

**PROPOSED RULEMAKING
ENVIRONMENTAL QUALITY BOARD
25 Pa. Code Chapters 88 & 90**

Coal Refuse Disposal Revisions

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code Chapters 88 (relating to anthracite coal) and 90 (relating to coal refuse disposal). The proposed amendments are intended to implement Act 74 of 2019 and to address the differences between the Commonwealth’s regulations and Federal regulations relating to temporary cessation at coal refuse disposal sites.

This proposal was adopted by the Board at its meeting of _____ (date)_____.

A. Effective Date

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

B. Contact Persons

For further information contact Gregory Greenfield, Environmental Group Manager, Bureau of Mining Programs, P.O. Box 8461, 5th Floor, 400 Market Street, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5015, or Christopher Minott, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, 9th Floor, 400 Market Street, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the Pennsylvania Hamilton Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection’s (Department) web site at www.dep.pa.gov (Select “Public Participation,” then “Environmental Quality Board”).

C. Statutory Authority

The proposed rulemaking is created under the authority of Section 5 of the Clean Streams Law (35 P.S. § 691.5); Section 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4b(a)); 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), which authorizes the Board to adopt rules and regulations necessary for the performance of the work of the Department.

D. Background and Purpose

Section 1 of the act of October 4, 2019 (P.L. 452, No. 74) (Act 74) amended section 6.1 of the Coal Refuse Disposal Control Act (52 P.S. § 30.56a) to conform with the regulations and standards for temporary cessation adopted by the United States Office of Surface Mining

Reclamation and Enforcement pursuant to Federal law, namely the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§1201—1328) (SMCRA) and regulations at 30 CFR 816.131 (relating to cessation of operations: temporary). Previously, while Federal rules under SMCRA provided flexibility, the Commonwealth's Coal Refuse Disposal Control Act had limited the temporary cessation of operations at a coal refuse disposal site to no more than one year. Act 74 removed the Commonwealth's one-year limitation and clarifies that any rules or regulations promulgated must be in conformance with Federal provisions on this subject. Act 74 also gave the Department an opportunity to promulgate regulations linking the status of operations generating coal refuse or related material to the coal refuse disposal area. The status of a coal refuse disposal site is directly related to the status of the source of the refuse and the proposed revisions will ensure that a change in status of one will result in a change in the status of the other. For example, when an underground coal mine is actively mining coal and sending the refuse material to a coal refuse disposal site, both facilities are considered active. If that underground coal mine is approved for temporary cessation, the coal refuse disposal site would also be approved for temporary cessation since no refuse material is being generated to be sent there. If mining was to begin again, both facilities would be considered active, whereas, if the mine was to permanently cease operations, the coal refuse disposal facility would be considered permanently ceased unless an alternative source of refuse material can be found.

The requirements for temporary cessation include a reference to a system to prevent precipitation from contacting the coal refuse. See 52 P.S. § 30.56a. Act 74 also revised Section 6.1 to include an enumerated list of the circumstances under which this system must be installed. Previously, the requirement was listed in paragraph form, which was somewhat unclear.

Other proposed changes to the regulations are a result of the Department's experiences with reviewing applications for the permitting of coal refuse disposal sites. Confusing or incorrect requirements in the regulations have resulted in applications being considered technically deficient and sent back to the permittee for corrections. The proposed clarifications will improve the quality of the applications and reduce the amount of correction letters sent to address these items. This includes the existing performance standards for terraces and surface water runoff at coal refuse disposal sites which, as written, have led to confusion on the purpose and intent. The terraces requirements are being revised to state that terraces must be constructed as they are needed to control erosion and prevent cascading failures of the final cap rather than just being an optional use. Also, the use of the terms "off of the fill" and "adjacent to and above the fill" in this section are proposed to be revised to clarify the original intent and resolve the existing conflicts with other parts of the section.

