

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
[25 PA. CODE CHAPTERS. 86, 87, 88, 89 and 90]
Incidental Coal Extraction, Bonding, Enforcement, Sediment Control, and
Remining Financial Guarantees

Order

The Environmental Quality Board (Board) by this order amends Chapter 86 (relating to surface and underground coal mining), Chapter 87 (relating to surface mining of coal), Chapter 88 (relating to anthracite coal), Chapter 89 (relating to the underground mining of coal and coal preparation facilities) and Chapter 90 (relating to coal refuse disposal). The final rulemaking incorporates amendments necessary to bring Pennsylvania's regulatory program into conformance with federal standards for state coal mining regulatory programs. In addition, the final rulemaking revises some requirements for the Remining Financial Guarantee program. The amendments affect requirements relating to incidental coal extraction, bonding, enforcement, sediment control, and Remining Financial Guarantees.

This order was adopted by the Board at its meeting of _____(blank)_____.

A. Effective Date

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information contact William Allen, Chief, Division of Monitoring and Compliance, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard S. Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service, (800) 654-5988 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection (Department) Web site (<http://www.depweb.state.pa.us>).

C. Statutory Authority

This final-form rulemaking is adopted under the authority of Section 5 of The Clean Streams Law (52 P.S. § 691.5); Sections 4(a) and 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.4(a) and 1396.4b); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and Section 1920-A of the Administrative Code of 1929 (71 P.S. 510-20).

D. Background and Purpose

This final regulation is intended to satisfy requirements for maintaining a state primacy program under the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. The amendments in this rulemaking pertain to federally required program changes described in 30 CFR §§ 938.16 (rr), (tt), (vv), (ww), (xx), (zz), (aaa), (ccc), (iii), (jjj), (nnn), (ppp) and (ttt). These requirements were imposed by the federal Office of Surface Mining Reclamation and Enforcement (OSM) on April 8, 1993 ((aaa), (ccc), (iii) and (jjj)), December 29, 1993 ((rr), (tt), (vv), (ww), (xx) and (zz)), July 20, 1994 (nnn) and November 7, 1997 ((ppp) and (ttt)).

Resolving these required amendments is necessary in order for Pennsylvania to maintain primacy in regulating coal mining. Failure to resolve these program deficiencies could result in OSM asserting their jurisdiction over all or part of the mining regulatory program. There is also a risk that the federal funding for the Abandoned Mine Land reclamation program could be reduced or eliminated if these deficiencies persist.

These requirements relate to notification of the decision by the Department to approve the continuation of an exemption from the permitting requirements for coal that is mined incidental to noncoal mining, violation review for permit approval, permitting exploration on land designated as unsuitable for mining, self-bonding, and the stability of large impoundments. The federal regulations noting these program deficiencies provided deadlines for Pennsylvania to correct them. These deadlines are long overdue.

The amendments in this rulemaking represent the outcome of discussions between the Department and OSM relative to the fulfillment of requirements set forth in the federal rules. The amendments in this rulemaking have been informally approved by OSM. These changes will be formally submitted to OSM as an amendment to the Pennsylvania coal mining program and the Department will request that OSM determine that the outstanding deficiencies noted above have been satisfied.

In addition, this regulation addresses issues that have surfaced in administering the Remining Financial Guarantee program. These issues are related to operational requirements and the conversion to a conventional bonding system (CBS) undertaken beginning in August 2001.

When the current Remining Financial Guarantee regulations were finalized in 1996, the Department used an alternate bonding system (ABS). The Department initiated the transition from an ABS to a CBS in 2001 and completed the implementation of the program in 2002. Under the ABS, bond amounts were based on per-acre rates and bond funds were supplemented by a per-acre reclamation fee and other funds in order to assure that the Commonwealth had enough bond money to complete the reclamation in the case of a forfeiture.

Under the CBS, the reclamation cost is calculated using bond rate guidelines for the specific reclamation tasks. Bond rate guidelines are updated routinely to keep up with changes in reclamation costs. The CBS is also referred to as full-cost bonding because the bond amount is determined based on the total projected reclamation cost. Bond amounts are no longer calculated on a per-acre basis. The regulations governing the Remaining Financial Guarantee program are being amended to better align with the transition to full-cost bonding for all mining operations.

Finally, the regulations include several minor editorial changes needed to correct spelling, spacing and punctuation errors.

