

title for James C. Cason is corrected to read "Acting Deputy Secretary."

Dated: January 21, 2002.

Timothy S. Elliott,

Acting Deputy Solicitor.

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DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA-135-FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are announcing receipt of a proposed amendment to the Pennsylvania regulatory program (the "Pennsylvania program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Pennsylvania proposes revisions to rules about surface and ground water monitoring in order to satisfy a required program amendment at 30 CFR 938.16(hh), (vvv), (www), (xxx), (yyy), (zzz), (aaa), and (bbb). Additionally, Pennsylvania is submitting new rules concerning coal refuse disposal operations. Pennsylvania intends to revise its program to be consistent with the corresponding Federal regulations and SMCRA, clarify ambiguities, and provide additional safeguards.

Finally, Pennsylvania requested we remove the required regulatory program amendment at 30 CFR 938.16(kk) (1) and (2). In this program amendment, we required Pennsylvania to correct cross-section references within the Pennsylvania Surface Mining Conservation and Reclamation Act (PA SMCRA).

This document gives the times and locations that the Pennsylvania program and proposed amendments to that program are available for your inspection, the comment period during which you may submit written comments on the amendment, and the procedures that we will follow for the public hearing, if one is requested.

DATES: We will accept written comments on this amendment until 4:00

p.m., e.s.t., February 25, 2002. If requested, we will hold a public hearing on the amendment on February 19, 2002. We will accept requests to speak at a hearing until 4:00 p.m., e.s.t. on February 11, 2002.

ADDRESSES: You should mail or hand deliver written comments and requests to speak at the hearing to Beverly Brock, Acting Director, Harrisburg Field Office at the address listed below.

You may review copies of the Pennsylvania program, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document at the addresses listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendment by contacting OSM's Harrisburg Field Office.

Beverly Brock, Acting Director, Harrisburg Field Office, Office of Surface Mining Reclamation and Enforcement, Harrisburg Transportation Center, Third Floor, Suite 3C, 4th and Market Streets, Harrisburg, Pennsylvania 17101, Telephone: (717) 782-4036.
J. Scott Roberts, Director, Bureau of Mining and Reclamation, Pennsylvania Department of Environmental Protection, Rachel Carson State Office Building, PO Box 8461, Harrisburg, Pennsylvania 17105-8461, Telephone: (717) 787-5103.

FOR FURTHER INFORMATION CONTACT: Beverly Brock, Telephone: 717-782-4036.

SUPPLEMENTARY INFORMATION:

- I. Background on the Pennsylvania Program
- II. Description of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

I. Background on the Pennsylvania Program

Section 503(a) of the Act permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of the Act * * *; and rules and regulations consistent with regulations issued by the Secretary pursuant to the Act." See 30 U.S.C. 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Pennsylvania program on July 30, 1982. You can find background information

on the Pennsylvania program, including the Secretary's findings, the disposition of comments, and conditions of approval of the Pennsylvania program in the July 30, 1982, **Federal Register** (47 FR 33050). You can also find later actions concerning Pennsylvania program and program amendments at 30 CFR 938.11, 938.12, 938.15 and 938.16.

II. Description of the Proposed Amendment

By two letters, both dated December 20, 2001, Pennsylvania sent us proposed amendments to its program (administrative record Nos. PA 881.00 and 837.101) under SMCRA (30 U.S.C. 1201 *et seq.*). Pennsylvania sent the amendments in response to the required program amendments at 30 CFR 938.16(hh), (vvv), (www), (xxx), (yyy), (zzz), (aaa), and (bbb) and to include changes made at its own initiative. The full text of the program amendment is available for you to read at the locations listed above under **ADDRESSES**. In a third letter dated November 16, 2001, (administrative record No. PA 880.00) Pennsylvania sent us an explanation regarding citation of cross-references in PA SMCRA required by the program amendment at 30 CFR 938.16(kk). This letter is also available for you to read at the locations listed under **ADDRESSES**.

In the first letter dated December 20, 2001, (administrative record No. PA 881.00) Pennsylvania notes that 30 CFR 938.16(hh) required it to amend 25 Pa. Code 89.59(a)(1) and (2) to be no less effective than 30 CFR 784.14(h)(1), relating to ground water monitoring plans. Specifically, 30 CFR 938.16(hh) required ground water monitoring plans to specify that, at a minimum, the total dissolved solids or specific conductance, pH, total iron, total manganese and water levels shall be monitored and data submitted to Pennsylvania at least every three months for each monitoring location.

In response to 30 CFR 938.16(hh) Pennsylvania submitted changes made to its regulations at 25 Pa. Code 89.59(a)(2), (3) and (b). The change in 25 Pa. Code 89.59(a)(2) was to delete the word "periodically" from the first sentence and to add the following phrase to the end to the section:

At a minimum, total dissolved solids or specific conductance corrected to 25°C, pH, acidity, alkalinity, total iron, total manganese, sulfates and water levels shall be monitored and reported to the Department at least every 3 months for each monitoring location.

The change Pennsylvania is proposing to 25 Pa. Code 89.59(a)(3) is to delete the last sentence from the section that reads, "The Department will approve

the nature of data, frequency of collection, reporting requirements and the duration of the monitoring programs." Pennsylvania is proposing to add the following to the end of the section:

Surface water shall be monitored for parameters that relate to the suitability of the surface water for current and approved postmining land uses and to the objectives for protection of the hydrologic balance as set forth in § 89.36 (relating to protection of hydrologic balance). At a minimum, total dissolved solids or specific conductance corrected to 25°C, total suspended solids, total iron, total manganese, acidity, alkalinity, pH, sulfates and flow shall be monitored and reported to the Department at least every 3 months for each monitoring location.

