

# PROPOSED RULEMAKING

## ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 87 AND 88]

### Water Supply Protection/Replacement (Mining)

The Environmental Quality Board (Board) proposes to amend Chapters 87 and 88 (relating to surface mining of coal; and anthracite coal). These proposed amendments address water supply replacement (coal surface mining) and revegetation of previously disturbed and unreclaimed areas.

The proposed amendments were adopted by the Board at its meeting of February 18, 1997.

#### A. *Effective Date*

These proposed amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final rule-making.

#### B. *Contact Persons*

For further information contact Evan T. Shuster, Bureau of Mining and Reclamation, Room 203 Executive House, P. O. Box 8461, Harrisburg, PA 17105-8461, (717) 787-7846, or Joseph Pizarchik, Assistant Counsel, P. O. Box 8464, Bureau of Regulatory Counsel, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This proposal is available electronically through the Department of Environmental Protection's (Department's) Web site (<http://www.dep.state.pa.us>).

#### C. *Statutory Authority*

These amendments are proposed under the rulemaking authority of section 4.2(a) of the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P. S. § 1396.4b(a)) which provides the Department's general rulemaking authority, and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20) which authorizes the Board to adopt regulations necessary for the Department to perform its work.

#### D. *Background and Purpose*

The Board is proposing to revise Chapters 87 and 88 to update the Department's coal mining regulations in light of the amendments to the SMCRA (52 P. S. §§ 1396.1—1396.31) by the act of December 18, 1992 (P. L. 1384, No. 173) (Act 173) and the act of May 22, 1996 (P. L. 232, No. 43) (Act 43).

Act 173 amended section 4(a)(2)C of SMCRA (52 P. S. § 1396.4(a)(2)(C)) relating to revegetation to establish minimum vegetative cover requirements for areas previously disturbed by surface mining activities (that is, abandoned coal mine lands) and proposed for re-mining. Section 4.2(f)(1) of SMCRA (52 P. S. § 1396.4b(f)(1)) was amended to extend the water supply replacement requirement to anyone who affects a supply while performing government-financed reclamation. Also, section 4.2(f)(2) of SMCRA was amended by Acts 173 and 43 to provide rebuttable presumption provisions concerning replacement of water supplies due to surface mining of coal. Section 4.2(f)(2) of SMCRA, the presumption of liability provision, does not apply to persons engaged in government-financed reclamation contracts or to surface

mining operations conducted under a mining permit issued by the Department before February 16, 1993.

Secondly, the proposed amendments to §§ 87.119(a) and 88.107 (relating to hydrologic balance: water rights and replacement) are based on several Commonwealth Court and Environmental Hearing Board (EHB) rulings which clarify the water supply replacement requirements of SMCRA and Department regulations. These clarifications address the character of the replacement water supply, including control, reliability and cost.

These proposed amendments do not address water supply replacement requirements governing underground coal mining. Water supply replacement for underground coal mining will be addressed in other regulatory amendments.

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

As indicated in Section D of this Preamble, these proposed changes are a result of amendments to SMCRA and several court rulings. The following summary identifies the section of the regulations proposed for change along with a description of the specific change.

##### *§§ 87.1 and 88.1 (Definitions)*

A definition of "de minimis cost increase" is being added. A de minimis cost increase over the cost to operate and maintain the original water supply is one that is either no more than \$60 or no more than 15% of the cost to operate and maintain the original supply. For example, if the original supply cost \$500 per year to run and the replacement supply cost \$570 per year, the cost increase is \$70 or 14% of the original cost. Although \$70 is greater than \$60, it is less than 15% of the cost of the original. Consequently, the \$70 increase is a de minimis cost increase. The definition is needed when determining whether a replacement water supply is adequate. This is explained in more detail as follows.

A definition of "water supply" is being added to §§ 87.1 and 88.1. The definition is not new language but is existing language that is being relocated from §§ 87.119 and 88.107.

A definition of "water supply survey" is being added to §§ 87.1 and 88.1 for the purpose of clarity. The language of Act 173 simply refers to a survey. The term is used in the context of water supplies. What is being referred to is a "water supply survey," as opposed to some other type of survey such as a property survey, an archeological survey, and the like. The definition of water supply survey also describes the contents of the survey. This clarification will serve the coal industry and the water supply owners by providing clear guidance regarding the requirements of these amendments.