E. Summary of Changes to the Proposed Rulemaking

§ 86.1. Definitions

The definition of *Owned or controlled* and *owns or controls* is being corrected to include the reference to the term defined in federal regulations which is “own, owner, or ownership” rather than “owned or controlled and owns or controls” as was proposed.

§ 86.133. General Requirements

Section 86.133 (d) is being revised to clarify that the permit application for exploration on areas designated as unsuitable for mining and the documentation of the decision to approve or deny the application are available for review by the public. This change is the result of analysis that concluded that the proposed regulations did not address the requirement in the federal regulations at 30 CFR 772.12(e) that these materials be available to the public.

§ 88.321. Disposal of noncoal wastes.

Section 88.321 is being revised to more closely reflect the federal regulation. This is accomplished by changing the phrase “on or near” to “in.”

§90.112. Hydrologic balance: dams, ponds, embankments and impoundments—design, construction and maintenance

Section 90.112 (c) (2) has been revised to include the phrase “runoff from” as it relates to a storm event.

§ 90.133. Disposal of noncoal wastes

Section 90.133 is being revised to more closely reflect the federal regulation. This is accomplished by changing the phrase “on or near” to “in.”

Remining Financial Guarantees

§86.282. Participation Requirements

Section 86.282 (a) (2) is being revised to clarify that the reclamation liability is for a proposed mining area rather than the permitted area. This change was made in response to comments.

Section 86.282 (a) (3) is being added to clarify that an operator who has participated in the remining financial guarantee program and has met its obligations is eligible for subsequent remining financial guarantees.

F. Summary of Comments and Responses on the Proposed Rulemaking

§ 86.1. Definitions

(C) 30 C.F.R. § 701.5 contains a definition for "*own, owner, or ownership,*" and not a definition for "*owned or controlled and owns or controls.*"

(R) The wording of the regulation has been changed to match the defined term in the federal regulations "own, owner, or ownership."

§ 86.37. Criteria for Permit Approval or Denial

(C) The definition of "violation" is unclear as 30 C.F.R. § 701.5 includes two definitions of "violation."

(R) The federal regulations contain a definition for the term "violation," which is being referenced in this rulemaking, and the additional defined term "Violation, failure or refusal." The term "violation, failure or refusal" is a separate term in the federal regulations. Therefore, no changes need to be made to the proposed regulatory amendment.

§ 86.129. Coal exploration on areas designated as unsuitable for surface mining operations.

(C) The permit term for this permit should be consistent with other five-year permits issued by the Department.

(R) This permit is for exploration only and is limited to no more than 250 tons of coal extraction, therefore the two-year permit term is appropriate.

§ 86.133. General Requirements

(C) The proposed revisions to §86.133 prevents the Department from waiving the UFM permit requirement.

(R) The federal regulations at 30 CFR 772.12 require a permit for exploration on areas designated as unsuitable for mining, therefore waiving the permit requirement is not an option.

§ 86.159 Self-bonding

(C) Subsection (a)(2) contains overly broad language relating to “all applicable Federal and State laws.”

(R) This language is taken verbatim from the federal regulations. Therefore a change has not been made, because the state regulation is intended to mirror the federal regulation.

§§ 86.165 and 86.281 to 86.284. Remining Financial Guarantees

(C) The language in § 86.282(a) does not clarify that an operator who demonstrates that it meets the requirements to participate in the Remining Financial Guarantee Program for the first time, will be automatically eligible for future Remining Financial Guarantees for future permits from the Department.

(R) The regulation has been amended to add section 86.282 (a)(3) to address this.

(C) The Department has proposed to remove the letter of credit option for the operator to demonstrate financial responsibility pursuant to § 86.282(a)(2). The Department should not undermine a bank’s (or other lending institution’s) ability to: (1) evaluate an operator’s financial stability and (2) issue a letter of credit based on that informed and highly regulated decision.

(R) These regulations do not apply to banking operations and so cannot impact how a bank operates or makes lending determinations.

(C) The option to post a letter of credit should not be eliminated. DEP and the Board should provide some evidence from the program’s experience to provide justification for this change or retain the existing language in the final-form regulation.

(R) A letter of credit can still be used as a bond. This regulation only eliminates the use of a letter of credit as the financial responsibility demonstration for a remining financial guarantee. While there have only been four guarantees for which the Commonwealth was required to spend money for the reclamation, three of these four were supported by letters of credit.

