ENVIRONMENTAL QUALITY BOARD

25 PA. CODE CHAPTERS 88 AND 90

COAL REFUSE DISPOSAL

COMMENT AND RESPONSE DOCUMENT

Comments were received from the following parties. Comments have been ordered by section. The commentator(s) are referenced by corresponding number at the end of each comment.

1. **U.S. Fish and Wildlife Service**

2. **Pennsylvania Coal Association**

3. **Pennsylvania Game Commission**

4. **Independent Regulatory Review Commission**

5. **United States Office of Surface Mining**

§ 88.310. Coal refuse disposal: general requirements *and* ***§ 90.167. Cessation of operations: temporary.***

Comment: Section 88.310(k) requires installation of a system to prevent precipitation from contacting the coal refuse when an operation temporarily ceases for more than 90 days "unless the Department approves a longer period…" Under 52 P.S. § 30.56a(i), the Department may approve a longer period "for reasons of a labor strike or business necessity." For improved clarity, the EQB should specify the conditions under which the Department will extend the 90-day period, and the criteria it will use to determine a "business necessity."

Section 90.167(d) states that, "The department may approve a longer period, not to exceed 1 year, for reasons of a labor strike or *business necessity*." The EQB should specify what it considers to be a "business necessity." **(4)**

Response: The term "business necessity" can cover a multitude of circumstances including equipment failure, loss of coal contract, weather related delays, and fires or explosions at the source mine. The term "business necessity" is broad. However, there is benefit to the regulated community and the Department in using a broad term. In this instance, neither the regulated industry nor the Commonwealth benefits from losing flexibility due to incorporation of restrictive criteria into the regulation. The district mining office staff will assess the request for an extension on a case-by-case basis. This allows for a common sense approach, which can better address unforeseen problems at a given mine site.

§ 90.1. Definitions. *and* ***§ 90.5. Site selection and permitting.***

Comment: The definition of "public recreational impoundment" is taken directly from the statute. Rather than repeating the definition, the EQB should consider simply referencing the statute. Also, the term "operator" is used throughout the regulation, but is not defined. For clarity, the EQB should include a reference to the definition of "operator" in 52 P.S. § 30.53(8). **(4)**

Response: Repeating statutory definitions in the regulations increases the readability and clarity of the regulations. It serves to make the regulation more user-friendly by making definitions of important terms readily available to the reader. Simply cross-referencing definitions forces the public and the regulated community to constantly rely on multiple, hard-to-procure publications in order to make sense of the regulations.

The suggested statutory definition of the term "operator" has been inserted under § 90.1.

Comment: Section 90.5 should be revised to clarify when a DEP decision is final and appealable. PCA suggests adding the following language to the end of subsection 90.5(b):

"…The Department's disapproval of a selected site shall be a final decision of the Department. However, approval of a selected site is not a final decision…"

This change will avoid premature appeals of site approvals, which are not final because the Department must still consider an application and issue a permit for the selected site. Conversely, disapproval of a selected site will finally preclude the operator from obtaining a permit for the site. **(2)**

Response: The Department agrees with the spirit of the comment. However, clarifying language is not necessary. The site selection process outlined in § 90.5 is the prerequisite to the permitting process. Since the process continues following approval of a selected site, the approval of a site is not an appealable action. Appeals may be appropriately filed at the time of permit issuance. However, when the Department disapproves a site, the operator is precluded from moving to the next step in the process. Disapproval is therefore a final appealable action.

Comment: Subsection (a) of § 90.5 refers to "coal refuse disposal activities." The term "coal refuse disposal operations" is used in the preamble and in other sections of the regulation, such as § 90.49. In the Act and Subchapter F, "coal refuse disposal activities" is the defined term. If these terms have the same meaning, "coal refuse disposal activities" should be used consistently and exclusively throughout the regulation. If these terms have different meanings, each term should be separately defined. **(4)**

Definitions of the terms *coal refuse disposal* and *coal refuse disposal operations* would be helpful in construing the regulation. **(2)**

Response: Unfortunately, terms such as *coal refuse disposal operation(s), coal refuse disposal activities, coal refuse disposal areas,* and *coal refuse disposal* have been used indiscriminately throughout the implementing statutes and regulations. It is beyond the scope of this rulemaking to address that issue. However, §§ 90.1 and 90.49 have been rewritten to help clarify the proposed regulation. A definition of *coal refuse disposal* has been added at § 90.1. *Coal refuse disposal operations* has been deleted from § 90.49. New language has been inserted at § 90.49(b) to clarify the subset of activities that is subject to § 86.102(12).

