

**EXECUTIVE SUMMARY**

**FINAL RULEMAKING FOR**

**WATER SUPPLY REPLACEMENT FOR SURFACE COAL MINES**

**25 Pa. Code Chapters 86 – 90**

This final-form rulemaking amends the coal mining regulations at 25 Pa. Code Chapter 87 (relating to Surface Mining of Coal) and 25 Pa. Code Chapter 88 (relating to Anthracite Coal) with associated minor corrections to 25 Pa. Code Chapter 89 (relating to Underground Mining of Coal and Coal Preparation Facilities) and 25 Pa. Code Chapter 90 (relating to Coal Refuse Disposal).

**Purpose of the Final Rulemaking**

This final-form rulemaking is authorized under The Clean Streams Law, the Surface Mining Conservation and Reclamation Act (“PA SMCRA”), the Coal Refuse Disposal Control Act, the Bituminous Mine Subsidence and Land Conservation Act and Section 1920-A of The Administrative Code of 1929.

The Federal Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §§ 1201—1328) (“Federal SMCRA”) established a “nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.” *See* 30 U.S.C. § 1202(a). SMCRA authorizes the Secretary of the Interior, through the Office of Surface Mining Reclamation and Enforcement (“OSM”), to administer the programs for controlling surface coal mining operations, and to review and approve or disapprove State programs for controlling the same. *See* 30 U.S.C. § 1211(c)(1).

Federal SMCRA allows a State to assume jurisdiction over the regulation of surface coal mining and reclamation operations if the State can administer that program according to Federal standards. *See* 30 U.S.C. § 1253. When a State program is approved by OSM, the State achieves “primacy” over the regulation of its surface coal mining program. The Commonwealth achieved primacy in 1982. *See* 47 Fed. Reg. 33050, 33076 (July 30, 1982). To maintain its jurisdiction over regulation of coal surface mining activities, the Commonwealth must maintain a State program in accordance with the requirements of Federal SMCRA, and with “rules and regulations consistent with regulations issued by the Secretary.” *See* 30 U.S.C. § 1253(a)(1) and (7). State laws must be consistent with the provisions of Federal SMCRA, 30 U.S.C. § 1255(a), and any provision of State law that provides for more stringent land use and environmental controls and regulations shall not be construed to be inconsistent with Federal SMCRA, 30 U.S.C. § 1255(b). In other words, a State program must be at least as effective as the requirements in SMCRA but may be more stringent.

This final-form rulemaking addresses inconsistencies between the Commonwealth’s surface coal mining program and Federal requirements relating to water supply replacement so that the Commonwealth may maintain primary regulatory authority over coal mining activities in Pennsylvania. This final-form rulemaking also aligns the language regarding water supply replacement for anthracite and bituminous surface mining with underground coal mining to the extent allowed by statute and ensures that the regulations are otherwise consistent with State law and Department practice, currently implemented through three Technical Guidance Documents (TGDs): *Water Supply Replacement and Compliance* (DEP ID #562-4000-101); *Increased*

*Operation and Maintenance Costs of Replacement Water Supplies on All Coal and Surface Noncoal Sites* (DEP ID #562-4000-102)); and *Water Supply Replacement and Permitting* (DEP ID #563-2112-605).

### **Summary of the Final Rulemaking**

In order to maintain primary regulatory authority over coal mining activities in Pennsylvania, the following regulatory amendments were required by OSM. The definition for "de minimis cost increase" was removed. Prior provisions that allowed operators under certain circumstances to recover costs from the Department for restoring or replacing an affected supply were removed as the statutory authority for those provisions was repealed in 2000. Language that indicated that a Department order to restore or replace a water supply would not affect final bond release was removed. Lastly, temporary water supply requirements were added that specified a temporary supply must be provided within 24 hours if the water supply owner or water supply user is without a readily available alternate source of water and must be adequate to meet the premining needs.

To address regulatory gaps or lack of clarity issues under PA SMCRA, the following amendments were also made in the final-form rulemaking. The definition for "water supply" was updated to now specify that soil moisture is not a water supply, and the definition for "water supply owner" was modified to now include landowners and water supply companies to reflect terminology in PA SMCRA was added. Language requiring permit applications to include calculations regarding the cost of potential replacement and requiring the Department to give advance notice to water supply owners whose water supplies are identified as potentially affected was added.

Clarification was also provided for sampling, laboratory analysis and notice to water supply owners and water supply users requirements. Additional clarification was also provided regarding the obligations to restore or replace an affected supply for any effect to a water supply, even if the effect is minimal. The amendments also specify that operators or mine owners must restore water supplies to meet reasonably foreseeable uses of the existing supply, not only the existing uses of the supply. To more closely mirror the statutory language in PA SMCRA, the concepts of "adequate quality" and "adequate quantity" of the replacement supply have been amended.

Additionally, clarifying language was added to better explain the procedure for determining operation and maintenance (O&M) costs of a replacement supply. Clarification was also added to explain that operators or mine owners must cover O&M costs in perpetuity as the obligation attaches to the land, not to the current water supply owner. Amendments also clarify the O&M requirements in situations when the current water supply owner or water supply user, or both, releases the obligation under a settlement agreement with the operator or mine owner that complies with the regulations and clarifies that an operator may cover O&M responsibilities for multiple water supplies under one bond.

Lastly, clarification of the statutory presumption of liability in PA SMCRA and the available defenses to the presumption was added. A provision that nothing in these regulations would prevent a mine owner or operator from pursuing other legal remedies should they incur costs in

restoring or replacing a supply that is later determined that some other party was responsible for the pollution or diminution of the water supply was included as well.

### **Affected Parties**

The regulated community is comprised of about 400 coal mining businesses, most of which are small businesses. The measures included in this final-form rulemaking will provide clarity to these mine owners and operators regarding compliance standards for water supply replacement and protect the rights of water supply owners and users who may have their water supplies affected by surface mining activities.

### **Outreach (Advisory Committee/Stakeholder Consultation)**

The Department collaborated with the Mining and Reclamation Advisory Board (MRAB), which is composed of representation from anthracite surface mine operators, the Pennsylvania Coal Alliance, the Pennsylvania Anthracite Council, the County Conservation Districts, the Citizens Advisory Council, the Pennsylvania House of Representatives, and the Pennsylvania Senate to develop the proposed rulemaking.

The MRAB's Regulatory, Legislative and Technical (RLT) committee participated in discussions about water supply replacement beginning with the creation of the TGDs noted above. The Department presented concepts for this proposed rulemaking to the MRAB beginning in 2017. After several meetings and exchanges of comments and draft language, the MRAB voted to concur with the Department's recommendation that the proposed rulemaking move forward in the regulatory process on October 25, 2018. The RLT committee reviewed the proposed minor changes from the proposed-to-final-form rulemaking and, on March 16, 2020, recommended the MRAB consider the final rulemaking. At its April 2, 2020, meeting, the MRAB voted to concur with the Department's recommendation that the final-form rulemaking move forward in the regulatory process.

### **Public Comments**

The final-form rulemaking was published on November 2, 2019, opening a 30-day public comment period (49 Pa.B. 6524). No public hearings were held. The public comment period closed on December 2, 2019. Comments were received from one public commenter and the Independent Regulatory Review Commission. All public comments were considered in the preparation of this final-form rulemaking and are addressed in the Comment and Response document.

### **Recommendation**

The Department recommends adoption of this final-form rulemaking.