The Department worked with the Mining and Reclamation Advisory Board (MRAB) to develop these proposed regulations. The MRAB is composed of two licensed bituminous surface mine operators, one licensed anthracite surface mine operator, four public members of the Citizens Advisory Council, one anthracite or one bituminous licensed professional engineer, one county conservation district representative, one majority party state senator, one minority party state senator, one majority party state representative, and one minority party state representative. The proposed revisions were first mentioned at the January 23, 2020 MRAB meeting as part of the review of the current regulatory agenda. At the March 16, 2020 MRAB Regulation, Legislation, and Technical (RLT) committee meeting, the draft language was reviewed and the committee

suggested changes to the language. A second meeting of the MRAB RLT committee took place on May 18, 2020 to review the draft revised language resulting from the March 16, 2020 committee meeting. The Department reviewed the revised draft with the MRAB again at its meeting on July 16, 2020. A third meeting of the MRAB RLT committee took place on October 15, 2020, to review the revised draft and the committee recommended a minor revision to the permanent cessation section. At the MRAB meeting of October 22, 2020, the MRAB recommended that the Department proceed with the rulemaking.

E. Summary of Regulatory Requirements

§ 88.310. Coal Refuse Disposal: General Requirements

Subsection (k)(1) is proposed to be revised to individually enumerate the triggers for installation of the system to prevent precipitation from encountering the coal refuse to reflect the list of triggers included in Act 74. This proposed revision also includes the language in Act 74 which clarifies that there is not a one-year upper limit on the length of temporary cessation.

§ 88.332. Cessation of Operations: Temporary

Act 74 amended section 6.1 of the Coal Refuse Disposal Control Act to conform with the regulations and standards for temporary cessation pursuant to Federal law. To be consistent with the Federal regulations at 30 CFR 816.131, subsection (a) was revised, and the existing requirements for temporary cessation for anthracite coal refuse disposal sites are proposed to be amended as follows.

Proposed amendments to subsection (a), which are based on the Federal requirements, will address temporary cessation status of operations lasting 30 days or more and will require a notice to be submitted to the Department. The list of items that must be included in this notice are enumerated as paragraphs (1)-(4) and include the affected acres in the permit area; a description of the extent and kind of reclamation of the area; a description of the activities that will continue during the temporary cessation status; and a description of the status of the operation or operations that is the source of the coal refuse. Paragraphs (1)-(3) are based on the Federal regulations and are in the existing subsection (a). Paragraph (4) is proposed based on the language in Act 74 to provide for the connection of coal refuse or related material to the coal refuse disposal area. Act 74 removed the one-year limitation on temporary cessation and that part of subsection (a) is proposed to be deleted.

Proposed amendments to subsection (b) address temporary cessation status of operations lasting 90 days or more and, in addition to the items required to be submitted in subsection (a), there are two additional items that must be included in the notice submitted to the Department. These items may be submitted at the same time as the subsection (a) notice or subsequent to that notice. These two additional items are enumerated as paragraphs (1) and (2) and include the confirmation that the current bond is adequate to complete reclamation and the timing of the installation of the phased system to prevent precipitation from contacting the refuse. The difference in requirements between subsections (a) and (b) ensures the operator does not need to address longer-term requirements if the temporary cessation will last less than 90 days. While

this distinction is not found in the Federal requirements nor Act 74, it is proposed because the amendments will allow for an unlimited time for cessation. The confirmation that the bond amount is adequate to complete the reclamation of the site as it currently exists is necessary to assure that the site can be fully reclaimed if the site ends up in bond forfeiture. The requirement for a schedule for the system to prevent precipitation from coming into contact with the refuse is proposed to assure that the potential water quality impacts of long-term cessation are mitigated. The existing statement about exemptions for a seasonal shutdown or labor strike is proposed to be deleted from this subsection as a justification for a longer temporary cessation is no longer needed since the upper time limit is proposed to be removed.

Proposed amendments to subsection (c) include the obligation to comply with the environmental protection statutes or “Acts” as defined in § 86.1 (relating to definitions) and Chapters 86-90, in addition to the provisions of the permit. Currently, subsection (c) only requires compliance with the provisions of the permit. The proposed amendments also clarify that operators are required to submit a permit renewal while under temporary cessation.

