

Regulatory Analysis Form

(Completed by Promulgating Agency)

INDEPENDENT REGULATORY REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency: Department of Environmental Protection

(2) Agency Number: 7

Identification Number: 532

IRRC Number: **3517**

(3) PA Code Cite: 25 Pa. Code Chapters 86, 87, 88, 89 & 90

(4) Short Title: OSM Program Consistency

(5) Agency Contacts (List Telephone Number and Email Address):

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(6) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation

- Emergency Certification Regulation;
 - Certification by the Governor
 - Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

To maintain Pennsylvania's program primacy, this final-form rulemaking primarily addresses inconsistencies between the Commonwealth's coal mining regulatory program and regulations developed by the federal Office of Surface Mining Reclamation and Enforcement (OSM). Specifically, it updates definitions and program processes within Pennsylvania's requirements to comply with the federal coal mining regulations at 30 CFR Parts 700 through 955 (relating to mineral resources). It also contains updates for general program maintenance, including correcting typographical errors, organization names, statutory citations, reminding requirements, and the use of reference data for the sizing of stormwater control facilities.

(8) State the statutory authority for the regulation. Include specific statutory citation.

This final-form rulemaking is authorized under the authority of Section 5 of The Clean Streams Law (35 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); Section 7(b) of the Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § 1406.7 (b)); and Section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20).

(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

Yes. Portions of the rulemaking are mandated under federal regulations. Section 101 of the Federal Surface Mining Control and Reclamation Act specifies that the primary governmental responsibility for regulating surface mining and reclamation operations should rest with the States. To achieve primary regulatory responsibility, often referred to as primacy, a State must develop and obtain OSM approval of a program that meets the requirements of the Act and that is no less effective than the federal regulations in achieving the requirements of the Act.

The following are required amendments to the Commonwealth's coal mining regulatory program codified in federal regulations at 30 CFR 938.16 (related to required regulatory program amendments):

This final-form rulemaking deletes the term "augmented" from 25 Pa. Code § 86.151(d)(relating to the period of liability) to match OSM's understanding of seeding that does not restart the period of liability. OSM disapproved the use of the term "augmented" in the last sentences of 25 Pa. Code §86.151(d) (relating to the period of liability) because it is less effective than the federal requirement (30 CFR 938.12(d)) that indicates that by definition, "augmented" seeding extends the period of liability for which an operator must maintain bond.

OSM requires that the Commonwealth revise its regulations relating to the valuation of collateral bonds at 25 Pa. Code § 86.158(b)(relating to special terms and conditions for collateral bonds) to match the federal requirements at 30 CFR 938.16(m)-(o):

(m) By November 1, 1991, Pennsylvania shall amend its rules at §86.158(b)(1) or otherwise amend its program to be no less effective than 30 CFR 800.21(a)(2) by requiring that the value of all government securities pledged as collateral bond shall be determined using the current market value.

(n) By November 1, 1991, Pennsylvania shall amend §86.158(b)(2) or otherwise amend its program to be no less effective than 30 CFR 800.21(e)(1) by requiring that the provisions related to valuation of collateral bonds be amended to be subject to a margin, which is the ratio of the bond value to the market value, and which accounts for legal and liquidation fees, as well as value depreciation, marketability, and fluctuations which might affect the net cash available to the regulatory authority in case of forfeiture.

(o) By November 1, 1991, Pennsylvania shall amend §86.158(b)(3) or otherwise amend its program to be no less effective than 30 CFR 800.21(e)(2) to ensure that the bond value of all collateral bonds be evaluated during the permit renewal process to ensure that the collateral bond is sufficient to satisfy the bond amount requirements.

OSM has also required that the Commonwealth revise its regulations relating to the use of public roads as part of an anthracite mining operation to match the federal requirements at 30 CFR 938.16 (mmm), providing:

(mmm) By October 5, 1993, Pennsylvania shall submit a proposed amendment to §88.1 to require that the definition of haul road include all roads (including public roads) that are used as an integral part of the coal mining activity and to clarify that the area of the road

includes the entire area within the right-of-way, including roadbeds, shoulders, parking and side areas, approaches, structures, and ditches.

In addition to the required regulatory amendments, OSM also has concerns related to the definition of surface mining activities. OSM has not taken formal action on this because the Commonwealth has committed to correcting the matter at the earliest opportunity. The final-form rulemaking meets this commitment.

These required regulatory amendments are overdue from the deadlines stated in 30 CFR Part 938 mainly caused by other required rulemaking priorities. In the interim, however, the Department has been implementing the provisions consistent with OSM's requirements.

