2842

Pennsylvania Coal Association
212 North Third Street • Suite 102 • Harrisburg, PA 17101

(717) 233-7900
FAX (717) 231-7610
pacoal1@aol.com

George L. Ellis
President

June 1, 2010

VIA EMAIL: RegComments@state.pa.us

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

RE: 25 PA Code Chapters 86, 87, 88, 89 and 90
Incidental Coal Extraction, Bonding, Enforcement Sediment Control and Remining Financial Guarantees
40 Pa. Bull. 2373 (May 1, 2010)

Dear Members of the Board:

The Pennsylvania Coal Association (PCA) submits the following comments in response to the above referenced rulemaking proposed by the Pennsylvania Department of Environmental Protection (the "Department").

PCA is the principal trade organization representing bituminous coal operators - underground and surface, large and small - as well as other associated companies whose businesses rely on a thriving coal economy. PCA member companies produce over 80 percent of the bituminous coal annually mined in Pennsylvania, which totaled 68 million tons in 2008.

Pennsylvania is the fourth leading coal producing state and its mining industry is a major source of employment and tax revenue. Latest data indicates it created 41,500 direct and indirect jobs with more than $7 billion in economic input stimulated by the activity of the industry. PA is home to two of the largest coal research facilities in the country accounting for nearly $500 million in coal-related research and development annually.

Specific Comments

§ 86.1. Definitions - The proposed revision to subpart (iii)(E) of the definition of "*owned or controlled* and *owns or controls*" in §86.1 is inaccurate. 30 C.F.R. § 701.1 contains a definition for "*own, owner, or ownership,*" and not a definition for "*owned or controlled*

and *owns or controls*." If the majority of these revisions are being changed as a requirement under the Federal requirements in 30 C.F.R. § 701.1, we suggest that every effort be made to utilize the exact wording of the Federal regulations to ensure consistency and reduce confusion amongst the public.

§ 86.37. Criteria for Permit Approval or Denial - The Department has proposed to amend § 86.37(a)(8) to include a reference to the Federal definition of a "violation" in 30 C.F.R. § 701.5. PCA is concerned that the definition of "violation" is unclear as 30 C.F.R. § 701.5 includes two definitions of "violation," as follows:

> *Violation*, when used in the context of the permit application information or permit eligibility requirements of sections 507 and 510(c) of the Act and related regulations, means—
>
> > (1) A failure to comply with an applicable provision of a Federal or State law or regulation pertaining to air or water environmental protection, as evidenced by a written notification from a governmental entity to the responsible person; or
> >
> > (2) A noncompliance for which OSM has provided one or more of the following types of notice or a State regulatory authority has provided equivalent notice under corresponding provisions of a State regulatory program—
> >
> > > (i) A notice of violation under §843.12 of this chapter.
> > >
> > > (ii) A cessation order under §843.11 of this chapter.
> > >
> > > (iii) A final order, bill, or demand letter pertaining to a delinquent civil penalty assessed under part 845 or 846 of this chapter.
> > >
> > > (iv) A bill or demand letter pertaining to delinquent reclamation fees owed under part 870 of this chapter.
> > >
> > > (v) A notice of bond forfeiture under §800.50 of this chapter when—
> > >
> > > > (A) One or more violations upon which the forfeiture was based have not been abated or corrected;
> > > >
> > > > (B) The amount forfeited and collected is insufficient for full reclamation under §800.50(d)(1) of this chapter, the

> regulatory authority orders reimbursement for additional reclamation costs, and the person has not complied with the reimbursement order; or
>
> (C) The site is covered by an alternative bonding system approved under §800.11(e) of this chapter, that system requires reimbursement of any reclamation costs incurred by the system above those covered by any site-specific bond, and the person has not complied with the reimbursement requirement and paid any associated penalties.

Violation, failure or refusal, for purposes of parts 724 and 846 of this chapter, means—

> (1) A failure to comply with a condition of a Federally-issued permit or of any other permit that OSM is directly enforcing under section 502 or 521 of the Act or the regulations implementing those sections; or
>
> (2) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or section 703 of the Act.

PCA respectfully requests that the Department clarify its proposed definition of "violation" to only include the former federal definition of "violation" in 30 C.F.R. § 701.5, and not include the latter definition of "violation, failure or refusal" in 30 C.F.R. § 701.5.

§ 86.129. Coal Exploration on Areas Designated as Unsuitable for Surface Mining Operations (UFM) - The Department is proposing to begin a new two-year permitting framework for exploration on areas designated as UFM. These additional requirements are expansive and basically require a full-blown impact assessment, which includes public notice and comment period, a cultural/historical impact analysis, endangered species identification and a demonstration that the proposed exploration is technologically and economically feasible. In addition, the proposed revisions to §86.133 (the "General Requirements" Section) would prevent the Department from waiving the UFM permit requirement.

PCA brings to the Department's attention that these extensive additional requirements must be completed at the operator's expense, with no guarantee that any coal may be extracted upon completion. For consistency, we suggest that the permit

term for this permit be consistent with other five-year permits issued by the Department.

