

**ADVANCE NOTICE OF FINAL RULEMAKING
COMMENTS AND RESPONSES**

**General Provisions
and
Areas Unsuited 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 Unsuited for Mining**

Advance Notice of Final Rulemaking

25 Pa. Code Chapter 86

This is a list of corporations, organizations and individuals from whom the Department received comments regarding the Advance Notice of Final Rulemaking.

Joseph W. Turner
Secretary/Treasurer
Raymond Proffitt Foundation
P.O. Box 723
Langhorne, PA 19047-0723

William and Susan Keane

Stephen P. Kunz
Certified Senior Ecologist (ESA)
Schmid & Company Inc.
1201 Cedar Grove Road
Media, PA 19063-1044

Cynthia A. Rossi

William T. Hopwood
Washington Trust Building Room 412
Washington, PA 15301

Wyona S. Coleman
Chair
Tri-State Citizens Mining Network
551 Pittsburgh Road
W. Brownsville, PA 15417

Beverly Braverman
Executive Director
Mountain Watershed Association, Inc.
Box 408
Melcroft, PA 15462

Gary E. Slagel
Director of Env. Regulatory Activities
Consol, Inc.
1800 Washington Road
Pittsburgh, PA 15241-1421

Michael G. Young
Director of Regulatory Affairs
Pennsylvania Coal Association
212 North Third Street Suite 102
Harrisburg, PA 17101

Tom Fitzgerald
Director
National Citizens' Coal Law Project
P.O. Box 1070
Frankfort, KY 40602

John J. Walliser, Esq.
Staff Attorney
Pennsylvania Environmental Council
64 South 14th Street
Pittsburgh, PA 15203-1548

Susan M. Wilson
Executive Director
Citizens Advisory Council
P.O. Box 8459
Rachel Carson State Office Building
Harrisburg, PA 17105-8459

Beverly M. Chiarulli, PhD
Indiana University of Pennsylvania
G-12 McElhaney Hall
Indiana, PA 15705-1087

Kurt J. Weist
Director
Widener Law School
Chester, PA

Mr. and Mrs. Murray W. Williams

Daniel G. Roberts
Director
and
Thomas L. Struthers
Associate Director
John Milner Associates, Inc.
535 North Church Street
West Chester, PA 19380

Summary of Issues and Discussion

In response to comments received during the official public comment period on the proposed rulemaking and following the Department's review of other related information, the Department prepared a draft final regulation that contains significant changes in two areas:

Section 86.101. Definitions. In the definition of surface mining operations, the reference to activities related to underground coal mining that affect the land surface has been deleted to clarify that surface mining operations do not include any surface effects of underground mining resulting from activities that were conducted beneath the land surface.

Section 86.126. Procedures: decision. Subsection (b) has been changed to delete the term "regulatory" and add paragraphs 1 and 2 to clarify Environmental Quality Board action on decisions.

The Department solicited comments on the draft final regulations by publication of an Advance Notice of Final Rulemaking in the *Pennsylvania Bulletin* on January 30, 1999.

Sixteen comment letters and electronic transmissions were received during the public comment period on the Advance Notice of Final Rulemaking.

General comments were made that many of the proposed regulatory changes weaken environmental protections. Comments received also questioned the premise that Pennsylvania's regulations should conform to federal regulations if there is a perception that environmental standards are lowered in doing so. Several commentators supported the regulatory changes.

The proposed changes are being made pursuant to Governor Ridge's Executive Order 1996-1 dated February 6, 1996 and the Department's Regulatory Basics Initiative. In fulfilling these requirements, the Department has modified regulations to conform to the federal requirements, except where there was a compelling and articulable Pennsylvania interest, or the regulatory language was required by a state law, in which case the more stringent Pennsylvania language was retained. Some of the proposed changes were made to improve the clarity of the regulatory language.

Comments were received that dealt with the changes in the two areas identified by the Department, as well as other changes contained in the draft final regulation. The Department has carefully reviewed these comments and has determined that changes are appropriate in two sections of the draft final regulation. They are Section 86.1, relating to definitions and Section 86.121, relating to areas exempt from designation as unsuitable for surface mining operations.

The following is a summary of comments relating to specific sections of the draft final regulation along with the Department's responses. This discussion of comments is keyed to

individual sections of the regulations and is presented in numerical order. Comments and responses on general issues are presented after the discussion on individual sections.