Proposed subsection (d) states that temporary cessation status ends as a result of the resumption of coal refuse disposal operations and any subsequent notices of temporary cessation status must include updated information that is outlined in subsection (a).

Proposed subsection (e) states that temporary cessation status for the coal refuse disposal operation ends when the status of a facility which produces the refuse that is disposed of at the coal refuse disposal site ends through permanent cessation or the operations resume.

§ 88.333. Cessation of Operations: Permanent

While neither the Federal regulations or statute address this, subsection (b) is proposed to be added to this section to provide a trigger for when a temporary cessation has developed into a permanent cessation. This necessitates the lettering of the existing language as subsection (a). Proposed subsection (b) describes the circumstances that will terminate the temporary cessation status of a coal refuse disposal facility for non-compliance, listed as paragraphs (1)-(3). The three circumstances which will terminate the temporary cessation status are failure to comply with a final adjudicated proceeding through an act or omission which violates the acts defined in § 86.1 (relating to definitions) or Chapters 86-90; failure to comply with a permit condition required by the acts or Chapters 86-90; and failure to comply with a consent order and agreement or a consent order. The intent of this new subsection is to trigger the reclamation requirement for sites where chronic non-compliance exists and allows the Department to have the ability to begin reclamation, if necessary. In these cases, it is unlikely that the permittee will be able to meet their obligations to complete the required reclamation.

§ 90.31. General Requirements

The Act 74 amendments to the Coal Refuse Disposal Control Act also provided for the Department to promulgate regulations to link operations generating coal refuse or related material to the coal refuse disposal area. Paragraph (6) is proposed to require the description of the operations that will be the source of the coal refuse to be disposed of in the application for a

coal refuse disposal permit. As plans change, this facility information can be updated to include other related facilities.

§ 90.50. Design Criteria: Groundwater and Surface Water Protection System

In response to Act 74, proposed amendments to subsection (b) add “as specified in the permit” as paragraph (1.1) to the list of triggers for the installation of the system for preventing precipitation from encountering coal refuse that will be installed to prevent adverse impacts to groundwater and surface water. Paragraph (2) is revised to update the reference to subsection (b) in § 90.167 (relating to cessation of operations: temporary) to reflect the proposed amendments to that section.

§ 90.122. Coal Refuse Disposal

Proposed amendments to subsection (h) parallel the language from Act 74 relating to when the system to prevent precipitation from encountering the coal refuse is to be implemented. Paragraphs (1)-(5) are proposed to be rescinded and reserved and paragraphs (6)-(9) are proposed to be added to list the instances when an operator must install the system to prevent precipitation from contacting the coal refuse. These include when each phase of the operation reaches capacity; when specified in the permit; when an operator temporarily ceases operation for a period of 90 days or more; or when the operation permanently ceases. The construction and design requirements currently contained in paragraphs (1) and (3) of subsection (h) are moved to proposed subsection (h.1).

The Department observed confusion among applicants regarding the purpose of terraces at coal refuse disposal sites and the need for clarification in the regulations. Subsection (m) is proposed to be revised to require terraces to control erosion and enhance stability and make their use as roads optional. With the existing regulations, terraces are not required if the maximum overall completed out slopes in subsection (m) are not exceeded, but terraces are required to break up lengthy out slopes of very large coal refuse embankments in order to control erosion and prevent cascading failures of the final cap and soil on an entire embankment out slope. A proposed revision will change the reference in this subsection from subsection (n) to (o) because terraces are needed to divert the drainage off of the fill and not as a diversion adjacent to or above the fill.

The Department’s experience with reviewing the applications for coal refuse disposal sites noted that part of the subsection referenced for diverting surface water runoff cannot be satisfied as written and the intent of the subsection is confusing. Subsection (n) is revised to clarify the design requirements for diverting surface water runoff away from the fill. The reference to all subsections of § 90.104 is also proposed to be revised by removing the reference to § 90.104(b) as the design requirements of § 90.104(b) conflict with the hydraulic requirements in this section and the requirement to maintain diversion channels located above the refuse fills in perpetuity.

