NOTICE OF FINAL RULEMAKING
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD
[25 PA CODE CHS. 77, 86, 87, 88, 89, 90, 211]
Land Reclamation Financial Guarantees and Bioenergy Crop Bonding

The Environmental Quality Board (Board) adds §§ 86.162b (relating to Land Reclamation Financial Guarantees) and 86.162c (relating to Bioenergy Crop Bonding) to 25 Pa. Chapter 86 to read as set forth in Annex A. Sections 86.162b and 86.162c implement the act of July 5, 2012 (P.L. 918, No. 95) (Act 95) and the act of October 24, 2012 (P.L. 1276, No. 157) (Act 157). The Board also amends Chapters 77, 86, 87, 88, 89, 90 and 211 to the correct the citation for the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P.S. §§ 1396.1- 1396.19b) due to the addition of section 19.2 in Act 157 and to correct citation errors.

This final form rulemaking was adopted by the Board at its meeting of _____, 2015.

A. *Effective Date*
This rulemaking will go into effect upon publication in the *Pennsylvania Bulletin* as a final-form rulemaking.

B. *Contact Persons*
For further information, contact Thomas Callaghan, PG, Director, Bureau of Mining Programs, Rachel Carson State Office Building, 5th Floor, 400 Market Street, P. O. Box 8461, Harrisburg, PA 17105-8461, (717) 787-5015; or Joseph Iole, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.state.pa.us (select "Public Participation Center", then select "The Environmental Quality Board").

C. *Statutory Authority*
This final-form rulemaking is authorized under the authority of section 5 of The Clean Streams Law (52 P.S. § 691.5); sections 4(a) and 4.2 of the SMCRA (52 P.S. §§ 1396.4(a) and 1396.4b); and section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20).

D. *Background and Purpose*
Act 95 allows for reclamation bond coverage for no cost to operators who remine and then reclaim the area with biofuel crops. The final-form rulemaking provides the framework for implementing this biofuels incentive. Act 95 amended the SMCRA by adding section 4.14 (52 P.S. § 1396.4n).

Act 157 specifically requires that the Board promulgate regulations to implement the Land Reclamation Financial Guarantee (LRFG) program. Accordingly, this final-form rulemaking provides the framework for bonding assistance underwritten by existing Commonwealth funds and premiums paid by surface mine operators.

This final-form rulemaking establishes eligibility requirements, program limits and operational standards.

Act 157

Prior to 2001, the Department operated an alternate bonding system (ABS) for surface coal mining sites. Under the ABS, flat-rate per-acre bonds were supplemented by a non-refundable per-acre "reclamation fee." Based upon shortfalls in funding under this program, the Department terminated the ABS and converted all surface coal mine sites to full-cost bonds. Mine sites bonded under the ABS with post-mining pollutional discharges where the permittee has failed to meet its regulatory obligations constitute a legacy of the ABS for which the Department has the responsibility to operate and maintain treatment systems.

Section 213 of the Act of June 22, 2001 (P.L. 979, No. 6A), known as the "General Appropriation Act of 2001," provided $7 million "For the conservation purpose of providing sum-certain financial guarantees needed to facilitate the implementation of full-cost bonding for a fee and, in the event of forfeiture, to finance reclamation of the forfeited surface mining site in an amount not to exceed the sum-certain guarantee." This appropriation resulted in the creation of the Conversion Assistance program.

The Department implemented Conversion Assistance under the authority of Section 1396.4(d.2) of SMCRA, which allows for "alternate financial assurance mechanisms which shall achieve the objectives and purposes of the bonding program." (52 P.S. § 1396.4(d.2)) Participants in the program executed an agreement through which they agreed to pay an annual premium of 1.5% of the value of the financial guarantee. During the conversion, the Department underwrote about $63 million of bond liability for Conversion Assistance. Currently, Conversion Assistance covers about $19 million in bond liability.

From the inception of the program through fiscal year 2013-2014, the Department collected about $6.3 million in premium payments, while about $300,000 was spent for reclamation of a forfeited site. Act 157 authorized a one-time transfer of $500,000 from this account to the remining financial assurance account to support the Remining Financial Guarantee (RFG) program. This transfer was executed in 2013. Therefore, more than $13 million are available to support the LRFG program as it is structured in Act 157.

