

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CH. 89]

Underground Mining—Mine Subsidence Control

The Environmental Quality Board (Board) by this order adopts amendments to Chapter 89 (relating to underground mining of coal and coal preparation facilities) concerning the underground mining of coal to read as set forth in Annex A. The amendments delete several regulatory requirements which implemented statutory requirements which the General Assembly repealed by the act of June 22, 1994 (P. L. 357, No. 54) (Act 54).

Notice of proposed rulemaking is omitted under section 204(3) of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. § 1204(3)) (CDL), which provides that an agency may omit the notice of proposed rulemaking if the agency finds for good cause that notice of proposed rulemaking is impracticable, unnecessary or contrary to the public interest. Notice of proposed rulemaking is unnecessary and contrary to the public interest in light of recent amendments to State law and recent decisions of the Pennsylvania Environmental Hearing Board (EHB) in *P.U.S.H. et al. v. DEP and Eighty-Four Mining Company*, EHB Docket Nos. 95-232-R (Consolidated) (Opinions and Orders issued November 27, 1996, and December 23, 1996). In 1994, the General Assembly enacted Act 54 which amended The Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) (52 P. S. §§ 1406.1—1406.21). Act 54 deleted sections 4 and 6(a) of the BMSLCA (52 P. S. §§ 1406.4 and 1406.6(a)) which provided protection to a certain class of structures. The Department's existing regulations contain several provisions which implemented sections 4 and 6(a) of the BMSLCA which were repealed. This rulemaking deletes these regulations which implemented sections 4 and 6(a) of the BMSLCA which the General Assembly has repealed. In the EHB's *P.U.S.H.* Opinion and Order on several Motions for Summary Judgment, the EHB decided that several regulations which implemented the statutory requirements of sections 4 and 6(a) of the BMSLCA which the General Assembly repealed in Act 54 remained in effect and were binding and enforceable, notwithstanding the General Assembly's intention to eliminate the requirements by repealing section 4. Because the statutory repeal of sections 4 and 6(a) of the BMSLCA eliminated the need for these regulations, the use of the omission of the notice of proposed rulemaking is authorized and appropriate to correct any confusion created by the EHB's decision. It is unnecessary to provide for public comment to delete regulations which implement a statutory provision which the General Assembly has repealed. It is in the public interest to remove any confusion created by the EHB's decision concerning these regulatory provisions.

This order was adopted by the Board at its meeting on March 18, 1997.

A. Effective Date

The amendments will go into effect immediately upon publication in the *Pennsylvania Bulletin* as final rulemaking.

B. Contact Persons

For further information, contact Roderick A. Fletcher, Director, Bureau of Mining and Reclamation, P. O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, or Leigh Cohen, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 2063, Rachel Carson State Office Building, Harrisburg, PA 17105-2063. 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

The final rulemaking is made under the authority of section 7 of the BMSLCA (52 P. S. § 1406.7) which grants the Department the authority to adopt rules and regulations necessary to carry out the purposes and provisions of the act.

D. Background and Summary

The deletions and revisions in this rulemaking are necessary to clarify the law because of recent EHB decisions which frustrate the intention of the General Assembly in enacting Act 54. The decisions have created confusion over the regulatory history of Chapter 89 and the Act 54 amendment to the BMSLCA. The EHB decisions were issued in the case *P.U.S.H. et al. v. DEP et al.*

In a November 27 decision, the EHB found, among other things, that the amended BMSLCA contained authority for portions for the underground mining regulations that were put into place to implement the BMSLCA before it was amended by Act 54. In reaching its conclusion, the EHB reviewed the regulatory history of Chapter 89 and found that after enactment of Act 54 the Board promulgated revisions to Chapter 89 but did not delete from Chapter 89 specific protections for dwellings, cemeteries, municipal public service operations and municipal utilities in place on April 27, 1966 (pre-66 structures). The purpose of the Board's regulatory revision was to conform to requirements of the Office of Surface Mining. The revisions were not intended to address Act 54 issues. The EHB determined that since the Board revised the Chapter 89 regulations since the enactment of Act 54, the Chapter 89 regulations conform to the Act 54 amendments. *P.U.S.H. et al. v. DEP et al.*, pp.25—29. The Department believes that the Legislature, through the Act 54 amendments to BMSLCA, specifically repealed the absolute protection afforded to pre-66 structures and replaced this absolute protection with a requirement to repair any subsidence damage caused to some of these structures. Consequently, in the Department's view, Act 54 invalidated the Department's regulations that implemented the statutory requirement to provide absolute protection for the pre-66 structures. The Department had intended to delete the regulations contained in the expedited rulemaking as part of the Department's Act 54 comprehensive regulatory package that the Department had expected to present to the Board at the March EQB meeting. The *P.U.S.H.* decisions prompted this rulemaking.

