Timetable for Review

December 1, 2010

The review of this final-form regulation was automatically suspended by law as of November 30, 2010. The date IRRC will consider this regulation will not be known until the regulation is resubmitted by the agency to the legislative standing committees established for the 2011-2012 legislative session. See 71 P.S. § 745.5a(j.1). As soon as the agency resubmits the final-form regulation, IRRC will post on this website the date it will consider this final-form regulation in a public meeting.

Regulatory Analysis Form

(Completed by Promulgating Agency)

SECTION I: PROFILE

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(1) Agency: Department of Environmental Protection

(2) Agency Number:

Identification Number: #7-458

IRRC Number: 2842

(3) Short Title: Incidental Coal Extraction, Bonding, Enforcement, Sediment Control, and Remining Financial Guarantees

(4) PA Code Cite: 25 Pa. Code Chapters 86, 87, 88, 89 and 90

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: Primary Contact: Michele Tate, 783-8727, 400 Market St., 16th floor, RCSOB, Harrisburg, PA 17105, Fax 783-8926, mtate@state.pa.us

Secondary Contact: R. Duke Adams, 783-8727, 400 Market St., 16th floor, RCSOB, Harrisburg, PA 17105, Fax 783-8926, ranadams@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- ☐ Proposed Regulation
- X Final Regulation
- ☐ Final Omitted Regulation
- ☐ Emergency Certification Regulation;
  - ☐ Certification by the Governor
  - ☐ Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

Regulatory Analysis Form

The regulation amends regulatory requirements to accomplish two goals. First, they revise the regulations to be consistent with the federal mining regulations as required by the federal Office of Surface Mining Reclamation and Enforcement (OSM) in order for Pennsylvania to maintain primary jurisdiction over coal mining activities within the Commonwealth. Secondly, they allow for a more effective and financially secure Remining Financial Guarantee program.

(9) Include a schedule for review of the regulation including:

A. The date by which the agency must receive public comments:	NA
B. The date or dates on which public meetings or hearings will be held:	NA
C. The expected date of promulgation of the proposed regulation as a final-form regulation:	May 2011
D. The expected effective date of the final-form regulation:	May 2011
E. The date by which compliance with the final-form regulation will be required:	May 2011
F. The date by which required permits, licenses or other approvals must be obtained:	NA

(10) Provide the schedule for continual review of the regulation.

The regulation will be revised, as needed, in accordance with the sunset review schedule published by the Department.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

The rulemaking is promulgated under the authority of Section 5 of The Clean Streams Law (52 P.S. § 691.5), Sections 4(a) and 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.4(a) and 1396.4b); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and Section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20).

Regulatory Analysis Form

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The amendments relating to program deficiencies are all required changes as described in 30 CFR §§ 938.16 (rr), (tt), (ww), (zz), (aaa), (ccc), (iii), (jjj), (nnn), (ppp) and (ttt). These requirements were imposed by OSM on April 8, 1993, December 29, 1993, July 20, 1994 and November 7, 1997. The deadlines for making the required program changes are long overdue.

The changes relating to the Remining Financial Guarantee program are not mandated.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The regulation is necessary for the Department to maintain full regulatory authority over coal mining activities in Pennsylvania. The regulation will enable the Commonwealth to fulfill its obligation to maintain a state primacy program that is as effective as and not inconsistent with Federal law.

For the Remining Financial Guarantee sections, the changes are necessary for the responsible management of the program to bring the regulations in line with the recent change to a conventional bonding program. Improvement of this program will result in benefits to the Commonwealth from the remining of abandoned mine lands.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

Not Applicable

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

No one will be adversely affected by the regulations relating to the program amendments and remining financial guarantees.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

There are about 500 coal mining companies that will have to comply with these amendments. For the Remining Financial Guarantee sections, there are about 125 coal mining companies who participate in the program.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no additional costs associated with the OSM program amendments or the Remining Financial Guarantee regulations.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The regulation will not result in any additional costs or savings to local governments.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

The OSM program amendments and remining financial guarantee regulations will not result in any additional costs or savings to state government.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Regulated Community	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Local Government	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
State Government	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Total Savings	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
COSTS:	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Regulated Community	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Local Government	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**

Regulatory Analysis Form

State Government	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Total Costs	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
REVENUE LOSSES:	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Regulated Community	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Local Government	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
State Government	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**
Total Revenue Losses	**$0**	**$0**	**$0**	**$0**	**$0**	**$0**

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	**FY -3 (2007 – 2008)**	**FY -2 (2008 – 2009)**	**FY -1 (2009 – 2010)**	**Current FY 2010-2011**
Environmental Program Management (#161-10382)	$39,685,000	$37,664,000	$31,100,000	$29,357,000
Environmental Protection Operations (#160-10381)	$98,574,000	$98,544,000	$84,218,000	$79,344,000

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The program amendment and remining financial guarantee regulation are not expected to result in any measurable cost increase or adverse effects, thus the benefits of maintaining primacy over coal mining within the Commonwealth and improvement to the remining incentives program outweigh any cost or adverse effects.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

These regulations were reviewed with the Mine Reclamation Advisory Board which recommended their approval.

Regulatory Analysis Form

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No alternative regulatory schemes were considered. OSM has directed the Commonwealth to make specific changes in its mining regulations to satisfy requirements for state primacy.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The regulation is intended to address only those matters where the Commonwealth's regulations were found to be less effective than or inconsistent with the federal regulations Existing Pennsylvania regulations that are beyond the scope of federal requirements are preserved.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

The regulation addresses Pennsylvania program provisions that were found to be less effective than or inconsistent with federal requirements for state primacy programs under the Federal SMCRA. It will bring Pennsylvania's program into conformance with nationwide standards for coal mining activities.

No other states have a remining financial guarantee program.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

Not applicable.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

None.

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FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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Copy below is hereby approved as to form and legality
Attorney General

By
(Deputy Attorney General)

DATE OF APPROVAL

☐ Check if applicable
Copy not approved Objections attached

Copy below is hereby certified to be true and correct copy of a document issued prescribed or promulgated by

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO 7-458

DATE OF ADOPTION NOVEMBER 16, 2010

BY John Hanger

TITLE JOHN HANGER
CHAIRMAN

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form
Executive or Independent Agencies

BY Andrew L. Clark

NOV 23 2010
DATE OF APPROVAL

(Deputy General Counsel)
(Chief Counsel - Independent Agency)
(Strike inapplicable title)

☐ Check if applicable No Attorney General Approval or objection within 30 days after submission

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

COAL MINING PROGRAM AMENDMENTS

25 *Pa Code*, Chapters 86 – 90

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
25 PA. CODE CHAPTERS. 86, 87, 88, 89 and 90
Incidental Coal Extraction, Bonding, Enforcement, Sediment Control, and Remining Financial Guarantees

Order

The Environmental Quality Board (Board) by this order amends Chapter 86 (relating to surface and underground coal mining), Chapter 87 (relating to surface mining of coal), Chapter 88 (relating to anthracite coal), Chapter 89 (relating to the underground mining of coal and coal preparation facilities) and Chapter 90 (relating to coal refuse disposal). The final-form rulemaking incorporates amendments necessary to bring Pennsylvania's regulatory program into conformance with federal standards for state coal mining regulatory programs. In addition, the final-form rulemaking revises some requirements for the Remining Financial Guarantee program. The amendments affect requirements relating to incidental coal extraction, bonding, enforcement, sediment control, and Remining Financial Guarantees.

This order was adopted by the Board at its meeting of November 16, 2010.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. Contact Persons

For further information contact William Allen, Chief, Division of Monitoring and Compliance, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard S. Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5988 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection (Department) Web site (http://www.depweb.state.pa.us).

