

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 86—88 AND 90]

Coal Mine Permits/Road Requirements

The Environmental Quality Board (Board) by this order amends Chapters 86—88 and 90 to read as set forth in Annex A. The amendments address criteria for approval/denial of coal mine permits and performance standards concerning roads used in conjunction with coal surface mines and coal refuse disposal operations.

This order was adopted by the Board at its meeting of February 19, 2002.

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 Evan Shuster, Chief of Permits Division, Bureau of Mining and Reclamation, P. O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103 or Bo Reiley, 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 by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This rulemaking is available electronically through the Department of Environmental Protection's (Department) website (<http://www.dep.state.pa.us>).

C. Statutory Authority

This final-form rulemaking is adopted under the authority of 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).

D. Background and Summary

This final-form rulemaking amends existing provisions relating to criteria for approval/denial of coal mine permits and performance standards concerning haul roads and access roads used in conjunction with coal surface mines and coal refuse disposal operations. Approximately 600 operators of anthracite and bituminous surface mines and coal refuse disposal operations will be affected by this final-form rulemaking. This final-form rulemaking is necessary to clarify the existing regulations and to make the regulations consistent with Federal regulations.

During the surface coal mining permit application approval process under § 86.37 (relating to criteria for permit approval or denial), it is established practice for a mining permit applicant to submit a permit application that included a mining plan for the entire permit area. Any necessary waiver approvals related to distance limitations (such as waiver for mining activities within 300 feet of an occupied dwelling) were typically included in the mining plan for the initial bonding increment. The mining permit applicant would provide bonding to cover the initial increment of mining, and the Department, in

issuing the mining permit, authorized mining activities only for that initial increment. When the permittee provided bonding for subsequent increments to be mined and obtained the necessary waiver approvals for that increment, the Department authorized mining activities for that specific increment.

The Environmental Hearing Board (EHB) in *Peter Blose vs. DEP and Seven Sisters Mining Company, Inc.* (No. 98-034-R) held that this established practice was contrary to § 86.37(a)(2) and (5), and that the Department may not approve a permit if any coal mining activities are proposed within 300 feet of an occupied dwelling located on the entire permit area if the waiver for allowing mining activities had not been obtained.

The regulatory change under § 86.37(a)(5) allows the Department to continue to review and approve mining permits following those procedures in place prior to the EHB's decision in *Blose*. These procedures, while still fully protective of occupied dwellings, have the additional benefits of ensuring that both the amount of bond calculated to ensure proper reclamation of the site and all erosion and sedimentation plans are as current as possible.

Sections 87.160(a), 88.138(a), 88.231(a), 88.335(a) and 90.134(a) are changed by deleting the requirement for a road maintenance plan for roads to be retained (upon completion of the mining and reclamation activities) as part of the postmining land use. This requirement for a road maintenance plan is deleted because it is more stringent than the corresponding Federal requirements, and because, as a practical matter, is unnecessary since the landowner has agreed to be responsible for any future maintenance of the road. Therefore, the Board deleted this requirement because it is unnecessary.

Section 90.134(a) (relating to haul road and access roads: general) is also changed to include a requirement that haul roads and access roads used in conjunction with coal refuse disposal activities must be designed, constructed and maintained to control or prevent erosion. This amendment addresses a condition placed on the Commonwealth's approved coal mining regulatory program by the Federal Office of Surface Mining. The amendment makes this specific requirement consistent with the requirements for other coal mining operations.

These regulatory changes were reviewed and discussed with the Mining and Reclamation Advisory Board (MRAB), the Department's advisory body for regulations pertaining to the surface mining of coal. A draft of the proposed rulemaking was reviewed and discussed with the MRAB at its meeting on April 26, 2001. The MRAB supported the proposed rulemaking. The MRAB reviewed and concurred with the final-form rulemaking at its meeting on October 25, 2001.

E. Summary of Comments and Responses on the Proposed Rulemaking

The Board approved publication of the proposed amendments at its July 17, 2001, meeting. The proposed amendments were published at 31 Pa.B. 4538 (August 18, 2001). A 30-day public comment period was provided. The Pennsylvania Coal Association, which was the only party that provided comments, expressed support for the amendments. No further changes have been made to these regulations from the proposed amendments as published at 31 Pa.B. 4538.

F. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the final-form regulations.

Benefits

The coal mining industry and the Department will benefit from this final-form rulemaking. In the case of amendments to § 86.37, a permit applicant would benefit by avoiding the costs to prepare and publicize a permit revision should the specific types of activities proposed in barrier areas after permit issuance require public notice. The cost savings for that would not be easily quantifiable because of the inability to estimate or predict with much degree of accuracy the number of proposals that would be submitted that require public notice. In the case of amendments to §§ 87.160, 88.138, 88.231, 88.335 and 90.134, a permittee would benefit by reduction in costs of preparing maintenance plans for mining roads to be retained (upon completion of the mining and reclamation activities) as part of the postmining land use. The Department will benefit by reduction in the amount of staff time needed to review the plans. The estimated cost savings related to deleting the requirement for road maintenance plans is \$47,750 annually for the industry and \$19,100 annually for the Department.

