

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

Comment and Response Document

List of Commentors

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The numbers following each comment identify the commentor.

Comments and Responses

§ 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.