C. Statutory Authority

This final-form rulemaking is adopted under the authority of Section 5 of The Clean Streams Law (52 P.S. § 691.5); Sections 4(a) and 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.4(a) and 1396.4b); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and Section 1920-A of the Administrative Code of 1929 (71 P.S. 510-20).

D. Background and Purpose

This final-form regulation is intended to satisfy requirements for maintaining a state primacy program under the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. The amendments in this rulemaking pertain to federally required program changes described in 30 CFR §§ 938.16 (rr), (tt), (vv), (ww), (xx), (zz), (aaa), (ccc), (iii), (jjj), (nnn), (ppp) and (ttt). These requirements were imposed by the federal Office of Surface Mining Reclamation and Enforcement (OSM) on April 8, 1993 ((aaa), (ccc), (iii) and (jjj)), December 29, 1993 ((rr), (tt), (vv), (ww), (xx) and (zz)), July 20, 1994 (nnn) and November 7, 1997 ((ppp) and (ttt)).

Resolving these required amendments is necessary in order for Pennsylvania to maintain primacy in regulating coal mining. Failure to resolve these program deficiencies could result in OSM asserting their jurisdiction over all or part of the mining regulatory program. There is also a risk that the federal funding for the Abandoned Mine Land reclamation program could be reduced or eliminated if these deficiencies persist.

These requirements relate to notification of the decision by the Department to approve the continuation of an exemption from the permitting requirements for coal that is mined incidental to noncoal mining, violation review for permit approval, permitting exploration on land designated as unsuitable for mining, self-bonding, and the stability of large impoundments. The federal regulations noting these program deficiencies provided deadlines for Pennsylvania to correct them. These deadlines are long overdue.

The amendments in this final-form rulemaking represent the outcome of discussions between the Department and OSM relative to the fulfillment of requirements set forth in the federal rules. The amendments in this rulemaking have been informally approved by OSM. These changes will be formally submitted to OSM as an amendment to the Pennsylvania coal mining program and the Department will request that OSM determine that the outstanding deficiencies noted above have been satisfied.

In addition, this regulation addresses issues that have surfaced in administering the Remining Financial Guarantee program. These issues are related to operational requirements and the conversion to a conventional bonding system (CBS) undertaken beginning in August 2001.

When the current Remining Financial Guarantee regulations were finalized in 1996, the Department used an alternate bonding system (ABS). The Department initiated the transition from an ABS to a CBS in 2001 and completed the implementation of the program in 2002. Under the ABS, bond amounts were based on per-acre rates and bond funds were supplemented by a per-acre reclamation fee and other funds in order to assure that the Commonwealth had enough bond money to complete the reclamation in the case of a forfeiture.

Under the CBS, the reclamation cost is calculated using bond rate guidelines for the specific reclamation tasks. Bond rate guidelines are updated routinely to keep up

with changes in reclamation costs. The CBS is also referred to as full-cost bonding because the bond amount is determined based on the total projected reclamation cost. Bond amounts are no longer calculated on a per-acre basis. The regulations governing the Remining Financial Guarantee program are being amended to better align with the transition to full-cost bonding for all mining operations.

Finally, the regulations include several minor editorial changes needed to correct spelling, spacing and punctuation errors.

The final-form rulemaking was reviewed by the MRAB at their September 7, 2010 meeting. The MRAB unanimously recommended that the final-form rulemaking proceed.

E. Summary of Changes to the Proposed Rulemaking

§ 86.1. Definitions

The definition of *Owned or controlled* and *owns or controls* is being corrected to include the reference to the term defined in federal regulations which is "own, owner, or ownership" rather than "owned or controlled and owns or controls" as was proposed.

§ 86.133.General Requirements

Section 86.133 (d) is being revised to clarify that the permit application for exploration on areas designated as unsuitable for mining and the documentation of the decision to approve or deny the application are available for review by the public. This change is the result of analysis that concluded that the proposed regulations did not address the requirement in the federal regulations at 30 CFR 772.12(e) that these materials be available to the public.

§ 88.321. Disposal of noncoal wastes.

Section 88.321 is being revised to more closely reflect the federal regulation. This is accomplished by changing the phrase "on or near" to "in."

§90 112. Hydrologic balance: dams, ponds, embankments and impoundments—design, construction and maintenance

Section 90.112 (c) (2) has been revised to include the phrase "runoff from" as it relates to a storm event.

§ 90.133. Disposal of noncoal wastes

Section 90.133 is being revised to more closely reflect the federal regulation. This is accomplished by changing the phrase "on or near" to "in."

Remining Financial Guarantees

§86.282. Participation Requirements

Section 86.282 (a) (2) is being revised to clarify that the reclamation liability is for a proposed mining area rather than the permitted area. This change was made in response to comments.

Section 86.282 (a) (3) is being added to clarify that an operator who has participated in the remining financial guarantee program and has met its obligations is eligible for subsequent remining financial guarantees.

F. Summary of Comments and Responses on the Proposed Rulemaking

§ 86.1. Definitions

(C) 30 C.F.R. § 701.5 contains a definition for "*own, owner, or ownership,*" and not a definition for "*owned or controlled* and *owns or controls.*"

(R) The wording of the regulation has been changed to match the defined term in the federal regulations "own, owner, or ownership."

§ 86.37. Criteria for Permit Approval or Denial

(C) The definition of "violation" is unclear as 30 C.F.R. § 701.5 includes two definitions of "violation."

(R) The federal regulations contain a definition for the term "violation," which is being referenced in this rulemaking, and the additional defined term "Violation, failure or refusal." The term "violation. failure or refusal" is a separate term in the federal regulations. Therefore, no changes need to be made to the proposed regulatory amendment.

§ 86.129. Coal exploration on areas designated as unsuitable for surface mining operations.

(C) The permit term for this permit should be consistent with other five-year permits issued by the Department.

(R) This permit is for exploration only and is limited to no more than 250 tons of coal extraction, therefore the two-year permit term is appropriate.

§ 86.133. General Requirements

(C) The proposed revisions to §86.133 prevents the Department from waiving the UFM permit requirement.

(R) The federal regulations at 30 CFR 772.12 require a permit for exploration on areas designated as unsuitable for mining, therefore waiving the permit requirement is not an option.

§ 86.159 Self-bonding

(C) Subsection (a)(2) contains overly broad language relating to "all applicable Federal and State laws."

(R) This language is taken verbatim from the federal regulations. Therefore a change has not been made, because the state regulation is intended to mirror the federal regulation.

§§ 86.165 and 86.281 to 86.284. Remining Financial Guarantees

(C) The language in § 86.282(a) does not clarify that an 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 for future permits from the Department.

(R) The regulation has been amended to add section 86.282 (a)(3) to address this.

(C) The Department has proposed to remove the letter of credit option for the operator to demonstrate financial responsibility pursuant to § 86.282(a)(2). 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.

(R) These regulations do not apply to banking operations and so cannot impact how a bank operates or makes lending determinations.

(C) The option to post a letter of credit should not be eliminated. DEP and the Board should provide some evidence from the program's experience to provide justification for this change or retain the existing language in the final-form regulation.

(R) A letter of credit can still be used as a bond. This regulation only eliminates the use of a letter of credit as the financial responsibility demonstration for a remining financial guarantee. While there have only been four guarantees for which the Commonwealth was required to spend money for the reclamation, three of these four were supported by letters of credit.

(C) The following proposed revision to § 86.282(a)(2) by the Department is vague and open to interpretation. The Department does not define "permitted remining site." It is not clear what area would be included in a "permitted remining site."