Note: Federal regulations and the PA Surface Mining Conservation and Reclamation Act section cited in this document can be found in the attached summary of Federal Regulatory and PA Surface Mining Conservation and Reclamation Act citations.

1. Issue:

Section 86.1. Definitions. Valid existing rights. Two commentators were satisfied with the proposed definition of valid existing rights (VER). Others were opposed to the changes because they thought the reference to a definition in the Code of Federal Regulations is inappropriate and confusing because the federal definition of VER is not resolved.

Response:

It is the Department's position that the definition of "valid existing rights" must be changed to be consistent with Pennsylvania statutory requirements of the Surface Mining Conservation and Reclamation Act, the Coal Refuse Disposal Control Act, and the Clean Streams Law (52 P.S. §§ 1396.4e and 30.56a; 35 P.S. § 691.315). These statutes provide that "valid existing rights" are to be as defined under Section 522 of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA). This change will bring the regulations into conformance to Pennsylvania statutory requirements and will make it unnecessary for Pennsylvania to change its definition if the federal definition is changed. The OSM is considering revisions to this definition in response to court rulings.

2. Issue:

Section 86.1. Definitions. Administratively complete application. Several comments were received in support of the view that the previous definition of a "Complete application" is better than the change to "Administratively complete application." The proposed changes reduce environmental protections in that an application need only "address" each requirement, instead of needing to "demonstrate compliance with applicable statutes and regulations".

Response:

The purpose of the proposed definition of an administratively complete application was to provide clarification of the term as it is used in Section 86.124(a)(6) relating to the initial processing of areas unsuitable for mining petitions. Section 86.124(a)(6) provides that the Department may determine not to process any petition that pertains to an area for which an administratively complete surface mining operation permit application has been filed and the first newspaper notice has been published. Because the proposed change does not adequately clarify this issue, the Department is recommending that the definition of administratively complete application be deleted from the rulemaking and that the definition of complete application be retained. This issue will be further evaluated and considered in future rulemaking.

3. Issue:

Section 86.101. Definitions. Surface mining operations. Comments were submitted that it is premature and unsound to delete language pertaining to activities and impacts related to underground mining that affect the land surface from the definition of “surface mining operations.” The commentators point out that the OSM has only published proposed interpretive rulemaking that deals with surface effects of underground mining in relation to Section 522(e) of the federal SMCRA. The final federal action on the interpretive rulemaking is pending.

Response:

The proposed change to the definition of “surface mining operations” makes the definition consistent with how OSM has been interpreting the federal definition of “surface coal mining operations” for the last several years. The definition is in accordance with OSM’s proposed interpretive rulemaking published in the January 31, 1997 *Federal Register (Fed. Reg., v. 62, No .21, Friday, January 31, 1997)* and is consistent with the 1991 opinion of the federal Department of the Interior’s Office of the Solicitor. The Department has no information that would indicate that OSM is going to reverse its current position set forth in the proposed interpretive rulemaking. It is noteworthy that federal SMCRA addresses areas unsuitable for surface mining operations only in the context of activities that occur on the land surface. Pennsylvania’s Bituminous Mine Subsidence and Land Conservation Act does not include any provision for areas unsuitable for mining. Furthermore, in 1992, Congress amended the federal SMCRA to impose additional obligations on coal mine operators to repair certain damages caused by underground mining, and Pennsylvania law was similarly amended in 1994. While the federal government’s position specifically addresses “subsidence” and Section 522(e), it does so through interpreting the definition of “surface coal mining operations.” “Surface coal mining operations” is used both in Section 522(e) and in the areas unsuitable for mining provisions and must be interpreted consistently. Therefore, the federal government’s interpretation of “surface coal mining operations” must also apply to the areas unsuitable for mining provisions.

4. Issue:

Section 86.101. Definitions. Surface mining operations. Some commentators indicate that Section 522(e) of the federal SMCRA and the federal interpretation are limited to subsidence and should not be extended to water resource impact and Areas Unsuitable for Mining petitions because the changes will diminish the Program’s effectiveness. The proposed federal interpretive rulemaking and the federal statute (Section 522(e)) are limited to subsidence and do not address water resources, while the federal areas unsuitable for mining petition provisions cover underground mining and water resources. The Department’s changes go beyond subsidence and include water resources and the areas unsuitable for mining petition process. The commentators said that even if underground mining was not included in prohibitions or limitations under Section 522(e), areas could be designated unsuitable for mining under the petition process.