Pennsylvania is also proposing to change 25 Pa. Code 89.59(b) by adding a sentence to the end of the section that reads, "The Department may also require the operator to conduct monitoring and reporting more frequently than every 3 months and to monitor additional parameters beyond the minimum specified in this section."

In the second letter of December 20, 2001, (administrative record No. PA 837.101) Pennsylvania submitted changes to various sections of its rules in 25 Pa. Code Chapters 88 and 90. Some of the proposed changes were to respond to required amendments at 30 CFR 938.16(vvv), (www), (xxx), (yyy), (zzz), (aaaa) and (bbbb). Other changes included adding 25 Pa. Code 90.116(a) to clarify that the water supply replacement requirements of 25 Pa. Code 87.119, relating to water rights and replacement for surface mining activities, are applicable to coal refuse disposal activities and adding subchapters E, F, and G to Chapter 90.

Changes to 25 Pa. Code Chapter 88 include the addition of references to 25 Pa. Code Chapter 90 to the first paragraph of 25 Pa. Code 88.281, replacing the word "full" with the phrase, "the fill," in 25 Pa. Code 88.310(e), and the addition of subsections 25 Pa. Code 88.310(j) and (k). The full text of subsections (j) and (k) is:

(j) The system to prevent adverse impacts to the surface water and groundwater shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles or cross-sections approved in the permit and shall function to prevent adverse impacts to surface water and groundwater.

(k) The system to prevent precipitation from coming in contact with the coal refuse shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles and cross-sections approved in the permit and shall function to

prevent precipitation from contacting the coal refuse.

(1) The system shall be installed as phases of the disposal area reach capacity, as specified in the permit, when the operation temporarily ceases for a period in excess of 90 days (unless the department approves a longer period, not to exceed 1 year) or when the operation permanently ceases.

(2) The system shall be designed to allow for revegetation of the site in accordance with the standard of success under § 88.330 (relating to revegetation: standards for successful revegetation) and for prevention of erosion.

In addition, Pennsylvania is proposing to amend 25 Pa. Code 88.332 by adding the following sentences to the end of subsection (a):

The system for preventing precipitation from contacting the coal refuse shall be installed when the temporary cessation exceeds 90 days. The department may approve a longer period, not to exceed 1 year, under subsection (b).

Numerous changes were proposed for 25 Pa. Code Chapter 90. Definitions for the terms "coal refuse disposal," "operator," and "public recreational impoundment" were to 25 Pa. Code 90.1. The proposed definitions are:

Coal refuse disposal—The storage, placement or disposal of coal refuse. The term includes engineered features integral to the placement of the coal refuse including relocations or diversions of stream segments contained within the proposed fill area and the construction of required systems to prevent adverse impacts to surface water and groundwater and to prevent precipitation from contacting the coal refuse.

Operator—A person operating a coal refuse disposal area, or part thereof.

Public recreational impoundment—A closed basin, naturally formed or artificially built, which is dammed or excavated for the retention of water and which is owned, rented or leased by the federal government, the commonwealth or a political subdivision of the commonwealth and which is used for swimming, boating, water skiing, hunting, fishing, skating or other similar activities.

Section 90.5 titled, "Site Selection and Permitting" is proposed to be added. The full text of this section, as proposed, is:

90.5. Site Selection and Permitting

(a) Prior to applying for a permit to conduct coal refuse disposal activities, the applicant shall comply with Subchapter E (relating to site selection). The department's technical guidance document number 563–2113–660, titled Coal Refuse Disposal—Site Selection, shall be used as guidance for selecting a coal refuse disposal site.

(b) After the department has approved a site in accordance with Subchapter E, the applicant may apply for a permit for coal refuse disposal activities in accordance with Chapters 86 and 88 (relating to Surface and Underground Coal Mining: General; and Anthracite Coal) and this chapter.

Pennsylvania is proposing numerous changes to section 25 Pa. Code 90.12 including organizational changes, deletion of some portions of existing regulations and addition of new regulations. The section as proposed to be changed now reads:

90.12. Geology

(a) The application shall include a description of the areal and structural geology within the proposed permit and adjacent area, including the lithology of the strata that influence the occurrence, availability, movement and quality of groundwater that may be affected by the coal refuse disposal. For lands within the proposed permit and adjacent areas, the applicant shall provide a description of the geology with complementing maps and cross sections and the results of test borings. The description shall include the strata down to and including any aquifer that may be affected. At a minimum, the description shall include:

(1) Location and quality of subsurface water.

(2) Depth, lithology and structure of near-surface bedrock.

(3) Location, identification and status of mining and coal refuse disposal operations within or adjacent to the proposed permit area.

(4) A description of any glacial, alluvial, or colluvial deposits or other unconsolidated deposits that are present within or beneath the proposed permit area, including their thickness and location.

(5) A description of any mine workings that are present beneath the proposed permit area.

(6) The attitude and characteristics of joints, cleats, fracture zones, and faults within the permit and adjacent areas.

(7) The location and identification of all coal seam croplines within the permit area.

(8) A description of the physical characteristics of soils within the permit area.

(9) A description of aquifers that are present beneath the proposed permit area.

(b) Maps, cross-sections, and geologic descriptions required by this section shall be prepared and certified by a qualified registered professional geologist.

Pennsylvania is proposing to revise section 90.13(2) to read as follows:

(2) Other information on the baseline hydrogeologic properties of the groundwater system shall be included with the application. The Department may require information on indicator parameters such as pumping test, lithologic and piezometer data or that other appropriate information be provided. The application shall include a description of the groundwater flow system as it relates to the design and operation of the proposed groundwater and surface water protection system as described in § 90.50 (relating to Design Criteria: Groundwater and Surface Water Protection System).

