

**FINAL-FORM RULEMAKING
BOARD OF COAL MINE SAFETY
[25 PA. CODE CH. 208]**

Prohibiting Electronic Liquid-Vaporizing Devices at Underground Bituminous Coal Mines

The Board of Coal Mine Safety (Board) amends Chapter 208 (relating to underground coal mine safety) to read as set forth in Annex A.

This final-form rulemaking was adopted by the Board at its meeting on [REDACTED].

A. Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact Richard Wagner, P.E., Director, Bureau of Mine Safety, P.O. Box 133, New Stanton, PA 15672, (724) 404-3154; or Christopher Minott, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, 9th Floor, Rachel Carson State Office Building, Harrisburg, PA 17105, (717) 787-9372. Persons with a disability may use the Pennsylvania Hamilton Relay Service by calling (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) web site at www.dep.pa.gov (select "Public Participation," then "Advisory Committees," then "Mining," then "Board of Coal Mine Safety" and then navigate to the Board meeting of [REDACTED]).

C. Statutory Authority

This final-form rulemaking is authorized under section 106.1(a) of the Bituminous Coal Mine Safety Act (BCMSA) (52 P.S. § 690-106.1(a)), which grants the Board the authority to adopt regulations that are necessary or appropriate to implement the requirements of the BCMSA and to protect the health, safety and welfare of miners and other individuals in and about mines. Section 106.1(f)(2) of the BCMSA further provides that regulations may address any hazards not addressed by existing safety standards. This final-form rulemaking imposes a civil penalty. The Department is authorized to assess civil penalties under 52 P.S. § 690-105(16), regarding powers and duties of the Department.

D. Background and Purpose

On July 7, 2008, the BCMSA was enacted, which was the first significant update of the Commonwealth's underground bituminous coal mine safety laws since 1961. Section 106 of BCMSA (52 P.S. § 690-106) establishes the Board, which consists of three members representing mine workers, three members representing underground bituminous coal mine operators and the Secretary of the Department of Environmental Protection who serves as the Board's chairperson.

The purposes of the BCMSA, enumerated under section 103(b) (52 P.S. § 690-103(b)), include the establishment and promulgation of improved mandatory standards to protect the health and safety of miners and other individuals in and about mines. To protect the health and safety of miners and other individuals, this final-form rulemaking amends the smoking prohibition at underground bituminous coal mines to expressly prohibit the use or possession, or both, of electronic liquid-vaporizing devices, including electronic cigarettes, and impose a penalty for violations of the prohibition. By prohibiting the use of or possession, or both, of electronic liquid vaporizing devices at underground bituminous coal mines, this final-form rulemaking addresses both explosive and distraction hazards these devices present at underground bituminous coal mining operations.

Coal mine fires pose a constant danger to the safety of miners and to their livelihood. Underground mine fires pose an added hazard because of the confined environment with remote exits. The Federal government has enacted safety regulations for underground coal mines that has greatly improved the safety of miners. See 30 CFR Part 75 (relating to mandatory safety standards—underground coal mines). However, mine fires and fire injuries remain serious hazards for all coal mining operations. The combination of an electronic cigarette and a lithium-ion battery is a new and unique hazard. There is no analogy among consumer products to the risk of a severe, acute injury presented by an e-cigarette. Fires or explosions caused by the batteries used in electronic cigarette are uncommon. However, the consequences can be devastating and life-altering for the victims. This is especially a concern in the underground mining environment, where explosions in underground mines are caused by accumulations of flammable gas or combustible dust, or both, mixed with air in the presence of an ignition source. While much progress has been made in preventing explosion disasters in coal mines, explosions still occur, sometimes producing multiple fatalities. Preventing fires is essential to the health and safety of mine workers.

Miners, their families, mining companies and others will benefit from the additional safety ensured by the avoided hazards associated with the use or possession of electronic liquid-vaporizing devices at underground bituminous coal mines. Additionally, miners, mine officials, mine operators and the Department will benefit from clarity regarding how the use and possession of these devices are regulated at underground bituminous coal mines.

The BCMSA authorizes the Department to interview individuals at a mine site, investigate them, and conduct inspections of their property to ensure compliance with the act. See 52 P.S. § 690-105(1)—(2). Specifically for smoking-related items, the BCMSA also allows an operator to search individuals in a mine or about to enter a mine, including their clothing and material belongings, for smoking-related items. See 52 P.S. § 690-268(b). Additionally, federal regulations require all operators to have a Mine Safety and Health Administration (MSHA) approved program to insure persons entering underground mines do not carry in smoking materials, matches, or lighters. See 30 CFR 75.1702 (relating to smoking; prohibition). An operator's MSHA approved plan would dictate the frequency of searches and other procedures that would uncover smoking-related items. If an operator finds a smoking-related article at a surface work area, they are not required under the BCMSA to report it to the Department. The Department would become involved in a situation where the violation was reported by an operator, forwarded to the Department as a tip through the MSHA hotline for anonymous tips, or uncovered by a Department inspector. The Department would conduct a follow-up investigation

as appropriate, which may include an inspection of the operator's smoke search and violation log kept pursuant to an MSHA approved smoking safety plan, or interviews with the operator and its employees.