The survey is to collect the specified information that is reasonably available. Information that is reasonably available is that information which can be collected without extraordinary efforts or the expenditure of excessive sums of money. For example, if the well owner does not possess any information on the length of the well casing, an operator would not be expected to spend the money for a borehole camera to determine the length of the casing or to remove a structure, such as a sunroom, that had been constructed over the well.

§§ 87.119(a) and 88.107(a) (Water Supply Replacement Obligations)

The phrase "or any person engaged in government-financed reclamation" has been added based on sections 4.2(f)(1) and 4.8(g) of SMCRA which establish water supply replacement requirements for persons engaged in government-financed reclamation, including reclamation under a no-cost government-financed reclamation contract.

For years section 4.2(f)(1) of SMCRA and §§ 87.119(a) and 88.107(a) have required an operator who affects a water supply to replace the affected supply with an alternate source adequate in water quantity and quality for the purpose served by the supply. Neither the statute nor the regulations defined the term "adequate." This resulted in litigation. The resulting court decisions provide guidance in determining whether a replacement water supply is "adequate." The court decisions addressed increased operation and maintenance costs, increased maintenance and the control, accessibility, reliability and permanence of the replacement water supply. These sections are amended to incorporate these court decisions and clarify what is meant by "adequate" for the purposes of a restored or replaced water supply.

In *Carlson Mining Co. v. DER*, 639 A.2d 1332 (Pa. Cmwlth. 1994) and *Carlson Mining Co. v. DER*, EHB 91-547-E the courts addressed increased operating and maintenance costs of a restored or replacement water supply. The courts found that for a replacement water supply to be adequate, any increase in operation and maintenance costs must be de minimis. The coal company is permanently responsible for any increase in operation or maintenance costs that are not de minimis. The term "de minimis cost increase" is defined in §§ 87.1 and 88.1 and is addressed in §§ 87.119 and 88.107.

Other decisions have also dealt with cost differentials for water supplies. These cases are *Gioia Coal Co. v. DER*, 1986 EHB 82 and *Buffy & Landis v. DER*, 1990 EHB 1665. In *Gioia*, the EHB held that, unless operation and maintenance costs were excessive, the Department could not require the operator to pay for the additional costs of the replacement supply. What would be "excessive" was not defined. In *Buffy & Landis*, the EHB held that: "... (a) proposal for a replacement water supply cannot be considered as an alternative source of water adequate in quantity and quality unless it demonstrates that either the operation and maintenance costs for the proposed replacement source are substantially the same as the existing system and the existing supply's users agree to shoulder these costs or that the miner has included in its proposal a satisfactory method for compensating the users of the existing supply for the replacement supply's increased costs." *Buffy & Landis*. In *Carlson*, the EHB found that, if they are more than a de minimis cost increase, the costs are excessive. The costs of the replacement supply was an annual increase of \$200.24 and a five-fold increase between the costs of operating and maintaining the original supply and the replacement supply. They found these costs to be more than marginally higher and excessive.

De minimis cost increase has been defined in these proposed amendments as an annual cost increase which is either less than 15% of the annual operating and maintenance costs of the previous supply or less than \$60 per year. The factor of .15 times is based on the fact that multiple cost estimates for the same water supply routinely vary by a factor of at least 15%. This factor is clearly less than the five-fold increase which was found to

be excessive in *Carlson*. The amount of \$60 is also based on *Carlson*, where the amount of \$200.24 was found to be excessive. Sixty dollars is less than three-tenths of the cost increase for *Carlson* and is an average of \$5 per month, which is an amount less than typical discretionary expenditures for most households. The definition of *de minimis* given above is much less than the values disputed in *Carlson* and is intended to avoid disagreements over amounts that are essentially the same, or of insignificant difference.

A cost increase less than 15% of the annual operating and maintenance costs of the previous supply is a de minimis cost regardless of the amount. For example, if the annual operation and maintenance costs of the previous supply were \$1,000 and the annual operation and maintenance costs of the replacement supply are \$1,140, the increase of \$140 is a de minimis cost because it is less than 15% of the annual operation and maintenance costs of the previous water supply. This is true even though the increased costs are more than \$60.