Pennsylvania is proposing some organizational changes to 25 Pa. Code 90.34(a). The section, as proposed, reads:

(a) An application shall contain a description of the proposed land use, following reclamation, of the lands to be affected within the proposed permit area by coal refuse disposal activities, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses, and the relationship of the proposed use to existing land use policies and plans. This description shall explain the following:

(1) How the proposed postdisposal land use is to be achieved, and the necessary support activities which may be needed to achieve the proposed land use.

(2) The detailed management plan to be implemented when pastureland is the postdisposal land use.

(3) Materials needed for approval of the alternative use under § 90.166 (relating to postdisposal land use).

(4) The consideration given to making all of the proposed coal refuse disposal activities consistent with surface owner plans and applicable Commonwealth and local land use plans and programs.

Pennsylvania is proposing to add a phrase to the first sentence of section 25 Pa. Code 90.45. The sentence now reads, "A person who conducts, or intends to conduct, coal refuse disposal activities on prime farmlands historically used for cropland, in accordance with Subchapter E (relating to site selection), shall submit a plan, as part of the permit application, for the disposal and restoration of the land."

Pennsylvania is proposing to add section 25 Pa. Code 90.49. The section, as proposed, reads:

90.49. Stream Buffer Zone Variance

(a) Stream buffer zone restriction. Coal refuse disposal may not occur within 100 feet (30.48 meters) of the bank of a stream. The department may grant a variance for disposal of coal refuse under subsection (c) if consistent with subchapter E (relating to site selection).

(b) Compliance required. Surface mining operations supporting coal refuse disposal shall comply with § 86.102(12) (relating to areas where mining is prohibited or limited).

(c) Variance. The department may grant a variance from the 100-foot (30.48-meter) stream buffer zone to dispose of coal refuse and to relocate or divert streams in the 100-foot (30.48-meter) stream buffer zone. The stream buffer zone is the area within 100 feet (30.48 meters) measured horizontally from the bank of any stream.

(1) Stream buffer zone variances will only be granted if the operator demonstrates to the satisfaction of the department that, as a result of the variance, coal refuse disposal will not adversely affect water quality and quantity, or other environmental resources of the stream and will not cause or contribute to the violation of applicable state or federal water quality standards.

(2) Prior to granting a variance, the operator shall be required to give public notice of the application in two newspapers of general circulation in the area once a week for two successive weeks.

(i) If a person files an exception to the proposed variance within 20 days of the last publication of the notice, the department will conduct a public hearing with respect to the application within 30 days of receipt of the exception.

(ii) The department will also consider information or comments submitted by the Fish and Boat Commission prior to taking action on a variance request.

(3) The variance will be issued as a written order specifying the methods and techniques that shall be employed to prevent or mitigate adverse impacts. Mitigation can include, but is not limited to, compensatory restoration and enhancements of nearby streams or stream segments.

Pennsylvania is proposing to add 25 Pa. Code 90.5. The full text of the section, as proposed, is:

90.50. Design Criteria: Groundwater and Surface Water Protection System

(a) The application shall include a description of the system that will be installed to prevent adverse impacts to groundwater and surface water. The description shall include maps, plans, and other information necessary to evaluate the design of the system.

(b) The application shall include a description of the system that will be installed to prevent precipitation from coming into contact with the coal refuse. The description shall include maps, plans, and other information necessary to evaluate the design of the system. The coal refuse disposal operation shall be designed in phases to minimize the amount of time the entire coal refuse area is exposed to precipitation prior to the installation of the system to prevent precipitation from contacting the coal refuse. The application shall describe the design of the system for preventing precipitation from contacting coal refuse and how the system will be installed in accordance with the following:

(1) During routine coal refuse disposal as phases of the coal refuse disposal area reach capacity.

(2) During periods of temporary cessation as directed under § 90.167(d) (relating to cessation of operations: temporary).

(3) When the operation permanently ceases.

(c) The department's technical guidance document number 563-2112-656, titled *Liners—Impoundments, Stockpiles, and Coal Refuse Disposal Areas*, shall be used as guidance for designing coal refuse disposal sites incorporating earthen, admixed or synthetic liners or caps for preventing adverse impacts to groundwater and surface water and for preventing precipitation from contacting coal refuse.

(d) The application shall include a description of the measures to be taken to ensure the long-term functionality of the systems described in subsections (a) and (b). The description shall address the site's susceptibility to mine subsidence and the potential impacts of mine subsidence on the systems described in subsections (a) and (b). The description shall also address the potential for deterioration of components of the systems described in subsections (a) and

(b) due to other physical or chemical processes including but not limited to attack from sulfate-laden or acidic groundwater and/or leachate.

In section 25 Pa. Code 90.101(b), Pennsylvania is proposing to replace the phrase, "the water," with the phrase, "groundwater and surface water."

Pennsylvania is proposing to add section 25 Pa. Code 90.116a. This section reads:

90.116a. Hydrologic Balance: Water Rights and Replacement

An operator who conducts coal refuse disposal and adversely affects a water supply by contamination, pollution, diminution, or interruption shall comply with § 87.119 (relating to water rights and replacement).

In 25 Pa. Code 90.122, Pennsylvania is proposing to delete former subsections (e) and (g). Under the proposed amendment, former subsection (f) is now subsection (e) and former subsection (h) is now subsection (f). In addition, Pennsylvania has submitted new subsections (g) and (h). The new subsections are:

(g) The disposal area shall be provided with a system to prevent adverse impacts to the surface water and groundwater. The system shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles or cross-sections approved in the permit and shall function to prevent adverse impacts to surface water and groundwater.