§ 90.12. Geology

Comment: PCA suggests adding the phrase "as appropriate" at the end of the first paragraph and after "borings" at the end of the first sentence of the second paragraph. Not all sites will require all of the information, and including an absolute requirement may result in appeals for failure to provide information that is not necessary to the Department's review of the application. PCA also suggests that non-use aquifers be excluded from the description

requirements. This is consistent with other programs, such as the Land Recycling and Remediation program, which recognizes that some aquifers are not useable. **(2)**

Response: The Department disagrees. The term "as appropriate" obfuscates the regulation, where currently it is quite clear. As noted in the comment, the non-use aquifer concept flows from Act 2 provisions of the Land Recycling and Remediation program. However, Act 2 specifically excludes mining. Inclusion of the non-use aquifer concept in the mining program would run counter to the current mining statutes and regulations. These require that mining activities be conducted to ensure protection of the hydrologic balance, including measures to protect the quality and quantity of surface water and groundwater within the permit and adjacent areas.

§ 90.13. Groundwater information.

Comment: Subsection (2) of § 90.13 requires "…Specific attention shall be given to describing the groundwater flow system…." The phrase "specific attention" is vague. The EQB should consider revising this provision to simply require a description of the groundwater flow system. **(4)**

Response: The wording has been changed as suggested.

§ 90.49. Stream buffer zone variance.

Comment: Section 90.49(c)(1) should be changed to mirror 30 CFR 816.57. Pennsylvania's provision is missing the word "activities." To be consistent with the intent of the federal regulation, the Department of Environmental Protection should change this section to read "…if the operator demonstrates to the satisfaction of the Department that the coal refuse disposal *activities* will not adversely affect…" **(1)**

Response: The Department disagrees. Section 90.49 reflects provisions of section 6.1(h)(5) of the Coal Refuse Disposal Control Act as amended by Act 114. Section 6.1(h)(5) clearly enumerates the operations that are subject to that section's variance provision. These specific operations are the disposal of coal refuse and the related stream diversions or relocations. Requests for variances for other mining operations fall under the variance provisions of § 86.102(12) of Chapter 86. Section 86.102(12) covers activities listed under the term "surface mining operations" as defined in § 86.101. A reference to § 86.102(12) is included in the proposed rulemaking at § 90.49(b).

Comment: Section 90.49(c)(3) states that, "the stream buffer zone variance will be issued as a written order specifying the methods and techniques that shall be employed to prevent *or mitigate* adverse impacts." This provision is contrary to § 90.49(c)(1), which states that adverse impacts are not allowed. It follows that if something is not allowed, there is no need to mitigate it. All references to mitigating adverse impacts should be eliminated, both in § 90.49(c)(3) and in the associated technical guidance document. **(1)**

Response: The regulatory language is based on statutory language that initially included prevention of "significant adverse hydrologic or water quality impacts." Subsequently, the word "significant" was dropped at the direction of OSM. The statute does not explicitly require prevention of adverse impacts. It allows the Department to review the proposed site with consideration for mitigation measures with the ultimate goal being no resultant adverse water quality impacts. Therefore, the word "mitigate" will remain in the proposed regulation and in the technical guidance in order to maintain consistency with the statute.

Comment: Language regarding stream relocations and diversions was included in § 90.49 of the draft Proposed Rulemaking reviewed and approved by the Mining and Reclamation Advisory Board (MRAB), but was removed from the proposed rulemaking as published in the *Pennsylvania Bulletin*. The language should be replaced to conform to the statute and the MRAB's approval of the draft. **(2)**

Response: The term *coal refuse disposal,* as used in §90.49, has been defined (see § 90.1. *Definitions*) to include stream relocations and diversions as well as other engineered features integral to the placement of the fill. By using a broadly defined term, *coal refuse disposal,* problems associated with not referencing each individual engineering feature can be avoided. Additionally, in order to adhere as closely as possible to the statutory language, the "stream relocations and diversions" wording has been inserted at § 90.49(c).