Similarly, an annual cost increase of less than \$60 is a de minimis cost. This is true even though the increase may be 15% or more of the annual operation and maintenance costs of the previous supply. For example, if the annual operation and maintenance costs of the previous supply were \$120 and the annual operation and maintenance costs of the replacement supply are \$144 (an increase of \$24 or 20%) the increase is still de minimis because it is less than \$60.

It does not matter whether the increase in annual operation and maintenance costs exceed the previous supplies operation and maintenance costs by 15% or more or if they are \$60 or more as long as the increase in annual operation and maintenance costs is less than one of these amounts. If it is less than one of these amounts, and it does not matter which one, the cost increase is de minimis.

The new provision concerning adequacy of the replacement supply in regards to maintenance, control, accessibility, reliability and permanence is being added because of findings in the *Carlson*, *Gioia* and *Buffy & Landis* decisions, plus the decision in *Haydu v. DER & PBS Coals Co., Inc.*, 1994 EHB 826. In *Gioia* the EHB found that: "... the user of a replacement water supply—who originally had complete control over his supply—be able to avoid having the replacement supply cut off at any time by the acts of another person." In *Buffy & Landis* the EHB ruled that "... when *Buffy & Landis*, exclusively control their existing private sources of supply, the proposal for a community replacement source of water must demonstrate that *Buffy & Landis* retain substantially equal control over it or consent thereto, if it is to be judged an adequate replacement proposal." It should be noted here that the term "community replacement source of water" in *Buffy & Landis* refers to a well that was to service five homes, and does not refer to a public water supply. In *Haydu*, the EHB found that: "... (t) to satisfy the requirements of section 4.2(f) of the SMCRA, a replacement water supply: must have an adequate quantity and quality; must not be unreliable; must not require excessive maintenance; and must provide the property owner with as much control as he exercised over his previous supply."

It has been Department practice to allow a water supply owner to waive an operator's obligation to restore or replace an affected water supply. The waiver had to be in writing on a Department form and had to be approved by the Department. The Mining and Reclamation Advi-

sory Board, after considerable debate, recommended that a waiver provision be included in these proposed amendments. The debate revolved around who should be allowed to submit the waiver. For example, if the landowner had leased the property as a residence, could the landowner or the tenant waive the requirement to replace the water supply without considering the interests of the other or was it necessary for both to agree to the waiver?

The statutory obligation to replace an affected water supply extends to the use of the water resource. The obligation to replace is not conditioned upon the user also being the landowner. In recognition of the possibility that more than one person can have a legal interest in a water supply, the waiver provisions added as §§ 87.119(a)(3) and 88.107(a)(3) allow for the waiver of the obligation to replace a water supply if everyone possessing a legal interest in the water supply agrees to the waiver. This approach is necessary to protect everyone's rights and to avoid needless disputes. The waiver must be in writing on a form prepared by the Department. Everyone possessing an ownership interest in the affected water supply must sign the waiver. For example, if the landowner has leased the property as a residence, both the landowner and the tenant must sign the waiver.

It is also intended that the requirement to restore or replace a water supply can be waived in its entirety or in part. For example, if the affected water supply has been replaced with a water supply that is adequate in every respect except that the replacement supply costs more to operate and maintain, the owner may waive the requirement to pay the increased operation and maintenance costs. This would occur when the operator agrees to pay the future operation and maintenance costs in a lump sum instead of as they occur. This is both more efficient and less onerous on the user and the operator.

*§§ 87.119(b) and 88.107(b) (Presumption of Liability for Pollution)*

Acts 173 and 43 added section 4.2(f)(2)–(7) to SMCRA which created a presumption of liability on the part of a surface mine operator or mine owner for pollution or diminution of public or private water supplies located within 1,000 feet (304.80 meters) of areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads. This provision is not applicable to persons engaged in government-financed reclamation contracts. Section 4.2(f) of SMCRA also contains five conditions which a surface mine operator or surface mine owner may use to rebut the presumption of liability. The same presumption of liability applies to surface mining activities which are not permitted by the Department.