(h) When a phase of the coal refuse disposal area reaches capacity, the operator shall install a system to prevent precipitation from coming in contact with the coal refuse in the completed phase.

(1) The system shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles or cross-sections approved in the permit.

(2) During normal coal refuse disposal, the system is not required to prevent precipitation from coming in contact with the coal refuse being placed in phases of the operation that have not reached capacity.

(3) The system shall be designed to allow for revegetation of the site in accordance with the standard of success under § 90.159 (relating to revegetation: standards for successful revegetation) and for the prevention of erosion.

(4) If the operator temporarily ceases operation of the coal refuse disposal area for a period in excess of 90 days (unless the department, for reasons of labor strike or business necessity, approves a longer period not to exceed one year) or when the operation permanently ceases, the operator shall install the system for preventing precipitation from contacting the coal refuse.

In 25 Pa. Code 90.167, Pennsylvania is proposing to change "shall" to "may" in section (b) and to add new subsection (d). Subsection (d) reads:

The operator shall install the system for preventing precipitation from contacting the

coal refuse when the temporary cessation exceeds 90 days. The department may approve a longer period, not to exceed 1 year, for reasons of a labor strike or business necessity.

Finally, Pennsylvania is proposing to add three new subchapters to 25 Pa. Code Chapter 90. The new subchapters are E. Site Selection, F. Coal Refuse Disposal Activities on Areas With Preexisting Pollutational Discharges, and G. Experimental Practices. The full text of these new subchapters follow:

Subchapter E. Site Selection

Section 90.201. Definitions

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

Preferred Site—A watershed polluted by acid mine drainage; a watershed containing an unreclaimed surface mine but which has no mining discharge; a watershed containing an unreclaimed surface mine with discharges that could be improved by the proposed coal refuse disposal operation; unreclaimed coal refuse disposal piles that could be improved by the proposed coal refuse disposal operation; or other unreclaimed areas previously affected by mining activities.

Search area—The geographic area within a 1-mile radius of an existing coal preparation facility or the 25-square-mile geographic area encompassing a proposed coal preparation facility

Selected Site—A location selected by the applicant and approved by the Department under this Subchapter for which the applicant can then apply for a permit to conduct coal refuse disposal activities.

Section 90.202. General Requirements

(a) A preferred site shall be used for coal refuse disposal unless the applicant demonstrates to the Department that an alternate site is more suitable based upon engineering, geology, economics, transportation systems, and social factors and is not adverse to the public interest.

(b) The applicant is required to determine whether the search area contains a preferred site.

(1) For a new coal refuse disposal area that will support an existing coal preparation facility, the applicant shall examine the geographic area within a 1-mile radius of the existing coal preparation facility.

(2) For a proposed coal refuse disposal area that will support a proposed coal preparation facility, the applicant shall examine a 25-square-mile geographic area encompassing the proposed coal preparation facility. In defining the 25-square-mile area, consideration shall be given to environmental, technical, transportation, economic, and social factors where applicable.

(c) If there are no preferred sites located within the search area, the applicant must conduct a comparative analysis of the potential coal refuse disposal sites in accordance with § 90.204(b) (relating to proposing an alternate site).

(d) The Department will not approve a site proposed by the applicant for coal refuse disposal activities when the Department finds that the adverse environmental impacts of using the site for coal refuse disposal activities would clearly outweigh the public benefits.

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

(1) Prime Farmlands.

(2) An exceptional value watershed as defined under Chapter 93 (relating to water quality standards).

(3) Sites known to contain threatened or endangered animals listed exclusively under the Commonwealth's protection programs.

(4) An area that is hydrologically connected to and contributes at least 5% of the drainage to wetlands designated as exceptional value under Chapter 105 (relating to dam safety and waterway management) unless a larger percentage contribution is authorized by the Department after consultation with the Fish and Boat Commission.

(5) A watershed less than 4 square miles in area upstream of the intake of a public water supply.

(6) A watershed less than 4 square miles in area upstream of the upstream limit of a public recreational impoundment.

(7) Sites known to contain Federally listed threatened or endangered plants or animals. At preferred sites known to contain Federally listed threatened or endangered species, approval will be granted only where the Department concludes and the United States Fish and Wildlife Service concurs that the proposed activity is not likely to adversely affect Federally listed threatened or endangered species or result in the take of Federally listed threatened or endangered species in violation of section 9 of the Endangered Species Act of 1973 (16 U.S.C.A. 1538).

(f) As part of the site selection process, an applicant may request approval for more than one site. The Department will evaluate each site proposed for coal refuse disposal and, if the Department finds that a proposed site meets the requirements of this subchapter, it will designate it as an approved site. The applicant will then have the option of choosing a selected site from among the approved sites and submitting an application for coal refuse disposal for that site.

Section 90.203. Proposing a Preferred Site

If the applicant proposes to use a preferred site, the Department will approve the proposed site subject to § 90.202(c) (relating to general requirements) provided the applicant demonstrates that the attendant adverse environmental impacts will not clearly outweigh the public benefits.

Section 90.204. Proposing an Alternate Site

(a) Where a preferred site(s) exists within the search area, but the applicant proposes an alternate site, the applicant shall:

(1) Demonstrate that the alternate site is more suitable, using criteria in § 90.202(a) (relating to general requirements), than all preferred sites within the search area.

(2) Identify other alternate sites considered and provide the basis for the rejection of these sites.

(3) Based on reasonably available data, demonstrate that it is the most suitable site based on environmental, economic, technical, transportation and social factors.

(b) If a preferred site does not exist within the search area, the applicant shall:

(1) Identify all the sites considered within the search area and provide the basis for their consideration.

(2) Provide the basis for the rejection of considered sites.

(3) Based on reasonably available data, demonstrate to the Department that the proposed site is the most suitable based on environmental, economic, technical, transportation, and social factors.