Comment: Subsections (a) and (c) of § 90.49 should be revised to apply to "perennial or intermittent stream" and "any perennial or intermittent stream," respectively. This is consistent with §§ 86.102 and 86.101, which includes coal refuse disposal in the definition of "surface mining operation" subject to the buffer zone, which applies to perennial and intermittent streams. **(2)**

Response: Section 90.49 follows the statutory language of the CRDCA and will remain unchanged. Furthermore, the CRDCA buffer zone provision was amended after §§ 86.101 and 86.102 were promulgated and after the buffer zone provision of SMCRA was enacted. Under the rules of statutory construction the language of the CRDCA will control because it is later in time and more specific, applying only to coal refuse disposal.

Comment: Subsection (c)(1) of § 90.49 should be revised by adding "downstream of the system installed pursuant to § 6.1(i) of the Coal Refuse Disposal Control Act and § 90.50(a) of this Chapter, to prevent adverse impacts to groundwater and surface water." Act 114 clearly contemplated the diversion and relocation of streams, including the piping of streams through the disposal area. This change would simply reflect that "adverse water quality impacts" must be prevented downstream of the fill area, not within the reach of the stream contained within or diverted through the fill. **(2)**

Response: The regulatory language is consistent with the statutory language. However, as a practical matter adverse impacts will be assessed downstream of the site's discharge. The proposed language will remain unchanged.

Comment: Section 90.49(c)(2)(ii) relates to "other environmental uses of the stream," which would include riparian and wetland areas affiliated with the stream. Because of the Commission's obligation to protect such critical/unique wildlife habitats under Title 34 of the *Game and Wildlife Code*, it is highly suggested that the last sentence include the consideration of comments submitted by the Pennsylvania Game Commission. **(3)**

Response: The Pennsylvania Fish and Boat Commission is referenced in § 90.49 because it is explicitly mentioned in the CRDCA. The Pennsylvania Game Commission will be given an opportunity to review and comment regarding stream barrier variances. The Technical Guidance Document covering stream barrier variances at coal refuse sites specifically directs the Department to provide the Game Commission with a copy of the variance application and to consider their comments.

Comment: Subsection (c)(2)(ii) of § 90.49 should be revised to "consider timely information submitted by the Fish and Boat Commission" to avoid unnecessary delays and uncertainty. **(2)**

Response: The suggested wording is not necessary. The existing technical guidance document already restricts the comment period to 30 days. Any comment submitted within the comment period is considered timely.

Comment: Section 90.49(a) and (c) - Under 52 P.S. §30.56a(h)(5), a variance can be granted under certain circumstances "to dispose of coal refuse *and to relocate or divert streams in the stream buffer zone*." (Emphasis added) Subsections (a) and (c) do not include the statutory variance to relocate or divert streams. For consistency with the statute, the EQB should revise Subsection (c) to address stream relocation or diversion. **(4)**

Response: Language regarding the relocation and diversion of streams has been added to § 90.49 (c) as suggested.

Comment: Section 90.49(b) uses the phrase "[c]oal refuse disposal operations other than coal refuse disposal." What are "coal refuse disposal operations other than coal refuse disposal"? **(4)**

Response: The phrase "coal refuse disposal operations other than coal refuse disposal" has been deleted. New language has been inserted, which clarifies the subset of activities that are subject to § 86.102(12).

Comment: Section 90.49(c)(1) states "Stream buffer zone variances will only be granted if the operator demonstrates to the satisfaction of the Department that the coal refuse disposal will not adversely affect water quality and quantity…" (Emphasis added) It is unclear how an operator

can make the required demonstration. The final-form regulation should include the criteria the Department will use to judge if an operator has made an adequate demonstration. **(4)**

Response: Adverse water quality and quantity impacts would include the following affects at any point downstream of the site's discharge: accelerated stream channel erosion, conditions leading to increased stream channel instability, substrate damage or increased flooding potential, and changes in stream chemistry resulting in or contributing to a violation of an applicable state or federal water quality standards. Permits issued under CRDCA are conditioned to maintain downstream uses. Due to variable conditions encountered at coal refuse sites, a list of "adverse impact" criteria was not included in the proposed regulation. Instead, the broad statutory language was used in § 90.49(c)(1). This approach allows Department technical staff the flexibility to consider site-specific factors when assessing stream buffer zone proposals and mitigation plans.

§ 90.50. Design criteria: groundwater and surface water protection system.

Comment: Section 90.50, subsection (c) requires a permit application to include a description of the site's susceptibility to mine subsidence. The description must include "particular attention to subsidence-induced impacts or other physical or chemical processes that could adversely affect the operation of the systems." The regulation does not specify the physical or chemical processes that must be addressed. As a result, the party submitting the permit application may not know exactly what information must be included in the application.