Act 157 requires the Board to promulgate regulations to implement the LRFG program. Act 157 includes a requirement for the LRFG program fee amount to be established by regulation. It takes the funds from the Conversion Assistance and transfers them to the LRFG program and converts existing Conversion Assistance to LRFGs.

Act 157 also describes factors for eligibility for LRFGs including:

(1) The environmental and safety hazards of the site for which a guarantee is proposed.
(2) The availability of coal reserves at the site.
(3) The operator's long-term financial stability.
(4) The operator's prior denial of coverage, if any, by surety bond companies.
(5) The operator's length of time in business and compliance history.

(6) Any other factor the Department considers indicative of an operator's ability to complete reclamation and pay required premiums under the program.

Act 157 requires the Department to determine the total amount of LRFGs that can be supported by the LRFG account based on loss reserves established by the application of the historical rate of mine operator bond forfeitures, plus a reasonable margin of safety to protect the account from the risk of forfeiture. Act 157 also requires the Board to establish, by regulation, underwriting methods adequate to insure the account against the risk of forfeiture of the guarantees.

Act 157 allows the Department to transfer interest earned on the funds in the LRFG account into the Reclamation Fee O & M Trust Account established pursuant to § 86.17 (relating to permit and reclamation fees) and § 86.187 (relating to use of money) to supplement the funding of the Reclamation Fee O & M Trust Account, which is used to pay for the operation and maintenance of treatment systems for the ABS legacy sites. It also provides that premiums collected and deposited in the LRFG account may be transferred into the Reclamation Fee O&M Trust Account consistent with the requirement to assure the financial stability of the LRFG program.

Act 157 states, "The land reclamation financial guarantee program established by this section may be discontinued immediately upon publication of notice in the *Pennsylvania Bulletin* if twenty-five per cent or greater of the outstanding bond obligation for the land reclamation financial guarantees program is subject to forfeiture."

Act 157 includes a provision for the annual appropriation of up to $2 million collected from the Gross Receipts Tax by the General Assembly to the Department for transfer into the Reclamation Fee O & M Trust Account established at § 86.17. Act 157 includes the following paragraph relating to the funding of this account:

"Beginning in fiscal year 2013-2014, up to two million dollars ($2,000,000) collected from the Gross Receipts Tax on sales of electric energy in Pennsylvania authorized by Article XI of the act of March 4, 1971 (P.L.6, No.2), known as the "Tax Reform Code of 1971, " may be appropriated annually by the General Assembly to the Department for transfer to the Reclamation Fee O&M Trust Account established pursuant to 25 Pa. Code §§ 86.17 and 86.187 to be used to supplement the funding of the Reclamation Fee O&M Trust Account."

Finally, Act 157 states, "The Land Reclamation Financial Guarantee Account shall be the sole source of funds underwriting the land reclamation financial guarantees program and the Commonwealth shall not be obligated to expend any funds beyond the amount in the Land Reclamation Financial Guarantee Account."

Act 157 revised SMCRA by appending section 19.2 to the end of the act. As a result, all of the regulatory references to SMCRA need to be updated to include the current citation (52 P.S. § §1396.1-1396.19b). The final-form rulemaking includes about 20 updates to this reference in Chapters 77, 86, 87, 88, 89, 90, and 211.

The LRFG program shares many concepts with the RFG program. The experience gained from implementing the RFG program since 1996 has been useful in establishing the requirements of the LRFG program. The regulations implement the requirements of Act 157.

Bioenergy Crop Bonding

Bond release for surface coal mines is achieved in three stages. Sites are eligible for stage 2 bond release after the area has been regraded and planted, with permanent vegetation established. The remaining bond is held for at least five years after the date planting of the vegetation was accomplished for the reclaimed area. This five-year period is the stage 3 reclamation liability period.

Act 95 requires the Department to encourage and promote the use of switchgrass, camelina, canola and other bioenergy crops for the revegetation of lands affected by surface mining activities, and the land so used shall be considered to be cropland for post-mining land use purposes.