Section 90.205. Alternatives Analysis

The alternatives analysis required by §§ 90.202(b) and 90.204 (relating to general requirements; and proposing an alternate site) satisfies the requirement for an alternatives analysis under the Dam Safety and Encroachments Act (32 P.S. 693.1–693.27) and regulations promulgated thereunder. See Chapter 105 (relating to dam safety and waterway management).

Section 90.206. Disapproval of a Proposed Site

If the Department disapproves the applicant's proposed site, the applicant may submit a new proposal supporting the selection of another site located either within or outside of the search area.

Section 90.207. Approval of a Selected Site

Department approval of a selected site does not indicate the Department will approve an application for coal refuse disposal activities for the selected site.

Subchapter F. Coal Refuse Disposal Activities on Areas With Preexisting Pollutational Discharges

Section 90.301. Scope

(a) This subchapter specifies procedures and rules applicable to those who seek authorization to engage in coal refuse disposal activities on an area on which there are preexisting pollutational discharges resulting from previous mining and describes the terms and conditions under which the Department may release bonds to operators who have received authorization.

(b) Chapter 86 (relating to surface and underground coal mining: general) and Subchapters A–D apply to authorizations to mine areas with preexisting pollutational discharges except as specifically modified by this subchapter.

Section 90.302. Definitions

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Abatement Plan—Any individual technique or combination of techniques, the implementation of which will result in reduction of the base line pollution load. Abatement techniques include but are not limited to: Addition of alkaline material, special plans for managing toxic and acid-

forming material, regrading, revegetation and relocating coal refuse to a coal refuse disposal area that includes systems to prevent adverse impacts to surface and groundwater and to prevent precipitation from contacting the coal refuse.

Actual Improvement—The reduction of the baseline pollution load resulting from the implementation of the approved abatement plan; except that any reduction of the baseline pollution load achieved by water treatment may not be considered as actual improvement provided, however, that treatment approved by the Department of the coal refuse before, during or after placement in the coal refuse disposal area shall not be considered to be water treatment.

Baseline Pollution Load—The characterization of the pollutional material being discharged from or on the pollution abatement area, described in terms of mass discharge for each parameter deemed relevant by the Department, including seasonal variations and variations in response to precipitation events. The Department will establish in each authorization the specific parameters it deems relevant for the baseline pollution load, including, at a minimum, iron and acid loadings.

Best Professional Judgment—The highest quality technical opinion forming the basis for the terms and conditions of the treatment level required after consideration of all reasonably available and pertinent data. The treatment levels shall be established by the Department under sections 301 and 402 of the Federal Water Pollution Control Act (33 U.S.C.A. 1311 and 1342).

Best Technology—Measures and practices which will abate or ameliorate, to the maximum extent possible, discharges from or on the pollution abatement area. These measures include engineering, geochemical or other applicable practices.

Coal Refuse Disposal Activities—The storage, dumping or disposal of any waste coal, rock, shale, slurry, culm, gob, boney, slate, clay, underground development wastes, coal processing wastes, excess soil and related materials, associated with or near a coal seam, that are either brought above ground or otherwise removed from a coal mine in the process of mining coal or are separated from coal during the cleaning or preparation operations. The term shall not include the removal or storage of overburden from surface mining activities.

Excess Soil and Related Material—Rock, clay or other material located immediately above or below a coal seam and which are extracted from a coal mine during the process of mining coal. The term does not include topsoil or subsoil.

Pollution Abatement Area—The part of the permit area that is causing or contributing to the baseline pollution load. It shall include adjacent and nearby areas that must be affected to bring about significant improvements of the baseline pollution load and may include the immediate locations of the discharges.

Section 90.303. Applicability

(a) Authorization may be granted under this subchapter when the authorization is part of the following:

(1) A permit issued after February 6, 1995, but only if the authorization request is made during one of the following periods:

(i) At the time of the submittal of the permit application for the coal refuse disposal activities, including the proposed pollution abatement area.

(ii) Prior to a Department decision to issue or deny that permit.

(2) A permit revision under § 86.52 (relating to permit revisions), but only if the operator affirmatively demonstrates to the satisfaction of the Department that:

(i) The operator has discovered pollutional discharges within the permit area that came into existence after its permit application was approved.

(ii) The operator has not caused or contributed to the pollutional discharges.

(iii) The proposed pollution abatement area is not hydrologically connected to an area where coal refuse disposal activities have been conducted under the permit.

(iv) The operator has not affected the proposed pollution abatement area by coal refuse disposal activities.

(v) The Department has not granted a bonding authorization and mining approval for the area under § 86.37(b) (relating to criteria for permit approval or denial).

(b) Notwithstanding subsection (a), no authorization may be granted under this subchapter for repermitting under §§ 86.12 and 86.14 (relating to continued operation under interim permits; and permit application filing deadlines), permit renewals under § 86.55 (relating to permit renewals: general requirements) or permit transfers under § 86.56 (relating to transfer of permit).

Section 90.304. Application for Authorization

(a) An operator who requests authorization under this Subchapter shall comply with the permit application requirements of Chapter 86 (relating to surface and underground coal mining: general) and Subchapters A–D, except as specifically modified by this subchapter. The operator shall also:

(1) Delineate on a map the proposed pollution abatement area, including the location of the preexisting discharges.

(2) Provide a description of the hydrologic balance for the proposed pollution abatement area that includes:

(i) Results of a detailed water quality and quantity monitoring program, including seasonal variations, variations in response to precipitation events and modeled baseline pollution loads using this monitoring program.

(ii) Monitoring for pH, alkalinity, acidity, total iron, total manganese, aluminum, sulfates, total suspended solids and other water quality parameters the Department deems relevant.