It should be noted that, with or without a rebuttable presumption of liability, the Department will continue to carefully evaluate each instance of water supply contamination or diminution based on the best scientific and technical information available, prior to ordering a surface mine operator or mine owner to restore or replace a water supply.

*§§ 87.119(c) and 88.107(c) (Defenses to Presumption of Liability)*

The language for §§ 87.119(c)(1) and 88.107(c)(1) is intended to clarify the provisions of section 4.2(f)(2)(ii) of SMCRA in two regards. First, the term "water supply user" has been added between "landowner" and "water supply company" to account for the possibility that the landowner and water supply user may be different persons. An example is when someone is renting a house

owned by another person. Second, the term "reasonable access" is used in place of "access." The intent of this proposed modification is to account for situations where an operator might need to spend considerable effort and money to gain physical access to a water supply. For example, a homeowner may have constructed a concrete patio over his wellhead. This language would also help protect homeowners from surface mine operators and mine owners proposing major disruptions and inconveniences to homeowners to gain access and to sample homeowners' wells.

*§§ 87.119(d) and 88.107(d) (Notification to the Department)*

These provisions require the surface mine operator or mine owner to provide the Department with all information pertaining to available defenses. This will allow the Department to evaluate any defenses to the presumption of liability available to the surface mine operator or mine owner. Doing so will enable the Department to avoid issuing erroneous orders and will save the operator and the Department expenses related to appeals of these orders.

*§§ 87.119(e) and (f) and 88.107(e) and (f) (Immediate Replacement of Water Supply and Department Cost Recovery)*

These subsections are proposed to be added to implement section 4.2(f)(3) of SMCRA. These requirements authorize the Department to restore or replace a water supply when the surface mine operator or mine owner fails to comply with an order issued by the Department to restore or replace a water supply which the Department determined had been affected by the operator. The requirements require the Department to recover incurred costs, including costs for providing a temporary water supply, from the surface mine operator or mine owner.

*§§ 87.119(g) and 88.107(g) (Operator Cost Recovery)*

These proposed subsections, which reflect the provisions of section 4.2(f)(5) of SMCRA, allow a surface mine operator or mine owner who provides a successful defense to the presumption of liability to seek recovery of reasonable costs from the Department. These costs include costs incurred for providing a temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees.

*§§ 87.119(h) and (j) and 88.107(h) and (j) (Other Remedies and Departmental Authority)*

The proposed language of these subsections reflect section 4.2(f)(6) of SMCRA which allows a landowner, water supply user or water supply company who claims pollution or diminution of a water supply to seek other legal remedies than are provided for by section 4.2(f) of SMCRA and these regulations. Subsections (j) in §§ 87.119 and 88.107 provide notice that the Department's authority to take other actions is not limited by those sections.

*§§ 87.119(i) and 88.107(i) (Issuance of New Permits)*

The proposed language of this subsection reflects section 4.2(f)(4) of SMCRA. If the Department issues an order under §§ 87.119 or 88.107 and that order is appealed, the Department cannot use the appealed order as the basis for blocking the issuance of new permits to the operator or the release of bonds when all other requirements for bond release have been satisfied. If the operator does not appeal the Department order, the order can serve as the basis for blocking the issuance of new permits to the operator or releasing bonds on any site.

*§§ 87.119(k) and 88.107(k) (Exception)*

These sections are being added to reflect section 4.2(f)(7) of SMCRA which provides that the provisions relating to the presumption of liability for replacement of water supplies do not apply to surface coal mine permits issued before February 16, 1993.

*§§ 87.147(b), 88.121(b) and 88.209(b) (Revegetation)*

These sections are proposed to be revised to provide for a different vegetative cover requirement as authorized by section 4(a)(2)(C) of SMCRA which allows the Department to approve a lesser vegetative cover requirement for areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and Chapters 87 and 88 and are proposed for re-mining.

*F. Benefits and Costs*

Executive Order 1996-1 requires a cost/benefit analysis of these proposed amendments.

