

**GENERAL PROVISIONS AND AREAS
UNSUITABLE FOR MINING (#7-331)**

REGULATORY BASICS INITIATIVE

25 PA CODE CHAPTER 86

**SURFACE AND UNDERGROUND COAL MINING: GENERAL
SUBCHAPTER A. GENERAL PROVISIONS
SUBCHAPTER D. AREAS UNSUITABLE FOR MINING**

COMMENT AND RESPONSE DOCUMENT

LIST OF COMMENTATORS

This is a list of corporations, organizations and interested individuals from whom the Environmental Quality Board has received comments regarding the above referenced regulation.

ID	Name/Address	Zip	Submitted 1 pg Summary	Provided Testimony	Req Final Rulemaking
1	Mr. Michael G. Young Director of Regulatory Affairs Pennsylvania Coal Association 212 North Third Street, Suite 102 Harrisburg, PA	17101	S	T	R
2	Independent Regulatory Review Commission 14th Floor 333 Market Street Harrisburg, PA	17101			

COMMENTS AND RESPONSES

Adjudicatory Process

1. Comment: The DEP should adopt an adjudicatory process, rather than a rulemaking procedure, to resolve unsuitable for mining (UFM) petitions. The DEP has acknowledged that it is impossible to resolve a petition through rulemaking within 12 months of receipt, as required by both state and federal law. In fact, the record shows that the average time between submission and final decision is nearly three years. An adjudicatory process would provide for active public participation and input and would at least permit the possibility of resolution within 12 months. Finality and expedited review would also be enhanced. (1)

Response: The average time for petitions received and processed through the regulatory review process during the past five years has averaged 24 months. The Commonwealth makes every effort to process petitions as expeditiously as possible; however, there are many factors which contribute to the additional time required for some petitions. Although the process established by the Regulatory Review Act does require additional time to address a UFM petition, it also provides a more significant level of public participation than provided by an adjudicatory process. Furthermore, in 1992 the General Assembly enacted Section 1930-A of the Administrative Code of 1929, 71 P.S. Section 510-30. Section 1930-A specifically provides the Environmental Quality Board (EQB) with the authority and states it is the EQB's duty to review areas unsuitable for mining petitions and to designate areas unsuitable for mining. Consistent with the law and the Administration's objective to improve public access to information and decision making, no changes have been made to the proposed regulation.

2. Comment: If an adjudicatory procedure is selected, procedures at Section 86.125(b) should be revised to allow cross-examination of expert witnesses, as the federal program does. (1)

Response: An adjudicatory process has not been selected. Therefore, a provision providing for cross-examination of expert witnesses has not been included. The regulatory process does provide specific opportunities for public input. These opportunities consist of the public comment period during the petition study, the public hearing and public comment period following the public hearing on the petition, and in the case of a proposed designation, the public comment period provided following publication of the proposed designation in the *Pennsylvania Bulletin*. This process provides more opportunities for the public to point out problems or inconsistencies in the information provided by the expert or other witnesses than does the adjudicatory process.

3. Comment: PCA opposes the deletion of the requirement that a verbatim transcript be prepared. (86.125) (1)

Response: The requirement for providing a verbatim transcript of the public hearing has not been deleted. The proposed change provides clarification that it is the Department's responsibility to conduct public hearings on petitions and to provide notice of the hearings. The requirement for providing a verbatim transcript of the public hearing is contained in Section 86.125(d).

Metric Units

4. Comment: Metric units of measurement should be deleted or explained in the preamble as a convenient reference, which imposes no substantive requirements. (1)

Response: The final rulemaking includes, where appropriate, equivalent measures in standard international metric system units. Although provided as a convenient reference, metric measurements impose the same requirements as existing standard measurements. Where the standard measurements are approximate, the metric measurements are also noted as approximate.

Definitions

5. Comment: The definition of "fragile lands" should be revised to eliminate the inconsistent and/or redundant inclusion of areas where surface mining is excluded under Section 4.5(h) of the Pennsylvania Surface Mining Conservation and Reclamation Act. (1 and 2)

Response: The Department agrees. The reference to Section 4.5(h) of the Surface Mining Conservation and Reclamation Act has been deleted from the "fragile lands" definition in the final rulemaking.

6. Comment: The definition of "historic lands" should be revised to delete reference to lands "eligible for inclusion on the National Register of Historic Places" in conformance with the revision to Section 86.102(3). (1)

Response: The proposed definition of historic lands is consistent with the language found in federal regulations in 30 CFR Section 762.5, relating to the definition of historic lands. An informal inquiry to the federal Office of Surface Mining's Field Office indicated that deletion of the referenced language would make the definition of historic lands less effective than federal requirements. No change to the proposed regulatory language has been made.

7. Comment: The Department should remove the word "air" from the description in Section 86.123(c)(3) so that it is consistent with the proposed change in the definition of "surface mining operations" in Section 86.1. (2)

Response: The proposed regulatory language in Section 86.123(c) is consistent with the federal language in 30 CFR 764.13(b)(1)(iv). An informal inquiry to the Office of Surface Mining's Harrisburg Field Office indicates that deletion of the word "air" from

Section 86.123(c)(3) would make this section less effective than federal regulations. The existing language provides an opportunity for a petitioner to describe how surface mining operations have, or may, adversely affect air quality.