The Board believes that the regulations which form the basis for the EHB decisions should be modified to ensure that they conform to the intent of the BMSLCA and

Federal law and do not unduly interfere with underground mining operations. The Board believes that the General Assembly passed the Act 54 amendments to the BMSLCA to remove the absolute prohibition of subsidence damage to pre-66 structures, and consequently repealed sections 4 and 6(a) of the BMSLCA. Accordingly, the Board believes it is appropriate to delete regulations which would implement this repealed statutory provision.

The Board has decided that the Department's regulation must be corrected immediately to eliminate the confusion created by the regulatory history of Chapter 89 and the recent EHB decisions and ensure the continued health of this Commonwealth's underground bituminous coal mining industry. Five of this Commonwealth's nine longwall mining operations have permits which will be up for renewal or revision between now and the end of calendar year 1997. These operations may be severely disrupted if the Department continues to enforce the existing regulations based on the EHB's interpretation in the *P.U.S.H.* decisions. These five operations collectively produce over 24 million tons of coal per year and account for approximately 40% of this Commonwealth's bituminous coal production. These mines directly employ 1,750 people and provide an estimated 5,250 jobs in support service and related industries.

The public will have the opportunity to comment on the matters addressed by this rulemaking in the near future. The subject matter of this expedited rulemaking will be opened for public comment as part of a larger rulemaking package on mine subsidence control, subsidence damage repair and water supply replacement. This larger package was also approved by the Board at its March 18, 1997, meeting for publication as proposed rulemaking in the *Pennsylvania Bulletin*. The larger package will go through the normal rulemaking procedure which includes the opportunity for public comment.

The following is a description of the amendments adopted under this rulemaking.

Deletion of protections for dwellings, cemeteries, municipal public service operations and municipal utilities which were in place on April 27, 1966

§§ 89.142, 89.143, 89.145 and 89.146.

The final regulations delete from Chapter 89 the regulations which implement the statutory requirement to provide absolute protection from subsidence damage for pre-66 structures. The absolute protection was provided to pre-66 structures through repealed section 4 of the BMSLCA. Repealed section 6(a) of the BMSLCA required mine operators to compensate owners of pre-66 structures if the structures were damaged by the mine operator's underground mining activities. Act 54 repealed both sections 4 and 6(a) of the BMSLCA.

It is notable that some of these structures continue to receive some form of treatment under the amended BMSLCA. Pre-66 dwellings undermined after August 21, 1994, are eligible for repair and compensation under section 5.4 of the BMSLCA (52 P. S. § 1406.5d), unless dwelling owners entered into voluntary agreements under former section 4 of the BMSLCA. Pre-66 dwellings are also protected against irreparable damage under section 9.1 of the BMSLCA (52 P. S. § 1406.9a). Public facilities are protected against material damage under section 9.1 of the BMSLCA. The final regulations clarify the law, because the final regulations delete the regulations which implement the absolute protections that were contained in repealed section 4 of the BMSLCA.

Deletion of ability to purchase support

§§ 89.142 and 89.144

Act 54 also repealed section 15 from the BMSLCA (52 P. S. § 1406.15). Section 15 of the BMSLCA provided surface owners with an opportunity to purchase coal support beneath their properties. These regulations delete from §§ 89.142 and 89.145 all regulatory requirements that are authorized by repealed section 15 of the BMSLCA. The revisions to §§ 89.142 and 89.145 clarify that the requirements of repealed section 15 became inapplicable with the enactment of Act 54.

E. *Benefits, Costs and Compliance*

Benefits

The revisions will effectuate the General Assembly's intention in enacting Act 54 and will eliminate the confusion that resulted from the regulatory history of Chapter 89, the enactment of Act 54 and the recent *P.U.S.H.* decision. In addition, these final-form regulations will provide immediate relief to operators of five longwall mining operations which are scheduled to have permits revised or renewed between now and the end of the 1997 calendar year. Without the revisions contained in the final-form regulations, the longwall mining operations may not have been able to conduct underground mining using the longwall mining technique. These operators will also save the costs of modifying mining plans to comply with the EHB decision and the costs associated with disruptions in coal production.

