

## **Comment/Response Document**

**Rulemaking on 25 Pa. Code Chapter 209a Surface Mines**

This document presents comments submitted to the Environmental Quality Board concerning the proposed Surface Mining rulemaking (25 *Pa. Code* Chapter 209a) and the Department's responses to those comments. The Environmental Quality Board approved publication of the proposed amendments at its meeting on May 16, 2007. The proposed rulemaking was published in the *Pa. Bulletin* on September 1, 2007 (37 *Pa. B.* 4754), commencing a 30-day public comment period that concluded on October 1, 2007.

List of Commentators

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## Comments and Responses

### 1. Selection of Sections Adopted by Reference

**Comment:** The Department should explain how it determined to adopt, and therefore enforce, selected sections of 30 CFR Parts 56 and 77. Commentator 2

**Response:** The Department chose to reference the portions of 30 CFR 56 and 77 that focused on: the activities in which the most serious accidents occurred, provisions that the Department inspection staff had sufficient expertise to regulate, and provisions applying to areas where the Department staff would normally go during the environmental and safety inspections they currently conduct. Provisions that would require the Department inspection staff to obtain and be trained in the use of specialized equipment, would require them to expand the area where they go when they conduct their routine inspections, or that contain standards already addressed by other regulations of the Department were not adopted.

For example, 77.1100 *Fire protection; training and organization* and 77.1101 *Escape and evacuation* were not chosen. The documentation for these items is normally kept at the company office, a location not normally visited during a Department inspector's routine inspection.

Sections 77.1109 (c)-(e) (relating to quantity and location of firefighting equipment) were selected because firefighting equipment may deteriorate over time. Additionally, the Department inspectors routinely work in areas where mining equipment is operating and firefighting equipment is required to be present on mining equipment.

Some additional sections of the MSHA regulations that weren't adopted were those related to electricity (with 2 exceptions) and those related to explosives. Enforcement of the sections of the MSHA regulations regarding protection of power conductors from mobile equipment and the movement or operation of equipment near high-voltage power lines can be accomplished by observation and do not require skills gained by specialized training. The remaining sections regarding electricity were not adopted because their enforcement would require Pennsylvania inspectors to obtain specialized training. The sections of the MSHA regulations regarding explosives were not adopted because the Department regulations regarding explosives in 25 PA Code Chapters 77, 87, 88, and 211 are adequate.

### 2. Compliance Assistance

**Comment:** While there is merit in a compliance assistance program to improve safety, the details of a Department inspector's actions as described in the Preamble are not clear for several reasons. The EQB should explain the following:

- How is a DEP inspector qualified to determine how MSHA would interpret its federal regulations where the EQB left sole jurisdiction to MSHA?
- What expectation does it place on an operator when a DEP inspector makes a determination that a violation under MSHA's sole jurisdiction "needs to be addressed?"

- What recourse does an operator have if the operator disagrees or a DEP inspector's interpretation differs from MSHA's interpretation? Commentator 2

**Response:** The possibility of a Pennsylvania surface mine inspector interpreting a MSHA regulation differently than an MSHA inspector is minimal. However, the Department will work closely with MSHA to further minimize differences in the interpretation of all of MSHA's regulations. Additionally, all Pennsylvania surface mine inspectors have routine MSHA safety training. Some of Pennsylvania's surface mine inspectors are "MSHA certified" safety instructors. If a Pennsylvania inspector believes that there is a deficiency of a MSHA safety regulation that Pennsylvania has not adopted, the inspector will mention it to the Permittee as an item that may need to be addressed.

Permittees are not obligated to act on correcting deficiencies (with respect to MSHA regulations not adopted by the Department) that are brought to their attention by Department inspectors. Compliance assistance is pointing something out and letting the permittee take action if, and only if, the permittee desires. For added clarity, the Preamble of these regulations will be modified to more clearly explain the Department's compliance assistance initiative.

### 3. Section 209a.10 Auger Mining

**Comment:** For consistency with the rest of this regulation, Section 209a. 10(b) should use the term "Department" as it is defined in 25 Pa. Code Section 1.1. Commentator 2

**Response:** This change has been made.

### 4. Section 209a.42 Accident Reporting

**Comment:** The requirement to report all accidents, including minor accidents and occupational injuries, within 1 hour of their occurrence would be overly burdensome to the mining industry as well as the Department. Commentators 1 and 2

**Response:** The Department agrees that reporting all accidents to the Department within 1 hour of the occurrence of the accident would be overly burdensome to the mining industry and the Department. The regulations have been amended to require that only accidents that result in death or serious injury, or have the potential to cause death or serious injury, be reported to the Department within 1 hour.

### 5. Section 209a.43 Alternative Standards

**Comment:** Section 209a.43 Subsections (a) and (b) allow alternative standards for past and future decisions by MSHA. However, this section does not address pending filings with MSHA and effectively prohibits alternative standards. At the time the regulation becomes effective, an operator, that previously submitted a petition and is awaiting a response from MSHA, could not comply with the requirement in Paragraph (b)(1) to provide a copy of the petition and supporting materials to DEP "upon submission to MSHA." We recommend amending this section to allow

operators with pending petitions to submit the appropriate information to DEP within a reasonable amount of time after the regulation becomes effective. Commentator 2

**Response:** The Department has amended this section to allow for acceptance of pending filings of petitions for alternative standards that were submitted to MSHA prior to this regulation's effective date, and acted on by MSHA after the regulation's effective date.

#### 6. Section 209a.44 Access to Documents

**Comment:** This section is too general because it gives the Department access to all records prepared to comply with 30 CFR Parts 50, 56 and 77. The Department should only have access to the records prepared to comply with the federal regulations adopted by reference. The EQB is not directly adopting 30 CFR Part 50, and is adopting a minority of the sections in 30 CFR Parts 56 and 77. The EQB should explain why the Department needs access to all information prepared to comply with 30 CFR Parts 50, 56 and 77 rather than just the provisions the EQB is adopting by reference in this regulation. Furthermore, giving Pennsylvania inspectors access to documents that apply to MSHA regulations that have not been adopted by reference may create confusion in the field as to whether the Pennsylvania inspector can enforce the MSHA regulations which were not adopted by reference. Commentators 1 and 2

**Response:** The Department's authority and responsibility to investigate accidents flows from the Surface Mining Conservation and Reclamation Act (52 P.S. §1396.1 – 1396.18h), the Noncoal Surface Mining Conservation and Reclamation Act (52 P.S. §§3301 - 3326), section 2(f) of the General Safety Law (43 P.S. §25-2(f), and Section 1917-A of the Administrative Code of 1929 (71 P.S. §510-17). This authority is not limited to the safety issues addressed in Chapter 209a. Limiting the Department's access to records that MSHA requires operators to keep may hinder the Department's ability to thoroughly investigate accidents. Although the EQB has decided not to incorporate by reference all sections of the MSHA regulations, all of the sections are interrelated. It is reasonable to require access to any documents relating to mine safety to ensure that thorough investigations are conducted to determine the causes of accidents. This effort will allow mine operators to apply effective preventative measures to minimize the probability that accidents of a similar nature will occur in the future.

The Department does not see the concern regarding confusion in the field as to which regulations are to be enforced. There is no ambiguity as to which MSHA regulations are adopted by reference. Thus, there is no ambiguity as to which standards Pennsylvania inspectors can enforce.