(R) The regulation language has been amended to change the word "permitted" to "proposed." This will clarify that the posting of the surety bond is an option for the initial bonding transaction on a permit application where a remining financial guarantee is requested and approved.

(C) Regarding the Department's proposed § 86.283(f), the Department should clarify the proposed subpart to limit the circumstances to when a discharge is related to the remining activities.

(R) The intent of the regulation is to require a replacement of a remining financial guarantee at any time liability for a pollutional discharge is incurred for that permit, not only when it is related to the remining activities. This will protect the remining financial guarantee program from the liability associated with long-term treatment.

§ 87.119. Hydrologic Balance: Water Rights and Replacement

(C) A surface mine operator or mine owner who incurs costs necessary to successfully appeal a Department order for a water supply replacement should be afforded the same cost recovery rights as the Department. The Preamble states that "[t]his correction is necessary due to a revision to the SMCRA." Section 525(e) of SMCRA allows for the recovery of costs and expenses, including attorney fees, by *either* party. The Department should not, by way of the proposed regulation, unilaterally eliminate a surface mine operator's or mine owner's cost recovery rights.

(R) The commenter has confused the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., with the Pennsylvania Surface Mining Conservation and Reclamation Act (SMCRA), which the preamble refers to. In December 2000, the operator cost recovery language was repealed from SMCRA. The regulation revision reflects the amendment of SMCRA by the repeal of § 4.2(f)(5).

§§ 88.321 and 90.133. Disposal of Noncoal Wastes

(C) 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 refuse pile or impounding structure," rather than "on or near" a refuse pile or impounding structure.

(R) The regulation has been revised to change the phrase "on or near" to the word "in."

§ 90.112. Hydrologic Balance

(C) The Department's proposed revisions to § 90.112 (c)(2) omit the term "runoff."

(R) The regulation language has been revised to include the term runoff.

Remining Financial Guarantees Generally

(C) The Remining Financial Guarantee program in Pennsylvania has resulted in reclamation of Abandoned Mine Lands. It is of great importance that Pennsylvania continue to facilitate reclamation of Abandoned Mine Lands whenever possible.

I respectfully request that EQB keep me informed when it moves to adopt the proposed regulation as a final rule.

(R) The Department agrees that the Remining Financial Guarantee program has been effective at encouraging reclamation of abandoned mine lands. The regulatory changes are focused on protecting the program so that it can continue doing so. The Department will keep in contact with the commentator as the rulemaking process progresses.

G. Benefits, Costs and Compliance

The amendments will enable the Commonwealth to fulfill its primacy obligations and retain primary enforcement responsibility over coal mining operations. They will also allow for more effective management of the Remining Financial Guarantee program.

Compliance Costs

It is not anticipated that the changes will impose any total additional compliance costs on the regulated community.

Compliance Assistance Plan

The Department will provide written notification to all coal mine operators to inform them of the final promulgation of these regulatory changes. The Department may also hold roundtable meetings with mine operators and consultants to explain program changes and answer questions.

The Department will update its fact sheets explaining the regulations. The Department will meet with affected landowners and assist them in understanding the amended regulations.

Paperwork Requirements

The amendments will require the Department to update its fact sheets explaining the law and regulations.

H. Pollution Prevention

The rulemaking will not modify the pollution prevention approach by the regulated community and maintains the multi-media pollution prevention approach of existing requirements in 25 *Pa. Code.*

I. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 21, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 *Pa.B.* 2373, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on ___(blank)___, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on ____(blank)____ and approved the final-form regulations.

K. Findings of the Board

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder at *1 Pennsylvania Code* §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 40 *Pennsylvania Bulletin* 2373 (Saturday, May 1, 2010).

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department of Environmental Protection, *25 Pennsylvania Code,* Chapters 86, 87, 88, 89 and 90, are amended to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board

ANNEX A

TITLE 25. ENVIRONMENTAL PROTECTION

PART 1. DEPARTMENT OF ENVIRONMENTAL PROTECTION

SUBPART C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 86. SURAFACE AND UNDERGROUND COAL MINING: GENERAL

§ 86.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Acts—Include the following:

(i) The Surface Mining Conservation and Reclamation Act (52 P. S. § § 1396.1—1396.31).

(ii) The Air Pollution Control Act (35 P. S. § § 4001—4015).

(iii) The Clean Streams Law (35 P. S. § § 691.1—691.1001).

(iv) The Coal Refuse Disposal Control Act (52 P. S. § § 30.51—30.66).

(v) Article XIX-A of The Administrative Code of 1929 (71 P. S. § § 510-1—510-1081).

(vi) The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § § 1406.1—1406.21).

(vii) The Dam Safety and Encroachments Act (32 P. S. § § 693.1—693.27).

(viii) The Solid Waste Management Act (35 P. S. § § 6018.101—6018.1003).

(ix) The Noncoal Surface Mining Conservation and Reclamation Act (52 P. S. § § 3301—3326).

*****

Owned or controlled and *owns or controls*—One or a combination of the relationships specified in subparagraphs (i)—(iv):

(i) Being a permittee of a coal mining activity.

(ii) Based on instruments of ownership or voting securities, owning of record in excess of 50% of an entity.

(iii) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant coal mining activity is conducted:

(A) Being an officer or director of an entity.

(B) Being the operator or contractor of a coal mining activity.

(C) Having the ability to commit the financial or real property assets or working resources of an entity

(D) Being a general partner in a partnership.

(E) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record a percentage of the entity as established in the definition of **"[~~owned or controlled and owns or controls~~] OWN, OWNER, OR OWNERSHIP"** in 30 CFR [~~773.5~~] **701.5** (relating to definitions).

(F) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive the coal after mining or having authority to determine the manner in which that person or another person conducts a coal mining activity.

(iv) Having another relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator or other entity conducts coal mining activities.

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§ 86.5. Extraction of coal incidental to noncoal surface mining.

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(m) If the Department has reason to believe that a specific mining area was not exempt under this section at the end of the previous reporting period, is not exempt or will be unable to satisfy the exemption criteria at the end of the current reporting period, the Department will notify the operator that the exemption may be revoked and the reasons therefore. The exemption will be revoked unless the operator demonstrates to the Department within 30 days that the mining area in question should continue to be

exempt. The operator and interested parties will be immediately notified of the revocation **or of the decision not to revoke the exemption**.

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§ 86.36. Review of permit applications.

(a) The Department will review the complete application, written comments, written objections and records of a public hearing or informal conference held under § § 86.32 and 86.34 (relating to opportunity for submission of written comments or objections on the permit application; and informal conferences).

(b) If the Department decides to approve the application, it will require that the applicant file the bond in accordance with Subchapter F (relating to bonding and insurance requirements) before the permit is issued.

(c) The Department will verify from the schedule submitted under § 86.63 (relating to compliance information) or other information available to the Department that coal mining activities owned or controlled by the applicant, a person owned or controlled by the applicant or a person who owns or controls the applicant under the definition of ''owned or controlled'' or ''owns or controls'' in § 86.1 (relating to definitions) are not currently in violation of the acts or the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. § § 1201—1328), or that the violation is in the process of being corrected to the satisfaction of the regulatory authority, department or agency which has jurisdiction over the violation of the acts or the Surface Mining Control and Reclamation Act of 1977 and a law, rule or regulation of a department or agency of the United States or of a state in the United States pertaining to air or water environmental protection incurred by the applicant in connection with a coal mining activity **[during the 3-year period prior to the date of application]**.

§ 86.37. Criteria for permit approval or denial.