By sustaining the viability of the five longwall operations, the revisions will serve to preserve coal production and jobs which are important to this Commonwealth's economy. These five operations collectively produce over 24 million tons of coal per year, or over 40% of this Commonwealth's total annual bituminous coal production. These operations directly employ approximately 1,750 people and provide an estimated 5,250 jobs in support services and related industries.

Compliance Costs

No additional compliance costs are expected to result from the revisions.

Compliance Assistance Plan

The amendments do not impose any additional requirements. Mine operators will need no assistance in order to comply with these regulatory changes.

Paperwork Requirements

No additional paperwork requirements will result from the amendments.

F. *Sunset Review*

These final-form regulations will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulations effectively fulfill the goals for which they were intended.

G. *Regulatory Review*

Under section 5(f) of the Regulatory Review Act (71 P. S. § 745.5(f)), on March 19, 1997, the Department submitted a copy of this final rulemaking with notice of proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. On the same date, the Department also submitted this rulemaking to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P. S. §§ 732-101—732-506). In

addition to the final rulemaking, IRRC and the Committees were provided with a copy of a detailed regulatory analysis form prepared by the Department.

These final-form regulations were deemed approved by the Committees on April 8, 1997, and were approved by IRRC on April 18, 1997, in accordance with section 5(c) of the Regulatory Review Act.

H. *Findings of the Board*

The Board find that:

(1) The amendments to §§ 89.142—89.146 to read as set forth in Annex A are necessary and appropriate to implement the BMSLCA.

(2) The use of the omission of notice of proposed rulemaking procedure is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the CDL (45 P. S. §§ 1201 and 1202) is, in this instance, unnecessary and contrary to the public interest.

(3) Use of the notice of proposed rulemaking is, in this instance, unnecessary and contrary to the public interest in light of recent amendments to the BMSLCA and recent decisions of the EHB in *P.U.S.H. et al. v. DEP and Eighty-Four Mining Company*. It is unnecessary to provide for public comment to delete regulations which implement statutory provisions which the General Assembly has repealed.

(4) Use of the notice of proposed rulemaking procedure is contrary to the public interest to remove any confusion created by the EHB's decision concerning these regulatory provisions which implement statutory provisions which the General Assembly has repealed.

I. *Order*

The Board orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 89, are amended by amending §§ 89.142—89.145 and by deleting § 89.146 to read as shown in Annex A with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of Attorney General and Office of General Counsel for approval as to legality and form as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to the House and Senate Environmental Resources and Energy Committees and IRRC as required by the Regulatory Review Act (71 P. S. §§ 745.1—745.15).

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect immediately upon publication.

JAMES M. SEIF,
Chairperson

Fiscal Note: 7-321. No fiscal impact; (8) recommends adoption.

(Editor's Note: For a document relating to this document see 27 Pa.B. 2379 (May 10, 1997).)

Annex A

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

Subchapter C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 89. UNDERGROUND MINING OF COAL AND COAL PREPARATION FACILITIES

Subchapter F. SUBSIDENCE CONTROL

§ 89.142. Maps.

(a) *General mine map.* The application shall include maps prepared under the supervision of and certified by a qualified registered professional engineer or qualified registered professional land surveyor drawn to a scale of 1 inch = 500 feet in a manner satisfactory to the Department, updated as requested by the Department, showing the items in this subsection. The requirements of paragraphs (2)—(7) may be satisfied by referencing the maps required by Subchapter B (relating to operations).

(1) The boundaries of areas proposed to be affected over the estimated total life of the mining activity, with a description of the size, sequence and time of the mining of subareas of the mine.

(2) The surface and coal elevations and the location of test borings and core samplings.

(3) Coal crop lines and the contours of the coal seam to be mined within the permit and adjacent areas.

(4) The location and extent of known workings of active, inactive or abandoned, underground or surface mines, including identification of the coal seams mined and mine openings to the surface within, above and below the proposed adjacent and permit areas.

(5) The portrayal of major aquifers on cross sections.

(6) The area covered by the subsidence control plan submitted under § 89.141(d) (relating to application requirements) with the following information identified:

(i) The boundaries of lands and names of current surface owners of record and known subsurface owners.

(ii) Public buildings and noncommercial structures customarily used by the public including churches, schools and hospitals, identifying these features by a numerical reference.