*Benefits*

The benefits of the proposed amendments are that water supplies within 1,000 feet (304.80 meters) of land affected by surface mining activities of a permit issued after February 16, 1993, should be replaced more expeditiously. The proposed amendments relating to revegetation impose no additional costs to surface coal mine operators and will save operators an estimated \$32,000 annually (\$40 reclamation cost savings per acre  $\times$  800 acres of abandoned mine land remined per year = \$32,000). In addition, the proposed provisions relating to revegetation should provide some additional incentive for surface coal mine operators to remine previously mined and unreclaimed lands.

*Compliance Costs*

The proposed amendments impose no additional mandatory costs on the coal operator other than what would currently be required under the statutory provisions of SMCRA relating to rebutting a presumption of liability for replacement of water supplies affected by the mining activities which are within 1,000 feet (304.80 meters) of the land affected by surface mining activities.

Operator costs for permanent replacement or restoration of degraded water supplies would be approximately \$7,500 per supply. Operator costs for providing a temporary water supply (until permanent replacement or restoration) would be approximately \$1,000 based upon providing a household with 4 residents with 75 gallons a day per resident for 2 months. The annual costs for water supply replacement would amount to an estimated \$40,800 assuming 5% of the operators degrade one water supply during a 5-year period [ $\$8,500$  per supply ( $\$7,500 + \$1,000$ )  $\div$  5 years =  $\$1,700$  per year  $\times$  24 operators (5% of 480 operators) =  $\$40,800$  per year].

The Commonwealth's costs of administering and enforcing these requirements will not change significantly beyond what would currently be required under the statutory provisions of SMCRA. The statutory provisions could significantly increase the Commonwealth's costs if the Department is unsuccessful in defending appeals by mine operators of Department orders to replace water supplies. The Department currently investigates approximately 80 complaints annually concerning degraded water supplies in the vicinity of surface coal mine operations. If the Department issued 2 compliance orders annually for replacement or restoration of a degraded water supply within 1,000 feet of a mining operation and the mine operator was successful in defending an appeal

of the orders under the rebuttable presumption provisions, the estimated minimum annual costs to the Department would be \$17,000 ( $\$8,500$  per water supply  $\times$  2 supplies per year =  $\$17,000$  per year). These are minimum costs and do not account for attorney fees and expert witness fees which the operator would also be entitled to recover under the statutory provisions relating to rebuttable presumption and under these regulations. These costs represent a very conservative estimate of what the overall costs may be to the Department if litigation costs are taken into account.

*Paperwork Requirements*

The proposed amendments will not result in additional forms or reports. Some additional recordkeeping procedures will be necessary to implement section 4.2(f) of SMCRA.

*G. Sunset Review*

These proposed amendments 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.

*H. Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S.  $\S$  745.5(a)), on April 16, 1997, the Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In addition to submitting the proposed rulemaking, 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.

If IRRC has objections to any portion of the proposed amendments, it will notify the Department within 30 days of the close of the public comment period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the regulations, by the Department, the General Assembly and the Governor.

*I. Public Comments*

*Written Comments*—Interested persons are invited to submit written comments, suggestions or objections regarding the proposal to the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477 (express mail: 15th Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA 17101-2301). Comments received by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by July 2, 1997 (within 60 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of their comments to the Board. The summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulations will be considered. The summary may not exceed one page in length and must also be received by July 2, 1997 (within 60 days of publication in the *Pennsylvania Bulletin*).

*Electronic Comments*—Comments may be submitted electrically to the Board at RegComments@A1.dep.state.pa.us and must also be received by the Board by July 2, 1997. A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgement of electronic com-

ments is not received by the sender within 2 working days, the comments should be retransmitted to ensure receipt.

J. Public Hearing

The Board will hold 2 public hearings for the purpose of accepting comments on this proposal. They will be held as follows:

June 10, 1997—3 p.m. Department of Environmental Protection, Greensburg District Office, Armbrust Professional Center, Bldg. C, Route 819 South, Greensburg, PA

June 12, 1997—1 p.m. Department of Environmental Protection, Pottsville District Office, 5 West Laurel Boulevard, Pottsville, PA

Persons wishing to present testimony are requested to contact Nancy Roush at the Environmental Quality Board, P. O. Box 8477, Harrisburg, PA 17105-8477, (717) 787-4526, at least 1 week in advance of the hearing to reserve a time to present testimony. Oral testimony is limited to 10 minutes for each witness. Witnesses are requested to submit three written copies of their oral testimony to the hearing chairperson at the hearing. Organizations are limited to designating one witness to present testimony on their behalf at each hearing.