Compliance Costs

This final-form rulemaking will impose no additional compliance costs on the regulated community.

Compliance Assistance Plan

The Department will provide written notification of the changes to the coal mining industry.

Paperwork Requirements

This final-form rulemaking will not result in additional paperwork. Paperwork will be reduced by eliminating the requirement for providing a maintenance plan for mining roads that remain as part of the postmining land use.

G. *Sunset Review*

This final-form rulemaking 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.

H. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on March 26, 2002, the Department submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC), and the Chairpersons of the Senate and House Environmental Resources and Energy Committees.

Under section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with a copy of the comments as well as other information. The Committees and IRRC did not submit comments. In preparing these final-form regulations, the Department has considered the comments received.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d) on April 15, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on April 19, 2002, and approved the final-form regulations.

I. *Findings*

The Board finds that:

(1) Public notice of the 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 in 1 Pa. Code §§ 7.1 and 7.2.

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

(3) This final-form rulemaking does not enlarge the purpose of the proposed amendments published at 31 Pa.B. 4538.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

J. *Order*

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

(a) The regulations of the Department, 25 Pa. Code Chapters 86—88 and 90, are amended by amending §§ 86.37, 87.160, 88.138, 88.231, 88.335 and 90.134 to read as set forth in Annex A.

(b) The Chairperson 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 IRRC 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 upon publication in the *Pennsylvania Bulletin*.

DAVID E. HESS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 2285 (May 11, 2002).)

Fiscal Note: Fiscal Note 7-367 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION
Subpart C. PROTECTION OF NATURAL RESOURCES
CHAPTER 86. SURFACE AND UNDERGROUND COAL MINING: GENERAL
Subchapter B. PERMITS
REVIEW, PUBLIC PARTICIPATION AND APPROVAL, DISAPPROVAL OF PERMIT APPLICATIONS AND PERMIT TERMS AND CONDITIONS

§ 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:

(1) The permit application is accurate and complete and that the requirements of the acts and this chapter have been complied with.

(2) The applicant has demonstrated that the coal mining activities can be feasibly accomplished as required by the act and this chapter under the operation and reclamation plan contained in the application.

(3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.

(4) The assessment of the probable cumulative impacts of all anticipated coal mining in the general area on the hydrologic balance as described in § 87.69, § 88.49, § 89.36 or § 90.35 has been made by the Department, and the activities proposed under the application have been designed to prevent material damage to the hydrologic balance outside the proposed permit area.

(5) The area covered by the operator's bond and upon which the operator proposes to conduct surface mining activities within the boundary of the proposed surface or coal mining activities permit is not one of the following:

(i) Included within an area designated unsuitable for mining under Subchapter D (relating to areas unsuitable for mining).

(ii) Within an area which has been included in a petition for designation under § 86.124(a)(6) (relating to procedures: initial processing, recordkeeping and notification requirements).

(iii) On lands subject to the prohibitions or limitations of Subchapter D.

(iv) Within 100 feet (30.48 meters) of the outside right-of-way line of any public road, except as provided for in Subchapter D.

(v) Within 300 feet (91.44 meters) from any occupied dwelling, except as provided for in Subchapter D.

(vi) Within 100 feet (30.48 meters) of a stream, except as provided for in § 86.102 (relating to areas where mining is prohibited or limited).

(6) The proposed activities will not adversely affect any publicly owned parks or places included on the National Register of Historic Places, except as provided for in Subchapter D. The effect of the proposed coal mining activities on properties listed on or eligible for listing on the National Register of Historic Places has been taken into account by the Department. This finding may be supported in part by inclusion of appropriate permit conditions or operational plan changes to protect historic resources, or a documented decision that no additional protective measures are necessary.

(7) Prior to approval of the bond under Subchapter F (relating to bonding and insurance requirements), a right of entry has been obtained from the landowner for each parcel of land to be affected by the coal mining activities in accordance with § 86.64 (relating to right of entry).

(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. 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 supersedes providing that relief, will be issued conditionally.

(9) A statement from the applicant that all reclamation fees required by 30 CFR Part 870 (relating to abandoned mine reclamation fees) have been paid.

(10) There are no past or continuing violations which show the applicant's, 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, lack of ability or intention to comply with the acts or the regulations promulgated thereunder, 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. If the Department makes a finding that the applicant or the operator specified in the application or a person who owns or controls the applicant or operator or a person owned or controlled by the applicant or operator, has demonstrated a pattern of willful violations of the acts of a nature and duration and with resulting irreparable damage to the environment as to indicate an intent not to comply with the acts, a permit will not be issued.

(11) The applicant has submitted proof that a violation by the applicant or by a person owned or controlled by the applicant or by a person who owns or controls the applicant under the definition of "owned or controlled" or "owns or controls" in § 86.1, of a law, rule or regulation of the United States or a state—other than the law of the Commonwealth—law, rule or regulation pertaining to air or water environmental protection enacted under Federal law, has been corrected or is in the process of being satisfactorily corrected. 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 supersedes providing that relief, will be issued conditionally.

(12) The applicant shall submit the bond required under Subchapter F prior to the issuance of the permit.

(13) The applicant has satisfied the requirements of § 87.53, § 88.32, § 88.491(k), § 89.121 or § 90.22.

(14) The proposed postmining land use of the permit area meets the requirements of § 87.159, § 88.89, § 88.183, § 88.289, § 88.493, § 89.88 or § 90.166.

(15) The proposed activities would not affect the continued existence of endangered or threatened species or result in the destruction or adverse modification of their critical habitats as determined under the Endangered Species Act of 1973 (16 U.S.C.A. §§ 1531—1544).

(16) A statement from the applicant that State and Federal final civil penalty assessments have been paid. Final civil penalty assessments are civil penalty assessments which have not been appealed within 30 days of assessment or appealed civil penalty assessments which

have been adjudicated by the EHB or other applicable judicial forum. For purposes of this subsection, civil penalty assessments include State and Federal civil penalty assessments related to coal mining activities which are assessed by one of the following:

- (i) The Department under the authority of the acts.
- (ii) The Federal Office of Surface Mining Reclamation and Enforcement (OSMRE) under the authority of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§ 1201—1328).
- (iii) A State regulatory authority which has been granted primary jurisdiction by OSMRE to implement the Federal coal mining regulatory program within its boundaries.

(b) An incremental phase approval of the permit will not be granted to conduct mining or reclamation operations or to expand mining or reclamation operations within a permit area if the Department has already issued an incremental phase approval for the area to another permittee, except for an area used for access or haul roads. An incremental phase approval of the permit will not be granted to conduct mining or reclamation operations, or permission to expand mining or reclamation operations within a permit area which has been limited to a portion or phase of the entire area until the applicant:

(1) Has filed with the Department a bond in accordance with § 86.143 (relating to requirements to file a bond).

(2) Meets the requirements of subsection (a)(7)—(9).

(c) After an application is approved, but before the permit is issued, the Department will reconsider its decision to approve the application, based on the compliance review required by subsection (a)(8), (10) and (11) in light of new information submitted under §§ 86.62(d) and 86.63(c) (relating to identification of interests; and compliance information).

CHAPTER 87. SURFACE MINING OF COAL

Subchapter E. SURFACE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 87.160. Haul roads and access roads.

(a) Haul roads and access roads shall be designed, constructed and maintained to control or prevent erosion and contributions of sediment to streams or runoff outside the affected area; air and water pollution; damage to fish and wildlife or their habitat; flooding; and damage to public or private property. To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement and culvert size, in accordance with current, prudent engineering practices and necessary design criteria established by the Department. Upon completion of the associated surface mining activities, the area disturbed by the road shall be restored in accordance with § 87.166 (relating to haul roads and access roads: restoration) unless retention of the road is approved as part of the postmining land use.

(b) The haul or access road may not be located in or within 100 feet (30.48 meters) of a perennial or intermittent stream except in accordance with § 86.102 (relating to areas where mining is prohibited or limited). A crossing

of a perennial or intermittent stream shall be made using bridges, culverts or similar structures. Bridges, culverts or other encroachment or water obstruction shall meet the requirements of Chapter 105 (relating to dam safety and waterway management).

(c) Each road shall have a drainage system that is compatible with the natural drainage system, is structurally stable, and which will pass safely the peak flow from a 10-year, 24-hour precipitation event or larger event if required by the Department. The drainage system shall include a sloped or crowned road surface, cross drains or culverts, stabilized ditches, erosion-resistant surfacing, sediment traps and other appropriate sediment control measures as required by § 87.106 (relating to hydrologic balance: sediment control measures).

(d) Roads shall be constructed on stable areas that avoid wet or unstable soils.

(e) Prior to the construction of the road, topsoil shall be removed, stored on a stable site and protected against erosion and compaction until restoration of the haul road.

(f) Disturbed areas adjacent to the road shall be vegetated or otherwise stabilized to prevent erosion.

(g) Haul roads shall be surfaced with material sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road. Acid or toxic-forming material may not be used for surfacing or construction of a road except where the road is within the confines of a coal refuse disposal or reprocessing area and the effluent meets the requirements of § 87.102 (relating to hydrologic balance: effluent standards).

(h) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired or reclaimed as soon as practicable after the damage has occurred.

(i) Haul roads and roads approved as part of the postmining land use shall be certified by a qualified registered professional engineer or qualified registered land surveyor that the roads have been constructed or reconstructed as designed in accordance with the approved plan.

CHAPTER 88. ANTHRACITE COAL

Subchapter B. SURFACE ANTHRACITE COAL MINES: MINIMUM

ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 88.138. Haul roads and access roads: general.

(a) Haul roads and access roads shall be designed, constructed and maintained to control or prevent erosion and contributions of sediment to streams or runoff outside the affected area; air and water pollution; damage to fish and wildlife or their habitat; flooding; and damage to public or private property. Upon completion of the associated surface mining activities, the area disturbed by the road shall be restored in accordance with § 88.144 (relating to haul roads and access roads: restoration) unless retention of the road is approved as part of the postmining land use.

(b) The haul road may not be located in or within 100 feet (30.48 meters) of a perennial or intermittent stream except in accordance with § 86.102 (relating to areas where mining is prohibited or limited). Any crossing of a perennial or intermittent stream shall be made using bridges, culverts or similar structures. Bridges, culverts or other encroachment or water obstruction shall meet the requirements of Chapter 105 (relating to dam safety and waterway management).

(c) Each road shall have a drainage system that is compatible with the natural drainage system, structurally stable and which will pass safely the peak flow from a 10-year precipitation event or larger event if required by the Department. The drainage system shall include sloped or crowned road surfaces, cross drains or culverts, stabilized ditches, erosion resistant surfacing, sediment traps and other appropriate sediment control measures as required by § 88.96 (relating to hydrologic balance: sediment control measures).

(d) Roads shall be constructed on stable areas that avoid wet or unstable soils.

(e) Prior to the construction of the road, all topsoil shall be removed, stored on a stable site and protected against erosion and compaction until restoration of the haul road.

(f) Any disturbed area adjacent to the road shall be vegetated or otherwise stabilized to prevent erosion.

(g) Acid-forming or toxic-forming material may not be used for surfacing or construction of a road except where the road is within the confines of a road refuse disposal or reprocessing area and the effluent meets the requirements of § 88.92 (relating to hydrologic balance: effluent standards).

**Subchapter C. ANTHRACITE BANK REMOVAL
AND RECLAMATION: MINIMUM
ENVIRONMENTAL PROTECTION PERFORMANCE
STANDARDS**

§ 88.231. Haul roads and access roads: general.

(a) Haul roads and access roads shall be designed, constructed and maintained to control or prevent erosion and contributions of sediment to streams or runoff outside the affected area; air and water pollution; damage to fish and wildlife or their habitat; flooding; and damage to public or private property. Upon completion of the associated surface mining activities, the area disturbed by the road shall be restored in accordance with § 88.237 (relating to haul roads and access roads: restoration) unless retention of the road is approved as part of the postmining land use.

(b) The haul road may not be located in or within 100 feet (30.48 meters) of a perennial or intermittent stream except in accordance with § 86.102 (relating to areas where mining is prohibited or limited). Any crossing of a perennial or intermittent stream shall be made using bridges, culverts or similar structures. Bridges, culverts or other encroachments or water obstructions shall comply with Chapter 105 (relating to dam safety and waterway management).

(c) Each road shall have a drainage system that is compatible with the natural drainage system, structurally stable and which will pass safely the peak flow from a 10-year precipitation event or larger event if required by the Department. The drainage system shall include sloped or crowned road surfaces, cross drains or culverts, stabilized ditches, erosion resistant surfacing, sediment traps and other appropriate sediment control measures as required by § 88.191 (relating to hydrologic balance: sediment control measures).

(d) Roads shall be constructed on stable areas that avoid wet or unstable soils.

(e) Prior to the construction of the road, all topsoil shall be removed, stored on a stable site and protected against erosion and compaction until restoration of the haul road.

(f) Any disturbed area adjacent to the road shall be vegetated or otherwise stabilized to prevent erosion.

(g) Acid-forming or toxic-forming material may not be used for surfacing or construction of a road except where the road is within the confines of a coal refuse disposal or reprocessing area and the effluent meets the requirements of § 88.187 (relating to hydrologic balance: effluent standards).

**Subchapter D. ANTHRACITE REFUSE DISPOSAL:
MINIMUM ENVIRONMENTAL PROTECTION
PERFORMANCE STANDARDS**

§ 88.335. Haul roads and access roads: general.

(a) Haul roads and access roads shall be designed, constructed and maintained to control or prevent erosion and contributions of sediment to streams or runoff outside the affected area; air and water pollution; damage to fish and wildlife or their habitat; flooding; and damage to public or private property. Upon completion of the associated surface mining activities, the area disturbed by the road shall be restored in accordance with § 88.341 (relating to haul roads and access roads: restoration) unless retention of the road is approved as part of the postmining land use.

(b) The haul road may not be located in or within 100 feet of a perennial or intermittent stream except in accordance with § 86.102 (relating to areas where mining is prohibited or limited). Any crossing of a perennial or intermittent stream shall be made using bridges, culverts or similar structures. Bridges, culverts or other encroachment or water obstruction shall meet the requirement of Chapter 105 (relating to dam safety and waterway management).

(c) Each road shall have a drainage system that is compatible with the natural drainage system, structurally stable and which will pass safely the peak flow from a 10-year precipitation event or larger event if required by the Department. The drainage system shall include sloped or crowned road surface, cross drains or culverts, stabilized ditches, erosion resistant surfacing, sediment traps and other appropriate control measures as required by § 88.296 (relating to hydrologic balance: sediment control measures).

(d) Roads shall be constructed on stable areas that avoid wet or unsuitable soils.

(e) Prior to the construction of the road, all topsoil shall be removed, stored on a stable site and protected against erosion and compaction until restoration of the haul road.

(f) Any disturbed area adjacent to the road shall be vegetated or otherwise stabilized to prevent erosion.

(g) Acid or toxic-forming material may not be used for surfacing or construction of a road except where the road is within the confines of a coal refuse disposal or reprocessing area and the effluent meets the requirements of § 88.292 (relating to hydrologic balance: effluent standards).

CHAPTER 90. COAL REFUSE DISPOSAL

**Subchapter D. PERFORMANCE STANDARDS FOR
COAL REFUSE DISPOSAL**

§ 90.134. Haul roads and access roads: general.

(a) Haul roads and access roads shall be designed, constructed and maintained to control or prevent: erosion

and contributions of sediment to streams or runoff outside the affected area; flooding; air and water pollution; damage to fish and wildlife or their habitat; and damage to public or private property. To ensure environmental protection appropriate for their planned duration and use, including consideration of the type and size of equipment used, the design and construction or reconstruction of roads shall incorporate appropriate limits for grade, width, surface materials, surface drainage control, culvert placement and culvert size, in accordance with current, prudent engineering practices, and necessary design criteria established by the Department. Upon completion of the associated surface mining activities, the area disturbed by the road shall be restored in accordance with § 90.140 (relating to haul roads and access roads: restoration), unless retention of the road is approved as part of the postmining land use.

(b) The haul road or access roads may not be located in or within 100 feet (30.48 meters) of a perennial or intermittent stream except in accordance with § 86.102 (relating to areas where mining is prohibited or limited). Crossing of a perennial or intermittent stream shall be made using bridges, culverts or similar structures. Bridges, culverts or other encroachment or water obstruction shall meet the requirements of Chapter 105 (relating to dam safety and waterway management).

(c) Each road shall have a drainage system that is compatible with the natural drainage system, structurally stable and will pass safely the peak flow from a 10-year, 24-hour precipitation event, or larger event if required by the Department. The drainage system shall include sloped or crowned road surface, cross drains or culverts, stabilized ditches, erosion-resistant surfacing, sediment traps and other appropriate sediment control measures as required by § 90.106 (relating to hydrologic balance: erosion and sedimentation control).

(d) Roads shall be constructed on stable areas that avoid wet or unstable soils.

(e) Prior to the construction of the road, all topsoil shall be removed, stored on a stable site and protected against erosion and compaction until restoration of the haul road.

(f) Disturbed areas adjacent to the road shall be vegetated or otherwise stabilized to prevent erosion.

(g) Haul roads shall be surfaced with material sufficiently durable for the anticipated volume of traffic and the weight and speed of vehicles using the road. Acid or toxic-forming material may not be used for surfacing or construction of a road except when the road is within the confines of a coal refuse disposal or reprocessing area, and the effluent meets the requirements of § 90.102 (relating to hydrologic balance: water quality standards, effluent limitations and best management practices).

(h) A road damaged by a catastrophic event, such as a flood or earthquake, shall be repaired or reclaimed as soon as practicable after the damage has occurred.

(i) Haul roads and roads approved as part of the postmining land use shall be certified by a qualified registered professional engineer or qualified registered land surveyor that the roads have been constructed or reconstructed as designed in accordance with the approved plan.

[Pa.B. Doc. No. 02-955. Filed for public inspection May 31, 2002, 9:00 a.m.]

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 93]

Stream Redesignations (Little Bush Kill, et al.)

The Environmental Quality Board (Board) by this order amends §§ 93.9c, 93.9d, 93.9l and 93.9p to read as set forth in Annex A.

This order was adopted by the Board at its meeting of February 19, 2002.

A. *Effective Date*

These amendments are effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. *Contact Persons*

For further information, contact Edward R. Brezina, Chief, Division of Water Quality Assessment and Standards, Bureau of Water Supply and Wastewater Management, 11th Floor, Rachel Carson State Office Building, P. O. Box 8467, 400 Market Street, Harrisburg, PA 17105-8467, (717) 787-9637 or Michelle Moses, Assistant Counsel, Bureau of Regulatory Counsel, 9th Floor, Rachel Carson State Office Building, P. O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) website (<http://www.dep.state.pa.us>).

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of sections 5(b)(1) and 402 of The Clean Streams Law (35 P. S. §§ 691.5(b)(1) and 691.402), which authorizes the Board to develop and adopt rules and regulations to implement the provisions of The Clean Streams Law, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which grants to the Board the power and duty to formulate, adopt and promulgate rules and regulations for the proper performance of the work of the Department. In addition, section 303 of the Federal Clean Water Act (33 U.S.C.A. § 1313) sets forth requirements for water quality standards and 40 CFR 131.32 (relating to Pennsylvania) sets forth certain requirements for portions of the Commonwealth's antidegradation program.

D. *Background of the Amendments*

The Commonwealth's Water Quality Standards, which are set forth in part in Chapter 93 (relating to water quality standards), implement sections 5 and 402 of The Clean Streams Law and section 303 of the Federal Clean Water Act. Water quality standards are in-stream water quality goals that are implemented by imposing specific regulatory requirements (such as treatment requirements and effluent limits) on individual sources of pollution.

The Department considers candidates for High Quality (HQ) or Exceptional Value (EV) Waters designation in its ongoing review of water quality standards. In general, HQ and EV waters shall be maintained at their existing quality, and wastewater treatment requirements shall ensure the attainment of designated and existing uses. The Department may identify candidates for redesignation during routine waterbody investigations. Requests for consideration may also be initiated by other agencies, such as the Fish and Boat Commission (FBC). Organizations, businesses or individuals may submit a rulemaking petition to the Board.

These streams were evaluated in response to three petitions, as well as requests from the FBC and Department staff as follows:

Petitions: Little Bush Kill (Bushkill Falls); Lizard Creek (West Penn Township); Smithtown Creek (Smithtown Creek Watershed Association).

FBC: Oswayo Creek

Department: Buck Hill Creek and Slate Run (corrective amendments).

Aquatic surveys were conducted by the Department's Bureau of Water Supply and Wastewater Management. The physical, chemical and biological characteristics and other information on these waterbodies were evaluated to determine the appropriateness of the current and requested designations using applicable regulatory criteria and definitions. Based upon the data collected in these surveys, the Board has made the designations in Annex A.

Copies of the Department's stream evaluation reports for these waterbodies are available from Edward R. Brezina whose address and telephone number are listed in Section B of this Preamble.

E. *Summary of Comments and Responses on the Proposed Rulemaking*

The Board approved the proposed rulemaking on March 20, 2001, and it was published at 31 Pa.B. 2375 (May 5, 2001) with provision for a 45-day public comment period that closed on June 19, 2001. The proposed redesignation of Browns Run (Warren County) included in the package became controversial during the public comment period, and has been removed from the final-form rulemaking package.

A total of six sets of comments were received on the proposed rulemaking, excluding Browns Run. Two provided comments on the proposed redesignation of the Little Bush Kill. Three were in response to the recommendation for Smithtown Creek. The Independent Regulatory Review Commission (IRRC) provided general comments on the redesignation process, the Little Bush Kill and Smithtown Creek (in addition to Browns Run).

The Brodhead Chapter of Trout Unlimited supported the redesignation of portions of the Little Bush Kill to EV. Staff of the Pike County Conservation District expressed concern for the protection of the lower EV segment because there would be an HQ segment upstream. IRRC questioned the reasonableness of segmenting the Little Bush Kill designation. The "biological test" and percent comparison criteria are included in the antidegradation regulation. Two sampling stations in the middle portion of the basin did not score 92% or greater in comparison to the reference stations. In addition, no other EV qualifiers were found to apply to this stream reach. As a result, the Department cannot recommend it for EV designation. Section 93.4a (relating to antidegradation) protects EV waters from degradation. Discharge permits or other approval actions in the middle HQ portion of the Little Bush Kill basin will include protection for the downstream EV segment.

Senator Joseph Conti, the Smithtown Creek Watershed Association (the petitioner) and the Tincum Township supervisors expressed opposition to the Department's recommendation to retain the current designation of Smithtown Creek rather than redesignating it EV as requested in the petition. Tincum Township included a consultant's report that critiqued the Department's evaluation and included stream survey data they believe

demonstrates that Smithtown Creek meets the biological qualifier for EV designation. The consultant used sampling methods and biological metrics that differ from those applied by the Department. The Department has not received documentation to show that the metrics and scoring criteria used by the consultant have been completely analyzed for the purpose of evaluating candidates for EV designation in this Commonwealth. IRRC questioned the reference stations used in the evaluation of Smithtown Creek. The Department believes the reference stations used to evaluate Smithtown Creek represent best available biological conditions in this part of this Commonwealth and thus are appropriate. The Department's recommendation regarding Smithtown Creek has not been changed.

F. *Summary of Changes to the Proposed Rulemaking*

The proposed redesignation of Browns Run (Warren County) became controversial during the public comment period. It has been removed from this package and will be considered as a separate final-form rulemaking.

The Department found a minor error in one of the Buck Hill Creek entries in the proposed rulemaking. The entry for the Buck Hill Creek basin from Griscom Creek to Buck Hill Falls should have noted the deletion of the word "Mouth" from the existing entry in the regulation, but did not. This has been corrected in the final-form regulations.

G. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the amendments.

1. *Benefits*—Overall, the citizens of this Commonwealth will benefit from these recommended changes because they will reflect the appropriate designated use and maintain the most appropriate degree of protection for each stream in accordance with the existing use.

2. *Compliance Costs*—Generally, the changes should have no fiscal impact on, or create additional compliance costs for the Commonwealth or its political subdivisions. The streams are already protected at their existing use, and therefore the designated use changes will have no impact on treatment requirements. No costs will be imposed directly upon local governments by this recommendation. Political subdivisions that add a new sewage treatment plant or expand an existing plant in these basins may experience changes in cost in the discussion of impacts on the private sector.

Persons conducting or proposing activities or projects that result in new or expanded discharges to streams shall comply with the regulatory requirements relating to designated and existing uses. These persons could be adversely affected if they expand a discharge or add a new discharge point since they may need to provide a higher level of treatment to meet the designated and existing uses of the stream. These increased costs may take the form of higher engineering, construction or operating costs for wastewater treatment facilities. Treatment costs are site-specific and depend upon the size of the discharge in relation to the size of the stream and many other factors. It is therefore not possible to precisely predict the actual change in costs.

3. *Compliance Assistance Plan*—The regulatory revisions have been developed as part of an established program that has been implemented by the Department since the early 1980s. The revisions are consistent with and based on existing Department regulations. The revisions extend additional protection to selected waterbodies that exhibit exceptional water quality and are consistent

with antidegradation requirements established by the Federal Clean Water Act and The Clean Streams Law. All surface waters in this Commonwealth are afforded a minimum level of protection through compliance with the water quality standards, which prevent pollution and protect existing water uses.

The amendments will be implemented through the National Pollutant Discharge Elimination System (NPDES) permitting program since the stream use designation is a major basis for determining allowable stream discharge effluent limitations. These permit conditions are established to assure water quality criteria are achieved and designated and existing uses are protected. New and expanding dischargers with water quality based effluent limitations are required to provide effluent treatment according to the water quality criteria associated with existing and designated water uses.

4. *Paperwork Requirements*—The regulatory revisions should have no direct paperwork impact on the Commonwealth, local governments and political subdivisions or the private sector. These regulatory revisions are based on existing Department regulations and simply mirror the existing use protection that is already in place for these streams. There may be some indirect paperwork requirements for new or expanding dischargers to streams upgraded to HQ or EV. For example, NPDES general permits are not currently available for new or expanded discharges to these streams. Thus, an individual permit, and its associated additional paperwork, would be required. Additionally, paperwork associated with demonstrating social and economic justification may be required for new or expanded discharges to certain HQ waters, and the nonfeasibility of nondischarge alternatives will be required for new or expanded discharges to certain HQ and EV Waters.

H. *Pollution Prevention*

The antidegradation program is a major pollution prevention tool because its objective is to prevent degradation by maintaining and protecting existing water quality and existing uses. Although the antidegradation program does not prohibit new or expanded wastewater discharges, nondischarge alternatives are encouraged and required when they are environmentally sound and cost-effective. Nondischarge alternatives, when implemented, remove impacts to surface water and reduce the overall level of pollution to the environment by remediation of the effluent through the soil.

I. *Sunset Review*

This final-form rulemaking 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 23, 2001, the Department submitted a copy of the notice of proposed rulemaking, published at 31 Pa.B. 2375, to IRRC and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department also provided IRRC and the Committees with

copies of the comments received, as well as other documentation. In preparing this final-form rulemaking, the Department has considered all comments received from IRRC and the public. The Committees did not provide comments on the proposed rulemaking.

Under section 5.1(d) of the Regulatory Review Act (71 P.S. § 745.5a(d)), on April 15, 2002, this final-form rulemaking was deemed approved by the House and Senate Committees. IRRC met on April 19, 2002, and approved this final-form rulemaking in accordance with section 5.1(e) of the Regulatory Review Act.

K. *Findings*

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, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) This final-form rulemaking does not enlarge the purpose of the proposal published at 31 Pa.B. 2375.

(4) This final-form rulemaking is necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

(5) This final-form rulemaking does not contain standards or requirements that exceed requirements of the companion Federal regulations.

L. *Order*

The Board, acting under authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 93, are amended by amending §§ 93.9c 93.9d, 93.9l and 93.9p to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(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 approval and review as to legality and form, as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC 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 upon publication in the *Pennsylvania Bulletin*.

DAVID E. HESS,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 2287 (May 4, 2002).)

Fiscal Note: Fiscal Note 7-362A remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE II. WATER RESOURCES

CHAPTER 93. WATER QUALITY STANDARDS

ANTIDegradation REQUIREMENTS

§ 93.9c. Drainage List C.

Delaware River Basin in Pennsylvania

Delaware River

Stream	Zone	County					Water Uses Protected	Exceptions To Specific Criteria
		*	*	*	*	*		
4—Sand Hill Creek	Basin				Monroe		HQ-CWF	None
4—Little Bush Kill	Basin, Source to Unnamed Tributary (UNT) 05067				Pike		EV	None
5—Unnamed Tributary 05067 to Little Bush Kill	Basin				Pike		EV	None
4—Little Bush Kill	Basin, UNT 05067 to UNT 05059				Pike		HQ-CWF	None
5—Unnamed Tributary 05059 to Little Bush Kill	Basin				Pike		EV	None
4—Little Bush Kill	Basin, UNT 05059 to UNT 05057				Pike		EV	None
5—Unnamed Tributary 05057 to Little Bush Kill	Basin				Pike		HQ-CWF	None
4—Little Bush Kill	Basin, UNT 05057 to Mouth				Pike		EV	None
		*	*	*	*	*		
3—Buck Hill Creek	Basin, UNT 05026 to Griscom Creek				Monroe		EV	None
4—Griscom Creek	Basin				Monroe		HQ-CWF	None
3—Buck Hill Creek	Basin, Griscom Creek to Buck Hill Falls				Monroe		HQ-CWF	None
3—Buck Hill Creek	Basin, Buck Hill Falls to Mouth				Monroe		HQ-CWF, MF	None
3—Goose Pond Run	Basin				Monroe		HQ-CWF	None
		*	*	*	*	*		

§ 93.9d. Drainage List D.

Delaware River Basin in Pennsylvania

Lehigh River

Stream	Zone	County					Water Uses Protected	Exceptions To Specific Criteria
		*	*	*	*	*		
3—Lizard Creek	Basin, Source to T-922 Bridge				Schuylkill		CWF	None
3—Lizard Creek	Basin, T-922 Bridge to Mouth				Carbon		TSF	None
3—Aquashicola Creek	Basin, Source to Buckwha Creek				Carbon		CWF, MF	None
		*	*	*	*	*		

§ 93.9l. Drainage List L.

Susquehanna River Basin in Pennsylvania

West Branch Susquehanna River

Stream	Zone	County	Water Uses Protected	Exceptions To Specific Criteria
		* * * * *		
4—Slate Run	Basin	Lycoming	EV	None
4—Little Slate Run	Basin	Lycoming	HQ-CWF	None
		* * * * *		

§ 93.9p. Drainage List P.

Ohio River Basin in Pennsylvania

Allegheny River

Stream	Zone	County	Water Uses Protected	Exceptions To Specific Criteria
		* * * * *		
3—Oswayo Creek	Basin, Source to Brizzee Hollow	Potter	CWF	None
4—Brizzee Hollow	Basin	Potter	HQ-CWF	None
3—Oswayo Creek	Basin, Brizzee Hollow to South Branch Oswayo Creek	Potter	HQ-CWF	None
4—South Branch Oswayo Creek	Basin	Potter	EV	None
3—Oswayo Creek	Basin, South Branch Oswayo Creek to Clara Creek	Potter	HQ-CWF	None
		* * * * *		
3—Oswayo Creek	Main Stem, Clara Creek to Honeoye Creek	Potter	CWF	None
4—Unnamed Tributaries to Oswayo Creek	Basins, Clara Creek to Honeoye Creek	Potter	CWF	None
4—Clara Creek	Main Stem	Potter	CWP	None
		* * * * *		

[Pa.B. Doc. No. 02-956. Filed for public inspection May 31, 2002, 9:00 a.m.]