Response:

The proposed federal interpretive rulemaking and the Department's draft final rulemaking amendment would limit the designation of areas as unsuitable for mining to activities related to surface and underground mining operations that are conducted on the land surface. The Department believes the draft final rulemaking is consistent with federal requirements and that it addresses the difference between the physical characteristics of mining activities conducted on the surface as opposed to underground.

As with the denial of a mine permit application, the designation of an area as unsuitable for mining pursuant to the mandatory criteria carries an implicit understanding that it is not possible to conduct mining operations to satisfy all the requirements of current statutes and regulations. Based upon Department recommendations, the Board has designated several areas as unsuitable for surface mining operations. Because the potential impacts of surface mining on water resources are relatively predictable, the impacts may be expected to occur under similar circumstances regardless of the specific operation plan or mining method. Unlike surface mining operations, the potential impacts on water resources associated with underground coal mining activities, particularly those impacts which may occur as a result of mine subsidence, may be extremely difficult or impossible to predict, absent site-specific and permit-specific data. The potential impact on water resources is dependent upon such factors as mining method, depth of mining, the extent of coal removal, coal thickness, the particular characteristics of the rock strata above the coal and the characteristics of the water resource. Congress amended the federal SMCRA in 1992 to impose additional obligations on coal mine operators to ensure repair of certain damage caused by underground coal mining activities. Pennsylvania law was similarly amended in 1994. These amendments also included provisions for restoration or replacement of water supplies adversely impacted by underground coal mining activities. The Department has, on numerous occasions, restricted or prohibited underground coal mining activities in specific areas to protect water resources.

The Department has considered three petitions requesting designation of areas as unsuitable for surface mining operations that included specific allegations concerning the potential impact of underground coal mining activities on water resources. The Board has considered two of these petitions and did not designate either of the areas as unsuitable for mining.

Given these circumstances the Department believes that protection of water resources and mitigation of the impact from underground coal mining activities can only be accomplished on a case-by-case basis through the permit review process.

5. Issue:

Section 86.101. Definitions. Fragile lands. Commentators indicated that the word "significantly" should not be added to the definition of "fragile lands" because any impacts to fragile lands could be considered significant. Additionally, the commentators state that the last part of the existing definition, beginning with "and buffer zones adjacent to the boundaries of

areas where surface mining operations are prohibited ... ", should be retained. It will significantly reduce environmental protections to change the existing language.

Response:

The Department has determined that the changes are consistent with federal regulations. The term is used in the context of a petition filed under the discretionary criteria in Section 86.122(b)(2), which also uses the term "significant damage." The Department evaluates the validity of petition allegations, including the degree of significance of alleged damage, based on relevant information. The buffer zones identified in Section 4.5(h) of Pennsylvania's Surface Mining Conservation and Reclamation Act, Section 6.1(h) of the Coal Refuse Disposal Act, and Section 315(o) of the Clean Streams Law do not all automatically qualify as fragile lands. If discrete buffer zone areas would meet the "fragile lands" definition as proposed, they would be recognized as such. Removal of the language is being made for clarification consistent with federal language used in 30 CFR 762.5. This change will not reduce environmental protections. The buffer zones in question will still be protected by mining prohibitions and limitations in Section 86.102.

6. Issue:

Section 86.101. Definitions. Public park. Commentators said that the existing sentence defining nonprofit organizations as local agencies in this circumstance should not be deleted. They maintain that in those instances where a nonprofit organization has designated lands for public recreational use, it is entirely appropriate that those lands should be treated as public parks.

Response:

The proposed changes will not reduce the protection for publicly owned parks. The Department believes that in this instance language consistent with federal regulations in 30 CFR 761.5 is warranted under the Regulatory Basics Initiative.

7. Issue:

Section 86.102(3). Areas where mining is prohibited or limited. Comments were received objecting to regulatory changes in Section 86.102(3) that would delete the phrase "on or eligible for inclusion on" the National Register of Historic Places. The commentators point out that this would limit protection only to those sites listed on the National Register. Several commentators asserted that the changes reduce the consideration and protection given to historic and archaeological resources and, in some instances, conflict with the federal law.

Response:

The Department recommended the changes to the provisions concerning historic and archaeological resources in order to conform Pennsylvania's coal mining regulations to the federal coal mining regulations in 30 CFR 761.11. The impacts of proposed mining on sites

eligible for listing on the National Register of Historic Places are to be taken into account by the Department during the permit application review process. These changes do not conflict with the federal law.