(a) A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following apply:

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(8) The applicant has submitted proof that a violation related to the mining of coal by the applicant, a person owned or controlled by the applicant or a person who owns or controls the applicant under the definition of "owned or controlled" or "owns or controls" in § 86 1 (relating to definitions) or by a related party of the acts, a rule, regulation, permit or license of the Department has been corrected or is in the process of being corrected to the satisfaction of the Department, whether or not the violation relates to an

adjudicated proceeding, agreement, consent order or decree, or which resulted in a cease order or civil penalty assessment. **For the purpose of this section, the term "violation" shall include the types of violations listed in the definition of "violation" found in 30 CFR § 701.5.** A permit issued under this paragraph on the basis that a violation is in the process of being corrected or pending the outcome of an appeal, and the appropriate regulatory authority program having jurisdiction over the violation provides for a stay of execution of the abatement procedure or a court of competent jurisdiction has issued a supersedeas providing that relief, will be issued conditionally.

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§ 86.62. Identification of interests.

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(b) *Statement* An application shall contain a statement of whether the applicant is a corporation, partnership, single proprietorship, association or other business entity. For all entities, the application shall contain the following information, as applicable, for each person who owns or controls the applicant under the definition of ''owned or controlled'' or ''owns or controls'' in § 86.1 (relating to definitions) except that the submission of a social security number is voluntary:

(1) The name, address, social security number and employer identification number of every:

(i) Officer.

(ii) Partner.

(iii) Associate

(iv) Shareholder of at least 10% of the voting stock.

(v) Director.

(vi) Other person performing a function similar to director of the applicant.

(vii) Contractor and subcontractor.

(viii) Person having the ability to commit the financial or real property assets or working resources of an entity.

(ix) Person owning or controlling the coal to be mined under the proposed permit under a lease, sublease or other contract, and having the right to receive the coal after mining or having authority to determine the manner in which the proposed coal mining activity is to be conducted.

(x) Person who has another relationship with the permit applicant which gives the person authority directly or indirectly to determine the manner in which the proposed coal mining activity is to be conducted.

(xi) Person who owns or controls the persons specified in subparagraphs (i)—(x), either directly or indirectly through intermediary entities.

(2) For each person listed in paragraph (1), list the following:

(i) The title of the person's position.

(ii) The date the position or stock ownership was assumed, and when submitted under § **[86.63 (relating to compliance information)]** **<u>86.212 (c) (relating to Federal minimum enforcement action)</u>**, the date of departure from the position.

(iii) The percentage of ownership.

(iv) The location in the organizational structure.

(v) The relationship to the applicant.

(c) *Related entity information.* Include the following:

(1) List the names of entities who, under the definition of ''owned or controlled'' or ''owns or controls'' in § 86.1, own or control the applicant or who are owned or controlled by the applicant and provide the following information for each entity:

(i) Identifying numbers, including employer identification number, Federal or State permit numbers, **<u>permittee name and address</u>** and the MSHA numbers with date of issuance for each permit.

(ii) The application number or other identifier of and the regulatory authority for other **<u>issued or</u>** pending mining operation permit applications filed by the entity in any State in the United States.

(iii) The name, address, social security number and employer identification number of every officer, partner, associate, principal shareholder, director or other person performing a function similar to director of the entity, including the title of the person's position and the date the position was assumed.

(2) For each person listed in subsection (b)(1), who is, or has been, associated with another entity as an owner or controller, under the definition of ''owned or controlled'' or ''owns or controls'' in § 86.1, within the 5-year period preceding the date of application, provide the following information:

(i) The name of each entity they are, or were, associated with.

(ii) Identifying numbers, including employer identification number, Federal or State permit number and the MSHA number with date of issuance for each permit.

(iii) The application number or other identifier of and the regulatory authority for other **issued or** pending mining operation permit application filed by the entity with which the person is affiliated in any state in the United States.

(d) After an applicant is notified that the application is approved, but before the permit is issued, the applicant shall either update, correct or submit a statement that no change has occurred in the information previously submitted under this section.

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§ 86.103. Procedures.

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(g) An application that includes an assertion of valid existing rights shall meet the requirements and follow the procedures established in 30 CFR § 761.16.

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§ 86.129. Coal exploration on areas designated as unsuitable for surface mining operations.

(a) Designation of an area as unsuitable for all or certain types of surface mining operations under this chapter does not prohibit coal exploration operations in the area.

(b) Coal exploration may be conducted on an area designated as unsuitable for surface mining operations in accordance with this chapter if the following apply:

(1) The person conducting coal exploration obtains an exploration permit from the Department pursuant to this section which meets the following conditions:

(i) The permit application demonstrates that the requirements of this section and § 86.134 (relating to coal exploration performance and design standards) will be met.

(ii) Public notice of the application and opportunity to comment is provided in accordance with § 86.31 (relating to public notices of filing of permit application) and § 86.32 (relating to opportunity for submission of written comments or objections).

(2) The permit application shall contain the following information:

(i) The name, address, and telephone number of the applicant.

(ii) The name, address and telephone number of the applicant's representative who will be present at, and responsible for, conducting the exploration activities.

(iii) A narrative describing the proposed exploration area.

(iv) A narrative description of the methods and equipment to be used to conduct the exploration and reclamation.

(v) An estimated timetable for conducting and completing each phase of the exploration and reclamation.

(vi) The estimated amount of coal to be removed and a description of the methods to be used to determine the amount.

(vii) A description of the following:

(A) Cultural or historical resources listed on the National Register of Historic Places;

(B) Cultural or historical resources known to be eligible for listing on the National Register of Historic Places,

(C) Known archeological resources located within the proposed exploration area,

(D) Any other information which the regulatory authority may require regarding known or unknown historic or archeological resources.

(viii) A description of any endangered or threatened species listed pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) identified within the proposed exploration area.

(ix) A description of the measures to be used to comply with the applicable requirements of § 86.134 of this chapter.

(x) The name and address of the owner of record of the surface land and of the subsurface mineral estate of the area to be explored.

(xi) A map or maps at a scale of 1:24,000, or larger, showing the areas of land to be disturbed by the proposed exploration and reclamation. The map shall specifically show existing roads, occupied dwellings, topographic and drainage features, bodies of surface water, and pipelines; proposed locations of trenches, roads, and other access routes and structures to be constructed; the location of proposed land excavations; the location of exploration holes or other drill holes or

underground openings; the location of excavated earth or waste-material disposal areas; and the location of critical habitats of any endangered or threatened species listed pursuant to the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(xii) If the surface is owned by a person other than the applicant, a description of the basis upon which the applicant claims the right to enter that land for the purpose of conducting exploration and reclamation.

(xiii) For any lands listed in § 86.102 of this chapter, a demonstration that, to the extent technologically and economically feasible, the proposed exploration activities have been designed to minimize interference with the values for which those lands were designated as unsuitable for surface coal mining operations. The application must include documentation of consultation with the owner of the feature causing the land to come under the protection of § 86.102 of this chapter, and, when applicable, with the agency with primary jurisdiction over the feature with respect to the values that caused the land to come under the protection of § 86.102 of this chapter.

(**[1]**3) The exploration is consistent with the designation.

(**[2]**4) The exploration will be conducted to preserve and protect the applicable values and uses of the area under Subchapter E (relating to coal exploration) **[and the Department has issued written approval for the exploration]**.

(5) The permit term may not exceed two years and the permit may not be renewed or transferred.
(6) The amount of coal removed shall be limited to the quantity needed for testing and analysis and may not exceed 250 tons.
(7) The application shall be subject to the criteria for permit approval or denial in § 86.37 (relating to the criteria for permit approval or denial) and 30 CFR § 772.12 (d), and the requirements for final permit action in § 86.39 (relating to final permit action).

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§ 86.133. General requirements.