(3) Provide a description of the abatement plan that represents best technology and includes the following:

(i) Plans, cross-sections and schematic drawings describing the abatement plan proposed to be implemented.

(ii) A description and explanation of the range of abatement level that is anticipated to be achieved, costs and each step in the proposed abatement plan.

(iii) A description of the standard of success for revegetation necessary to ensure success of the abatement plan.

(b) The operator seeking this authorization shall continue the water quality and quantity monitoring program required by subsection (a)(2) after making the authorization request. The operator shall submit the results of this continuing monitoring program to the Department on a monthly basis until a decision on the authorization request is made.

Section 90.305. Application Approval or Denial

(a) Authorization may not be granted under this subchapter unless the operator seeking the authorization affirmatively demonstrates the following to the satisfaction of the Department on the basis of information set forth in the application:

(1) Neither the operator, nor an officer, principal shareholder, agent, partner, associate, parent corporation, subsidiary or affiliate, sister corporation, contractor or subcontractor, or a related party as defined in § 86.1 (relating to definitions) has either of the following:

(i) Legal responsibility or liability as an operator for treating the water pollution discharges from or on the proposed pollution abatement area.

(ii) Statutory responsibility or liability for reclaiming the proposed pollution abatement area.

(2) The proposed abatement plan will result in significant reduction of the baseline pollution load and represents best technology.

(3) The land within the proposed pollution abatement area can be reclaimed.

(4) The coal refuse disposal activities on the proposed pollution abatement area will not cause additional surface water pollution or groundwater degradation.

(5) The standard of success for revegetation will be achieved. The standard of success for revegetation for sites previously reclaimed to the standards of Chapters 87, 88 and 90 shall be the standards set forth in § 90.159 (relating to revegetation: standards for successful revegetation). The standard of success for revegetation for sites not previously reclaimed to the standards of Chapters 87, 88 and 90 shall be, at a minimum, the following, provided the site is not a bond forfeiture site where the forfeited money paid into the fund is sufficient to reclaim the forfeited site to the applicable standards:

(i) A ground cover of living plants not less than can be supported by the best available topsoil or other suitable material in the reaffected area.

(ii) A ground cover no less than that existing before disturbance of the area by coal refuse disposal activities.

(iii) Adequate vegetation to control erosion. Vegetation may be no less than that necessary to ensure the success of the abatement plan.

(6) The coal refuse disposal activities on permitted areas other than the proposed pollution abatement area will not cause surface water pollution or groundwater degradation.

(7) Requirements of § 86.37(a) (relating to criteria for permit approval or denial) that are consistent with this section have been met.

(b) An authorization may be denied under this subchapter if granting the authorization will, or is likely to, affect a legal responsibility or liability under The Clean Streams Law (35 P.S. 691.1–691.1001), the Surface Mining Conservation and Reclamation Act (52 P.S. 1396.1–1396.19a), Chapter 86 (relating to surface and underground coal mining: general) or Subchapters A–D, for the proposed pollution abatement area or other areas or discharges in the vicinity of the proposed pollution abatement area.

(c) Authorization may not be granted under this subchapter unless there are one or more preexisting discharges from or on the pollution abatement area.

(d) The authorization allowed under this subchapter is only for the pollution abatement area and does not apply to other areas of the permit.

Section 90.306. Operational Requirements

(a) An operator who receives an authorization under this subchapter shall comply with the requirements of Chapter 86 (relating to surface and underground coal mining: general) and Subchapters A–D except as specifically modified by this subchapter. The operator shall also:

(1) Implement the approved water quality and quantity monitoring program for the pollution abatement area until the requirements of § 90.309 (relating to criteria and schedule for release of bonds on pollution abatement areas) are met.

(2) Implement the approved abatement plan.

(3) Notify the Department immediately prior to the completion of each step of the abatement plan.

(4) Provide a progress report to the Department within 30 days after the completion of each step of the abatement program that includes a statement signed by the operator, and if required by the Department, a statement signed by the supervising engineer, that all work has been performed in accordance with the terms and conditions of the pollution abatement authorization, the approved maps, plans, profiles and specifications.

Section 90.307. Treatment of Discharges

(a) Except for preexisting discharges that are not encountered during coal refuse disposal activities or the implementation of the abatement plan, the operator shall comply with § 90.102 (relating to hydrologic balance: effluent standards).

(b) The operator shall treat the preexisting discharges that are not encountered during coal refuse disposal activities or implementation of the abatement plan to comply with the effluent limitations established by best professional judgment. The effluent limitations established by best professional judgment may not be less than the baseline pollution load. If the baseline pollution load, when expressed as a concentration for a specific parameter, satisfies the effluent limitation in § 90.102 for that parameter, the operator shall treat the preexisting discharge for that parameter to comply with either effluent limitations established by best professional judgment or the effluent limitations in § 90.102.

(c) For purposes of subsections (a) and (b), the term encountered may not be construed to mean diversions of surface water and shallow groundwater flow from areas undisturbed by the implementation of the abatement plan that would otherwise drain into the affected area, as long as the diversions are designed, operated and maintained under § 90.104 (b)–(h) (relating to hydrologic balance: diversions).

(d) An operator required to treat preexisting discharges will be allowed to discontinue treating the discharges under subsection (b) when the operator affirmatively demonstrates the following to the Department's satisfaction:

(1) The preexisting discharges are meeting the effluent limitations established by subsection (b) as shown by groundwater and surface water monitoring conducted by the operator or the Department.

(2) Coal refuse disposal activities under the permit—including the pollution abatement area—are being or were conducted under the requirements of the permit and the authorization, and Chapter 86 (relating to surface and underground mining: general) and this chapter except as specifically modified by this subchapter.

