

**NOTICE OF PROPOSED RULEMAKING  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ENVIRONMENTAL QUALITY BOARD**

**[25 PA. CODE CHAPTERS 86, 87, 88, 89 and 90]**

**Incidental Coal Extraction, Bonding, Enforcement, Sediment Control, and  
Remining Financial Guarantees**

The Environmental Quality Board (Board) proposes to amend Chapter 86 (relating to surface and underground coal mining), Chapter 87 (relating to surface mining of coal), Chapter 88 (relating to anthracite coal), Chapter 89 (relating to the underground mining of coal and coal preparation facilities) and Chapter 90 (relating to coal refuse disposal). The proposed rulemaking incorporates amendments necessary to bring Pennsylvania's regulatory program into conformance with federal standards for state coal mining regulatory programs. In addition, the proposed rulemaking revises some requirements for the Remining Financial Guarantee program. The amendments affect requirements relating to incidental coal extraction, bonding, enforcement, sediment control, and Remining Financial Guarantees.

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

**A. Effective Date**

The proposed amendments will become effective upon publication as final rulemaking in the *Pennsylvania Bulletin*.

**B. Contact Persons**

For further information contact William Allen, Chief, Division of Monitoring and Compliance, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard S. Morrison, 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) 654-5988 (TDD users) or (800) 654-5988 (voice users). This proposed rulemaking is available on the Department of Environmental Protection (Department) Web site (<http://www.depweb.state.pa.us>).

**C. Statutory Authority**

The rulemaking is proposed under the authority of Section 5 of The Clean Streams Law (52 P.S. § 691.5); Sections 4(a) and 4.2 of the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.4(a) and 1396.4b); Section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and Section 1920-A of the Administrative Code of 1929 (71 P.S. 510-20).

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

This proposed regulation satisfies requirements for maintaining a state primacy program under the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq. The amendments in this rulemaking pertain to federally required program changes described in 30 CFR §§ 938.16 (rr), (tt), (vv), (ww), (xx), (zz), (aaa), (ccc), (iii), (jjj), (nnn), (ppp) and (ttt). These requirements were imposed by the federal Office of Surface Mining Reclamation and Enforcement (OSM) on April 8, 1993 ((aaa), (ccc), (iii) and (jjj)), December 29, 1993 ((rr), (tt), (vv), (ww), (xx) and (zz)), July 20, 1994 (nnn) and November 7, 1997 ((ppp) and (ttt)).

Resolving these required amendments is necessary in order for Pennsylvania to maintain primacy in regulating coal mining. Failure to resolve these program deficiencies could result in OSM asserting their jurisdiction over all or part of the mining regulatory program. There is also a risk that the federal funding for the Abandoned Mine Land reclamation program could be reduced or eliminated if these deficiencies persist.

These requirements relate to notification of the decision by the Department to approve the continuation of an exemption from the permitting requirements for coal that is mined incidental to noncoal mining, violation review for permit approval, permitting exploration on land designated as unsuitable for mining, self-bonding, and the stability of large impoundments.

The amendments in this rulemaking represent the outcome of discussions between the Department and OSM relative to the fulfillment of requirements set forth in the federal rules. The amendments in this rulemaking have been informally approved by OSM. These changes will be formally submitted to OSM as an amendment to the Pennsylvania coal mining program and the Department will request that OSM determine that the outstanding deficiencies noted above have been satisfied.

In addition, this proposed regulation addresses issues that have surfaced in administering the Remining Financial Guarantee program. These issues are related to operational requirements and the conversion to a conventional bonding system (CBS) undertaken beginning in August 2001.

When the current Remining Financial Guarantee regulations were finalized in 1996, the Department used an alternate bonding system (ABS). The Department initiated the transition from an ABS to a CBS in 2001 and completed the implementation of the program in 2002. Under the ABS, bond amounts were based on per-acre rates and bond funds were supplemented by a per-acre reclamation fee and other funds in order to assure that the Commonwealth had enough bond money to complete the reclamation in the case of a forfeiture.

Under the CBS, the reclamation cost is calculated using bond rate guidelines for the specific reclamation tasks. Bond rate guidelines are updated routinely to keep up with changes in reclamation costs. The CBS is also referred to as full-cost bonding because the bond amount is determined based on the total projected reclamation cost.

Bond amounts are no longer calculated on a per-acre basis. The regulations governing the Remining Financial Guarantee program are being amended to better align with the transition to full-cost bonding for all mining operations.

Finally, the proposed regulations include several minor editorial changes needed to correct spelling, spacing and punctuation errors.