Persons in need of accommodations as provided for in the Americans With Disabilities Act of 1990 should contact Nancy Roush directly at (717) 787-4526 or through the Pennsylvania AT&T Relay Services at (800) 654-5984 (TDD) to discuss how the Department may accommodate their needs.

JAMES M. SEIF, Chairperson

Fiscal Note: 7-315. (1) Surface Mining Conservation and Reclamation Fund; (2) Implementing Year 1997-98 is \$Minimal; (3) 1st Succeeding Year 1998-99 is \$Minimal; 2nd Succeeding Year 1999-00 is \$Minimal; 3rd Succeeding Year 2000-01 is \$Minimal; 4th Succeeding Year 2001-02 is \$Minimal; 5th Succeeding Year 2002-03 is \$Minimal; (4) Fiscal Year 1996-97 \$34,165,000; Fiscal Year 1995-96 \$29,758,000; Fiscal Year 1994-95 \$31,383,000; (8) recommends adoption.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 87. SURFACE MINING OF COAL

Subchapter A. GENERAL PROVISIONS

§ 87.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

\* \* \* \* \*

De minimis cost increase—For purposes of § 87.119 (relating to hydrologic balance: water rights and replacement), a cost increase which meets one of the following criteria:

(i) Is less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced.

(ii) Is less than \$60 per year.

\* \* \* \* \*

Water supply—For the purpose of § 87.47 (relating to alternative water supply information) and § 87.119, an existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses.

Water supply survey—The collection of reasonably available information for a water supply to establish:

- (i) The location, type and use of the water supply.
(ii) The chemical and physical characteristics of the water.
(iii) The quantity of the water.
(iv) The physical description of the water supply, including the depth and diameter of the well, length of casing and description of the treatment and distribution systems.
(v) Hydrogeologic data such as the static water level and yield determination.

\* \* \* \* \*

Subchapter E. SURFACE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 87.119. Hydrologic balance: water rights and replacement.

(a) Water supply replacement obligations. The operator of any mine [ which ] or a person engaged in government-financed reclamation who affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quantity and water quality, for the purpose served by the water supply. [ For the purpose of this section, the term "water supply" shall include any existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses. ]

(1) To be adequate, the restored or replacement water supply, at a minimum, shall:

- (i) Be as reliable as the previous water supply.
(ii) Be as permanent as the previous water supply.
(iii) Not require excessive maintenance.
(iv) Provide the owner and the user with as much control and accessibility as exercised over the previous water supply. The use of a public water supply as a replacement water supply provides the owner and the user adequate control and accessibility.

(v) Not result in more than a de minimis cost increase to operate and maintain.

(2) If the operating and maintenance costs of the restored or replacement water supply are more than a de minimis cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance costs of the restored or replacement water supply.

(3) The requirement contained in this section to restore or replace an affected water supply may, upon approval by the Department, be waived. The waiver shall be in writing on a form prepared by the Department. Everyone who possesses an ownership interest in the water supply shall sign the waiver.

**(b) *Presumption of liability for pollution.***

(1) It shall be presumed, as a matter of law, that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads.

(2) If surface mining activities are conducted on areas which are not permitted or bonded, it shall be presumed, as a matter of law, that the surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the land affected by the surface mining activities.

**(c) *Defenses to presumption of liability.*** There are only five defenses to the presumption of liability provided in subsection (b). For any of the five defenses to apply, the mine operator or mine owner shall affirmatively prove by a preponderance of evidence that one or more of the following conditions exists:

(1) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner reasonable access to conduct a water supply survey prior to commencing surface mining activities.

(2) The water supply is not within 1,000 linear feet (304.80 meters) of:

(i) The boundaries of areas bonded and affected by coal mining operations, areas of overburden removal and storage and areas used for support but not including haul and access roads.

(ii) The boundaries of areas affected by surface mining activities in areas which are not bonded.