In the final-form regulation, the EQB should clarify the meaning of "other physical or chemical processes." Additionally, the phrase "particular attention" is vague and should be clarified. **(4)**

Response: Section 90.50 (c) has been revised to clarify the informational requirements. The term "particular attention" has been dropped.

§ 90.122. Coal refuse disposal.

Comment: In the Pennsylvania Bulletin publication of the proposed rulemaking, the right bracket showing the deletion of subsection (g) was inadvertently omitted. This bracket should be included in the final-form regulation. **(4)**

Response: The correction has been made.

§ 90.201. Definitions.

Comment: The definition of "search area" at § 90.201 should be clarified by adding the following language:

"*An applicant may propose a different location for the center of the search area as an alternative to a coal preparation facility, provided the operator can demonstrate that this is appropriate, using the factors to be considered in defining the search area*."

Although the coal preparation facility is the most logical single point for defining the center of the search area, there may be unusual circumstances at a given site which would make the definition of the area surrounding a point other than the coal preparation facility more appropriate. **(2)**

Response: The existing language in § 90.201 provides considerable flexibility regarding the delineation of a "search area." Because the suggested change would not provide additional flexibility, it will not be added.

Comment: The definition of "search area" under § 90.201 does not require that either the one-mile search radius or the 25-mile square mile search area be entirely conducted within the borders of the Commonwealth. The definition as proposed would allow for a portion of the search area to include other states' jurisdictional areas, and still meet the defined criteria of the search. In truth, an operator could have an existing coal preparation facility located in West Virginia, apply for a coal refuse disposal permit in Pennsylvania, feasibly reduce the search area conducted in Pennsylvania, and ultimately exclude a "preferred site" which would have otherwise been within the search area of Pennsylvania. **(3)**

Response: The CRDCA does not limit the search area to Pennsylvania. However, the Department has the final say on the configuration of the 25-mile search area. In circumstances where an applicant has designed the search area to deliberately exclude preferred sites, the Department will require the search area to be reconfigured.

Comment: The definition of "preferred site" under § 90.201 does not stipulate how much of a watershed must be impacted before it becomes a preferred site. At one time, the Department was considering to impose that a minimum of 25% of the watershed had been accumulatively impacted by either acid mine drainage, unreclaimed surface mine, or unreclaimed coal refuse disposal piles. The definition as proposed would allow for a one acre unreclaimed surface mine which has no mining discharge, contained within a 500-acre watershed area, to qualify as a "preferred site." **(3)**

Response: The Department's technical guidance document, titled Coal Refuse Disposal – Site Selection, contains criteria for identifying preferred sites. Considerations such as in-stream water quality, length of stream segment polluted, and the percent of disturbed land in relation to the size of the watershed are addressed. While not absolutes, these criteria serve as a guide to operators and Department staff conducting "preferred site" assessments.

Comment: The definition of "search area" contains a substantive provision in the last sentence. The EQB should move the last sentence to § 90.202(b). **(4)**

Response: The definition of "search area" at § 90.201 has been revised. The substantive provision was relocated to §90.202(b).

§ 90.202. General requirements.

Comment: Section 90.202(c)(2) states "[t]he site is known or is likely to contain Federally listed threatened or endangered plants or animals…" The phrase "or is likely to" does not appear in 52 P.S. §30.54a(b). The EQB should delete the phrase "or is likely to." **(4)**

The Endangered Species Act and OSM's regulations (16 U.S.C. § 1536 (a)(2)) make clear that the existence of the species is a prerequisite to the restrictions. Furthermore, the statutory and regulatory language refers to designated critical habitats. Restricting sites which are "known to contain" listed species is consistent with the CRDCA and fully complies with the federal statutes and regulation, because consultation and concurrence will be required where those species are known to exist, and where their continued existence may therefore be jeopardized. In contrast to the clear language of the CRDCA, the Proposed Rulemaking contains no standard for determining whether a site is "likely to contain" an endangered or threatened species.

Including the language at issue in the regulation would essentially codify a provision that is inconsistent with the CRDCA, without any federally mandated rationale. The proposed rulemaking should therefore be amended to strike the words "or is likely" from § 90.202(c)(2).

