pennsylvania
DEPARTMENT OF ENVIRONMENTAL PROTECTION

COMMENT AND RESPONSE DOCUMENT

Federal Office of Surface Mining Reclamation and Enforcement (OSM) Program Consistency Rule

25 Pa. Code Chapters 86 – 90
48 Pa.B. 6844 (October 27, 2018)
Environmental Quality Board Rulemaking #7-532
(Independent Regulatory Review Commission #3517)

List of Commenters on the Proposed Rulemaking

1. Duane C. Feagley, Executive Director
   Pennsylvania Anthracite Council

2. Elam M. Herr, Asst. Executive Director
   PSATS
   4855 Woodland Dr.
   Enola, PA 17025

3. Rachel Gleason, Executive Director
   Pennsylvania Coal Alliance
   202 3rd Street, Suite 203
   Harrisburg, PA 17101

4. Independent Regulatory Review Commission
   333 Market St., 14th Floor
   Harrisburg, PA 17101

Summary of Comments and Responses

1. **Comment:** The commenter is concerned that the term "public roads" as used in the revised definition of "Haul roads" is very broad and could be used to impose additional bonding and other fees on common use public roads that are shared by thousands of other business concerns. The commenter requests that the EQB and the Department consider adopting the following language in the preamble of the regulation:

> "'Integral part of the coal mining activity' is intended to address mining activities that normally would not occur on a public road. This would involve any use of the public road by off-road vehicles or equipment that cannot be licensed for on-road use. The length of the public road to be defined as a haul road is limited to the length of the public road used for travel by vehicles or equipment that are an 'integral part of the coal mining activity.' Any use of a public road by licensed on road vehicles would not be considered an integral part of the coal mining activity unless they exceed legal posted weight limits or otherwise do not meet legal state or local restrictions upon use the public road." (1)

Response: The Department has clarified the preamble for the final-form rulemaking to include language similar to that requested by the commenter.

2. **Comment:** Presently, 25 Pa. Code, Section 86.31 requires notification by registered mail to the "city, borough, incorporated town or township in which the activities are located." The federal rules do not change this requirement, yet the proposed regulation would revise 25 Pa. Code Section 86.31(c)(1) to still require notification but by electronic notice and delete the registered

mail requirement. The commenters contend that this notification is too important to not notify the municipality by registered mail. Since the federal policy does not require electronic notification, the commenters ask that the existing notification by registered mail be retained. IRRC notes that Pennsylvania is permitted to be more stringent than the federal rules and ask the Board to explain the reasonableness of not requiring notification by registered mail for proposed mining activities. IRRC asks in what circumstances is electronic notice appropriate and if electronic notice is retained in the final regulation to set standards when it is appropriate. IRRC asks the Board to explain how the notification requirements in the final regulation adequately protect public health safety and welfare. (2) (4)

Response: The Federal rule at 30 CFR 773.6(a)(3) requires: "[T]he regulatory authority shall issue written notification indicating the applicant's intention to mine the described tract of land, the application number or other identifier, the location where the copy of the application may be inspected, and the location where comments on the application may be submitted." The Federal requirement is to provide written notice and does not specify the means by which written notice is given.

The regulation has been revised to require written notification to be consistent with the Federal requirement and allow the Department flexibility to use mail or electronic notice. The Department may provide notice by registered mail on a case-by-case basis. Authorizing the Department to provide notice by means other than registered mail is reasonable because it implements part of the Department's "Permit Reform Initiative" to reduce permit backlogs, modernize the permitting process, and better utilize technology to improve both oversight and efficiency. As notice becomes automated through the Department's electronic permitting system, parties will receive notice of completed permit applications in a more timely manner, and the resources the Department saves can be committed to other work directed at protecting the public health, safety, and welfare. The Department does not believe that the regulation requires standards to determine when electronic notice is appropriate. In practice, the method of written notice should not be an issue because local government agencies are generally involved very early in the application process (before a complete application is submitted). The transition to electronic notification requires interaction and cooperation between the Department and the local government in order to establish the appropriate contacts. This interaction will provide the opportunity for the local government to express any concerns they have about the process at that time.

3. **Comment:** IRRC notes that the Preamble states that Section 86.31(c)(1) "requires notification by registered mail to the municipality where mining is proposed." IRRC further notes that the Annex proposes to delete the phrase "the city, borough, incorporated town or township" and replace that language with "the municipality." IRRC points out that Section 86.1 contains a definition of the term "municipality". Section 86.1 defines a municipality as, "A county, city, borough, town, township, school district, institution or an authority created by any one or more of the foregoing." IRRC asks if it is the Board's intention to expand the notification requirement to all of these entities. (4)

Response: The Federal Rule at 30 CFR § 773.6(a)(3)(i) is to provide written notice to "[l]ocal governmental agencies with jurisdiction over or an interest in the area of the proposed surface

coal mining and reclamation operation . . . .” The Department interprets this requirement to apply to general purpose units of government, specifically, the city, borough, incorporated town or township. The amendment in the proposed rulemaking was not intended to expand the notification requirement to counties or special purpose local government units in addition to relevant authorities included under 25 Pa. Code § 86.31(c)(2) (“Sewage and water treatment authorities that may be affected by the activities.”) and (c)(3) (“Governmental planning agencies with jurisdiction to act with regard to land use, air or water quality planning in the area of the proposed activities.”). Language in the final-form rulemaking is therefore revised by reverting to the existing language listing “the city, borough, incorporated town or township.”

4. **Comment:** The Pennsylvania Department of Environmental Protection worked within the Department’s advisory board process and consulted with the Mining and Reclamation Advisory Board (MRAB) in developing the consistency regulations. While there is some need to further develop guidance or policy on the definition of surface mining activities, the MRAB unanimously voted to move forward with the regulation and continue constructive conversation regarding the specifics of that definition. As such, the Pennsylvania Coal Alliance supports the proposed regulatory changes in the aforementioned proposed rulemaking. (3)

   Response: The Department acknowledges the comment.

5. **Comment:** The Regulatory Analysis Form indicates that no data was the basis of the proposed rulemaking. However, the data available through the National Oceanic and Atmospheric Administration (NOAA) on-line tool for precipitation events is referred to repeatedly in the proposed regulation. The Board should clarify that the availability of the data from the NOAA tool is the basis for the revisions proposed. (4)

   Response: The Regulatory Analysis Form has been revised to reflect the fact that the data available through the NOAA on-line tool was used as a basis for the regulation. The response includes a link to the web page where the tool is available.

6. **Comment:** The proposed rulemaking includes, in several sections, “…shall be determined by reference to data provided by the National Oceanic Atmospheric Administration or equivalent resources.” The commenter asked for greater clarity on what constitutes as “equivalent resources?” (4)

   Response: This language is intended to allow for continued reliance on the data in the case where there is a government reorganization, technological advance or other factor that would cause the specific description of the tool to be outdated. While this can be corrected through further rulemaking, the “equivalent resources” reference will provide continuity.