(3) The operator has implemented each step of the abatement plan as approved in the authorization.

(4) The operator did not cause or allow additional surface water pollution or groundwater degradation by re-affecting the pollution abatement area.

(e) If after discontinuance of treatment of discharges under subsection (d) the discharges fail to meet the effluent limitations established by subsection (b), the operator shall reinstitute treatment of the discharges under subsection (b). An operator who reinstates treatment under this subsection will be allowed to discontinue treatment if the requirements of subsection (d) are met.

(f) Discontinuance of treatment under subsection (d) may not be deemed or construed to be or to authorize a release of bond under § 90.309 (relating to criteria and schedule for release of bonds on pollution abatement areas).

Section 90.308. Request for Bond Release

Sections 86.172(c) and 90.309 (relating to criteria for release of bond; and criteria and schedule for release of bonds on pollution abatement areas) apply to the release of bonds for pollution abatement areas authorized by this subchapter. Section 86.172(a), (b) and (d) shall not be applicable to the release of bonds.

Section 90.309. Criteria and Schedule for Release of Bonds on Pollution Abatement Areas

(a) The Department will release up to 50% of the amount of bond for the authorized pollution abatement area if the applicant demonstrates and the Department finds the following:

(1) The coal refuse disposal activities were conducted on the permit area, including the pollution abatement area, under the requirements of the permit and the authorization, Chapter 86 (relating to surface and underground mining: general) and this

chapter except as specifically modified by this subchapter.

(2) The operator has satisfactorily completed backfilling, grading, installing the water impermeable cover and drainage control in accordance with the approved reclamation plan.

(3) The operator has properly implemented each step of the pollution abatement plan approved and authorized under this subchapter.

(4) The operator has not caused degradation of the baseline pollution load at any time during the 6 months prior to the submittal of the request for bond release under this subsection and until the bond release is approved as shown by all groundwater and surface water monitoring conducted by the permittee under § 90.306(a)(1) (relating to operational requirements) or conducted by the Department.

(5) The operator has not caused or contributed to surface water pollution or groundwater degradation by re-affecting the pollution abatement area.

(b) The Department will release up to an additional 35% of the amount of bond for the authorized pollution abatement area but retain an amount sufficient to cover the cost to the Department of reestablishing vegetation if completed by a third party if the operator demonstrates and the Department finds the following:

(1) The operator has replaced the topsoil or material conserved under § 90.97 (relating to topsoil: removal), completed final grading, planting and established revegetation under the approved reclamation plan and achieved the standards of success for revegetation in § 90.305(a)(5) (relating to application approval or denial).

(2) The operator has not caused or contributed to groundwater or surface water pollution by re-affecting the pollution abatement area.

(3) The operator has achieved the following standards:

(i) Achieved the actual improvement of the baseline pollution load described in the approved abatement plan as shown by groundwater and surface water monitoring conducted by the permittee for the time provided in the abatement plan after completion of backfilling, final grading, drainage control, topsoiling and establishment of revegetation to achieve the standard for success in § 90.305(a)(5).

(ii) Achieved the following:

(A) At a minimum has not caused degradation of the baseline pollution load as shown by groundwater and surface water monitoring conducted by the operator or the Department for one of the following:

(I) For a period of 12 months from the date of initial bond release under subsection (a), if backfilling, final grading, drainage control, placement of impermeable cover, topsoiling and establishment of revegetation to achieve the standard of success for revegetation in § 90.305(a)(5) have been completed.

(II) If treatment has been initiated at any time after initial bond release under subsection (a) and § 90.307(e) (relating to treatment of discharges), for 12 months from the date of discontinuance of treatment under

§ 90.307(d), if backfilling, final grading, drainage control, placement of impermeable cover, topsoiling and establishment of revegetation to achieve the standard of success for revegetation in § 90.305(a)(5) have been completed.

(B) Conducted all the measures provided in the approved abatement plan and additional measures specified by the Department in writing at the time of initial bond release under subsection (a) of this section for the area requested for bond release.

(C) Caused aesthetic or other environmental improvements and the elimination of public health and safety problems by engaging in coal refuse disposal activities and reffecting the pollution abatement area.

(D) Stabilized the pollution abatement area.

(c) The Department will release the remaining portion of the amount of bond on the authorized pollution abatement area if the operator demonstrates and the Department finds the following:

(1) The operator has successfully completed the approved abatement and reclamation plans, and the pollution abatement area is capable of supporting the postdisposal land use approved under § 90.166 (relating to postdisposal land use).

(2) The operator has complied with the permit and the authorization, Chapter 86 and this chapter, except as specifically modified by this subchapter.

(3) The operator has not caused degradation of the baseline pollution load from the time of bond release under subsection (b) or, if treatment has been initiated after bond release under subsection (b) in accordance with § 90.307(e) for 5 years from the discontinuance of treatment under § 90.307(d).

(4) The applicable liability period has expired under § 86.151 (relating to period of liability).

Subchapter G. Experimental Practices

Section 90.401. General

(a) To encourage advances in coal refuse disposal practices, coal refuse site reclamation, and advances in technology or practices that will enhance environmental protection with respect to coal refuse disposal activities, the Department may grant permits approving experimental practices and demonstration projects. The Department may grant these permits under the following circumstances:

(1) The environmental protection provided will be potentially more protective or at least as protective as required by this chapter, the Coal Refuse Disposal Control Act (52 P.S. §§ 30.51-30.66) and Chapter 86 (relating to surface and underground coal mining: general).

(2) The coal refuse disposal activities approved under the permits are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practices or demonstration projects.