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(d) The Department will, except as otherwise provided in § 86.137(b) (relating to public availability of information), place the notices **AND THE EXPLORATION PERMIT DOCUMENTS, AS REQUIRED PURSUANT TO SUBSECTION (F) FOR EXPLORATION ON AREAS DESIGNATED AS UNSUITABLE FOR MINING,** on public file and make them available for public inspection and copying during regular office hours at the established fee. **FOR THE PURPOSE OF THIS SECTION THE EXPLORATION PERMIT DOCUMENTS INCLUDE THE APPLICATION AND**

DOCUMENTS RELATING TO THE DECISION TO APPROVE OR DENY THE APPLICATION.

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(f) Coal exploration on lands where a petition to declare an area unsuitable for mining has been received by the Department or on lands designated unsuitable for mining shall **[by] be** conducted only after **[written-approval is granted by] a permit has been obtained from** the Department. **This permit requirement may not be waived.** The Department may prescribe conditions and requirements necessary to preserve the values sought to be protected in the petition before approving coal exploration in these areas. The exploration activities shall be conducted in accordance with § 86.129 (relating to coal exploration) to insure that the exploration activity does not interfere with a value for which the area has been designated unsuitable for mining.

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§ 86.159. Self-bonding.

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(1) The self-bond shall be executed by:

(1) The applicant, except as provided in paragraphs (2) and (3).

(2) If the applicant is a subsidiary corporation, the applicant's parent corporation shall be a party to the self-bond which shall establish the applicant and its parent corporation as co-indemnitors under the self-bond. **Corporations applying for a self-bond, and parent and non-parent corporations guaranteeing an applicant's self-bond, shall submit an indemnity agreement signed by two corporate officers who are authorized to bind their corporations. A copy of such authorization shall be submitted to the Department along with an affidavit certifying that such an agreement is valid under all applicable Federal and State laws. In addition, the corporate guarantor shall provide a copy of the corporate authorization demonstrating that the corporation may guarantee the self-bond and execute the guarantee agreement.** The parent corporation may cancel its obligations under the self-bond upon 120 days written notice to the Department, but the cancellation will not be effective until the self-bond is replaced with an alternate form of bonding authorized by this subchapter and approved by the Department.

(3) If the applicant is a partnership, joint venture or syndicate, each person with a beneficial interest in the same shall be a party to the self-bond and shall be established as a co-indemnitor under the self-bond.

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86.165. Failure to maintain proper bond.

(a) If a permittee fails to promptly post additional bond required under § 86.152 (relating to adjustments), or fails to make timely deposits of bond according to the schedule submitted under § 86.161 (relating to phased deposits of collateral), or fails to make payments under § 86.162a (relating to Anthracite Deep Mine Operators Emergency Bond Loan Fund) or fails to maintain subsidence insurance provided in § 86.162 (relating to subsidence insurance in lieu of bond), **or fails to make annual payments for financial guarantees as required under § 86.283 (a) (relating to procedures)**. the Department will issue a notice of violation to the permittee, and if the permittee fails to correct the violation within 15 days of the notice, the Department will issue a cessation order for the permittee's permit areas and thereafter take actions that may be appropriate.

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§ 86.195. Penalties against corporate officers.

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(b) Whenever the Department issues an order to an operator for failing to abate violations contained in a previous order, it will send by certified mail to each corporate officer listed in the surface mining operator's license application under § 86.353 (relating to identification of ownership), or to each corporate officer listed in a coal mining activities application under § 86.62 (relating to identification of interests), a copy of the failure to abate order and a notice of the **[officer']** **officer's** liability under this section. If the violations are not abated within 30 days of issuance of the failure to abate order, the Department may assess a civil penalty against each officer receiving the notice provided by this subsection.

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§ 86.211. Enforcement—general.

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(d) If one or more of the conditions in subsection (b) exist, the operator may request the Department to grant an abatement period exceeding 90 days. The abatement period granted will not exceed the shortest possible time necessary to abate the violation. The operator has the burden of establishing by **[clean]** **clear** and convincing proof that he is entitled to an extension under this section. In determining whether or not to grant an abatement period exceeding 90 days, the Department may consider relevant written information from the operator or other sources.

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§ 86.281. Financial guarantees to insure reclamation—general.

a) In the Remining Financial Assurance Fund there is a special account providing financial guarantees for qualified operators who conduct remining. Funds in this special account may be used to financially assure bonding obligations under § 86 143 (relating to requirement to file a bond) of a qualified operator engaged in remining.

(b) The financial guarantee applies to **a permit with** remining areas approved by the Department. Operators who wish to participate in this program shall demonstrate, for each permit, their eligibility under § § 86.253 and 86.282 (relating to operator and project qualification; and participation requirements).

(c) For each approved permit of an eligible operator for a remining area, the Department will **[reserve a portion]** **designate a specified amount** of the financial guarantees special account in the Remining Financial Assurance Fund **[as collateral for]** **to financially assure** reclamation obligations on the **permit with an approved** remining area. **[The amount of the reserve will be the average cost per acre for the Department to reclaim a mine site multiplied by the number of acres in the remining area.]** **The specific amount designated will be the estimated cost for the Department to reclaim the remining area.**

(d) **The** Department may not issue financial guarantees on a permit in excess of 10% of the then current amount in the special account in the Remining Financial **[Aassurance]** **Assurance** Fund. The Department will not issue financial guarantees **[toa]** **to** a mine operator if the aggregate amount of financial guarantees on permits issued to the operator will exceed 30% of the then current amount in the special account in the Remining Financial Assurance Fund. The Department will not issue additional financial guarantees when the aggregate amount of outstanding financial guarantees exceeds that amount resulting from dividing the current amount in the special account in the Remining Financial Assurance Fund by the historical rate of bond forfeiture under § 86 181 (relating to bond forfeiture-general) with a margin of safety determined by the Department.

(e) Upon declaration of forfeiture, the [reserved funds] specified amount of the financial guarantee from the financial guarantee special account will be used with other bonds forfeited on the permit by the Department to complete reclamation of the [remining area] mine site in accordance with the procedures and criteria in § § 86.187—86.190. If the actual cost of reclamation by the Department exceeds the [amount reserved]specified amount of the financial guarantee, additional funds from the Remining Financial Assurance Fund [will]may be used to complete reclamation.

§ 86.282. Participation requirements.

(a) Upon completion of the technical review of a permit application and receipt of a request for bond, an operator may apply to participate in the financial guarantees program for a remining area if the requirements of § 86.253 (relating to operator and project

qualification) are met. To participate in this program, an operator shall demonstrate to the Department's satisfaction one of the following:

(1) The operator would be able to post a collateral bond otherwise required by this chapter and demonstrate appropriate experience in coal mining and reclamation.

(i) The operator shall demonstrate ability to post a collateral bond by meeting the following conditions for the operator's most recently completed fiscal year and the 2 preceding fiscal years:

(A) A ratio of current assets to current liabilities of 1.5 or greater.

(B) A ratio of total liabilities to tangible net worth of 3 or less.

(ii) The operator shall submit a notarized statement signed by the operator and an independent certified public accountant (CPA), an officer of a financial institution with which the operator conducts business or other person or entity responsible for the accounts of the operator. The statement shall list the operator's ratio of current assets to current liabilities and the operator's ratio of total liabilities to tangible net worth for the most recently completed fiscal year and the 2 preceding fiscal years.

(iii) The operator shall demonstrate appropriate experience in coal mining and reclamation by showing that he has had a coal mining license under section 3.1 of the act (52 P. S. § 1396.3a) for 5 years or the person designated by the operator to manage the operation has a minimum of 5 years of experience in coal mining and reclamation.

