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December 22, 2009

Via email: RegComments@state.pa.us

The Honorable John Hanger
Secretary, Pennsylvania Department of Environmental Protection
Chairperson
Pennsylvania Environmental Quality Board
Rachel Carson State Office Building,
16th Floor
400 Market Street, Harrisburg, Pennsylvania 17101-2301

Re: Proposed Amendments to Pennsylvania's Regulations
Governing the Beneficial Use of Coal Ash

Dear Secretary Hanger:

On November 7, 2009, the Pennsylvania Environmental Quality Board ("EQB") published in the Pennsylvania Bulletin proposed revisions to existing regulations governing the beneficial use of coal ash in Pennsylvania. See 39 Pa. Bull. 6429 (Nov. 7, 2009). The proposed regulations include extensive changes to the requirements that apply to the beneficial use of coal ash. The purpose of this letter is to provide comments to the EQB and the Pennsylvania Department of Environmental Protection ("PADEP") regarding the proposed regulations on behalf of the Pennsylvania Chamber of Business and Industry ("PCBI"). With 24,000 members and customers, PCBI represents a broad spectrum of Pennsylvania industrial entities, businesses, and commercial enterprises, a number of which are engaged in activities that are directly affected by the proposed changes to Pennsylvania's requirements regarding the beneficial use of coal ash. We very much appreciate the opportunity to comment on the proposed regulations and look forward to continuing to work with the EQB and PADEP in connection with the regulatory development process to ensure the continuing viability of beneficially using coal ash.

Pennsylvania has had a robust beneficial use program for coal ash for many years. Under the Pennsylvania Solid Waste Management Act ("SWMA"), coal ash is expressly excluded from the definition of "solid waste" in Pennsylvania. 35 P.S. § 6018.103. "Coal ash" is in turn defined under the SWMA as follows:

Fly ash, bottom ash or boiler slag resulting from the combustion of coal, that is or has been beneficially used, reused or reclaimed for a commercial, industrial or governmental purpose. The term includes such materials that are stored, processed, transported or sold for beneficial use, reuse or reclamation.

35 P.S. § 6018.103.

While coal ash is not a solid waste under the SWMA, PADEP is vested with certain powers under Section 508 of the SWMA to establish siting criteria and design and operating standards governing the storage of coal ash prior to beneficial use and the use of coal as structural fill, soil substitutes and soil additives. See 35 P.S. § 6018.508. Moreover, Section 508 of the SWMA authorizes PADEP to certify coal ash that is used as structural fill, soil substitutes and soil additives. Id. Section 508 of the SWMA also contains an extensive list of uses of coal ash that qualify as beneficial uses, including use of bottom ash as anti-skid material, use of coal ash as a raw material, use of coal ash for mine subsidence, mine fire control and mine sealing, and use of coal ash as structural fill, soil substitutes or soil additives. Id.

Pennsylvania's regulations governing the beneficial use of coal ash are currently set forth in the beneficial use provisions of the residual waste regulations at 25 Pa. Code §§ 287.661 – 287.666. Under the proposed regulations, these provisions will be deleted and replaced with a new, self-contained set of provisions to be codified as 25 Pa. Code Chapter 290. The proposed provisions in 25 Pa. Code Chapter 290 greatly expand the types of requirements that must be satisfied in order to beneficially use coal ash in Pennsylvania.

PCBI strongly supports the efforts of PADEP and the EQB to ensure that coal ash in Pennsylvania can be beneficially used in a broad array of ways. As described below, coal ash can effectively and safely be used for many different functions.

The beneficial use of coal ash is vital to addressing the environmental legacy of former mining sites that are located in many portions of the Commonwealth. Mine reclamation using coal ash offers a viable, cost-effective and safe mechanism to help take on one of the most formidable environmental challenges in Pennsylvania. Based on data and information compiled by PADEP, acid mine drainage remains one of the leading causes of surface water quality degradation in the Commonwealth. Moreover, abandoned mines pose safety concerns for hikers, hunters and other recreational users of outdoor areas. The dangers of open pits and highwalls are well documented.