(3) The experimental practices or demonstration projects do not reduce the protection afforded public health and safety below that provided by this chapter, the Coal Refuse Disposal Control Act and Chapter 86.

(b) Experimental practice permits issued under this subchapter shall meet all the provisions, standards, and information requirements of the 30 CFR 785.13 (relating to experimental practices mining).

In the letter of November 16, 2001, (administrative record No. PA 880.00) Pennsylvania notes that 30 CFR 938.16(kk) required it to amend the references contained in sections 3.1(c) and 3.1(d) of PA SMCRA. The condition requires the cross-reference to section 4.2(f) in section 3.1(c) be replaced with section 4b(f) and the cross reference to section 18.6 in section 3.1(d) be replaced with section 24.

Pennsylvania explained that sections 3.1(c) and 3.1(d) of PA SMCRA are part of a numbering system used by the Pennsylvania Legislative Reference Bureau. Likewise the cross-referenced sections 4.2(f) and 18.6 are also Legislative Reference Bureau numbering. Section 4b(f) is part of a numbering system used in Purdon's Pennsylvania Statutes Annotated (Purdon's). The complete number for section 4(b)(f) in Purdon's is 52 P.S. 1396.4b(f). Purdon's 52 P.S. 1396.4b(f) is the Legislative Reference Bureau's Section 4.2(f). Section 24 was formerly a Purdon's number. The complete number for section 24 in Purdon's was 52 P.S. 1396.24. Section 1396.24 was renumbered to 1396.18f in 1993 as a result of amendments to PA SMCRA. Purdon's section 1396.18f is the Legislative Reference Bureau's Section 18.6. Pennsylvania believes that since the cross-references in sections 3.1(c) and 3.1(d) of SMCRA are the appropriate Legislative Reference Bureau Numbers that should be referenced, 30 CFR 938.16(kk) should be removed.

III. Public Comment Procedures

Under the provisions of 30 CFR 732.17(h), we are seeking your comments on whether the amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If we approve the amendment, it will become part of the State program.

Written Comments

Send your written comments to OSM at the address given above. Your written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of your recommendations. We will not consider or respond to your comments when developing the final rule if they are received after the close of the comment period (see **DATES**). We will make every attempt to log all comments into the administrative record, but comments delivered to an

address other than the Harrisburg Field Office may not be logged in.

Availability of Comments

We will make comments, including names and addresses of respondents, available for public review during normal business hours. We will not consider anonymous comments. If individual respondents request confidentiality, we will honor their request to the extent allowable by law. Individual respondents who wish to withhold their name or address from public review, except for the city or town, must state this prominently at the beginning of their comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public review in their entirety.

Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., e.s.t. on February 11, 2002. If you are disabled and need special accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. We will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, we will not hold a hearing.

To assist the transcriber and ensure an accurate record, we request, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with us to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public and, if possible, we will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

IV. Procedural Determinations

Executive Order 12630—Takings

This rule does not have takings implications. This determination is based on the analysis performed for the counterpart Federal regulation.

Executive Order 12866—Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget under Executive Order 12866.

Executive Order 12988—Civil Justice Reform

The Department of the Interior has conducted the reviews required by section 3 of Executive Order 12988 and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments because each program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731, and 732 have been met.

Executive Order 13132—Federalism

This rule does not have Federalism implications. SMCRA delineates the roles of the Federal and State governments with regard to the regulation of surface coal mining and reclamation operations. One of the purposes of SMCRA is to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." Section 503(a)(1) of SMCRA requires that State laws regulating surface coal mining and reclamation operations be "in accordance with" the requirements of SMCRA. Section 503(a)(7) requires that State programs contain rules and regulations "consistent with" regulations issued by the Secretary pursuant to SMCRA.

Executive Order 13211—Regulations That Significantly Affect the Supply, Distribution, or Use of Energy

On May 18, 2001, the President issued Executive Order 13211 which requires agencies to prepare a Statement of

Energy Effects for a rule that is (1) considered significant under Executive Order 12866, and (2) likely to have a significant adverse effect on the supply, distribution, or use of energy. Because this rule is exempt from review under Executive Order 12866 and is not expected to have a significant adverse effect on the supply, distribution, or use of energy, a Statement of Energy Effects is not required.

National Environmental Policy Act

This rule does not require an environmental impact statement because section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804 (2), the Small Business Regulatory Enforcement Fairness Act. This rule: (a) Does not have an annual effect on the economy of \$100 million; (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local governmental agencies or geographic regions; and (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. This determination is based upon the fact

that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation was not considered a major rule.

Unfunded Mandates

This rule will not impose an unfunded mandate on State, local, or tribal governments or the private sector of \$100 million or more in any given year. This determination is based upon the fact that the State submittal, which is the subject of this rule, is based upon counterpart Federal regulations for which an analysis was prepared and a determination made that the Federal regulation did not impose an unfunded mandate.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: January 9, 2002.

Allen D. Klein,

Regional Director, Appalachian Regional Coordinating Center.

[FR Doc. 02-1945 Filed 1-24-02; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 86

[AMS-FRL-7132-8]

RIN 2060-AJ73

Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines; Proposed Non-Conformance Penalties for 2004 and Later Model Year Emission Standards for Heavy-Duty Diesel Engines and Heavy-Duty Diesel Vehicles; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: This document corrects the preamble to a proposed rule published in the **Federal Register** of January 16, 2002, regarding non-conformance penalties for heavy-duty diesel engines and vehicles. This correction provides the correct EPA docket number for the submission of comments on the proposed rule.

FOR FURTHER INFORMATION CONTACT: Margaret Borushko, U.S. EPA, National Vehicle and Fuels Emission Laboratory, 2000 Traverwood, Ann Arbor, MI 48105; Telephone (734) 214-4334; Fax: