

NOTICE OF FINAL RULEMAKING
[25 PA CODE CHAPTER 208]

ORDER

The Board by this Order amends the Department of Environmental Protection's (Department) regulations at 25 Pa Code Chapter 208 (relating to underground coal mine safety) to read as set forth in Annex A. The final rulemaking conforms Pennsylvania law to federal law, thereby establishing that the incombustible content of coal dust, rock dust and any other dust will not be less than 80 percent in bituminous coal mines.

This notice was given under Board order at its meeting of September 17, 2013.

A. Effective Date

These amendments will be effective upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Joe Sbaffoni, Director Bureau of Mine Safety, Fayette County Health Center, 100 New Salem Road, Room 167, Uniontown PA 15401, (724) 439-7469, jsbaffoni@pa.gov; or Susana Cortina de Cárdenas, Assistant Counsel, Bureau of Regulatory Counsel, Office of Chief Counsel, Rachel Carson State Office Building, 9th Floor, P.O. Box 8464, Harrisburg, PA 17105-8464, (717) 787-7060, scortina@pa.gov. Persons with a disability may use the Pennsylvania AT & T Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final form rulemaking is available through the Department's website at www.dep.state.pa.us.

C. Statutory Authority

The final rulemaking is authorized under the authority of Sections 106 and 106.1 of the Bituminous Coal Mine Safety Act (52 P.S. §§ 690-106 and 106.1) (BCMSA), which grant the Board the authority to adopt regulations implementing the BCMSA, including additional safety standards. The Board is authorized to promulgate regulations that are necessary or appropriate to implement the requirements of the BCMSA, and to protect the health, safety and welfare of miners and other individuals in and about mines.

D. Background and Purpose

This final rulemaking requires that where rock dust is to be applied in bituminous underground coal mines located in this Commonwealth, the incombustible content of the combined coal dust, rock dust, and other dust that is present in a mine's intake and return airways must be not be less than 80 percent.

On September 23, 2010, the United States Department of Labor and the federal Mine Safety and Health Administration (MSHA) issued an emergency temporary standard (ETS) under section 101(b) of the Federal Mine Safety and Health Act of 1977 in response to the grave danger that miners in underground bituminous coal mines throughout the country face when accumulations of coal dust are not made inert. 75 FR 57857. MSHA concluded, from investigations of mine explosions and other reports, that immediate action is necessary to protect miners.

The ETS served as an emergency temporary final rule with immediate effect and provided an opportunity for notice and comment, after which time a final rule would be issued. The National Institute for Occupational Safety and Health (NIOSH) conducted a series of large-scale dust explosion tests at the NIOSH Lake Lynn Experimental Mine (LLEM) using the dust survey results to determine the incombustible content necessary to prevent explosion propagation. Based on the results of this testing, NIOSH recommended an 80 percent total incombustible content (TIC) in both intake and return airways of bituminous coal mines in the ETS. In addition, the incombustible content of the dust must be increased to 0.4 percent for each 0.1 percent of methane present.

Based on NIOSH's data and recommendations, and MSHA data and experience, the U.S. Secretary of Labor determined that miners were exposed to grave danger in areas of underground bituminous coal mines that were not properly and sufficiently rock dusted in accordance with the requirements in the ETS and that the ETS was necessary to protect miners from such danger. The Final MSHA Rule retained the requirements of the ETS verbatim to ensure continuous protection for underground bituminous coal miners from grave danger due to hazards of coal dust explosions. 76 FR 35978, June 21, 2011.

In developing the final federal rule, MSHA considered its accident investigation reports of mine explosions in intake air courses that involved coal dust; the NIOSH Report of Investigations entitled "Recommendations for a New Rock Dusting Standard to Prevent Coal Dust Explosions in Intake Airways"; MSHA's experience and data; public comments on the ETS; and testimony provided at the public hearings. MSHA believes that the requirements of the final rule are necessary to continue to protect underground bituminous coal miners from grave danger. These regulations are codified at 30 CFR §§ 75.403 and .403-1.

The percentage of incombustible content of rock dust plays an important role in the probability and severity of explosions in bituminous coal mines. Rock dust has been used for 100 years as a precautionary measure to prevent explosions. The workings of these mines lead to the production of explosive coal dust, and adding rock dust with an incombustible content of a certain percentage reduces the potential, as well as the severity, of explosions. This has been amply documented by the above-referenced studies. Inert rock dust acts as a heat sink, that is, a source that absorbs and dissipates heat, so that a certain amount of inert rock dust with coal dust is likely to prevent or reduce the potential for coal dust explosions. For that reason, federal regulation mandates that the incombustible content of the combined coal, rock and any other type of dust used in bituminous coal mines must be no less than 80 percent.

On July 7, 2008, the Pennsylvania General Assembly enacted the BCMSA. The BCMSA is the first significant update of the Commonwealth of Pennsylvania's underground bituminous coal mine safety laws since 1961. 52 P.S. § 690-103(a). One of the significant changes made by the BCMSA is the authority to promulgate regulations for mine safety. The General Assembly established the Board to promulgate the regulations. This seven-member board consists of the Department's Secretary as Chair, three members representing the viewpoint of mine workers and the viewpoint of underground bituminous coal mine operators, respectively. 52 P.S. § 690-106.

A significant problem with the pre-existing law was that its safety standards were becoming outdated. There was no effective mechanism to modify existing standards or to adopt new safety standards to address changes in technology or other hazards. To rectify this problem, the BCMSA contains broad rulemaking authority to adopt regulations to either modernize safety standards in the BCMSA or adopt new safety standards not contained in the BCMSA. The Board was directed to consider whether to adopt federal mine safety standards not in the BCMSA. 52 P.S. § 690-106.1.

After learning of the more stringent MSHA requirements under 30 CFR §§ 75.403 and .403-1 for the maintenance of incombustible content of rock dust, the Board determined that the Commonwealth should incorporate the federal standards into state regulation and provide the Department the necessary independent authority to enforce those standards. Accordingly, on May 11, 2013, at 43 Pa.B. 2587, the Board proposed these requirements for a 30 day public comment period. The Board received comments from the United Mine Workers of America, who fully supports the rulemaking. The Independent Regulatory Review Commission (IRRC) provided notice to the Board that it had reviewed the proposed regulation, but had no objections, comments, or recommendations to offer on the regulation. IRRC noted that if the Board delivers the final-form regulation without revisions to the Commission, and the standing committees do not take any action on the final rulemaking, the final regulation will be deemed approved by IRRC. No changes were made to the regulation between the proposed and final rulemaking.

E. Summary of Comments and Responses to the Proposed Rulemaking

The United Mine Workers wholeheartedly support the Board's rulemaking. The commentator believes that this rulemaking, which is consistent with the federal standards, will save lives.

The Board agrees and appreciates the commentator's support of the rulemaking. The Board believes that the rulemaking will enhance the Department's ability to ensure the safety of miners by reducing the potential or severity of explosions in bituminous coal mines, and by allowing the Department to have independent authority to enforce the federal requirement. This final rulemaking also conforms Pennsylvania regulations to federal regulations that are already in place.

F. Summary of Final Regulatory Requirements

The Board proposed the addition of a regulation which will require the use of additional rock dust to reduce the possibility and severity of explosions that may cause bodily harm or loss

of life while working underground, as well as prevent property loss. No changes were made to the regulation from its proposed form.

25 *Pa Code* § 208.71(a) provides that, among other things, the incombustible content of the combined coal dust, rock dust, and other dust must be not less than 80 percent.

25 *Pa Code* § 208.71(b) provides that where methane is present, the percent of incombustible content of such combined dust must be increased 0.4 percent for each 0.1 percent of methane.

25 *Pa Code* § 208.71(c) provides that moisture contained in the combined coal dust, rock dust and other dusts must be considered as a part of the incombustible content of such mixture.

G. Benefits and Costs

Benefits

The final rulemaking will reduce the possibility and severity of explosions that may cause bodily harm, loss of life or property. The final regulation incorporates the provisions of federal regulations into the state's regulations, thus enhancing the Commonwealth's mine safety program and its reputation for excellence.

Compliance Costs

The final rulemaking will not add any compliance costs to those already existing, as a federal regulation is already in place in this regard. This rulemaking imposes standards already imposed by MSHA.

Compliance Assistance Plan

The Department plans to educate and assist the public and regulated community in understanding the final regulation and how to comply with it. This will be accomplished through the Department's ongoing compliance assistance program.

Paperwork Requirements

The regulatory revisions will not increase the paperwork that is already generated because of the existing federal regulation that is already in place.

H. Sunset Review

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

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on May 1, 2013, the Board submitted a copy of the notice of proposed rulemaking, published at 43 Pa. B. 2587 (May 11, 2013) to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment.

Under section 5(g) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Board has considered all comments submitted.

Under section 5.1(j.2) of the Regulatory Review Act, on _____, 2013, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____, 2013, and approved the final-form regulations.

J. 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 Pa. 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 43 Pa.B. 2587 (May 11, 2013).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

K. Order of the Board

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

- (1) The regulations of the Department of Environmental Protection, 25 Pa. Code Chapter 208, are amended to read as set forth in Annex A.
- (2) The Chairperson 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 Chairperson of the Board shall submit this order and Annex A to the IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (4) The Chairperson 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.

E. Christopher Abruzzo
Acting Chairperson