When reviewing coal refuse disposal site applications, the Department has observed that the applications often require technical deficiency letters due to confusion caused by incorrect or non-applicable section references in the existing regulations. Subsection (o) is proposed to be revised to require surface water runoff diverted off of the fill to be conveyed in channels in

natural ground or suitable engineered fill. The reference to § 90.104 and § 90.105 are also proposed to be removed as they are confusing and conflict with the design requirements in this section. Diverted off the fill is a different function than a diversion channel located adjacent to or above the fill and § 90.105 is not related to the management of disposal area runoff.

§ 90.167. Cessation of Operations: Temporary

Act 74 amended section 6.1 of the Coal Refuse Disposal Control Act to conform with the regulations and standards for temporary cessation pursuant to Federal law. To be consistent with the Federal regulations at 30 CFR 816.131, subsection (a) was revised, and the existing requirements for temporary cessation for bituminous coal refuse disposal sites are proposed to be amended as follows.

Proposed amendments to subsection (a), which are based on the Federal requirements, will address temporary cessation status of operations lasting 30 days or more and will require a notice to be submitted to the Department. The list of items that must be included in this notice are enumerated as paragraphs (1)-(4) and include the affected acres in the permit area; a description of the extent and kind of reclamation of the area; a description of the activities that will continue during the temporary cessation status; and a description of the status of the operation or operations that is the source of the coal refuse. Paragraphs (1)-(3) are based on the Federal regulations and are in the existing subsection (a). Paragraph (4) is proposed based on the language in Act 74 to provide for the connection of coal refuse or related material to the coal refuse disposal area.

Proposed amendments to subsection (b) address temporary cessation status of operations lasting 90 days or more and in addition to the items required to be submitted in subsection (a), there are two additional items that must be included in the notice submitted to the Department. These items may be submitted at the same time as the subsection (a) notice or subsequent to that notice. These two additional items are enumerated as paragraphs (1) and (2) and include the confirmation that the current bond is adequate to complete reclamation and the timing of the installation of the phased system to prevent precipitation from contacting the refuse. The difference in requirements between subsections (a) and (b) ensures the operator does not need to address longer-term requirements if the temporary cessation will last less than 90 days. While this distinction is not found in the Federal requirements nor Act 74, it is proposed because the amendments will allow for an unlimited time for cessation. The confirmation that the bond amount is adequate to complete the reclamation of the site as it currently exists is necessary to assure that the site can be fully reclaimed if the site ends up in bond forfeiture. The requirement for a schedule for the system to prevent precipitation from coming into contact with the refuse is proposed to assure that the potential water quality impacts of long-term cessation are mitigated. The existing statement about exemptions for a seasonal shutdown or labor strike is proposed to be deleted from this subsection as a justification for a longer temporary cessation is no longer needed since the upper time limit is proposed to be removed.

Proposed amendments to subsection (c) include the obligation to comply with the environmental protection statutes or “Acts” as defined in § 86.1 and Chapters 86-90, in addition to the provisions of the permit. Currently, subsection (c) only requires compliance with the provisions

of the permit. The proposed amendments also clarify that operators are required to submit a permit renewal while under temporary cessation.

Subsection (d) is proposed to be rescinded and reserved since Act 74 removed the one-year limitation on temporary cessation. The installation of the system preventing precipitation from contacting the coal refuse is proposed to be included in subsection (b), which addresses the requirements for temporary cessation of 90 days or more.

Proposed subsection (e) states that temporary cessation status ends as a result of the resumption of coal refuse disposal operations and any subsequent notices of temporary cessation status must include updated information that is outlined in subsection (a).

Proposed subsection (f) states that temporary cessation status for the coal refuse disposal operation ends when the status of a facility which produces the refuse that is disposed of at the coal refuse disposal site ends through permanent cessation or the operations resume.