Occupied Dwelling Waivers

8. Comment: Proposed Section 86.102(9)(ii) should be revised to match the corresponding federal provision. The proposed language does not provide an exception so that waivers obtained prior to the effective date of the federal Surface Mining Control and Reclamation Act do not require a knowing waiver of the 300-foot restriction. (1)

Response: An exception to the requirement for waivers, if the waiver was obtained prior to the effective date of the federal act, has been added to Section 86.102(9).

Economic Impact

9. Comment: The specific changes in the proposed rulemaking that diminish the disproportionate costs on the regulated community should be identified in the Regulatory Analysis Form. (2)

Response: The Department has provided clarification of the proposed changes in Section 86.126(b) by adding paragraphs 1 and 2 and has added an explanation of the cost savings in the Regulatory Analysis Form. The final form regulation provides a more timely decision in those cases where the Environmental Quality Board does not designate an area as unsuitable for mining. The changes will allow the Department to consider issuance of mine permits which may have been delayed because of a petition to have the area designated as unsuitable for mining.

Reasonableness and Clarity

10. Comment: The proposed changes to Section 86.103(2)(ii) could result in a permit being deemed approved through inaction of an agency. (2)

Response: The proposed change is consistent with federal language in 30 CFR Section 761.12(f)(2). This change provides that, in the absence of an objection from an agency, the Department may make a decision concerning the proposed mining operation in conjunction with the requirements of Department regulations in Section 86.37(a)(5) and (6).

11. Comment: We recommend that the term “regulatory decision” be deleted from Subsection 86.126(b) and that subparagraphs be added to differentiate the procedures used when acting on the Department’s recommendation to designate or not to designate areas as unsuitable for mining. The language should include a statement that designations will be promulgated as a regulation in accordance with the Regulatory Review Act. (2)

Response: The Department deleted the term “regulatory decision” and has changed Section 86.126(b) to add two paragraphs, which provide procedures the Board will use for designating areas as unsuitable for mining and for those cases when the Board’s decision is not to designate an area as unsuitable. Applicable statutory citations have been included.

12. Comment: The proposed change to Section 86.125(i), which adds the phrase “or as otherwise established by the Department” is too vague and should be deleted from the final form rulemaking. Alternatively, the Department should clarify how and under what circumstances a different time period will be applied. (2)

Response: The phrase has been deleted from the draft final rulemaking.

13. Comment: Federal requirements at 30 CFR Section 764.19(b) require a final written decision within 12 months of receipt of a complete petition. The proposed changes to Section 86.125(j) provide that the Department will prepare a recommendation to the Board within 60 days of the close of the public comment period. Since the Board must still act on the Department’s recommendation, how will the 12-month requirement be met? (2)

Response: The areas unsuitable for mining process is established by separate statutes that contain somewhat conflicting provisions. Federal statutes and regulations require a final written decision by the regulatory authority within 60 days of a public hearing, or if no hearing is held, within 12 months of the receipt of a complete petition. Commonwealth statutes contain similar requirements. The Administrative Code of 1929, however, requires decisions concerning the designation of areas as unsuitable for mining to be made by the Environmental Quality Board (EQB) through the rulemaking process. Because this regulatory decision requires mandatory legislative and administrative review schedules and an opportunity for additional public comment, it is not possible for the EQB to issue a final written regulatory decision within 12 months. The proposed changes will, however, provide a more timely decision-making process. Under the proposed draft final rulemaking the 12-month statutory requirement will be met when the Department submits a written recommendation to the EQB within 12 months of receipt of a complete petition. The Department would also provide notification and a statement of the reasons for the recommendation to the petitioner and intervenors. If the EQB decision is that an area should not be designated, the petition process would end with the publication of the EQB decision. If the EQB decision is that the area should be designated, the Department would submit a proposed rulemaking in accordance with existing procedures. Although this process does require additional time to reach a final decision, it also provides a more significant level of public participation in decisions concerning designation of areas as unsuitable for mining and is consistent with the Administration’s objectives to improve public access to information and decision making in the Department.

14. Comment: We request that the Board explain what procedure would occur if rather than accepting a Department recommendation, the Board requested additional information or study. (2)

Response: If the EQB requests additional information or study, the Department will provide an appropriate response. The Department routinely provides additional information in response to EQB questions.

One-Page Summary: Comments of Pennsylvania Coal Association To Proposed Rulemaking: Chapter 86 General Provisions and Areas Unsuitable for Mining

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- An adjudicatory process would provide for active public participation and input and would at least permit the possibility of resolution within 12 months. Finality and expedited review would also be enhanced.
- Metric units of measurement would be deleted or explained in the preamble as a convenient reference which imposes no substantive requirements.
- The definition of “fragile lands” should be revised to eliminate the inconsistent and/or redundant inclusion of areas where surface mining is excluded under Section 4.5(h) of the Pennsylvania Surface Mining Conservation and Reclamation Act.
- The definition of “historic lands” should be revised to delete reference to lands “eligible for inclusion on the National Register of Historic Places” in conformance with the revision to Section 86.102(3).
- Proposed Section 86.102(9)(e)(2) should be revised to match the corresponding federal provision. The proposed language does not provide an exception so that waivers obtained prior to the effective date of the federal Surface Mining Control and Reclamation Act do not require a knowing waiver of the 300-foot restriction in SMCRA.
- If an adjudicatory procedure is selected (and it should be), procedures at Section 86.125(b) should be revised to allow cross-examination of expert witnesses, as the federal program does. PCA also opposes the deletion of the requirement that a verbatim transcript be prepared.