§§ 86.165 and 86.281 to 86.284. Remining Financial Guarantees - The intent of the Remining Financial Guarantee Program authorized by the SMCRA provides low cost bonds to qualified operators who are willing to reclaim abandoned mine lands immediately adjacent to their active mining operations. An operator is limited to a maximum financial guarantee value of 30 percent of the amount allocated in the Financial Guarantee Special Account, and each permit site is limited to a maximum financial guarantee value of ten percent. The operator pays, in advance, an annual fee for financial guarantees of one percent per year.

As of December 31, 2008, mine operators have reclaimed 2,399 acres of abandoned mine land, saving the Commonwealth approximately $16.6 million in reclamation costs.[1] More than 158 coal mine operators have used the remining incentives provided by the program. About half of the 2008 reclamation of abandoned mine lands accomplished by the mining industry was completed in conjunction with the Department's Remining Financial Guarantee Program. This figure clearly demonstrates that the program is mutually beneficial for both the mining industry and the Commonwealth.

As proposed, the Department's language in § 86.282(a) does not clarify whether an eligible operator who demonstrates that it meets the requirements to participate in the Remining Financial Guarantee Program for the first time, will be automatically eligible for future Remining Financial Guarantees at the same participation level for future permits from the Department. PCA respectfully requests that the Department clarify § 86.282(a) to reflect that once an operator qualifies for the Remining Financial Guarantee Program, it will automatically qualify to participate in Remining Financial Guarantees at the same level for future mining permits.

In addition, the Department has proposed to remove the letter of credit collateral bond option for the operator to demonstrate financial responsibility pursuant to § 86.282(a)(2). PCA respectfully holds that the Department should not undermine a bank's (or other lending institution's) ability to: (1) evaluate an operator's financial stability and (2) issue a letter of credit based on that informed and highly regulated decision. The Environmental Protection Agency ("EPA") accepts letters of credit from an owner or operator of a hazardous waste treatment, storage, or disposal facility ("RCRA Facility") as a means of financial assurance for closure of the RCRA Facility. *See* 40 C.F.R. 264.143(d). Pennsylvania incorporates 40 C.F.R. 264.143(d) by reference in 25 PA. CODE § 264a.1. *See also* 25 PA. CODE § 264a.143. While PCA understands the Department's concern with the financial stability of operators participating in the Remining Financial

[1] Surface Mining Conservation and Reclamation Act, Reclamation and Remining Incentives Report 2008 (Document No. 5600-BK-DEP4249), Pennsylvania Department of Environmental Protection, Office of Mineral Resources Management, Harrisburg, Pennsylvania (June 2009).

Guarantee Program, it should not eliminate the option to post a letter of credit, which is currently honored by both the EPA and the Department in regards to closure of RCRA Facilities.

Furthermore, PCA holds that the following proposed revision to § 86.282(a)(2) by the Department is vague and open to interpretation:

> The operator will demonstrate this by submitting a letter of acceptance from a surety company licensed to do business in this Commonwealth and which writes bonds for reclamation of mine sites located in this Commonwealth or by submitting a surety bond for an equal portion of the remaining reclamation liability for the **permitted remining site.**

(emphasis added). The Department does not define "permitted remining site" in its proposed rulemaking, and it is not defined in the current Chapter 86. As such, it is not clear to PCA what area would be included in a "permitted remining site." PCA assumes this would include the "remining area", as defined in § 86.252, which states as follows:

> *Remining area*—An area of land on which remining will take place, including that amount of previously undisturbed area up to 300 feet from the edge of the unreclaimed area which must be affected to achieve a final grade compatible with adjacent areas. Additional undisturbed land may be within a remining area if the permittee demonstrates that a larger area is needed to accomplish backfilling and grading of the unreclaimed area or is needed for support activities for the remining activity.

PCA respectfully requests the Department to clearly define "permitted remining site", i.e., the territory the Department intends to be covered by the surety bond requirement of § 86.282(a)(2).

Regarding the Department's proposed § 86.283(f), PCA respectfully requests that the Department revise the proposed subpart to include the following clarification (in bold):

> (f) If a discharge **related to remining activities** not meeting the effluent criteria of § 87.102, § 88.92, § 88.187, § 88.292, § 89.52 or § 90.102 develops on a permit on which a financial guarantee is being used, the operator shall within 90 days of receipt of written notice by the Department replace the financial guarantee with other types of financial assurance mechanisms authorized for the purpose of covering the costs of treating the discharge. If an acceptable bond has not been received and approved by the Department within the specified time limit, the Department will issue a cessation order for mining activities except for reclamation and other activities required to maintain the permit area.

(emphasis added). PCA submits that this clarification is consistent with the Department's intent, as expressed in the Preamble.

§ 87.119. Hydrologic Balance: Water Rights and Replacement - Currently, this section reads as follows:

> (g) *Operator cost recovery.* A surface mine operator or mine owner who appeals a Department order, provides a successful defense during the appeal to the presumptions of liability and is not otherwise held responsible for the pollution or diminution is entitled to recovery of reasonable costs incurred, including, but not limited to, the costs of temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees from the Department.

