

**NOTICE OF FINAL RULEMAKING  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ENVIRONMENTAL QUALITY BOARD  
25 PA. CODE CHS. 209 AND 209a COAL MINES**

**Order**

The Environmental Quality Board (Board) by this order rescinds Chapter 209 (relating to coal mines) and adds Chapter 209a (relating to surface mining) to read as set forth in Annex A. This final-form rulemaking revokes existing, antiquated anthracite and bituminous safety regulations and replaces them with selected Federal safety regulations that are adopted by reference. In addition, selected Federal safety regulations for industrial mineral mines are also adopted by reference.

This order was adopted by the Board at its meeting of \_\_\_\_\_, 2008.

**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 Joseph G. Pizarchik, Director, Bureau of Mining and Reclamation, P. O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103; or Marc Roda, 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) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) website: [www.depweb.state.pa.us](http://www.depweb.state.pa.us).

**C. Statutory Authority**

The final-form rulemaking is adopted under the authority of:

1. Section 4.2 of the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P. S. § 1396.4b) and section 11(a) of the Noncoal Surface Mining Conservation and Reclamation Act (NSMCRA) (52 P. S. § 3311(a)), which authorize the Department to promulgate regulations for the health and safety of those persons engaged in surface mining and for the protection of the general public.
2. Section 2(f) of the General Safety Law (43 P. S. § 25-2(f)), which requires, among other things, operators of surface industrial mineral mines to adopt measures to protect persons working therein.

3. Sections 1917-A and 1920-A of The Administrative Code of 1929 (71 P. S. §§ 510-17 and 510-20), which authorize the Board to adopt regulations to prevent the occurrence of a nuisance and to promulgate rules and regulations necessary for the proper work of the Department.

#### **D. Background and Purpose**

The Department's surface mine safety program is implemented by surface mining conservation inspectors. As part of the environmental inspection, the inspector also identifies unsafe conditions and works with the operator to correct those conditions before an accident occurs. The inspector's ability to identify and correct unsafe conditions is hampered by the inadequacy and limited scope of the surface mining safety regulations in Chapter 209. Chapter 209, Subchapter A (relating to general safety in bituminous coal strip mines) is antiquated and differs from safety requirements established by the United States Department of Labor, Mine Safety and Health Administration (MSHA). This difference in standards is a source of confusion and jeopardizes safety at bituminous surface mines. The effectiveness of the Department's safety program at anthracite surface mines is compromised because the existing regulations are limited to blasting. There are no Pennsylvania safety regulations for anthracite surface mines. Furthermore, the Chapter 209, Subchapter B anthracite surface coal mine blasting regulations are not only out-of-date, but are unneeded. The storage, handling and use of explosives at anthracite surface mines are addressed by Chapters 88 and 211 (relating to anthracite coal; and storage, handling and use of explosives). Finally, Department safety efforts for surface industrial mineral mines are hampered because there are no Pennsylvania safety standards for these mines.

This final-form rulemaking addresses the Rendell Administration's initiative to develop a "world class mine safety program." To implement this initiative, Chapter 209 is rescinded and replaced with new standards for coal and industrial mineral surface mines. For the most part, this final rulemaking adopts by reference MSHA safety standards contained in 30 CFR Parts 56 and 77 (relating to safety and health standards-surface metal and nonmetal mines; and mandatory safety standards, surface coal mines and surface work areas of underground coal mines). By adopting the MSHA standards, the Department's safety standards are modernized and additional costs on operators are minimized. Finally, by eliminating inconsistencies between the Department's standards and the MSHA standards, the possibility for confusion in the field is minimized.

These amendments achieve the Department's goal of providing superior safety at surface mines in this Commonwealth, in the most cost effective and the least intrusive manner possible. The provisions of the MSHA regulations adopted by this final-form rulemaking are: those that address the most significant risk to surface miners in this Commonwealth, provisions that the Department inspection staff have sufficient expertise to implement, and provisions that apply to areas where the Department staff would normally go during the environmental and safety inspections they currently conduct. The Board did not adopt the MSHA regulations that would require the Department inspection staff to obtain and be trained in the use of specialized equipment or would require Department inspectors to expand their routine inspection area. In addition, the Board did not adopt the MSHA regulations which contain standards that are addressed by existing Department regulations. This approach allows for improvements in overall safety without increased costs.