(3) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(4) The pollution or diminution occurred as a result of some cause other than the surface mining activities.

(5) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner reasonable access to determine the cause of pollution or diminution or to replace or restore the water supply.

**(d) *Notification to Department.*** The surface mine operator or mine owner shall notify the Department and provide all information which supports a defense to the presumption of liability when one or

more of the five defenses to the presumption of liability provided in subsection (c) are met.

**(e) *Immediate replacement of water supply.*** If the Department finds that immediate replacement of an affected water supply used for potable or domestic purposes is required to protect public health or safety and the surface mine operator or mine owner has failed to comply with an order issued under section 4.2(f) of SMCRA (52 P. S. § 1396.4b(f)), the Department may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply.

**(f) *Department cost of recovery.*** The Department will recover the costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible surface mine operator or mine owner. Costs recovered will be deposited in the Surface Mining Conservation and Reclamation Fund.

**(g) *Operator cost recovery.*** A surface mine operator or mine owner who appeals a Department order, provides a successful defense during the appeal to the presumptions of liability and is not otherwise held responsible for the pollution or diminution is entitled to seek recovery of reasonable costs incurred, including, but not limited to, the costs of temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees from the Department.

**(h) *Other remedies.*** Nothing in this section prevents a landowner, water supply user or water supply company who claims pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or in equity.

**(i) *Issuance of new permits.*** A Department order issued under this section which is appealed, will not be used to block issuance of new permits or the release of bonds when a stage of reclamation work is completed.

**(j) *Departmental authority.*** Nothing in this section limits the Department's authority under section 4.2(f)(1) of SMCRA.

**(k) *Exception.*** A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b)—(i), but is subject to subsections (a) and (j).

**§ 87.147. Revegetation: general requirements.**

\* \* \* \* \*

(b) Revegetation shall provide for a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area, except that introduced species may be used in the revegetation process when desirable and necessary to achieve the approved postmining land use plan. Vegetative cover shall be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the approved postmining land use, when compared with the utility of naturally occurring vegetation during each season of the year.

(1) For areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and this chapter, and are proposed to be reaffected or redisturbed, the Department may approve a vegetative cover which, at a minimum, may not be less than the vegetative cover existing before redisturbance and shall be adequate to control erosion and achieve the approved postmining land use.

(2) For areas designated as prime farmland, [ the requirements of ] §§ 87.177—87.181 apply.

\* \* \* \* \*

CHAPTER 88. ANTHRACITE COAL

Subchapter A. GENERAL PROVISIONS

PRELIMINARY PROVISIONS

§ 88.1. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

\* \* \* \* \*

*De minimis cost increase*—For purposes of § 88.107 (relating to hydrologic balance: water rights and replacement), a cost increase which meets one of the following criteria:

(i) Is less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced.

(ii) Is less than \$60 per year.

\* \* \* \* \*

*Water supply*—For the purpose of § 88.27 (relating to alternative water supply information) and § 88.107, an existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses.

*Water supply survey*—The collection of reasonably available information for a water supply to establish:

(i) The location, type and use of the water supply.

(ii) The chemical and physical characteristics of the water.

(iii) The quantity of the water.

(iv) The physical description of the water supply, including the depth and diameter of the well, length of casing and description of the treatment and distribution systems.

(v) Hydrogeologic data such as the static water level and yield determinations.

\* \* \* \* \*

Subchapter B. SURFACE ANTHRACITE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 88.107. Hydrologic balance: water rights and replacement.

(a) *Water supply replacement obligations.* The operator of any mine [ which ] or a person engaged in government-financed reclamation who affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water

supply with an alternate source, adequate in water quality and water quantity for the purpose served by the water supply. [ For the purpose of this section, the term “water supply” includes any existing or currently designated or currently planned source of water or facility or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses. ]

(1) To be adequate, the restored or replacement water supply, at a minimum, shall:

(i) Be as reliable as the previous water supply.

(ii) Be as permanent as the previous water supply.

(iii) Not require excessive maintenance.

(iv) Provide the owner and the user with as much control and accessibility as exercised over the previous water supply. The use of a public water supply as a replacement water supply provides the owner and the user adequate control and accessibility.