(iii) Dwellings identified by numerical reference.

(iv) Urbanized areas, cities, towns, communities and adjacent industrial or commercial buildings.

(v) Public parks and historic structures.

(vi) Structures which are entitled to support identified by numerical reference.

(vii) Major electric transmission lines and pipelines, including identification by name or numerical reference.

(viii) Public roads and railroads.

(ix) Surface water bodies, including perennial streams, lakes, ponds, dams and impoundments with a volume of 20 acre-feet or more, indicating by numerical reference those perennial streams and other bodies of water which are a significant source for a public water supply.

(x) Coal refuse disposal areas identified by numerical reference, solid and hazardous waste disposal areas, and other air and water pollution control facilities.

(xi) Gas, oil and water wells, identified by numerical reference.

(xii) Mine surface operations and facilities.

(xiii) Landslide prone areas.

(xiv) Aquifers which serve as a significant source for a public water supply system, identified by numerical reference.

(xv) Political subdivisions.

(7) Areas over the proposed mine where the overburden is 100 feet or less.

(b) *Six-month maps.* The operator shall submit mining maps to the Department every 6 months. The maps shall:

(1) Be drawn to a scale of 1 inch = 100 feet or 1 inch = 200 feet.

(2) Be prepared under the supervision of and certified by a qualified registered professional engineer or qualified registered professional land surveyor.

(3) Show the area of mining projected for the next 6 months.

(4) Show the area of mining affected over the last 6 months, including pillar locations, and the areas abandoned or completed within the last 6 months.

(5) Provide the following information:

(i) The location and identifying number for structures and surface features required to be identified by number in subsection (a)(6).

(ii) The location and identifying number of structures and surface features required to be identified by number in subsection (a)(6), which have appeared since the permit application.

(iii) The location of features described in subsection (a)(6)(iv) and (viii).

(iv) The location of surface boundaries and identification of surface owners of record and the owner of record of the coal seam being mined.

(v) The boundaries of the projected mining area and within that area the designation of coal areas to be mined and coal areas to be left unmined, including: A description for areas to be supported by the pillar plan required by § 89.143(b)(3) (relating to performance standards), coal left in place in compliance with other statutes including those listed in § 89.141(d)(4) and identification of other areas of planned and controlled subsidence.

(vi) Existing mine workings adjacent to the projected mining area, including a designation of any survey stations, elevations of the bottom of the coal seam and areas of geographical faults.

(vii) Other information as requested in accordance with the policies and procedures of the Department.

(c) *Map to be filed with recorder of deeds.* After the Department has determined that the 6-month map is in accordance with the subsidence control plan, the operator shall file a copy of the map with the recorder of deeds for each county in which mining is projected, and submit to the Department proof of this filing.

(d) *Mining restricted until maps filed.* No mining may occur until it is shown as projected mining on the maps required by this subsection and the maps have been on file with the recorder of deeds' office for 10 days.

§ 89.143. Performance standards.

(a) *General requirements.* Underground mining activities shall be planned and conducted in accordance with the following:

(1) The subsidence control plan required by § 89.141(d) (relating to application requirements) and be consistent with the postmining land use protected by § 89.88 (relating to postmining land use).

(2) The performance standards in subsections (b)—(f).

(3) No underground mining activity will be authorized beneath structures where the depth of overburden is less than 100 feet, with the exception of mine related openings to the surface such as entries, shafts and boreholes and site specific variances for entry development as approved by the Department.

(4) The mine operator shall adopt and describe to the Department in his permit application measures to maximize mine stability; however, this subsection does not prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

(b) *Prevention of damage.* Requirements are as follows:

(1) Underground mining activities shall be planned and conducted in a manner which prevents subsidence damage to the following:

(i) Public buildings and noncommercial structures customarily used by the public, including churches, schools and hospitals.

(ii) Impoundments and other bodies of water with a storage capacity of 20 acre feet or more.

(iii) Aquifers, perennial streams and bodies of water which serve as a significant source for a public water supply system, as defined in the Pennsylvania Safe Drinking Water Act (35 P. S. §§ 721.1—721.17).

(iv) Coal refuse disposal areas authorized by permits issued under Chapter 90 (relating to coal refuse disposal).

(2) The damage prohibited by this subsection includes the cracking of walls, foundations and monuments, the draining of aquifers, perennial streams or other bodies of water which serve as a significant source for a public water supply system, as defined in the Pennsylvania Safe Drinking Water Act and the weakening of impoundments and embankments. Damage to structures described in paragraph (1)(i) need not be prevented if done with the consent of the current owner.