Act 95 requires that the funds for the Bioenergy Crop Bonding program be provided, to the extent funds are available from the appropriation to the Department under section 213 of the Act of June 22, 2001 (P.L. 979, No. 6A), known as the "General Appropriation Act of 2001," or to the extent funds are otherwise appropriated. Act 95 also requires the Department to make sum-certain guarantees to cover stage 3 reclamation liability available at no cost to the surface mine permittee. In order to qualify, a remining site must be revegetated with switchgrass, camelina, canola or other bioenergy crops. Act 95 also provides that, in the event of forfeiture, the designated funds be used to finance reclamation of the forfeited surface mining site in an amount not to exceed the sum-certain guarantee.

The regulations implement the requirements of Act 95.

Mining and Reclamation Advisory Board collaboration

The Department consulted with the Mining and Reclamation Advisory Board (MRAB) through a series of meetings with the MRAB's Regulation, Technical and Legislative Committee to develop this final-form rulemaking. The Department presented the draft proposed rulemaking to the MRAB at its October 24, 2013 meeting. The MRAB recommended that the proposed rulemaking proceed with one recommendation. The MRAB recommended that language be added to the regulation regarding the appropriation of money from the Gross Receipts Tax as described in section 19.2b (b)(7) of the SMCRA.

The MRAB recommended that the following language be included in the rulemaking:

> No later than the date of the Department's annual budget request to the Governor's Budget Office, the Department shall report to the MRAB as to when a transfer from the Gross Receipts Tax to the Reclamation Fee O & M Trust Account is necessary to supplement the funding of the Reclamation Fee O & M Trust Account in order to offset an increase in the reclamation fee in the subsequent fiscal year.

As has been the practice since the Board established the adjustable per-acre reclamation fee in 2008, and as required under § 86.17 (e), the Department will continue to provide information to the MRAB about the status of the on-going operation and maintenance of treatment facilities at the ABS legacy sites and the funding status of the Reclamation Fee O & M Trust Account. The proposed rulemaking included a revision to § 86.17 (e)(2) that explicitly addressed the MRAB recommendation. In the course of fulfilling the existing obligation under this section, the Department provides the information by the time that the Department's budget request is provided to the Governor's Budget Office.

The management of the water treatment obligations associated with the legacy of the ABS requires a long-term, stable funding source. The existing funding sources have been able to provide enough money to eliminate the need for the per-acre reclamation fee for the most recent years. Current projections suggest that this trend will not continue since it was primarily the result of an initial balance in the Reclamation Fee O & M Trust Account that has been exhausted. Also, operational costs have increased, and it is expected that they will continue to do so. In addition, the treatment facilities must be operated and maintained well into the future. The adjustable reclamation fee was established to provide an on-going source of funding for these costs. However, it is necessary to have multiple funding options in order to assure that the treatment costs will be covered as long as treatment is needed.

The initial evaluation of the ABS discharges in 2008 indicated that the annual operation and maintenance costs would exceed $1.3 million. Additional annual costs, for occasionally rebuilding treatment systems, were estimated at about $229,000 per year. The revenue from the dedicated funding sources for the Reclamation Fee O & M Trust Account for fiscal year 2013-2014 totaled about $326,800. The annual Gross Receipts Tax appropriation will close this gap.

The final-form rulemaking was reviewed with the MRAB at its January 22, 2015 meeting. The MRAB recommended that the Department pursue the finalization of this rulemaking.

E. *Summary of Changes to the Proposed Rulemaking*

Section 86.17(e)(2) has been revised to delete the phrase "…the need to offset an increase in the reclamation fee and…" In addition, to assure that the Department provides the MRAB with the necessary information under their recommendation, the phrase "…including an estimate of the reclamation fee for the calendar year immediately following the current fiscal year" has been inserted. This retains the requirement to provide information to, and collaborate with, the MRAB but eliminates the impression that the reclamation fee should remain at $0.

Section 86.162b (f)(3) has been revised to more closely track the statutory language by inserting "reasonable" to modify the margin of safety and add that the purpose of the margin of safety is to protect the account for the risk of forfeiture.