(v) Not result in more than a de minimis cost increase to operate and maintain.

(2) If the operating and maintenance costs of the restored or replacement water supply are more than a de minimis cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance costs of the restored or replacement water supply.

(3) The requirement contained in this section to restore or replace an affected water supply may, upon approval by the Department, be waived. The waiver shall be in writing on a form prepared by the Department. Everyone who possesses an ownership interest in the water supply shall sign the waiver.

(b) *Presumption of liability for pollution.*

(1) It shall be presumed, as a matter of law, that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads.

(2) If surface mining activities are conducted on areas which are not permitted or bonded, it shall be presumed, as a matter of law, that the surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the land affected by the surface mining activities.

(c) *Defense to presumption of liability.* There are only five defenses to the presumption of liability provided in subsection (b). For any of the five defenses to apply, a mine operator or mine owner shall affirmatively prove by a preponderance of evidence that one or more of the following conditions exists:

(1) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner reasonable access to conduct a water supply survey prior to commencing surface mining activities.

(2) The water supply is not within 1,000 linear feet (304.80 meters) of:

(i) The boundaries of areas bonded and affected by coal mining operations, areas of overburden removal and storage and areas used for support but not including haul and access roads.

(ii) The boundaries of areas affected by surface mining activities in areas which are not bonded.

(3) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(4) The pollution or diminution occurred as a result of some cause other than the surface mining activities.

(5) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner reasonable access to determine the cause of pollution or diminution or to replace or restore the water supply.

(d) *Notification to the Department.* The surface mine operator or mine owner shall notify the Department and provide all information which supports a defense to the presumption of liability when one or more of the five defenses to the presumption of liability provided in subsection (c) are met.

(e) *Immediate replacement of water supply.* If the Department finds that immediate replacement of an affected water supply used for potable or domestic purposes is required to protect public health or safety and the surface mine operator or mine owner has failed to comply with an order issued under section 4.2(f) of SMCRA (52 P. S. § 1396.5b(f)), the Department may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply.

(f) *Department cost of recovery.* The Department will cover the costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible surface mine operator or mine owner. Costs recovered will be deposited in the surface mining conservation and reclamation fund.

(g) *Operator cost recovery.* A surface mine operator or mine owner who appeals a Department order, provides a successful defense during the appeal to the presumptions of liability and is not otherwise held responsible for the pollution or diminution is entitled to seek recovery of reasonable costs incurred, including, but not limited to, the costs of temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees from the Department.

(h) *Other remedies.* Nothing in this section prevents a landowner, water supply user or water

supply company who claims pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or in equity.

(i) *Issuance of new permits.* A Department order issued under this section which is appealed, will not be used to block issuance of new permits or the release of bonds when a stage of reclamation work is completed.

(j) *Departmental authority.* Nothing in this section limits the Department's authority under section 4.2(f)(1) of SMCRA (52 P. S. § 1396.4b(f)(1)).

(k) *Exception.* A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b)—(i) but is subject to subsections (a) and (j).

§ 88.121. Revegetation: general requirements.

\* \* \* \* \*

(b) Revegetation shall provide for a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the revegetation process when desirable and necessary to achieve the approved postmining land use plan. For areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and this chapter, and are proposed to be reaffected or redisturbed, the Department may approve a vegetative cover which, at a minimum, may not be less than the vegetative cover existing before redisturbance and shall be adequate to control erosion and achieve the approved postmining land use.

\* \* \* \* \*

Subchapter C. ANTHRACITE BANK REMOVAL AND RECLAMATION: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 88.209. Vegetation: general requirements.

\* \* \* \* \*

(b) Seeding and planting shall provide for a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the vegetation process when desirable and necessary to achieve the approved postmining land use plan. For areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and this chapter, and are proposed to be reaffected or redisturbed, the Department may approve a vegetative cover which, at a minimum, may not be less than the vegetative cover existing before redisturbance and shall be adequate to control erosion and achieve the approved postmining land use.

\* \* \* \* \*

[Pa.B. Doc. No. 97-724. Filed for public inspection May 2, 1997, 9:00 a.m.]