8. Issue:

Section 86.102(9). Areas where mining is prohibited or limited. Some commentators assert that the proposed changes reduce the protection of individuals whose dwellings are within 300 feet of proposed operations and thus should not be adopted. They say that the changes lessen the burden on the mine applicant to gain the permission of existing land owners by expanding what is considered to be a valid waiver to include such things as a “lease, deed, or other conveyance” and the “constructive knowledge” of future owners. The existing language is adequate and should not be changed.

Response:

The change makes it clear that the regulations will reflect the possession of property rights of the interested persons in accordance with Pennsylvania’s property law. A valid waiver of the mining restriction by a property owner would remain in effect against subsequent owners who had actual or constructive knowledge of the existing waiver. The Department found that Section 86.102(9) was more restrictive than federal counterpart regulations in 30 CFR 761.11(e).

9. Issue:

Section 86.103(e) and 86.103(e)(2)(ii). Procedures. Comments were received indicating that the proposed change from “may” to “will” in Section 86.103(e) reduces the protections currently afforded to public parks and National Register places and should not be adopted. The commentators say the change eliminates recognition of National Register sites close to proposed mining operations that may adversely impact the historical nature of the site. Mining effects that “will” affect a site are not always evident. The Pennsylvania Historical and Museum Commission should evaluate each case to determine possible adverse effects. Commentators also indicate that “failure of an agency to respond to a notification within a specified comment period constitutes an approval” is not acceptable.

Response:

The regulatory changes provide a 30-day response time for the appropriate agency with allowance for an additional 30-day extension if requested by the agency. The Department believes that the regulation provides sufficient time for the agency to respond to a notification and assures that the Department will receive comments in a timely manner. The changes are consistent with federal requirements in 30 CFR 761.12(f).

10. Issue:

Section 86.123(c)(5). Procedures: petitions. Several commentators said that demonstration of an “injury in fact” test is entirely inappropriate and should not be added to the

regulations. Requiring a demonstration of “injury in fact” would shift the burden of proof onto the injured party. One commentator said it is unclear what constitutes “injury in fact” and suggested that the regulations should include a definition of the term.

Response:

The Department believes that the changes made regarding “injury in fact” will not materially affect the way in which petition allegations and demonstrations of a petitioner’s interest will be evaluated. Petitions requesting areas to be designated are accepted by the Department for study based on petitioners’ interests that are, or could be, adversely affected. The Department believes that petitions based on a similar demonstration of adverse effects on a petitioner’s interest could meet the requirement of a demonstration of “injury in fact.” This change is consistent with federal regulatory language in 30 CFR 764.13

11. Issue:

Section 86.124(a)(2). Procedures: initial processing, recordkeeping and notification requirements. Some commentators maintain that the proposed sentence “A frivolous petition is one in which the allegations of harm lack serious merit” is unnecessary and should not be adopted. The meaning of the word “frivolous” as used in the existing regulations does not need to be clarified. Additionally they asked who would make the decision as to whether the allegations lack serious merit.

Response:

The Department believes that the change would not materially affect the way unsuitable for mining petitions are processed. The Department, during its initial review, determines the complete, incomplete, or frivolous nature of petitions. The change is consistent with the language of the federal regulations in 30 CFR 764.15(a)(3) and clarifies how the term will be interpreted and applied by the Department.

12. Issue:

Section 86.125. Procedures: hearing requirements. Some commentators stated the agency conducting the public fact-finding hearings on areas unsuitable for mining petitions should not be changed from the Board to the Department while others supported the change.

Response:

The proposed revisions provide clarification that the Department is responsible for the administrative aspects of petitions. As such, the Department is interested in obtaining additional information relating to the petitions in order to prepare a comprehensive report and recommendation to the Board. The Board has the final decision-making authority over the designation of an area unsuitable for mining. This change is consistent with the existing administrative role of the Department and with the decision-making role of the Board, which will

continue to have access to all information in the Departmental administrative record, including material obtained from public fact-finding hearings.

13. Issue:

Section 86.126(b). Procedures: decision. One commentator asked how the changes would affect the rulemaking process. Does the Board's final decision by-pass the proposed rulemaking stage and public participation, or is the decision on the petition published as a proposed rule?

Response:

Final rulemaking changes retain the existing Board rulemaking process. If the Board decision is to designate an area unsuitable for mining, it will be published as a proposed rule with public participation. If carried through to final rulemaking and approved by the Board, the area petitioned would be incorporated into the Department's regulations as an area designated unsuitable for mining. If the Board's decision is to not designate an area as unsuitable for mining, the rulemaking process will end with the publication of the decision in the *Pennsylvania Bulletin*.

14. Issue:

Section 86.129. Coal exploration. Several commentators objected to changes that remove areas under study for designation from the coal exploration regulations. They believe that the existing language affording protection to areas under study for designation, as well as designated areas, should be retained. The commentators question how coal exploration activities can be consistent with uses and values of an area designated unsuitable for mining.

Response:

The Department identified the changes as necessary to conform to the federal language. Coal exploration has never been prohibited on areas designated unsuitable for mining. The federal language in 30 CFR 762.14 provides for requirement of written approval and the protection of the values and uses of the area designated unsuitable for mining. There are instances where exploration within areas designated unsuitable for mining may be appropriate. Examples include areas where not all coals are designated, where proposed mining plans on adjacent areas could benefit from geologic data gained by exploratory drilling, or where data obtained from exploration may lead to an improvement of environmental conditions.

15. Issue:

Advance Notice of Final Rulemaking. Several commentators asserted that the ANFR approach was flawed because there was no preamble explaining the changes being proposed and there was no comment and response document. They say that these missing documents made it difficult to understand some of the changes made since the regulations were approved as

proposed. In addition, they say that the 30-day public comment period was too short to allow for review.

Response:

The purpose of the ANFR was to provide for public review of the draft final rulemaking and to obtain comment on two new issues that had not previously been considered by the public. The first new issue is a change in definition in Section 86.1 introduced in response to a federal regulatory interpretation, while the second related to a change in Section 86.126 in response to a comment from the IRRC. Since the public had not previously considered these two issues, there were no comments to report on. Also, since the ANFR was solicited prior to the development of the final rulemaking, a comment and response document on the proposed rulemaking was not yet available when the ANFR was released for comment. It is the Department's policy to present a Comment and Response document that incorporates comments previously received on the proposed rulemaking, and a summary of comments received as a result of the ANFR, to the Board as part of the final rulemaking.

16. Issue:

OSM approval. Comments were received stating that federal approval is needed for all changes to the Pennsylvania coal mining regulations before they become effective. Pennsylvania cannot alter its approved state program without approval of OSM. In addition, in the administration, interpretation, and implementation of the state program the Department is obligated to conform to the federal laws and regulations.

Response:

The changes to Pennsylvania's approved state program regulations are being made to conform Pennsylvania's regulations to the federal laws and regulations. OSM requires final state action on rulemaking changes before formal review of the changes by OSM. The rulemaking will be forwarded to OSM for review and approval when the changes have been approved by the Board.

Based upon the comments received on the proposed rulemaking, comments received on the Advance Notice of Final Rulemaking, and the Department's review, the following changes were made to the final rulemaking:

§86.1. Definitions. The proposed definition of "Administratively complete application" was deleted and the existing definition of "Complete application" was retained. The development of definitions for these terms will be addressed in future rulemaking.

§86.101. Definitions. In the definition of fragile lands, the reference to areas where surface mining operations are prohibited under Section 4.5(h) of Pennsylvania SMCRA has been deleted.

§86.101. Definitions. In the definition of surface mining operations, the reference to activities related to underground coal mining that affect the land surface has been deleted to clarify that surface mining operations do not include any surface effects of underground mining resulting from activities that are conducted beneath the land surface.

§86.102. Areas where mining is prohibited or limited. An exception to knowingly made waivers has been added to §86.102(9)(iii).

§86.121. Areas exempt from designation as unsuitable for surface mining operations. In §86.121(b)(2), “and” has been replaced with “or” to clarify that this subsection applies to any one or more of the three acts cited.

§86.125. Procedures: hearing requirements. The phrase “or as otherwise established by the Department” has been deleted from §86.125(i).

§86.126. Procedures: decision. Subsection (b) has been changed to delete the term “regulatory” and add paragraphs 1 and 2 to clarify EQB action on decisions. Statutory citations have also been clarified.

§86.130. Area designated unsuitable for mining. In §86.130(b)(13)(ii) and §86.130(b)(14), where §86.121(a) is referenced, subsection (a) has been deleted.