## **E. Summary of Regulatory Requirements**

### ***OSM Program Deficiencies Remining Financial Guarantees and Permit Application Fees***

#### *§ 86.1. Definitions*

The Noncoal Surface Mining and Reclamation Act is being added to the list for the definition of *Acts*. When Chapter 86 was promulgated in 1983, noncoal mining was regulated under the authority of the Surface Mining Conservation and Reclamation Act. (SMCRA) In 1984, the Noncoal Surface Mining Conservation and Reclamation Act (NSMCRA) was enacted, superseding the role of SMCRA for noncoal mining. In order to comply with federal program requirements (and to have an effective regulatory program) relating to incidental extraction of coal under noncoal mining permits, it is necessary to include NSMCRA in the applicable Acts.

This amendment was required, in part, by the federal requirements set forth at 30 CFR § 938.16 (tt).

The definition of *Owned or controlled* and *owns or controls* is being corrected to include the current reference to the federal regulations relating to definitions. This is necessary because of federal regulation revisions that resulted in the definition being placed in a different section.

#### *§86.5. (Extraction of coal incidental to noncoal surface mining)*

Section 86.5 (m) is amended to add the requirement for the Department to notify interested parties in the case that the Department decides not to revoke an exemption from the coal permitting requirements.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ppp).

#### *§ 86.36. Review of permit applications*

Section 86.36 is amended to delete the three-year time limitation for the review of an outstanding Federal violation.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (rr).

*§ 86.37. Criteria for permit approval or denial*

Section 86.37 (a)(8) is amended to include a reference to the federal definition of a violation.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ww). This amendment also resolves the deficiencies set forth at 30 CFR §§ 938.16 (vv) and (xx).

*§ 86.62. Identification of interests*

Section 86.62 (b)(2)(ii) is being amended to correct the reference to the federal minimum enforcement action.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (zz).

Section 86.62 (c) is being amended to include the permittee name and address as required information relating to permits for related entities and to clarify that issued permits must be reported as part of an application.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (aaa).

*§ 86.103(g). Procedures*

Section 86.103(g) is being added to require that the procedures for processing an assertion of Valid Existing Rights follow the federal requirements by incorporating the federal procedural requirements by reference.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ccc).

*§ 86.129. Coal exploration on areas designated as unsuitable for surface mining operations*

Section 86.129 (b) is being amended to provide specific procedures and requirements for permit applications for exploration activities on lands designated as unsuitable for mining. The detailed requirements mirror the federal procedures and standards for approval. This amendment also results in the renumbering of current subsections 86.129 (b)(1) and 86.129 (b)(2).

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ccc).

*§ 86.133. General requirements*

Section 86.133 (f) is being amended to clarify that a permit is required for exploration activities on lands designated as unsuitable for mining.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ccc).

*§86.159. Self-bonding*

Section 86.159 (l) (1) is amended to incorporate the language in the federal regulations regarding the indemnification of self-bonds in the case of a corporate applicant that has a parent company. To date, there have not been any coal mine operators to use self-bonding.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (nnn).

*§87.112. Hydrologic balance: dams, ponds, embankments and impoundments—design, construction and maintenance*

Section 87.112 (c) is amended to add a requirement to protect miners or the public. Section 87.112 (c) (1) is amended to add the required seismic safety factor.

These amendments were required by the federal requirements set forth at 30 CFR § 938.16 (iii).

*§ 88.321. Disposal of noncoal wastes.*

Section 88.321 is amended to include all noncoal wastes and to apply the prohibition to impoundments.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ttt).

*§89.111. Large impoundments*

Section 89.111 (c) is amended to add a requirement to protect miners or the public. Section 89.111 (c) (1) is amended to add the required seismic safety factor.

These amendments were required by the federal requirements set forth at 30 CFR § 938.16 (iii).

*§90.112. Hydrologic balance: dams, ponds, embankments and impoundments—design, construction and maintenance*

Section 90.112 (c) is amended to add a requirement to protect miners or the public. Section 90.112 (c) (2) is amended to match the language in the federal

regulations regarding spillway capacity for large impoundments at coal refuse disposal sites.

These amendments were required by the federal requirements set forth at 30 CFR § 938.16 (jjj).

*§ 90.133. Disposal of noncoal wastes*

Section 90.133 is amended to include all noncoal wastes and to apply the prohibition to impoundments.

This amendment was required by the federal requirements set forth at 30 CFR § 938.16 (ttt).

***Remining Financial Guarantees***

*§86.165. Failure to maintain proper bond*

Section 86.165(a) is amended to add that an operator's obligation to maintain a proper bond includes the payments required under the Remining Financial Guarantee program. This amendment will allow the enforcement of the payment requirement using consistent procedures.

*§86.281. Financial guarantees to insure reclamation—general*

Section 86.281(c) is amended to provide that the Department will designate a specified amount in the financial guarantees special account as financial assurance for the reclamation obligation of a permit with an approved remining area, rather than reserving a portion of those funds. This change is necessary in light of the conversion to a conventional bonding program. Under conventional bonding, the total reclamation cost is accounted for when determining the bond amount, thus enabling the Department to calculate more precisely the amount of funds that may need to be used to reclaim an approved remining area covered by a remining financial guarantee.

