



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

COMMENT AND RESPONSE DOCUMENT

Prohibiting Electronic Liquid-Vaporizing Devices at Underground Bituminous Coal Mines

25 Pa. Code Chapter 208
51 Pa.B. 1316 (March 13, 2021)
Board of Coal Mine Safety Rulemaking #7-558
Independent Regulatory Review Commission #3292

COMMENTATORS ON THE PROPOSED RULEMAKING

1. Molly Pisciotano, Advocacy Director, Pennsylvania
American Lung Association
810 River Ave.
Pittsburgh, PA 15212
2. Independent Regulatory Review Commission (IRRC)

COMMENTS AND RESPONSES

1. **Comment:** American Lung Association in Pennsylvania (ALA) writes in support of the proposed rulemaking. The ALA notes that, given the dangerous health effects and potential hazards associated with e-cigarettes and other electronic liquid-vaporizing devices, it's crucial that the health, safety and welfare of miners and other individuals is protected by prohibiting these devices in coal mines.

Response: The Department acknowledges the comment and thanks the commentator for their support.

2. **Comment:** IRRC comments that the Department should explain its statutory authority to assess a civil penalty beyond the enforcement remedies listed in Chapter 5 of the Act (relating to Enforcement and Remedies). IRRC also notes two additional concerns. First, the process to determine whether an individual has violated § 208.375 is not explained. Second, § 208.375(b)(2) and § 208.376(d)(2) do not explain when the Department would or would not implement other remedies available to it.

Response: The administrative penalty provision in Chapter 5 applies to mine officials and operators. *See* 52 P.S. § 690-503(b) (relating to penalties for mine officials and operator liability). Separate from this authority, Chapter 1 of the Bituminous Coal Mine Safety Act (BCMSA) notes that the Department has the power under the act to “assess civil penalties.” 52 P.S. § 690-105(16). Unlike the administrative penalty contemplated in Chapter 5 of the BCMSA, the civil penalty promulgated with this rulemaking would apply to individuals beyond mine officials and operators. The authority to promulgate this civil penalty originates in the rulemaking and civil penalty authorities located in Section 105 of the BCMSA, not Chapter 5. The Preamble has been updated to clarify the Department’s statutory authority to promulgate the civil penalty in question.

As to IRRC’s concern regarding the process for determining a violation, the BCMSA allows an operator to search any individual, including clothing and material belongings, who is in a mine or about to enter a mine, for smoking items. 52 P.S. § 690-268(b). 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. An operator's MSHA approved plan would dictate the frequency of searches and other procedures that would uncover an e-cigarette or other smoking articles. Additionally, the BCMSA allows Department inspectors to conduct investigations and interviews of individuals at a mine and make inspections of private property as necessary to determine compliance with the Act. 52 P.S. § 690-105. Either provision could produce evidence, either physical evidence through a search or an admission through an interview, that an individual has violated this section. If an operator finds an e-cigarette or other smoking 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 satisfied a violation has occurred, the Department would assess the penalty. As an action taken by the Department, the penalty would be appealable to the Environmental Hearing Board.

As to IRRC's concern regarding other remedies, the Department directs IRRC to the enforcement remedies listed in Chapter 5. These remedies remain available to the Department should the particular circumstances of a smoking or e-cigarette violation warrant further action in addition to levying a civil penalty. Mere possession of an e-cigarette in the surface area surrounding an underground mine may not warrant any additional action by the Department. Actively smoking an e-cigarette in an underground mine, in contrast, may warrant seeking a decertification action in addition to levying a civil penalty.

3. **Comment:** IRRC notes 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.

Response: The Department agrees with IRRC's suggestion. Section 208.376(d) has been revised to reference the articles listed in subsection (b), instead of containing its own list of prohibited items.

4. **Comment:** IRRC comments that the number of individuals affected by the regulation should be included in the RAF submitted with the final-form regulation. IRRC also asks 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.

Response: Section 15 of the RAF has been updated to include information on the number of individuals who have been decertified for violating existing smoking safety prohibition. The Department does not anticipate any additional quantifiable cost from this regulation to the regulated community so has left its answer to section 19 of the RAF unchanged.