Section 86.162b (k)(3) has been revised to clarify the way in which an applicant can demonstrate eligibility for LRFGs. The following statement has been added: "an operator will be eligible under this subsection if they have not been cited through a notice of violation under §86.165(a) (relating to failure to maintain a proper bond) within the previous three years prior to their

request for a land reclamation financial guarantee." In addition, the reference to reclamation obligations incurred under the remining financial guarantee program has been deleted because there is no straight forward way to provide this demonstration.

Section 86.162b (m)(2) has been revised to specify that a written payment schedule will be provided.

Section 86.165 (relating to failure to maintain a proper bond) has been revised to add failing to make payments for LRFG as another circumstance under which this section is applicable. This revision is responsive to the comment from IRRC about the eligibility requirements for LRFGs.

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

Two commenters indicated that the swift passage and implementation of these regulations are important to industry and we urged the EQB to move forward with these regulations as quickly as the law and the regulatory process permits.

The rulemaking will be undertaken as expeditiously as possible.

A commenter asked the EQB to consider revising § 86.162b(o) to allow the Department the discretion, on a case-by-case basis, to release the operator's bond prior to release of the LRFG as it is permitted to do for Remining Financial Guarantee bonds. This option would be limited exclusively to sites that are reclaimed, grass has been planted and risk of forfeiture is negligible.

This comment is based upon a mistaken premise. The regulation at § 86.283 (e) requires that a remining financial guarantee bond "will be reduced or released prior to any other bond submitted by the operator to cover the reclamation obligations of that permit." The purpose of the requirement that the financial guarantees be released prior to other bonds is to limit the liability to the financial guarantees programs and to make the funds available to provide bond coverage for other mine sites. However, the Department has another program, the Land Maintenance Financial Guarantee program, which provides for bond coverage for the scenario where the site is reclaimed, grass has been planted and the stage 2 liability has been released. Therefore, it is not appropriate or necessary to make the suggested revision to the regulation.

A commenter pointed out that there is no legal requirement or "need" to offset any increase in the $0 reclamation fee, which would have the practical effect of eliminating the reclamation fee as a source of revenue to the Reclamation Fee O & M Trust Account.

During the development of the proposed rulemaking, the MRAB expressed interest in assuring that any increases to the reclamation fee be minimized. The proposed wording overemphasized this intention to minimize the reclamation fee. Therefore subsection 86.17(e)(2) of the rulemaking has been revised to delete the phrase "…the need to offset an increase in the reclamation fee and…" In addition, to assure that the Department provides the MRAB with the necessary information under their recommendation, the phrase "…including an estimate of the reclamation fee for the calendar year immediately following the current fiscal year" has been inserted.

A commenter asserted that the proposed amendment would subvert the intention that the Reclamation Fee O & M Trust Account be funded through the adjustable reclamation fee by implementing a premise that is not in Act 157, namely that the public coffers should always be tapped in preference to charging coal mine operators a reclamation fee.

One of the intentions of Act 157 is to provide a variety of funding sources for the Reclamation Fee O & M Trust Account. This includes interest earned on the funds in the LRFG Account, and premiums paid for LRFGs. The process for the adjustable reclamation fee is required under existing regulation and will be in place until the funding for the ABS Legacy is actuarially sound. The existing regulations at § 86.187 (Use of money) state in subsection (a) (iii) that the "Department may deposit other moneys into the Reclamation Fee O&M Trust Account, including appropriations, donations, or, the fees collected for sum-certain financial guarantees needed to facilitate full-cost bonding in accordance with applicable law." The Reclamation Fee O & M Trust account is intended to have a variety of funding streams, one of which is from the reclamation fee. The reclamation fee is unique, in that it serves as an enforceable regulatory mechanism that provides long-term revenue and is adjustable to account for variations in costs and availability of other revenue streams.

The Independent Regulatory Review Commission (IRRC) provided a comment relating to the language added at the request of the MRAB in section 86.17(e)(2), that the added language could have the practical effect of eliminating the reclamation fee as a source of revenue and asked the EQB to review the language added to the regulation, consider amendments and provide further explanation.