The Department will work closely with MSHA and provide training to its inspectors 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.

The provisions of these regulations that are more stringent than the MSHA regulations are related to auger mining. MSHA regulations apply nationally and are necessarily broad. In order to reflect conditions in Pennsylvania's coal mines, these regulations require additional benching of highwalls at mines where augering occurs. These auger mining provisions are more specific than the MSHA requirements.

The Department's accident reporting requirements are less stringent than those of MSHA. During accident investigations the Department will defer to MSHA's lead and provide assistance. Since the Department's role in these investigations is secondary to MSHA's, this regulation requires reporting of accidents to the Department in 1 hour. MSHA requires reporting of accidents within 15 minutes. Additionally, the Board has not adopted provisions of the MSHA regulations directly related to incidents that cause occupational illnesses or injuries and will not require reporting of these incidents. The only incidents the Department requires to be reported are those defined in the regulations as accidents.

On many surface mine sites, the Department conducts inspections more frequently than MSHA. Effective safety programs rely on the principle of prevention. Constant reminders of hazards helps prevent complacency that can lead to accidents. With these final-form regulations in place, the higher awareness provided by the Department's inspectors will help prevent accidents and result in a safer work environment at surface mines in this Commonwealth.

At a meeting on January 25, 2007 the Mining and Reclamation Advisory Board (MRAB) considered this proposed rulemaking as it applies to surface coal mining. The MRAB unanimously recommended that the Board move forward with the proposed rulemaking. On January 10, 2008 the MRAB recommended that the Department proceed with the final-form rulemaking with the changes specified below.

#### **E. Summary of Changes Made in the Final-form Rulemaking**

##### *§ 209a. 10(b) (Auger Mining)*

Throughout the regulation, "Department" has been used instead of "Department of Environmental Protection." For consistency, "Department of Environmental Protection" found in § 209a. 10(b) has been changed to "Department." This change was made in response to a comment described below.

##### *§ 209a.42(a) (definition of "accident")*

The definition of "accident" has been modified to specify what constitutes an accident under this regulation. The accident reporting section of the proposed regulation is not an MSHA regulation reference, but uses MSHA regulations as a guideline. The definition of accident in the

final-form rulemaking is a subset of what constitutes an accident for MSHA. The MSHA accident reporting regulations apply to surface and underground mining. For the purposes of these surface mining regulations, MSHA's definition of an accident is overly broad because it includes events that occur on the surface and underground. In response to a comment described below, the definition of accident has been modified. The definition of accident is now limited to incidents that occur on surface mines that cause death or serious injuries, or have a reasonable potential to do so. In addition, the definition of accident now includes rock bursts.

*§ 209a.42(b) (Accident Notification)*

The provisions of the proposed regulation requiring the Department be contacted within an hour of an accident are amended to specify how to contact the Department. Specifically, the final-form rulemaking directs the operator of a mine where an accident occurs to contact the District Mining Office having jurisdiction over the mine. Additionally, the final rulemaking provides that if contact cannot be made with the District Mining Office, the operator shall contact the Department's 24 hour emergency telephone number. These changes were made to enhance consistency and clarity.

*§ 209a.42(c) (Accident Reporting)*

The provisions of the proposed regulation which require that MSHA accident reporting forms be submitted to the Department have been revised. Specifically, the final-form rulemaking directs the operator of a mine where an accident occurs to mail to the Department's District Mining Office having jurisdiction over the mine all forms submitted to MSHA regarding the accident. The final-form rule making has been amended to eliminate the reference to a specific MSHA form. Additionally, it sets a time of 10 days in which the forms must be submitted to the Department. These changes were made for consistency and clarity.

*§ 209a.43 (Alternative Standards)*

The proposed rulemaking has been amended to add a subsection addressing pending mine-specific variance requests. This new subsection provides that the Department, for petitions for mine-specific alternative standard requests that are pending with MSHA upon the effective date of this rulemaking, will adopt that modified mine-specific safety and health standard upon the operator's submission of a copy of MSHA's approval of the alternative standard to the Department. This change was in response to a comment described below.

**F. Summary of Comments and Responses on the Proposed Rulemaking**

*Selection of Sections Adopted by Reference*

A commentator asked how the Board determined which selected sections of 30 CFR Parts 56 and 77 to adopt, and therefore enforce.