When a search or investigation results in evidence that an individual had smoking-related items at or around an underground mine site, the BCMSA's statutory enforcement provisions currently provide the Department limited options. For a mine operator or mine official, the Department may issue an administrative penalty. *See* 52 P.S. § 690-503 (regarding administrative penalties). Section 690-503 does not apply to other employees at a mine site who are not mine operators or officials. The Department may also decertify an individual for failure to comply with provisions of, or regulations promulgated under, the BCMSA. *See* 52 P.S. § 690-510(b). This is the typical sanction for individuals who engage in conduct, such as bringing combustible material into an underground mine, that puts mine workers at significant risk. However, this sanction cannot be utilized for individuals who do not yet have a certification, such as apprentice miners. Additionally, in some circumstances, initiating a decertification action for violating a smoking, or smoking-related, provision would be unduly harsh and punitive.

To remedy the Department's currently limited options to appropriately penalize the use or possession of e-cigarettes, this rulemaking, promulgated under the Department's statutory authority to assess civil penalties and the Board's authority to promulgate regulations to improve mine worker safety, gives the Department additional regulatory authority to assess a civil monetary penalty. Under this rulemaking, the Department may assess a civil penalty for the regulatory maximum amount for each violation, which is currently \$342. This amount is the maximum civil penalty available under Federal law. The civil penalty provides the Department with flexibility to punish smoking safety standard violations where decertification may not be appropriate. As an action taken by the Department, the penalty would be appealable to the Environmental Hearing Board.

This final-form rulemaking also separately distinguishes the prohibition at surface work areas of underground bituminous coal mines from the prohibition inside these mines.

E. Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking

This final-form rulemaking amends the existing smoking prohibition at § 208.375 (relating to smoking prohibition), which applies at surface work areas of underground bituminous coal mines and adds an additional section, § 208.376 (relating to smoking prohibition: underground areas).

§ 208.375. Smoking prohibition: surface work areas

Subsection (a) retains the existing smoking prohibition at surface work areas of underground bituminous coal mines, which incorporates the Federal regulation at 30 CFR 77.1711 (relating to smoking prohibition). No changes were made to this subsection from proposed to final-form rulemaking.

Subsection (b) expressly prohibits electronic liquid-vaporizing devices and authorizes the imposition of a penalty for violations of this section. The penalty refers to the penalty imposed under Federal law, so as not to be more stringent. *See* 30 CFR 100.5(d) (relating to

determination of penalty amount; special assessment), which is adopted and incorporated herein by reference. Under the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C.A. §§ 2461—2467), the maximum penalty is updated every year to reflect inflation and is currently set at \$342, as of January 14, 2021. See 86 FR 2970 (January 14, 2021). The penalty is not exclusive of any other enforcement option the Department determines is warranted under the particular circumstances of the violation. The Department will review whether to pursue other enforcement actions, in addition to levying a civil penalty, on a case by case basis as warranted by the particular facts giving rise to the violation.

Subsection (b) has changed from the proposed rulemaking. The Board has determined that violating a smoking, or smoking-related, prohibition is severe enough of an offense that no circumstances would warrant deviating from the relatively small Federal maximum civil penalty. See 30 CFR 100.5(d). Therefore, the Board has opted to promulgate the final-form regulation without discretion to reduce the civil penalty from the Federal maximum amount.

§ 208.376. Smoking prohibition: underground areas

Subsections (a)—(c) are based on the existing provisions of the smoking prohibition in underground bituminous coal mines from section 268(b) of the BCMSA (52 P.S. § 690-268(b)) and add clarification that this prohibition applies to the use and possession of electronic liquid-vaporizing devices. Subsection (a) prohibits smoking or the use of an open flame, subsection (b) prohibits the possession of smoking materials and subsection (c) authorizes operators to search any individual entering the mine. No changes were made to these subsections from proposed to final-form rulemaking.

Subsection (d) authorizes the imposition of a penalty for violations of this section. Just as in § 208.375, described previously, the penalty refers to the penalty imposed under Federal law, so as not to be more stringent. See 30 CFR 100.5(d). Under the Federal Civil Penalties Inflation Adjustment Act of 1990, the maximum penalty is updated every year to reflect inflation and is currently set at \$342 as of January 14, 2021. See 86 FR 2970. The penalty is not exclusive of any other enforcement option the Department determines is warranted under the particular circumstances of the violation. The Department will review whether to pursue other enforcement actions, in addition to levying a civil penalty, on a case by case basis as warranted by the particular facts giving rise to the violation.