The Board should also bear in mind that this provision applies only to preferred sites – i.e., those in previously affected areas. Requiring investigating previously affected areas on speculation that they "are likely to contain" threatened or endangered species will increase costs and administrative burdens for operators and the Department, and excluding areas where such species have not been confirmed as present is not sound environmental policy. **(2)**

Response: The language containing the "likely to contain" phrase was required by OSM in consultation with the USFWS during their combined review of the Department's technical guidance document on the site selection process. The need for this precise language was reinforced during OSM's conditional approval of the Act 114 program amendments (April 22, 1998 *Federal Register*, page 19805). Subsequently, PCA questioned inclusion of the "likely to contain" phrase during the Mining and Reclamation Advisory Board's (MRAB) review of this proposed rulemaking. As a result, the Department made a commitment to the MRAB to solicit a legal interpretation from OSM regarding their authority to impose restrictions in situations where sites are considered "likely to contain" federally listed threatened or endangered species. On February 16, 2000, the Department wrote to OSM to request that legal clarification. The Department followed that request with phone calls and a second written request, dated September 12, 2000. In response, OSM has recently clarified that the precise "likely to contain" language is not necessary due to the fact that the requirement to consider sites likely to contain listed threatened or endangered species is already present at § 90.18(2). Therefore, in

order to remain true to the statutory wording, the "likely to contain" phrase has been dropped. (A copy of OSM's November 21, 2000 response is attached.)

Comment: Subsection (a) of § 90.202 should be revised to require the use of a preferred site "unless the operator demonstrates to the Department, based on reasonably available data, that an alternative site is more suitable… ." This would avoid uncertainty about the level of data collection required by the operator to satisfy this requirement. **(2)**

Response: The Department disagrees. The proposed regulatory language follows the statutory language. The general assembly apparently contemplated using the "reasonably available data" approach after the preferred site issue had been resolved under section 4.1(a) of the CRDCA.

Comment: The evaluation criteria should be consistent with respect to the Department's review of an acceptable "alternate site" rather than an existing "preferred site." In §§ 90.202(c)(1) and 90.204(a)(3) the Department notes that one of its reviewing criteria for approval is "environmental factors" associated with the proposed alternate site. However, the applicant is not required to submit that information in § 90.202(a). Likewise, geology and engineering criteria have been noted in § 90.202(a) but are not part of § 90.204(a)(3). **(3)**

Response: The Department disagrees. The criteria are consistent with the statutory intent. Section 4.1 of the CRDCA spells out certain criteria to be considered when evaluating preferred versus alternate sites. The criteria under § 90.202(a) reflects section 4.1(a) of CRDCA and is to be used to evaluate an applicant's demonstration that a alternate site is more suitable than a preferred site. Section 90.204 is designed to reflect section 4.1(c) and (d) of CRDCA, which addresses circumstances where an applicant is comparing various alternate sites. Section 90.204 comes into play when a preferred site does not exist within the search area or when the applicant has already made the demonstration, required under § 90.202(a), that an alternate site is more suitable. The phrase "*using criteria in § 90.202(a)*" has been added for clarity at § 90.204(a)(1).

Comment: The section 90.202(d) wording, "unless it is a preferred site," should be deleted. The language allows the Department to minimize important environmental factors, such as exceptional value wetlands, wetlands, and Commonwealth listed threatened and endangered species for sites that meet the "preferred site" definition. **(3)**

Response: The Department disagrees. Sections 4.1(a) and (b) of CRDCA explicitly address criteria for preferred sites. Section 4.1(b) exempts preferred sites from the absolute exclusions listed under § 90.202(d). Regardless of the site's status as non-preferred or preferred, CRDCA and proposed regulations (§ 90.202 (c)) require that a site can only be approved where the adverse environmental impacts will not clearly outweigh the public benefits. Additionally, the wetland encroachment issues will be addressed during the permitting process, which requires a detailed site assessment following the site selection process.

Comment: The CRDCA states that "*coal refuse disposal* shall not occur" in the areas designated in subsections 90.202(d)(1)-(6). However, the proposed rulemaking mandates that a *site* may not be approved if it *contains* any of these areas. This could result in the exclusion of sites that include incidental or support areas that will not be used for coal refuse disposal. PCA therefore recommends that subsection (d) be revised as follows:

(d) Except on preferred sites, the Department shall not approve the coal refuse disposal on or within any of the following areas….