Section 86.281 (e) is amended in conjunction with the revision in Section 86.281 (c) and to clarify that all of the bonds forfeited (including the Remining Financial Guarantee) on a permit are to be used for reclamation of the mine site (including the remining area). It also is amended to allow, rather than require, the use of additional funds from the Remining Financial Assurance Fund if they are needed to complete the reclamation of the mine site. This change is based primarily on the concept that under conventional bonding, the bond amount posted is the amount required to complete the reclamation. In addition, it provides the Department with flexibility to use money from the Remining Financial Assurance Fund to pay for the necessary reclamation.

*§86.282. Participation Requirements*

Section 86.282 (a) (2) is being revised to delete the option of using the ability to

obtain a letter of credit as a demonstration of financial responsibility. Experience in implementing the Remining Financial Guarantee program has shown that the ability to obtain a letter of credit from a bank is not a good test of financial responsibility.

#### *§86.283. Procedures*

Section 86.283 (a) (1) is amended to change the way the amount of the payment is determined as a result of the change to conventional bonding. The deleted language is based on the per-acre bond rate system. The proposed wording is based on the amount of the Remining Financial Guarantee.

Section 86.283 (d) is amended to clarify how financial guarantee funds are allocated.

Section 86.283 (e) is amended to delete language relating to the process of “bond rollover” that was allowed under the ABS. The concept of “bond rollover” is not pertinent to conventional bonding.

Section 86.283 (f) is being added to reduce the potential risk of insolvency of the Remining Financial Assurance Fund by requiring the replacement of a Remining Financial Guarantee in the event a polluttional discharge occurs at a mine site bonded with a Remining Financial Guarantee.

#### *§86.284. Forfeiture*

Sections 86.284 (a) and (c) are amended to be consistent with the changes made in Sections 86.281 (c) and (e).

### ***Corrections***

#### *§86.195. Penalties against corporate officers*

Section 86.195 (b) is amended to add an “s” to the word “officer.”

#### *§86.211. Enforcement—general*

Section 86.211 (d) is amended to use the word “clear” instead of “clean.”

#### *§86.281. Financial guarantees to insure reclamation—general*

Section 86.281 (d) is amended to add the article “The” at the beginning and correct two typographical errors.

§ 87.119. *Hydrologic balance: water rights and replacement.*

Section 87.119 (g) is being corrected to remove attorney fees and expert witness fees from the specific costs that may be recovered.

This correction is necessary due to a revision to the SMCRA.

**F. Benefits, Costs and Compliance**

The amendments will enable the Commonwealth to fulfill its primacy obligations and retain primary enforcement responsibility over coal mining operations. They will also allow for more effective management of the Remining Financial Guarantee program.

*Compliance Costs*

It is not anticipated that the proposed changes will impose any total additional compliance costs on the regulated community.

*Compliance Assistance Plan*

The Department will provide written notification to all coal mine operators to inform them of the final promulgation of these regulatory changes. The Department will also hold roundtable meetings with mine operators and consultants to explain program changes and answer questions.

The Department will update its fact sheets explaining the regulations. The Department will continue to meet with affected landowners and assist them in understanding the amended regulations.

*Paperwork Requirements*

The amendments will require the Department to update its fact sheets explaining the law and regulations.

**G. Pollution Prevention**

The rulemaking will not modify the pollution prevention approach by the regulated community and maintains the multi-media pollution prevention approach of existing requirements in 25 Pa. Code.

**H. Sunset Review**

These 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.



**I. Regulatory Review**

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on (blank), the Department submitted a copy of these proposed amendments to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed amendments, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations or objections shall specify the regulatory review criteria that have not been met. The Act specifies detailed procedures for review of these issues by the Department, the General Assembly and the Governor prior to final publication of the regulations.

**J. Public Comments**

*Written Comments* - Interested persons are invited to submit comments, suggestions or objections regarding the proposed amendments to the Environmental Quality Board, P.O. Box 8477, Harrisburg, PA 17105-8477 (express mail: Rachel Carson State Office Building, 16<sup>th</sup> Floor, 400 Market Street, Harrisburg, PA 17101-2301). Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by \_\_\_\_\_ (within 30 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must also be received by \_\_\_\_\_. The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

*Electronic Comments* - Comments may be submitted electronically to the Board at [RegComments@state.pa.us](mailto:RegComments@state.pa.us) and must also be received by the Board by \_\_\_\_\_. A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgement of electronic comments is not received by the sender within two working days, the comments should be retransmitted to ensure receipt.

JOHN HANGER  
Chairperson  
Environmental Quality Board