Coal ash can also be used in connection with a wide array of construction projects and as a substitute for other materials that need to be manufactured or mined. For example, coal ash can be used as a construction material in road and airport construction projects. Use of coal ash as part of these public projects can often result in significant savings to the tax payers in the overall costs of the projects. Coal ash is also used in making concrete or as a substitute for cement in certain applications. Other uses of coal ash and other coal combustion residues like synthetic gypsum from flue gas desulfurization include serving as an ingredient in wall board, serving as a soil amendment or soil substitute, and serving as an ingredient in making masonry blocks and bricks. New uses for coal ash continue to be found as research moves forward and new products are developed.

Against this backdrop, PCBI recommends that the EQB and PADEP carefully review the proposed regulations to ensure that the proposed requirements are necessary and warranted. By

adding new layers of requirements to the beneficial use process, the proposed regulations will necessarily deter certain beneficial use activities. Given the special status of coal ash under the SWMA and the strong legislative mandate to promote the beneficial use of coal ash, PCBI suggests that the regulatory balance be carefully drawn.

Pennsylvania's beneficial use program for coal ash has been widely regarded as one of the most progressive in the country. The collected experiences and scientific data from the beneficial use of coal ash in Pennsylvania indicate that the existing program has worked well while providing meaningful safeguards for the environment. Accordingly, PCBI urges the EQB and PADEP to carefully evaluate and judiciously identify those elements of the existing program that may need to be made more stringent to better protect human health and the environment. Stated differently, making wholesale changes to requirements that are already functioning at a high level does not appear to be a prudent use of governmental resources. Moreover, adding new and more stringent requirements to the beneficial use program for coal ash has the potential to undercut the environmental benefits that are associated with that program (such as reducing acid mine drainage and reclaiming abandoned mines).

The proposed regulations reflect an accretion of requirements that individually may appear to be incrementally small but collectively can have major ramifications on those who are involved in the beneficial use of coal ash. By way of example but not limitation, the proposed regulations (1) increase sampling and reporting frequencies for coal ash certifications, (2) expand the universe of parameters that must be evaluated, (3) add new operational requirements for beneficial uses, (4) impose new procedural requirements (including public notices and deed amendments) for certain beneficial use projects, (5) double the amount of groundwater quality monitoring that must be performed to establish background conditions, (6) significantly lengthen the duration of groundwater quality monitoring following placement of coal ash, (7) expand the number of groundwater monitoring wells that must be installed, (8) add new standards that must be met for storage of coal ash, and (9) impose significant new fees on the regulated community. It is unclear whether these and similar expanded requirements are designed to address documented deficiencies in the existing beneficial use program for coal ash in the least burdensome manner practicable or instead simply reflect the imprint of regulatory tools used in other contexts.

Given the wide-spread and successful usage of coal ash under Pennsylvania's existing regulatory program, PCBI respectfully requests the EQB and PADEP to carefully consider whether the universe of proposed regulatory changes are necessary in the first instance and, if warranted by deficiencies in the existing regulations, are appropriately and narrowly tailored to address those deficiencies in the least intrusive manner that is practicable. The continuing viability of beneficially using coal ash is vital to the Commonwealth's environmental and economic interests. The beneficial use program for coal ash provides opportunities to utilize an abundant and home-grown resource in a wide variety of ways, including helping to solve some of Pennsylvania's greatest environmental challenges. To facilitate the beneficial use of coal ash, maintaining regulatory balance is critically important. The proposed regulatory changes alter the

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balance that has worked well up to now. While PCBI recognizes that regulatory programs may need to evolve in order to remain effective, the evolutionary process with respect to the beneficial use program for coal ash would appear to warrant a light touch at this juncture given the fact that the existing program has had a proven positive track record.

We very much appreciate the opportunity to have provided these comments to the EQB and PADEP. PCBI welcomes any opportunities that may be afforded in the coming weeks to discuss the proposed regulations and changes that may be made to the proposed regulations in the course of the regulatory development process.

Sincerely,

A handwritten signature in black ink, appearing to read "Gene Barr", written in a cursive style.

Gene Barr
Vice President, Government and Public Affairs

cc: Mr. Stephen Socash
Susan Seighman, Esquire