In support of this, PCA further notes that the CRDCA contemplates that prime farmland may be affected by coal refuse disposal activities under some circumstances. (See 52 P.S. § 30.55(h).) Furthermore, the requirement that adverse hydrologic consequences be avoided and the state's antidegradation regulations will prevent harm to other listed resources. **(2)**

Response: The Department agrees. The suggested language more closely tracks the statutory language and has been incorporated. Additionally, revisions were made to § 90.202(d)(4) to more closely track the statutory language.

Comment: Section 90.202(c)(2) does not contain the complete text of the Department's Technical Guidance Document entitled, Coal Refuse Disposal- Site Selection regarding restrictions at sites containing federally listed threatened or endangered species. The guidance was intended to clarify how PADEP intended to implement section 4.1(b) of Act 114. Since the Technical Guidance contains a disclaimer as to its legal effect, the Department may wish to consider adding the complete text to the regulation to assuage any concerns that may be raised by the USFWS when these proposed regulations are submitted to OSM as a program amendment. **(5)**

Response: The missing portion of the text in the Technical Guidance language, "*..or result in the 'take' of federally listed threatened or endangered species in violation of Section 9 of the Endangered Species Act*," has been added to § 90.202(d)(7).

Comment: Section 4.1(b) of CRDCA provides an absolute prohibition for using non-preferred sites for refuse disposal on sites known to contain federal threatened or endangered plants or animals, or state threatened or endangered animals. Section 90.202(c)(2) appears to be inconsistent with section 4.1(b) in that it allows the approval of coal refuse disposal on non-preferred sites known to contain the federally listed species where the Department concludes and the USFWS concurs that the proposed use of the site would be unlikely to adversely affect these species. **(5)**

Response: The provision was inadvertently misplaced and has been moved to § 90.202(d)(7), which addresses restrictions at preferred sites.

Comment: There appears to be an inconsistency in § 90.202(d)(3) and section 4.1(b) of CRDCA, in that § 90.202(d)(3) bans approval of coal refuse disposal activities on sites

containing state threatened or endangered plants and animals, whereas section 4.1(b) extends the ban only to sites containing state threatened or endangered animals. **(5)**

Response: The Department agrees. The reference to state threatened or endangered plants has been deleted.

Comment: Section 90.202(d) does not provide non-preferred sites with the absolute protection of section 4.1(d) of CRDCA for federally listed threatened or endangered species. **(5)**

Response: Section 90.202 has been revised. The provision that allows coal refuse disposal on sites containing federally threatened or endangered species has been moved to new paragraph (7) that bans such practice unless the site is a preferred site where the Department concludes that the proposed activity is not likely to adversely impact federally listed species.

§ 90.203. Proposing a preferred site.

Comment: Regarding § 90.203, given Act 114's purpose of encouraging the use of preferred sites, PCA questions why the burden is on the applicant to demonstrate that the adverse impacts will not clearly outweigh the public benefits. This should be the Department's burden. **(2)**

Response: The burden is shared by the Department and the applicant. Where a preferred site is considered for coal refuse disposal, the applicant identifies any adverse environmental impacts and any public benefits that might occur as a result of the coal refuse disposal, including any environmental impacts that result from a stream barrier variance. The Department must then determine if the adverse impacts clearly outweigh the public benefits.

Comment: This section appears to reiterate the requirements listed in § 90.202. If § 90.203 does not add new requirements, it should be deleted. **(4)**

Response: Section 90.203 implements section 4.1(a)(5) of CRDCA. Section 90.202 implements section 4.1(c) and (d) of CRDCA.

§ 90.205. Alternatives analysis.

Comment: Section 90.205 would entail that an alternative analyses need not be completed on "preferred sites" and that the criteria as set forth in Chapter 105 has been circumvented with respect to the criteria for alternatives analyses on "alternate sites." However, Title 25 Chapter 105, is explicit in the requirement for an alternative analyses which includes designs to avoid or minimize adverse environmental impacts as they would relate to all streams and wetlands within the Commonwealth to include those which may be contained within the "preferred site" or "alternate site" locations. Further, Chapter 105 sets definitive criteria for exceptional value

watersheds and wetlands, whereas the proposed § 90.202(d) would avoid addressing these habitats in "preferred sites." **(3)**

Response: Section 90.205 tracks the exact language of section 4.1(e) of the statute. Essentially, the Act 114 revisions to CRDCA do address Chapter 105 requirements. Section 4.1(e) of CRDCA explicitly states that the alternatives analysis outlined under section 4.1 of CRDCA satisfies the requirement for an alternatives analysis under the Dam Safety and Encroachments Act.

§ 90.302. Definitions.