The Board chose to adopt the portions of 30 CFR 56 and 77 that focus on: the activities in which the most serious accidents occurred, provisions that the Department inspection staff have

sufficient expertise to regulate, and provisions applying to areas where the Department staff normally goes during the environmental and safety inspections they currently conduct. The federal provisions which require expertise beyond that of the Department's inspection staff were not adopted. Also not adopted were provisions that would require the Department inspection staff to obtain and be trained in the use of specialized equipment, or which would require the inspectors to expand their routine inspection areas. Finally, the Board did not adopt federal provisions that are already addressed by other Department regulations.

### *Compliance Assistance*

A commentator pointed out that while there is merit in a compliance assistance program to improve safety, the details of a Department inspector's actions were not clearly explained in the preamble of the proposed rulemaking. The commentator questioned how a DEP inspector is qualified to determine how MSHA would interpret its federal regulations where the EQB left sole jurisdiction to MSHA. Additionally, the commentator asked what expectations will be placed on an operator offered compliance assistance, what recourse an operator has if the operator disagrees with the Department's interpretation, or what if MSHA's interpretation of the regulation differs from the Department's.

All Pennsylvania surface mine inspectors have routine MSHA safety training, and some surface mine inspectors are "MSHA certified" safety instructors. The Department has the statutory authority, and obligation, to improve the safety and safety awareness on mine sites. For example, when an inspector has the expertise to clearly identify non-compliance with an MSHA regulation, he or she may provide assistance for mine operators in complying with the MSHA regulations that the Department has not adopted. If a Pennsylvania inspector is aware of a violation of an MSHA safety regulation that the Commonwealth has not adopted, the inspector will point out the condition and explain to the permittee that it may be a violation of an MSHA regulation. Compliance assistance will be used in identifying potential MSHA compliance issues and letting the permittee take action at their discretion.

### *Auger Mining*

A commentator recommended that 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 1.1n instead of Department of Environmental Protection.

This change has been made to the final-form regulation.

### *Accident Reporting*

Commentators stated that 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.

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.

#### *Alternative Standards*

A commentator stated that alternative standards for past and future decisions by MSHA are allowed, but pending filings with MSHA are not addressed.

The Board has amended this final-form regulation to provide for adoption of a mine-specific alternative standard that is pending with MSHA and approved after the effective date of this final rulemaking. To obtain the Department's approval, the mine operator must submit a copy of the MSHA approval of the mine-specific alternate standard to the Department.

#### *Access to Documents*

Commentators expressed that the Department should only have access to the records prepared to comply with the federal regulations adopted by reference and not have access to all records required by MSHA.

Limiting the Department's access to records that MSHA requires operators to keep may hinder the Department's ability to thoroughly investigate accidents. 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.

### **G. Benefits, Costs and Compliance**

#### *Compliance Costs*

This final-form rulemaking will not impose additional compliance costs on the regulated community. Surface mines in this Commonwealth must already comply with these Federal safety regulations. In fact, the implementation of this rulemaking should result in cost savings in that accidents will be prevented. There are no additional costs expected to be incurred by the Commonwealth.

#### *Compliance Assistance Plan*

The Department's inspectors will be available to explain the new regulations to each job foreman.

#### *Paperwork Requirements*

This final-form rulemaking establishes two paperwork requirements. First, there is a requirement to submit to the Department copies of the application request to, and MSHA's subsequent approval of, a modification of a health and safety standard that has been incorporated by reference into this final-form rulemaking. Second, there is the requirement to submit to the

Department the same accident reports submitted to MSHA. The only cost to the operator is the cost of copying and mailing these documents to the Department.

#### **H. Pollution Prevention**

The final-form rulemaking will not modify the pollution prevention approach by the regulated community and maintains the multimedia pollution prevention approach of existing requirements in 25 Pa. Code (relating to environmental protection).

#### **I. Sunset Review**

The 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 August 16, 2007 the Department submitted a copy of the notice of proposed rulemaking, published at 37 *Pennsylvania Bulletin* 4754, 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 37 *Pennsylvania Bulletin* 4754 on September 1, 2007.

(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*, Chapter 209a 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:

KATHLEEN A. MCGINTY  
Chairperson  
Environmental Quality Board