(2) The operator would be able to obtain a surety bond **[or letter of credit collateral bond]**otherwise required under this chapter. 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 **[or letter of credit collateral bond]**for **an equal portion of** the remaining **reclamation liability for the [~~permitted~~] PROPOSED remining site [permit area]**. The acceptance letter shall indicate the complete name and address of the surety company and state that the surety company would write the bond.

(3) THE OPERATOR HAS PREVIOUSLY PARTICIPATED IN THE REMINING FINANCIAL GUARANTEE PROGRAM AND HAS MET ITS RECLAMATION OBLIGATIONS AND MADE TIMELY PAYMENTS.

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§ 86.283. Procedures.

(a) An operator's participation in the financial guarantees program is subject to the following:

(1) Annual payments will be 1% of the total amount of the **remining financial guarantee[number of acres of remining area to be affected multiplied by the Department's current applicable bond rates]**.

(2) The first payment is due upon receipt of notice of the Department's approval of the operator's application to participate in the program. Payments shall be made annually thereafter concurrent with the license renewal or in accordance with a schedule determined by the Department.

(3) Payments are not refundable and will be deposited into the financial guarantees special account in the Remining Financial Assurance Fund to be used in case of operator forfeiture. When the special account becomes actuarially sound, excess payments may be used under section 18(a.1) and (a.2) of the act (52 P. S. § 1396.18(a.1) and (a.2)).

(4) The operator may not substitute financial guarantees for existing collateral or surety bonds.

(b) The operator is responsible for making the annual payment as calculated by the Department, until the amount of the bond is reduced or released in accordance with § § 86.170—86.172 (relating to scope; procedures for seeking release of bond; and criteria for release of bond).

(c) An operator approved to participate in the financial guarantees program is not required to pay the per acre reclamation fee required by § 86.17(e) (relating to permit and reclamation fees) for the remining area.

(d) The Department will issue a letter to the operator specifying the amount of money in the financial guarantees special account in the Remining Financial Assurance Fund **allocated as financial assurance [which has been reserved as collateral]**for the operator's reclamation obligations on the remining area. A copy of the letter will be kept in the operator's permit application file.

(e) The obligation covered by the financial guarantees program bond will be reduced or released prior to any other bond submitted by the operator to cover the reclamation obligations of that permit. **[This portion of the bond may not be used to cover the reclamation obligation on another section of the permit area.]**

(f) If a discharge 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.

§ 86.284. Forfeiture.

(a) Upon forfeiture under § 86.181 (relating to general), the Department will declare forfeit the **specified** amount **[reserved for the operator]** **of the financial guarantee for the permit** in the financial guarantees special account in the Remining Financial Assurance Fund in addition to other bonds posted by the operator to cover the reclamation obligation on the permit.

(b) The Department's declaration of forfeiture under this section does not excuse the operator from meeting the requirements of this chapter or other requirements under the act.

(c) Upon declaration of forfeiture, the Department will use the bond money **posted by the operator** and **[reserved funds]** **the specified amount of the financial guarantee** to complete the reclamation of the mine site in accordance with the procedures and criteria in § § 86.187—86.190.

(d) The financial guarantees program will be discontinued immediately and notice published in the *Pennsylvania Bulletin*, if 25% or greater of the total outstanding financial guarantees are declared forfeit. If the financial guarantees program is discontinued, no additional financial guarantees may be approved. Outstanding financial guarantees will remain in effect until released under § § 86.170—86.175.

(e) The financial guarantees program may be suspended upon notice in the *Pennsylvania Bulletin* when the number of participating permits declared forfeit is equal to that number of permits calculated by multiplying the historical rate of forfeiture plus a margin of safety times the number of permits participating in the program. No additional financial guarantees will be approved until the total amount of financial guarantees declared forfeit has been replaced through the accumulation of annual payments or by other means.

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CHAPTER 87. SURFACE MINING OF COAL

§ 87.112. Hydrologic balance: dams, ponds, embankments and impoundments—design, construction and maintenance.

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(c) If the embankment is more than 20 feet in height as measured from the upstream toe of embankment to the crest of the emergency spillway or has a storage volume of 20 acre-feet or more, **[or]** is located where failure could cause loss of life or serious property damage **or otherwise poses a hazard to miners or the public** , it shall:

(1) Be stable under all probable conditions of operation and be designed and constructed to achieve a static safety factor of 1.5 or other higher static safety factor required by the Department **and a seismic safety factor of at least 1.2**.

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§ 87.119. Hydrologic balance: water rights and replacement.

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(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, **and** restoration or replacement costs**[, attorney fees and expert witness fees]** from the Department.

(k) *Exception.* A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b)—(i), but is subject to subsections (a) and (j).

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CHAPTER 88. ANTHRACITE COAL

§ 88.321. Disposal of noncoal wastes.

Noncoal wastes including, but not limited to, grease, lubricants, paints, flammable liquids, garbage and other hazardous wastes shall be disposed of or stored temporarily in accordance with the Solid Waste Management Act (35 P. S. § § 6018.101—6018.1003) and the regulations promulgated thereunder. Storage shall be such that fires are prevented and that the area remains stable and suitable for reclamation and revegetation. **Noncoal waste[**Waste**]** materials **[with low ignition points]** including, but not limited to, wood, cloth, waste paper, oil, grease and garbage may not be deposited **[~~on or near~~] IN** a coal refuse disposal pile **or impounding structure**.

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CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

§ 89.111. Large impoundments.

*****

(c) If the embankment is more than 20 feet in height as measured from the upstream toe ! the embankment to the crest of the emergency spillway, or has a storage volume of 20 acre feet or more, **[or]** is located where failure could cause loss of life or serious property damage **or otherwise poses a hazard to miners or the public,** it shall:

(1) Be stable under all probable conditions of operation and be designed and constructed to achieve a static safety factor of 1.5, or higher if required by the Department **and a seismic safety factor of at least 1.2**.

*****

CHAPTER 90. COAL REFUSE DISPOSAL

§ 90.112. Hydrologic balance: dams, ponds, embankments and impoundments—design, construction and maintenance.

*****

(c) If the embankment is more than 20 feet in height as measured from the upstream toe of embankment to the crest of the emergency spillway, or has a storage volume of 20 acre feet or more, **[or]** is located where failure, could cause loss of life or serious property damage **or otherwise poses a hazard to miners or the public**, it shall:

(1) Be stable under probable conditions of operation and be designed and constructed to achieve a static safety factor of 1.5 or a higher static safety factor required by the Department.

(2) Have an appropriate combination of principal and emergency spillways to **[discharge safely the runoff from a 100-year, 24-hour precipitation event or a larger event specified and required by the Department]** **safely pass, adequate storage capacity to safely contain, or a combination of storage capacity and spillway capacity to safely control, the probable maximum RUNOFF FROM precipitation of a 6-hour precipitation event.**

(3) Have a foundation investigation, as well as necessary laboratory testing of foundation material to determine the design requirements for foundation stability.

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§ 90.133. Disposal of noncoal wastes.

Noncoal wastes, including, but not limited to, grease, lubricants, paints, flammable liquids, garbage and other hazardous wastes, shall be disposed of or stored temporarily in accordance with the Solid Waste Management Act and the regulations promulgated thereunder. Storage shall be of a type that fires are prevented and that the area remains

stable and suitable for reclamation and revegetation. **Noncoal waste[**Waste**]** materials **[with low ignition points]** including, but not limited to, wood, cloth, waste paper, oil, grease and garbage may not be deposited **[~~on or near~~] IN** a coal refuse disposal pile **or impounding structure**.