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

This final-form rulemaking addresses three primary needs:

1. To maintain Pennsylvania's program primacy, this final-form rulemaking resolves inconsistencies between the Commonwealth's coal mining regulatory program and regulations from OSM. The loss of program primacy would threaten the federal grant provided through Title V of the federal Surface Mining Control and Reclamation Act of 1977, which funds about fifty percent of the Coal Mining Program. (Note: In FY 16-17, Pennsylvania's coal mining program cost \$25,413,733.). Further, it would cause disruption for the mining industry in the Commonwealth if permitting and enforcement of mining activities were transferred to OSM.
2. Stormwater control facilities have historically been designed based on the 10-year, 24-hour precipitation events data housed within the tables in sections 87.103, 88.93, 88.188, 88.293, 89.53 and 90.103. These tables currently use outdated climatological data from the early 1980s, which has resulted in stormwater facilities that are over-designed and require unnecessary earth disturbance. The final-form regulation replaces these tables with data from the National Oceanic and Atmospheric Administration's (NOAA) online precipitation and storm event tool, which provides a more accurate account of storm events and, generally, lower precipitation levels. This revision will potentially result in properly-sized stormwater control facilities and reduced costs for mine operators.
3. The Commonwealth's mine operators, of which there are approximately 400 in Pennsylvania, will benefit from the added clarity and corrections included in this regulation, which will improve the efficiency and implementation of the requirements.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

The primary purpose of the final-form rulemaking is to bring the Commonwealth's coal mining requirements in conformance with the federal requirements. No requirements in this rule are more stringent than the federal standards. However, some of the regulatory requirements included in this final-form rulemaking are unique to the Commonwealth. For example, no other state has a remaining financial guarantee or Anthracite Emergency Bond Loan program.

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

All states with program primacy must have regulations that are no less stringent than the OSM requirements. Some states simply adopt the federal requirements by reference. Others, like the Commonwealth, customize the requirements to meet the circumstances in the state.

Revisions to sections 86.1 and 87.1 (amending the definition of surface mining activities), 88.1 (amending the definition of haul road), and 86.158 (amending bonding requirements) will make these regulations as effective as federal requirements. Revisions to sections 87.157, 88.131, and 88.219 will provide an alternative means of regulating temporary cessation of activities that removes an upper-time limit that is specific in the Commonwealth and replaces it with a more flexible approach compared to other states that terminates temporary cessation if the permittee fails to comply with the statutes, regulations, or permit.

Overall, the Commonwealth will remain in a competitive position compared with other states while retaining the flexibility needed for the particular circumstances described above.

(13) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

The final-form rulemaking includes some corrections to cross-references to other regulations, but it does not impact the referenced regulations.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Department collaborated with the Mining and Reclamation Advisory Board (MRAB), which is composed of representation from anthracite surface mine operators, the Pennsylvania Coal Alliance, the Pennsylvania Anthracite Council, the County Conservation Districts, the Citizens Advisory Council, the Pennsylvania House of Representatives, and the Pennsylvania Senate to develop the proposed rulemaking.

This included discussion at several Regulation, Legislation and Technical (RLT) committee meetings. In July 2016, the Department delivered a presentation summarizing the proposed requirements to the MRAB at their quarterly meeting. At its April 6, 2017, meeting, the MRAB voted to concur with the Department's recommendation that the proposed rulemaking move forward in the regulatory process. This presentation was available on the Department's MRAB web page prior to the meeting. At its April 25, 2019, meeting, the MRAB voted to concur with the Department's recommendation that the final-form rulemaking move forward in the regulatory process.

Additional opportunities for stakeholder input were made available when the program amendments were promulgated by OSM and subject to public comment in the *Federal Register*.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

The regulated community is comprised of about 400 businesses, most of which are small businesses. The regulations will apply consistently among all operators for small and large businesses alike.

The amendments are primarily administrative, and therefore the impact on small businesses will be negligible. However, the amendment relating to stormwater control facilities is likely to save time and monetary resources for all businesses because the result will be more appropriately-sized (smaller) stormwater control facilities.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

There are about 400 coal mining companies conducting operations in the Commonwealth that will be subject to this regulation.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

By resolving inconsistencies with the federal requirements, this final-form rulemaking will allow the Commonwealth to maintain primacy over its coal mining regulatory program. Maintaining primacy prevents the disruption the mining industry in the Commonwealth would experience if permitting and enforcement of mining activities were transferred to OSM.

