all four seasons before an application can be submitted? We ask the Board to explain in the Preamble to the final-form regulation the timetable for compliance with this requirement.

Regarding Subsection (b) (relating to water supply replacement obligations), the Preamble explains that Sections 87.119a and 88.107a replace Sections 87.119 and 88.107, respectively, which apply to mine operators and persons engaged in government-financed reclamation. However, government-financed reclamation is not addressed in Subsection (b) and the Board does not explain in the Preamble why these persons are no longer obligated to meet the water supply replacement requirements. A public commentator found this omission “problematic because [government-financed construction contracts] often utilize the exact same processes and procedures as surface mining.” We ask the Board to amend the final-form regulation or to explain in the Preamble why it is reasonable for a person engaged in government-financed reclamation not to be required to meet the obligations in this subsection.

Under Subsection (b), Paragraph (1) states that the operator or mine owner “who affects a water supply to any demonstrable extent . . . shall **promptly** restore or replace the affected water supply with a permanent alternate supply . . .” [Emphasis added.] The term “promptly” is not regulatory language and does not set a binding norm that could be predicted by the regulated community. We ask the Board to clarify this implementation timeframe in the final-form regulation.

Also under Subsection (b), Paragraph (2) states that “for any water supply that will . . . be affected by . . . the proposed mining, the operator or mine owner shall provide a replacement supply **prior to commencing the activity.**” [Emphasis added.] How does this provision work with Subsection (c) (relating to temporary water supplies) that requires the operator or mine owner to provide a temporary water supply within 24 hours if the affected water supply owner or user is without a readily available alternate source of water? We ask the Board to explain in the Preamble to the final-form regulation how an owner or mine operator will be required to implement these regulations.

As noted above, Subsection (c) relates to **temporary** water supplies. The term “temporary” is not regulatory language and does not set a binding norm that could be predicted by the regulated community. We ask the Board to clarify this timeframe in the final-form regulation.

Further relating to Subsection (c), we note that the requirement for a temporary water supply may be subject to a preliminary determination by the Department. The Board states in the Preamble that “the Department may determine in a preliminary review that the water supply loss is not related to the mining activity in which case the operator or mine owner will not be required to install a temporary supply. This determination may not be possible, however, within a 24-hour [timeframe], but the District Mining Office personnel who investigate water loss claims stated that they can regularly make this preliminary determination within 48 hours of notification of an impacted supply.” We have several concerns related to this provision and the Board’s explanation. Why is the timeframe for implementation in Subsection (c) 24 hours if the Department needs 48 hours to make a determination? If the provision remains unchanged at final, what is the recourse for an operator or mine owner who has complied by providing a temporary water supply within 24 hours if the Department then determines that the water supply loss is not related to mining activity? Who will reimburse the operator or mine owner? We ask the Board to explain the reasonableness and fiscal impacts of these implementation timeframes in the final-form regulation.

Subsection (j) (relating to presumption of liability) is described in the Preamble as “specify[ing] that the presumptive area includes support areas” However, this subsection does not explicitly include “support areas.” We ask the Board to add “support areas” or explain in the Preamble to the final-form regulation how support areas are addressed in this subsection.

3. Regulatory Analysis Form (RAF). – Economic or fiscal impacts.

Both RAF Question #9 and the Preamble state: “Section 4.2(f)(4) of PA SMCRA [the Pennsylvania Surface Mining Conservation and Reclamation Act], 52 P.S. § 1396.4b, was not approved [by the United States Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (OSM)] because it allowed for final bond release when there is an outstanding water supply replacement order. See 30 CFR 938.12(c)(1). Sections 87.119(i) and 88.107(i) were not approved for the same reason. See 30 CFR 938.12(c)(7).” The Preamble also states that “[s]tate laws must be consistent with the provisions of Federal SMCRA, see 30 U.S.C.A. § 1255(a)” Has Section 4.2(f)(4) of the Pennsylvania SMCRA been amended to conform to Federal law? If not, how is the Department addressing OSM’s disapproval of this statutory provision?

This proposed regulation adds a requirement for an operator or mine owner to provide a temporary water supply to a water supply owner or user in certain circumstances. The Board provides in response to RAF Questions #15 and #17 that district mine offices receive complaints and claims for water supply replacement each year. Further, the Board states in response to RAF Questions #19 and #24 that providing a temporary water supply would cost \$1,000 – \$2,000 per occurrence. However, the Board does not provide an estimate of costs for the regulated community to implement this regulation in response to RAF Question #23. Since the Board states that there are costs for temporary water supplies and claims for these supplies, we ask the

Board to amend its response to Question #23 or to explain why it is appropriate to respond “\$0” to this question.

4. Miscellaneous clarity.

- As published in the *Pennsylvania Bulletin*, Section 87.119a(d)(1) contains a typographical error in the cross-reference to Section 4.29(f) of the Pennsylvania SMCRA. This cross-reference should be corrected to Section 4.2(f).
- If the Department is required to submit this proposed regulation to OSM for its review and approval, we ask the Board to provide this information in the Preamble to the final-form regulation.
- Paragraph 6 of the draft Model SMCRA Water Supply Settlement Agreement and Release Form limits the “release of the SMCRA water supply restoration/replacement rights given by the Water Supply Owners in this Agreement [to] a term of no more than thirty-five (35) years.” What is the reason for this time limit?