The regulations require that the adjustable reclamation fee be in place until the funding for ABS legacy is actuarially sound. Whether revenue is needed from the reclamation fee or not will be based on a number of factors, primarily whether money is available from the other sources of revenue contributing to the account. If the legislature appropriates all of the money authorized under section 19.2(b)(7) of Act 157 each year, that may have the practical effect of eliminating the reclamation fee, regardless of the language in section 86.17(e)(2). The language has been revised to remove the impression that the goal is that the adjustable reclamation fee is being eliminated.

IRRC also provide comment relating to the language added at the request of the MRAB in section 86.17(e)(2), where it states "…the need to offset an **increase** in the reclamation fee…" IRRC suggested rather than using the word "increase" phrasing the regulation as an "adjustment" or similar language was more suitable to the EQB's intent.

The regulatory language has been revised, deleting the reference to the increase of the reclamation fee. Instead, a requirement to provide an estimate of the reclamation fee for the subsequent calendar year has been inserted. This provides for the information that the MRAB had requested and eliminates the impression that the reclamation fee can only be increased.

IRRC recommended that section 86.162b (f)(3) be revised to include the statutory language.

This section has been revised to incorporate the statutory language.

IRRC also commented that section 86.162b (k)(3) is not clear with respect to what a coal mine operator must demonstrate.

This section has been revised to include the description that the demonstration may be done through documentation that the operator has not been subject to any notices of violation under section 86.165 for failing to maintain a proper bond based on late payments. This revision necessitated an accompanying revision to section 86.165.

IRRC suggested that section 86.162b(m)(2) be revised to specify that the payment schedule be in writing.

This suggested revision has been included in the final-form rulemaking.

G. *Benefits, Costs and Compliance*

Benefits

The primary benefit of the programs established through this rulemaking is that no-cost bond coverage for the bioenergy crop bonding and low-cost bond coverage for the LRFG program will be provided to surface coal mine operators. Bonding costs have a substantial impact on a mine operator's financial status because these costs reduce available credit and capital for on-going operations. Another benefit of this rulemaking is that it provides a discretionary funding source for the legacy of the ABS through the optional transfer of interest and premiums for the LRFG program. This rulemaking also promotes and provides an incentive for the utilization of bioenergy crops for mine reclamation.

Compliance Costs

Participation in the LRFG Program or the Bioenergy Crop Bonding Program is optional for coal mine operators. Therefore, the compliance costs are minimal. In fact, it is likely that the programs will reduce costs for coal mine operators by providing for the low-cost or no-cost bond alternatives.

Compliance Assistance Plan

Compliance assistance for this rulemaking will be provided through the routine interaction with trade groups and individual applicants. There are about 500 licensed coal surface mine operators in Pennsylvania which are subject to this regulation. It is not anticipated that the rulemaking will increase costs. Most of the operators subject to this rulemaking are small businesses.

Paperwork Requirements

Since participation in the LRFG Program or the Bioenergy Crop Bonding Program is optional for coal mine operators, coal mine operators have a choice if the additional requirements outweigh

the benefits. The additional paperwork requirements associated with this final-form rulemaking with which the industry would need to comply include somewhat increased documentation to be submitted with the permit application for both programs.

H. *Pollution Prevention*

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department 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.

I. *Sunset Review*

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 7, 2014, the Department submitted a copy of this proposed rulemaking, published at 44 Pa.B. 6781 (October 25, 2014), to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees, for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on _____, the 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 _____, and approved the final-form rulemaking.

K. *Findings of the Board*

The Board finds that:

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

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

(3) These regulations do not enlarge the purpose of the proposal published at 44 *Pennsylvania Bulletin* 4681 (October 25, 2014).

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

L. *Order of the Board*

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

(1) The regulations of the Department of Environmental Protection, *25 Pennsylvania Code*, Chapters 77, 86, 87, 88, 89, 90, 211, are amended by amending Chapters 77, 86, 87, 88, 89, 90, 211 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

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

(5) This order shall take effect immediately.

John Quigley
Acting Chairperson
Environmental Quality Board