Comment: The definitions of "actual improvement," "coal refuse disposal activities," and "pollution abatement area" are taken directly from 52 P.S. § 30.53. Rather than repeating these definitions, the EQB should consider simply referencing the statute.

Best professional judgment - The phrase "reasonably available data" is not clear. The EQB should specify what it considers "reasonably available data." **(4)**

Response: Repeating statutory definitions into the regulations adds value by increasing the readability and clarity of the regulations. It serves to make the regulation more user-friendly by making definitions of important terms readily available to the reader. Simply cross-referencing definitions forces the public and the regulated community to constantly rely on multiple, hard-to-procure publications in order to make sense of the regulations.

The definition of the term "best professional judgment" along with the phrase "reasonably available data" were imported directly from the existing remining (Chapter 87, subchapter F) provisions of the surface coal mining regulations. The remining provisions of Chapter 87 were reviewed and approved by OSM, and the regulated community has operated under those regulations for the past 16 years. To promote continuity across the mining program and to avoid confusion to the public and the regulated community, the regulation uses the same terminology as the existing Chapter 87 regulations.

"Reasonably available data" is information that can be collected without extraordinary effort or the expenditure of excessive sums of money.

§ 90.303. Applicability.

Comment: Regarding § 90.303, the CRDCA provides that DEP "may grant special authorization" if the conditions in the Act are met. The draft regulations state that authorization "may not be granted" unless the conditions are met. The language in the regulation should be changed to mirror the statutory language. There is no clear reason for varying from the statutory language, and the regulations should remain as faithful as possible to an Act which was intended to be self-implementing. PCA therefore recommends using the statutory language. **(2)**

Subsection (a) rephrases the parallel statutory language at 52 P.S. § 30.56b(b). The EQB should explain the need to alter the statutory language. **(4)**

Response: The Department agrees that the language should mirror the statute, and subsection (a) has been changed as suggested.

§ 90.304. Application for authorization.

Comment: Section 90.304 (a)(2)(ii) - what criteria will the EQB use to determine "other water quality parameters the Department deems relevant"? How will the operator be informed? **(4)**

Response: Additional parameters may need to be assessed if warranted based on site-specific knowledge regarding historical uses or problems at a given mine site. The operator will be made aware of additional monitoring requirements during the review of the permit application. Module 26 of the permit application is designed to characterize baseline conditions at sites with preexisting discharges.

§ 90.306. Operational requirements.

Comment: Subsection (4) of § 90.306 should be revised to delete the requirement that the operator provide a *notarized* statement and to specify the circumstances in which a supervising engineer's signature may be required. PCA does not see what purpose is served by a notarized statement, and specifying when an engineer's statement is required will avoid confusion and delays. **(2)**

Why must statements from operators under paragraph (4) be notarized? Additionally, the phrase "if required by the Department is unclear." When would a statement signed by the supervising engineer be required? Does this statement also have to be notarized? **(4)**

Response: The provision requiring notarized statements has been deleted. The statement signed by the supervising engineer will be required in circumstances where the work being completed requires engineering expertise as defined under the provisions of the Pennsylvania's Engineer, Land Surveyor, and Geologist Registration Act. There is no requirement for the engineer's statement to be notarized.

§ 90.307. Treatment of discharges.

Comment: Subsection (c) of § 90.307 should be revised by replacing "may not be construed" with "shall not be construed." This is the language used in the CRDCA. **(2)**

Response: The wording has not been changed. The Legislative Reference Bureau insists on the use of "may not" because it carries a stronger prohibition. "Shall not" eliminates the duty to act, while "may not" eliminates the permission to act.

§ 90.309. Criteria and schedule for release of bonds on pollution abatement areas.

Comment: "Planting" is included in both § 90.309(a)(2) and (b)(1). The latter reference to planting should be deleted from subsection (b)(1), since planting will have been required to obtain release of the first bond percentage in (a).

We also suggest that the words "at any time" be deleted from subsection (a)(4). A one-time event caused by unusual circumstances should not be grounds for withholding bond release where there is no indication of a continuing problem, and there is no provision for exceptions which do not indicate a potential for a continuing problem. **(2)**

Response: "Planting" was inadvertently included in § 90.309 (a)(2), but has been deleted in the final regulation. The "at any time" language in (a)(4) remains. This subsection addresses degradation caused by the operator, not degradation caused by severe weather conditions or other unforeseen or uncontrollable events.