§ 90.168. Cessation of Operations: Permanent

While neither the Federal regulations or statute address this, subsection (b) is proposed to be added to this section to provide a trigger for when a temporary cessation has developed into a permanent cessation. This necessitates the lettering of the existing language as subsection (a). Proposed subsection (b) describes the circumstances that will terminate the temporary cessation status of a coal refuse disposal facility for non-compliance, listed as paragraphs (1)-(3). The three circumstances which will terminate the temporary cessation status are failure to comply with a final adjudicated proceeding through an act or omission which violates the acts defined in § 86.1 (relating to definitions) or Chapters 86-90; failure to comply with a permit condition required by the acts or Chapters 86-90; and failure to comply with a consent order and agreement or a consent order. The intent of this new paragraph is to trigger the reclamation requirement for sites where chronic non-compliance exists and allows the Department to have the ability to begin reclamation, if necessary. In these cases, it is unlikely that the permittee will be able to meet their obligations to complete the required reclamation.

§ 90.202. General Requirements

Proposed amendments to paragraph (b)(1) change the reference to a “coal preparation facility” to a “coal mining activity”. This change is proposed because not all coal refuse is the result of coal preparation. For example, some surface mines will take their refuse to a refuse disposal site. The existing language is also inconsistent with the language in the Coal Refuse Disposal Control Act (52 P.S. § 30.54a).

F. Benefits, Costs, and Compliance

Benefits

This proposed rulemaking will make the Department’s regulations consistent with State law and Federal regulations related to the operation of coal refuse disposal areas. The proposed

rulemaking will clarify when an operator must install a system for preventing precipitation from encountering coal refuse, which will improve environmental protection by reducing the likelihood that precipitation will generate a pollutorial discharge from the site. This proposed rulemaking will also establish a relationship between the coal refuse disposal area and the source of the refuse, which will improve environmental protection by ensuring that disposal areas do not remain unreclaimed long after the source has ceased generating refuse. This proposed rulemaking is not expected to directly improve public health, although it may have an indirect public health benefit to the extent that it reduces the likelihood of pollutorial discharges from coal refuse disposal areas.

Compliance costs

All existing and future permittees of coal refuse disposal sites will be required to comply with the proposed regulation. This proposed rulemaking will not create any new compliance costs and it is not expected to prevent or avoid costs. The proposed rulemaking will provide clearer requirements on the existing requirements which may avoid costs associated with navigating unclear requirements that could be inconsistently interpreted or applied.

Compliance assistance plan

Compliance assistance for this proposed rulemaking will be provided through the Department's routine interaction with trade groups and individual applicants. No financial assistance will be necessary or provided.

Paperwork requirements

This proposed rulemaking does not require additional paperwork.

G. Pollution Prevention (if applicable)

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. DEP encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This regulation has incorporated the following pollution prevention incentives:

This proposed rulemaking will clarify when an operator must install a system for preventing precipitation from encountering coal refuse, which will improve environmental protection by reducing the likelihood that precipitation will generate a pollutorial discharge from the site. This proposed rulemaking will also require some relationship between the coal refuse disposal area and the source of the refuse, which will improve environmental protection by ensuring that disposal areas do not remain unreclaimed long after the source has ceased generating refuse.

H. *Sunset Review*

The Board is not establishing a sunset date for these regulations since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

I. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on **DATE**, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations, or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor.

J. *Public Comments*

Interested persons are invited to submit to the Board written comments, suggestions, support or objections regarding the proposed rulemaking. Comments, suggestions, support or objections must be received by the Board by **DATE**.

Comments may be submitted to the Board online, by e-mail, by mail or express mail as follows.

Comments may be submitted to the Board by accessing eComment at <http://www.ahs.dep.pa.gov/eComment>.

Comments may be submitted to the Board by e-mail at RegComments@pa.gov. A subject heading of the proposed rulemaking and a return name and address must be included in each transmission.

If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt. Comments submitted by facsimile will not be accepted.

Written comments should be mailed to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477. Express mail should be sent to the Environmental Quality Board, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

K. *Public Hearings*

If sufficient interest is generated as a result of this publication, a public hearing will be scheduled at an appropriate location to receive additional comments.

PATRICK McDONNELL,
Chairperson