Incidental Coal Extraction, Bonding, Enforcement, Sediment Control, and Remining Financial Guarantees

Comment and Response Document

List of Commentors

(1) Pennsylvania Coal Association
Ms. Josie Gaskey, Director, Regulatory and Technical Affairs
212 North Third St., Suite 102
Harrisburg, PA 17101

(2) Western PA Coalition for Abandoned Mine Reclamation
Mr. Andrew P. McAllister, Regional Coordinator
226 Donohoe Rd., Suite 110
Greensburg, PA 15601

(3) Independent Regulatory Review Commission
Mr. Kim Kaufman, Executive Director
333 Market Street, 14th Floor
Harrisburg, PA 17101

The numbers following each comment identify the commentor.

Comments and Reponses

§ 86.1. Definitions

Comment: 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. § 701.5 contains a definition for "*own, owner, or ownership,*" and not a definition for "*owned or controlled* and *owns or controls*." (1), (3)

Response: The wording of the regulation has been changed to match the defined term in the federal regulations "own, owner, or ownership."

§ 86.37. Criteria for Permit Approval or Denial

Comment: The definition of "violation" is unclear as 30 C.F.R. § 701.5 includes two definitions of "violation." (1), (3)

Response: It is not correct that the federal regulations contain two separate definitions for the same term, i.e. the term "violation." Rather, the federal regulations contain a definition for the term "violation," which is being referenced in this rulemaking, and the additional defined term in the federal regulations is for the term "Violation, failure or refusal." The term "violation, failure or refusal" is a separate term in the federal regulations and is not a definition of "violation." Therefore, no changes need to be made to the proposed regulatory amendment.

§ 86.129. Coal Exploration on Areas Designated as Unsuitable for Surface Mining Operations (UFM)

Comment: The proposed revisions to §86.133 (the "General Requirements" Section) prevents the Department from waiving the UFM permit requirement. (1), (3)

Response: The federal regulations at 30 CFR 772.12 require a permit for exploration on areas designated as unsuitable for mining, therefore waiving the permit requirement is not an option because the state regulations must be at least as stringent as the federal regulations. The program amendment requirement will not be addressed unless the state regulations are as effective as the comparable federal regulation.

Comment: The permit term for this permit should be consistent with other five-year permits issued by the Department. (1), (3)

Response: This permit is for exploration only and is limited to no more than 250 tons of coal extraction, therefore the two-year permit term is appropriate. Exploration is generally completed by operators in a short time period, significantly less than two years, so a two-year period is more than sufficient.

§ 86.159 Self-bonding

Comment: Subsection (a)(2) contains overly broad language relating to "all applicable Federal and State laws." (1), (3)

Response: This language is taken verbatim from the federal regulations. Therefore a change has not been made, because the state regulation is intended to mirror the federal regulation. Recall that this change is being made to address a perceived deficiency in the state regulations.

§§ 86.165 and 86.281 to 86.284. Remining Financial Guarantees

Comment: The 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. (1)

Response· The regulation has been amended to add section 86.282 (a)(3) which reads as follows:

> (3) The operator has previously participated in the remining financial guarantee program and has met its reclamation obligations and made timely payments of premiums.

This change clarifies that the demonstration of financial responsibility applies to new participants or those who have failed to meet obligations under the program in the past.

Comment: 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). 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. (1)

Response: These regulations do not apply to banking operations and so cannot impact how a bank operates or makes lending determinations. These regulations apply to coal mining activities, not

banking operations so this regulation does nothing to undermine a bank's ability to do their business in any way.

Comment: The option to post a letter of credit should not be eliminated. (1)
Comment: DEP and the Board should provide some evidence from the program's experience to provide justification for this change or retain the existing language in the final-form regulation. (3)

Response: A letter of credit can still be used as a bond, this regulation only eliminates the use of a letter of credit as the financial responsibility demonstration for a remining financial guarantee. From the inception of the program in 1997 through March 2010, there have been 16 remining financial guarantees forfeited. Half of these were guarantees where the other bond posted by the operator was in the form of a surety bond. As it turned out, none of the surety bond cases required the Department to spend money from the Remining Financial Assurance Fund. The ability to obtain a surety bond is a good indicator of financial ability to address reclamation because of the collateral required for a surety bond; the overall financial capacity of the operator receives greater scrutiny from the surety company. There have only been four guarantees for which the Commonwealth was required to spend money for the reclamation. Three of these four were supported by letters of credit and the fourth had no other bond. It was apparent from the Department's review of these cases that obtaining a letter of credit from a bank did not necessarily entail a substantial review of the overall financial capacity of the operator. The Department has concluded from this experience that continuing to allow the letter of credit as a demonstration of financial responsibility presents a substantial risk to the long-term viability of the program. Notably, this change will not affect operators who have previously participated in the RFG program and have met their obligations under the program.

Comment: 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." The Department should define "permitted remining site", i.e., the territory the Department intends to be covered by the surety bond requirement of § 86.282(a)(2). (1), (3)

Response: The regulation language has been amended to change the word "permitted" to "proposed." This will clarify that the posting of the surety bond is an option for the initial bonding transaction on a permit application where a remining financial guarantee is requested and approved.

Comment: Regarding the Department's proposed § 86.283(f), the Department should clarify 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... (emphasis added).

This clarification is consistent with the Department's intent, as expressed in the Preamble. (1)

Response: This clarification is not consistent with the Department's intent. Any post-mining discharge liability related to a permit with a remining financial guarantee threatens the long-term viability of the program. The intent is to require a replacement of a remining financial guarantee at any time liability for a pollutional discharge is incurred for that permit. This will protect the remining financial guarantee program from the liability associated with long-term treatment.

§ 87.119. Hydrologic Balance: Water Rights and Replacement

Comment: 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 provide a successful defense to the presumptions of liability related to contamination or diminution of water supplies in § 4.2(f)(2) of the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.4b(f)(2). 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." Section 525(e) of SMCRA allows for the recovery of costs and expenses, including attorney fees, by *either* party. The Department should not, by way of the proposed regulation, unilaterally eliminate a surface mine operator's or mine owner's cost recovery rights. (1), (3)

Response: The commenter has confused the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., with the Pennsylvania Surface Mining Conservation and Reclamation Act (SMCRA), which the preamble refers to. In December 2000, § 4.2(f)(5), 52 P.S. § 1396.4b(f)(5), which states as follows, was repealed from SMCRA:

(5) A surface mining operator and owner who provides a successful defense to the presumptions of liability shall be entitled to recover the 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.

See Act of December 20, 2000, P.L. 980, No. 138, § 2. The regulation revision reflects the amendment of SMCRA by this repeal of § 4.2(f)(5). The applicable provisions pertaining to costs and fees for mining proceedings are found in 27 Pa.C.S.A. § 7708. Section 7708(c) contains detailed provisions regarding each party's right to costs and fees in proceedings concerning coal mining activities. See 27 Pa.C.S.A. § 7708(c).

§§ 88.321 and 90.133. Disposal of Noncoal Wastes

Comment: 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 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). There is a significant difference between disposal **in** a coal refuse pile or impounding structure and **on or near** a coal refuse pile. (1)

Response: The regulation has been revised to change the phrase "on or near" to the word "in."

§ 90.112. Hydrologic Balance

Comment: The Department's proposed revisions to § 90.112 (c)(2) omit the term "runoff." We suggest the Department's language include the words "the runoff." (1), (3)

Response: The regulation language has been revised to include the runoff from the event.

Remining Financial Guarantees Generally

Comment: The Remining Financial Guarantee program in Pennsylvania has resulted in reclamation of Abandoned Mine Lands and so, is of great interest to my organization and to Pennsylvania's Abandoned Mine Reclamation community as a whole. It is of great importance that Pennsylvania continue to facilitate reclamation of Abandoned Mine Lands whenever possible.