The Department has proposed revising this section to delete the award of both attorney and expert witness fees to surface mine operators or owners that successfully appeal a Department order. PCA is aware of the attorney fees the Department has had to pay as a result of successful appeals. However, we point out that § 87.119(f) entitles the Department to recover all its costs, including "costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible surface mine operator or mine owner." We suggest that a surface mine operator or mine owner who incurs costs necessary to successfully appeal a Department order, such as hiring attorneys and expert witnesses, should be afforded the same cost recovery rights as the Department.

In addition, the Department states in the Preamble that "[t]his correction is necessary due to a revision to the SMCRA." PCA is unaware of any support for the Department's statement in the Surface Mining Control and Reclamation Act (SMCRA). In fact, our review of Section 525(e) of SMCRA reveals that recovery of costs and expenses, including attorney fees, by *either* party is appropriate.[2] The Department should not, by way of the proposed regulation, unilaterally eliminate a surface mine operator's or mine owner's cost recovery rights.

§§ 88.321 and 90.133. Disposal of Noncoal Wastes - References in the Preamble to these sections indicate these amendments are required under 30 C.F.R. § 938.16(ttt). We disagree and suggest that what is required is that noncoal waste cannot be deposited in a coal refuse pile or impounding structure. According to 30 C.F.R. § 938.16(ttt), "Pennsylvania shall submit a proposed amendment to sections 88.321 and 90.133, or otherwise amend its program, to require that no noncoal waste be deposited in a coal

[2] "(e) Whenever an order is issued under this section, or as a result of any administrative proceeding under this Act, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings, including any judicial review of agency actions, may be assessed against either party as the court, resulting from judicial review or the Secretary, resulting from administrative proceedings, deems proper." 30 U.S.C. § 1275.

refuse pile or impounding structure." (emphasis added). The Department's proposed amendments to §§ 88.321 and 90.133 read as follows:

> "Noncoal wastes...may not be deposited **on or near** a coal refuse disposal pile or impounding structure."

(emphasis added). We believe there is a significant difference between disposal **in** a coal refuse pile or impounding structure and **on or near** a coal refuse pile. If the Department's intent is to comply with federal requirement set in 30 C.F.R. § 938.16(ttt), as noted in the Preamble, the proposed revisions should read as follows:

> "Noncoal wastes...may not be deposited **in** a coal refuse pile or impounding structure."

PCA respectfully requests that the Department revise §§ 88.321 and 90.133 to mirror the federal requirement set in 30 C.F.R. § 938.16(ttt).

§ 90.112. Hydrologic Balance - The proposed amendment would change the sizing criteria for spillway capacity from being based on a 100-year, 24-hour precipitation event to being based on a 6-hour precipitation event. In the preamble, the Department indicates subsection (c)(2) is being amended "to match the language in the Federal regulations...as required...in 30 C.F.R. § 938.16(jjj)," which states the following:

> [A] proposed amendment to §90.112(c)(2) to require that all impounding structures that meet the criteria of 30 CFR 77.216(a) and are either constructed of coal mine waste or intended to impound coal mine waste have sufficient spillway capacity and/or storage capacity to safely pass or control the runoff from the 6-hour PMP or greater precipitation event.

30 C.F.R. § 938.16(jjj). The Department's proposed revisions to § 90.112 (c)(2) omits the term "runoff" and reads as follows:

> (2) Have an appropriate combination of principal and emergency spillways to safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum precipitation of a 6-hour precipitation event.

PCA does not believe the Department's language matches the language in the federal regulations and is concerned that future interpretations of § 90.112(c)(2) may differ from the Department's intent to have the state language match the federal language. We suggest the Department's language include the words "the runoff" as follows:

> (2) Have an appropriate combination of principal and emergency spillways to safely pass, adequate storage capacity to safely contain, or a combination of

storage capacity and spillway capacity to safely control, **the runoff** from the probable maximum precipitation of a 6-hour precipitation event.

PCA appreciates the opportunity to comment on the proposed rulemaking. Thank you for your consideration of our comments.

Sincerely,

Josie Gaskey
Dir., Regulatory & Technical Affairs
PA Coal Association

cc - George Ellis

2842

From: Josie Gaskey [josie.a.gaskey@comcast.net]
Sent: Tuesday, June 01, 2010 2:27 PM
To: EP, RegComments
Subject: 25 PA CODE Chs. 86,87,88,89 and 90 - Incidental Coal Extraction, Bonding Enforcement, Sediment Control and Remining Financial Guarantees
Attachments: PCA Comments Final.doc

Attached are the Pennsylvania Coal Association's comments regarding the proposed amendments to 25 PA CODE Chapters 86, 87, 88, 89 and 90 - Incidental Coal Extraction, Bonding, Enforcement, Sediment Control and Remining Financial Guarantees.

Josie Gaskey
Director, Regulatory and Technical Affairs
Pennsylvania Coal Association
212 North Third Street
Suite 102
Harrisburg, PA 17101
717-233-7900, ext. 24
717-231-7610 fax
josie.a.gaskey@comcast.net