Additionally, the clarity and corrections included in this regulation will improve the efficiency and implementation of the requirements by mine operators. This will assist the regulated community to have a better understanding of compliance standards.

Another possible benefit as a result of this final-form rulemaking may be realized by stormwater facilities. Due to the reliance on out-of-date precipitation data, some stormwater facilities may have been over-designed and required unnecessary earth disturbance. The revisions should help future stormwater facilities to be properly-sized and possibly result in reduced costs for mine operators.

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The benefits included in this final-form rulemaking generally focus on eliminating inconsistencies, reducing confusion, and improving efficiency. Further, aligning the Commonwealth's regulations with the federal regulations will allow the Commonwealth to maintain program primacy and secure the federal Title V grant, which funds approximately fifty percent of the Coal Mining Program. Mining operators may benefit by realizing financial savings from a reduction in stormwater controls.

As these regulatory amendments are primarily administrative, no additional costs are anticipated.

(19) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

One area where cost savings may be recognized is from the proper sizing of stormwater controls. While it is not possible at this time to provide a specific estimate, the potential savings will be based on the number of new facilities to be built, the location of those facilities and the specific designs.

Because registered mail is no longer a requirement, there are anticipated small savings related to this change for the cost of mailing.

No additional costs or savings to the regulated community are anticipated.

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No additional costs or savings to local governments are anticipated. However, one amendment changes the way that a municipality is provided notice by the Department that a mining permit application has been received in their jurisdiction. This is an administrative change and, while it will impact the Department's compliance with the regulation, it is not anticipated to add costs to local governments.

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No additional costs or savings to the state government are anticipated.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

It is not anticipated that the additional reporting, recordkeeping or other paperwork will be substantial as the changes made in this final-form rulemaking focus on clarifying program compliance rather than creating new procedures.

(22a) Are forms required for implementation of the regulation?

No forms will be needed to implement the requirements included in this final-form rulemaking.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

N/A

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Savings	\$0	\$0	\$0	\$0	\$0	\$0
COSTS:						
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$0	\$0	\$0	\$0	\$0
REVENUE LOSSES:						
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY -3 2015/16	FY -2 2016/17	FY -1 2017/18	Current FY 2018/19
Coal Mining Program	\$24,011,704.00	\$25,078,176.00	\$23,876,588.00	\$26,348,138
	Note: This is based on the Title V grant expenditures on a federal FY basis.	Note: This is based on the Title V grant expenditures on a federal FY basis.	Note: This is based on the Title V grant expenditures on a federal FY basis.	Projected based on Title V grant request.

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

It is estimated that 400 small businesses will be subject to this regulation. Due to the nature of the updates in this final-form rulemaking, it is not anticipated that additional reporting, recordkeeping or other paperwork will be required.

This regulation is not expected to have an adverse impact on small businesses as it mainly focuses on eliminating inconsistencies from the federal requirements, reducing confusion, and improving efficiency for operators. No alternative method other than modification to the regulation exists to make the Commonwealth's regulations consistent with the federal regulations.

(25) List any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

These amendments are primarily administrative, and so minorities, the elderly, small businesses, and farmers will experience minimal, if any, impact. Therefore, no special provisions are included.

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No alternative regulatory provisions were considered during the development of this rulemaking. Although no alternative methods were explored, the Department expects the revisions to provide clarity and potential cost savings to the regulated community.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The amendments included in this final-form rulemaking will bring the Commonwealth in compliance with the minimum regulatory standards set by the Federal Government. Although no alternative methods were explored, the Department expects the revisions to provide clarity and potential cost savings to small businesses.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

Data is implicated in these regulatory amendments, specifically by incorporating the reference to the NOAA tool for determining the size of storm events. The tool is currently available at the following web site: <https://hdsc.nws.noaa.gov/hdsc/pfds/>

These amendments are intended to make the Commonwealth's regulations consistent with the federal regulations.

(29) Include a schedule for review of the regulation including:

- | | |
|---|-----------------|
| A. The length of the public comment period: | 30 days |
| B. The date or dates on which any public meetings or hearings will be held: | NA |
| C. The expected date of delivery of the final-form regulation: | Quarter 4, 2019 |
| D. The expected effective date of the final-form regulation: | Quarter 1, 2020 |
| E. The expected date by which compliance with the final-form regulation will be required: | Quarter 1, 2020 |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | Quarter 1, 2020 |

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

Effectiveness will be gauged through ongoing interaction with the industry, advisory boards, and the public.