I respectfully request that EQB keep me informed when it moves to adopt the proposed regulation as a final rule. (2)

Response: The Department agrees that the Remining Financial Guarantee program has been effective at encouraging reclamation of abandoned mine lands. The regulatory changes are focused on protecting the program so that it can continue doing so. The Department will keep in contact with WPCAMR as the rulemaking process progresses.

pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION
POLICY OFFICE

November 23, 2010

Mr. Kim Kaufman, Executive Director
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17120

Re: Final-Form Rulemaking – Air Quality Fee Schedule (#7-441)
Final-Form Rulemaking – Coal Mining Program Amendments (#7-458)

Dear Mr. Kaufman:

Pursuant to Section 5.1(a) of the Regulatory Review Act, please find enclosed copies of two final-form rulemakings for review and comment by the Independent Regulatory Review Commission (IRRC). The Environmental Quality Board (EQB) approved these final-form rulemakings at its November 16, 2010, meeting.

The first final rulemaking enclosed, **the Air Quality Fee Schedule final rulemaking,** amends existing requirements and fee schedules codified in 25 *Pa. Code* Chapter 127, Subchapter I (relating to plan approval and operating permit fees) to ensure that fees are sufficient to cover the costs of administering the air quality program, as required under Section 6.3 of the Air Pollution Control Act (APCA) (35 P.S. § 4006.3). In addition to increasing existing fees, the rulemaking proposes new fees applicable to plan approval modifications and requests for determination (RFD) of whether a plan approval is required. Specifically, the rulemaking amends the annual emission fee paid by the owner or operator of a Title V facility for up to 4,000 tons of each "regulated pollutant" and adds a new section to address fees for risk assessment applications. The rulemaking also adds Subchapter D (relating to testing, auditing and monitoring fees) to 25 *Pa. Code* Chapter 139 to establish fees to address Department-performed stack emissions source testing, test report reviews and auditing and monitoring activities related to continuous emissions monitoring systems (CEMS). The final-form rulemaking is expected to increase revenue to the Department by approximately $7.5 million per year to cover the costs of administering the air pollution control program. The rulemaking requires the Department at least every 5 years to provide the Board with an evaluation of the fees, including a recommendation for regulatory changes to address any disparity between the program income generated by the fees and the Department's cost of administering the air quality program, with the objective of ensuring sufficient fees meet all program costs The rulemaking, if adopted as final by the Board, will be submitted to the U.S. Environmental Protection Agency as a revision to the State Implementation Plan.

The proposed rulemaking was approved by the Board on July 21, 2009, and was published for public comment in the October 17, 2009, edition of the *Pennsylvania Bulletin.* During the 60-day public comment period, which included three public hearings in Harrisburg on November 17, 2009; Norristown on November 18, 2009; and Pittsburgh on November 20, 2009, the Board

received comments from 17 commentators. As a result of comments received, changes were made to the Definitions section of the final rulemaking, as well as to the effective calendar years for the fee schedules in order to conform the dates with the projected effective date of the final-form rulemaking, which is expected to be 2011.

The final-form regulation was discussed with the Air Quality Technical Advisory Committee (AQTAC) at its October 21, 2010, meeting. The final-form regulation was discussed with the Citizens Advisory Council (CAC) Air Committee on October 18, 2010. The AQTAC and CAC concurred with the Department's recommendation to move the final-form regulation forward to the Board. In addition, the comments on the proposed rulemaking were discussed with the Small Business Compliance Advisory Committee (SBCAC) on July 28, 2010. On October 29, 2010, the SBCAC sent a letter to the Department recommending that the fee for Requests for Determination submitted by the owners or operators of small businesses be reduced or waived.

The second final rulemaking enclosed, **Coal Mining Program Amendments,** includes two categories of amendments. First, the rulemaking includes amendments to address regulatory program deficiencies identified by the Federal Office of Surface Mining Reclamation and Enforcement (OSMRE), which has oversight authority over Pennsylvania's coal mining program. A majority of the deficiencies that are addressed in this final rulemaking are minor and include modifications that are needed to ensure that state regulations are consistent with and as effective as federal regulations. The regulatory deficiencies must be addressed in order for Pennsylvania to retain regulatory authority for its coal mining program. If program deficiencies are not resolved to the satisfaction of OSMRE, the Commonwealth is at risk for loosing or receiving less federal funding for the Abandoned Mine Land Reclamation program. Second, the rulemaking includes improvements to the Remining Financial Guarantee program, which are needed because of the transition in the coal mining bonding program from an alternate bonding system, which used acre-based bond rates, to a conventional bonding system where the bond amount is based on the actual costs of reclamation. The amendments included in the rulemaking are not expected to increase or add costs to the regulated community.

The Board approved the proposed rulemaking on March 16, 2010, with a 30-day public comment period. The proposal was published for public comment in the May 1, 2010, edition of the *Pennsylvania Bulletin*. The Board received comments from three commentators, a majority of which requested greater clarity and more precise alignment of federal regulatory language with state program deficiency sections. Comments were also received regarding operator eligibility concerning the remining financial guarantees portion of the rulemaking. As a result of the public comments received on the OSMRE program deficiency amendments, minor changes were made at final rulemaking to enhance clarity and to ensure consistency with federal language. Concerning the remining financial guarantees amendments, changes were made at final rulemaking to clarify that the reclamation liability applies to a proposed mining area rather than the permitted area and that an operator who has participated in the remining financial guarantee program and who has met its obligations is eligible for subsequent remining financial guarantees. At the September 7, 2010, meeting of the Department's Mining and Reclamation Advisory Board (MRAB), the MRAB recommended the Department proceed with the rulemaking to the Board for final approval.

The Department of Environmental Protection will provide assistance as necessary to facilitate IRRC's review of these final-form rulemakings under Section 5.1(e) of the Regulatory Review Act. In acknowledgement that the House and Senate Environmental Resources and Energy Committees will not be able to complete their required 20-day review of the enclosed rulemakings because of the adjournment sine die of the legislative session, the Department, in accordance with requirements of Section 5.1(j.1) of the Regulatory Review Act, will resubmit the final-form rulemakings to IRRC and the House and Senate Environmental Resources and Energy Committees when the Committees are designated in 2011. The Department acknowledges that IRRC shall not act on the enclosed regulations until the review time of the Committees has expired. The remaining period for the Committees to complete their review of the enclosed final-form rulemakings will be calculated in adherence with the requirements in Section 5.1(j.1) of the Regulatory Review Act.

Please contact me at the number above if you have any questions or need additional information.

Sincerely,

Michele L. Tate

Michele L. Tate
Regulatory Coordinator

Enclosures

0120-FM-PY0011 8/2006

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF POLICY

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE REGULATORY REVIEW ACT

I.D. NUMBER: 7-458

SUBJECT: Coal Mining Program Amendments

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

RECEIVED IRRC 2010 NOV 23 P 1:02

TYPE OF REGULATION

- ☐ Proposed Regulation
- ☒ Final Regulation
- ☐ Final Regulation with Notice of Proposed Rulemaking Omitted
- ☐ 120-day Emergency Certification of the Attorney General
- ☐ 120-day Emergency Certification of the Governor
- ☐ Delivery of Tolled Regulation
  - a. ☐ With Revisions
  - b. ☐ Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
11/23/10	Rhonda Campbell	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Rep. Camille George
11/23/10	Rhonda Campbell	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
11/23/10	D. Costello	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Senator Mary Jo White
11-23-10	A. Rybarczyk	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
11/23/10	K Cooper	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL (for Final Omitted only)
		LEGISLATIVE REFERENCE BUREAU (for Proposed only)