(C) The following proposed revision to § 86.282(a)(2) by the Department is vague and open to interpretation. The Department does not define “permitted remining site.” It is not clear what area would be included in a “permitted remining site.”

(R) The regulation language has been amended to change the word “permitted” to “proposed.” This will clarify that the posting of the surety bond is an option for the initial bonding transaction on a permit application where a remining financial guarantee is requested and approved.

(C) Regarding the Department’s proposed § 86.283(f), the Department should clarify the proposed subpart to limit the circumstances to when a discharge is related to the remining activities.

(R) The intent of the regulation is to require a replacement of a remining financial guarantee at any time liability for a pollutional discharge is incurred for that permit, not only when it is related to the remining activities. This will protect the remining financial guarantee program from the liability associated with long-term treatment.

§ 87.119. Hydrologic Balance: Water Rights and Replacement

(C) A surface mine operator or mine owner who incurs costs necessary to successfully appeal a Department order for a water supply replacement should be afforded the same cost recovery rights as the Department. The Preamble states that “[t]his correction is necessary due to a revision to the SMCRA.” Section 525(e) of SMCRA allows for the recovery of costs and expenses, including attorney fees, by *either* party. The Department should not, by way of the proposed regulation, unilaterally eliminate a surface mine operator’s or mine owner’s cost recovery rights.

(R) The commenter has confused the federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq., with the Pennsylvania Surface Mining Conservation and Reclamation Act (SMCRA), which the preamble refers to. In December 2000, the operator cost recovery language was repealed from SMCRA. The regulation revision reflects the amendment of SMCRA by the repeal of § 4.2(f)(5).

§§ 88.321 and 90.133. Disposal of Noncoal Wastes

(C) According to 30 C.F.R. § 938.16(ttt), “Pennsylvania shall submit a proposed amendment to sections 88.321 and 90.133, or otherwise amend its program, to require that no noncoal waste be deposited in a coal refuse pile or impounding structure,” rather than “on or near” a refuse pile or impounding structure. The Department’s proposed amendments to §§ 88.321 and 90.133 read as follows:

(R) The regulation has been revised to change the phrase “on or near” to the word “in.”

§ 90.112. Hydrologic Balance

(C) The Department's proposed revisions to § 90.112 (c)(2) omit the term “runoff.”

(R) The regulation language has been revised to include the term runoff.

Remining Financial Guarantees Generally

(C) The Remining Financial Guarantee program in Pennsylvania has resulted in reclamation of Abandoned Mine Lands. It is of great importance that Pennsylvania continue to facilitate reclamation of Abandoned Mine Lands whenever possible.

I respectfully request that EQB keep me informed when it moves to adopt the proposed regulation as a final rule.

(R) The Department agrees that the Remining Financial Guarantee program has been effective at encouraging reclamation of abandoned mine lands. The regulatory changes are focused on protecting the program so that it can continue doing so. The Department will keep in contact with the commentator as the rulemaking process progresses.

G. Benefits, Costs and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the proposed regulation.

The amendments will enable the Commonwealth to fulfill its primacy obligations and retain primary enforcement responsibility over coal mining operations. They will also allow for more effective management of the Remining Financial Guarantee program.

Compliance Costs

It is not anticipated that the changes will impose any total additional compliance costs on the regulated community.

Compliance Assistance Plan

The Department will provide written notification to all coal mine operators to inform them of the final promulgation of these regulatory changes. The Department will also hold roundtable meetings with mine operators and consultants to explain program changes and answer questions.

The Department will update its fact sheets explaining the regulations. The Department will continue to meet with affected landowners and assist them in understanding the amended regulations.

Paperwork Requirements

The amendments will require the Department to update its fact sheets explaining the law and regulations.

H. Pollution Prevention

The rulemaking will not modify the pollution prevention approach by the regulated community and maintains the multi-media pollution prevention approach of existing requirements in 25 Pa. Code.

I. Sunset Review

These regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on (date), the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 2373, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) 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 Department has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on (blank), 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 (blank) and approved the final-form regulations.

K. 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 Pennsylvania 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 40 *Pennsylvania Bulletin* 2373 (Saturday, May 1, 2010).

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

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

- (a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code*, Chapters 86, 87, 88, 89 and 90, are amended to read as set forth in Annex A.
- (b) 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.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately.

BY:

JOHN HANGER
Chairperson
Environmental Quality Board