Subsection (d) has changed from the proposed rulemaking. At the suggestion of the Independent Regulatory Review Commission (IRRC), the list of prohibited items in subsection (d) was changed to a reference to “the items identified in subsection (b)” to improve clarity. Prior to the change, the lists in subsection (b) and subsection (d) were slightly different, which could have caused confusion for the regulated community. Additionally, a change was made to require the maximum allowable penalty under 30 CFR 100.5(d) for violating smoking-related mandatory safety standards, for the same reasons this change was made in § 208.375.

F. Summary of Comments and Responses on the Proposed Rulemaking

The proposed rulemaking was adopted by the Board at its meeting on September 1, 2020 and was published at 51 Pa.B. 1316 (March 13, 2021). No public hearings were held. The 30-day public comment period closed on April 12, 2021.

The Board received one public comment from the American Lung Association (ALA) and comments from IRRC. The ALA comment was in support of the proposed regulation. IRRC had three comments. A summary of IRRC's comments are as follows:

1. IRRC commented that the Department should explain its statutory authority to assess a civil penalty beyond the enforcement remedies listed in Chapter 5 of the BCMSA (relating to Enforcement and Remedies). IRRC also noted two additional concerns. First, the process to determine whether an individual has violated the section was not explained. Second, §§ 208.375(b)(2) and 208.376(d)(2) did not explain when the Department would or would not implement other remedies available to it.

2. IRRC noted that, for clarity, subsections (b) and (d) of § 208.376, which both state smoking-related articles that may not be carried into mines, should be revised to contain identical lists or explain why such a revision should not take place.

3. IRRC commented that the number of individuals affected by the regulation should be included in the RAF submitted with the final-form regulation. IRRC also asked the Board to estimate the cost to the regulated community and provide the number of individuals who have been decertified for violating existing smoking prohibitions.

In response to IRRC's first comment, the Department has included in Section D of the Preamble to this final-form rulemaking a more detailed description of its statutory authority to assess civil penalties and how the civil penalties in this final-form rulemaking would be assessed. In response to IRRC's second comment, the list in subsection (d) of § 208.376 was modified to reference the list of items in subsection (b) to improve consistency. In response to IRRC's third comment, the RAF was updated to include the number of individuals affected by this regulation and an accounting of individuals who have been decertified for violating existing smoking prohibitions.

G. Benefits, Costs and Compliance

Benefits

This final-form rulemaking will improve safety by expressly prohibiting the use or possession, or both, of electronic liquid-vaporizing devices, which present safety hazards, under the existing prohibitions against smoking and possession of smoking materials. The safety of miners in the workplace is a compelling public interest. All miners, their families, mining companies and others will benefit from the additional safety ensured by the avoided hazards associated with the use or possession of electronic liquid-vaporizing devices at underground bituminous coal mines, such as explosive hazards and distraction hazards. Additionally, miners, mine officials, mine

operators and the Department benefit from clarity regarding how the use and possession of these devices are regulated at underground bituminous coal mines.

Compliance costs

This final-form rulemaking does not create any compliance costs and therefore does not minimize compliance costs. Because this final-form rulemaking prohibits the use or possession of certain items by persons at underground bituminous coal mines, the only requirement to comply is that persons not use or possess these items, which they can do at no cost.

Paperwork requirements

This final-form rulemaking does not generate additional paperwork because mining operators must comply with the existing statute and regulation.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) establishes a National policy that promotes pollution prevention as the preferred means for achieving State environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking has minimal impact on pollution prevention since it is focused on mine safety.

I. Sunset Review

The Board is not proposing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to review these regulations for their effectiveness and recommend updates to the Board as necessary.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 25, 2021, the Department submitted a copy of this rulemaking, published at 51 Pa.B. 1316 (March 13, 2021), to IRRC and to 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 House and Senate Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final rulemaking, the Department has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on [REDACTED], the final-form rulemaking was deemed approved by the House and Senate Committees. Under

section 5.1(e) of the Regulatory Review Act, IRRC met on [REDACTED], and approved the final-form rulemaking.

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 Pa. 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 51 Pa.B. 1316 (March 13, 2021).

(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:

(1) The regulations of the Department, 25 Pa. Code Chapter 208, are amended as set forth in Annex A.

(2) The Chairperson of the Board shall submit this final-form regulation 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.

(3) The Chairperson of the Board shall submit this final-form regulation to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(4) The Chairperson of the Board shall certify this final-form regulation and deposit them with the Legislative Reference Bureau, as required by law.

(5) This final-form regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

PATRICK McDONNELL,
Chairperson
Board of Coal Mine Safety