(3) The measures adopted to comply with this subsection shall consist of one of the measures in subparagraph (i) or (ii).

(i) The support area beneath the structure or surface feature to be protected where coal extraction is limited to 50%, and the following:

(A) The support area shall consist of pillars of coal of a size and in a pattern which maximizes bearing strength and is approved by the Department.

(B) The support area shall be rectangular in shape and determined by projecting a 15° angle of draw from the surface to the coal seam beginning 15 feet from either side of the structure. For a structure on a slope of 5% or greater, the support area on the downslope side of the structure shall be extended an additional distance determined by multiplying the depth of the overburden by the percentage of the surface slope. A pillar lying partially

within the support area shall be considered part of the support area and be consistent with the other support pillars in size and pattern.

(C) The area between the two support areas shall be treated as a support area, when the distance between the two support areas is less than the depth of the overburden.

(D) More stringent measures may be imposed or mining may be prohibited, if the measures fail to prevent subsidence damage.

(ii) Alternative measures, including full extraction techniques which result in planned and controlled subsidence, may be adopted where the operator demonstrates that the proposed measures are at least as effective in the prevention of subsidence damage as those described in this subsection. In support of the demonstration the Department may require:

(A) Premining and postmining elevation surveys of a nearby area which core samples demonstrate to be geologically similar to the area of the protected surface features.

(B) A history of mining in the surrounding area and a report listing claims of subsidence damage resulting from the mining.

(C) An engineering report on the damage to be expected from the proposed mining pattern.

(D) The operator to initiate a monitoring program to detect surface movement resulting from the mining operation. The program shall consist of monitors placed sufficiently in advance of the mining so that the mining can be stopped before the protected surface features are damaged; in calculating this distance a 25° angle of draw shall be used.

* * * * *

§ 89.144. Public notice.

(a) The operator shall send a notice by certified mail, return receipt requested, to the owner of record of each property and each political subdivision overlying its mining activities. A notice shall be sent to the resident of each structure overlying the mining operation. The notice shall be sent at least 6 months, but not more than 5 years, prior to mining beneath that property or structure or within that political subdivision. The operator shall provide the Department with a copy of each notice and return receipt, or, if the certified mail is not accepted, a copy of the returned envelope documenting that the notice was not accepted or not deliverable.

(b) The notice shall include the following information:

(1) An identification of the area in which mining will take place.

(2) The approximate time frame, within the permit term, for the conduct of underground mining activities that may cause subsidence and affect specific structures.

(3) The location of the offices where the applications and maps submitted under §§ 89.141 and 89.142 (relating to application requirements; and maps) are available for inspection and a schedule of dates for the submission of the 6 month maps under § 89.142(b).

(4) The location of the offices of both the permittee and the Department where a surface owner can submit a written complaint alleging subsidence damage covered by section 6(a) of The Bituminous Mine Subsidence and Land Conservation Act (52 P. S. § 1406.6(a)) or § 89.145(a) (relating to surface owner protection).

(c) The operator shall establish and implement a procedure to notify Federal, State or local government agencies responsible for administering public facilities, such as roads, as to when the mining activity beneath or adjacent to the public facility will occur. The notification shall be 6 months prior to mining beneath the public facility or shall be timed to enable the agency to take appropriate measures to protect the facility and to prevent conditions which may endanger the health, safety or welfare of the public.

§ 89.145. Surface owner protection.

(a) The operator shall correct material damage resulting from subsidence caused to surface lands including perennial streams as protected under § 89.143(d) (relating to performance standards), to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence.

(b) Within 10 days of being advised of a claim of subsidence damage to a structure or surface feature, the operator shall provide the Department with a report of the claim which shall include the following information:

(1) The date of the claim.

(2) The name, address and telephone number of the owner of the structure, surface feature or surface land claimed to be damaged.

(3) The number assigned to the structure or feature under § 89.142(a)(6) (relating to maps).

(4) A mine map, scale 1 inch = 100 feet or 200 feet, showing the structure, feature or surface land and the extent of mining either beneath or adjacent to it.

(5) Other information pertinent to the investigation.

§ 89.146. [Reserved].

[Pa.B. Doc. No. 97-753. Filed for public inspection May 9, 1997, 9:00 a.m.]