

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 88 AND 90]

Coal Refuse Disposal Revisions

The Environmental Quality Board (Board) amends Chapters 88 and 90 (relating to anthracite coal; and coal refuse disposal). The amendments are intended to implement section 6.1(i) and (j) of the Coal Refuse Disposal Control Act (52 P.S. § 30.56a(i) and (j)) as amended by the act of October 4, 2019 (P.L. 452, No. 74) (Act 74) and to address the differences between the Commonwealth's regulations and Federal regulations regarding temporary cessation at coal refuse disposal sites.

This final-form rulemaking was adopted by the Board at its meeting of May 18, 2022.

A. *Effective Date*

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin* and approval by the Office of Surface Mining Reclamation and Enforcement.

B. *Contact Persons*

For further information contact Gregory Greenfield, Environmental Group Manager, Bureau of Mining Programs, P.O. Box 8461, 5th Floor, 400 Market Street, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5015, or Richard Marcil, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, 9th Floor, 400 Market Street, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 783-8504. Persons with a disability may use the Pennsylvania Hamilton Relay Service, (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board" and then navigate to the Board meeting of May 18, 2022).

C. *Statutory Authority*

This final-form rulemaking is authorized under section 5 of The Clean Streams Law (35 P.S. § 691.5); section 4.2(a) of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4b(a)); section 3.2 of the Coal Refuse Disposal Control Act (52 P.S. § 30.53b); and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to adopt rules and regulations necessary for the performance of the work of the Department.

D. *Background and Purpose*

Section 1 of Act 74 amended section 6.1 of the Coal Refuse Disposal Control Act (52 P.S. § 30.56a) to conform with the regulations and standards for temporary cessation adopted by the United States Office of Surface Mining Reclamation and Enforcement under Federal law, namely the Surface Mining Control and Reclamation Act of 1977 (SMCRA) (30 U.S.C.A. §§ 1201—1328) and regulations at 30 CFR 816.131 (relating to cessation of operations: temporary). Previously, while Federal rules under SMCRA provided flexibility, the Commonwealth's Coal Refuse Disposal Control Act (52 P.S. §§ 30.51—30.66) had limited the temporary cessation of operations

at a coal refuse disposal site to no more than 1 year. Act 74 removed the Commonwealth's 1-year limitation and clarified that any rules or regulations promulgated must be in conformance with Federal provisions on this subject. Act 74 also gave the Department an opportunity to promulgate regulations linking the status of operations generating coal refuse or related material to the coal refuse disposal area. The status of a coal refuse disposal site is directly related to the status of the source of the refuse and the revisions will ensure that a change in status of one will result in a change in the status of the other. For example, when an underground coal mine is actively mining coal and sending the refuse material to a coal refuse disposal site, both facilities are considered active. If that underground coal mine is approved for temporary cessation, the coal refuse disposal site would also be approved for temporary cessation since no refuse material is being generated to be sent there. If mining was to begin again, both facilities would be considered active, whereas, if the mine was to permanently cease operations, the coal refuse disposal facility would be considered permanently ceased unless an alternative source of refuse material can be found.

The requirements for temporary cessation include a reference to a system to prevent precipitation from contacting the coal refuse. Act 74 also revised section 6.1 of the Coal Refuse Disposal Control Act to include an enumerated list of the circumstances under which this system must be installed. Previously, the requirement was listed in paragraph form, which was somewhat unclear.

Other changes to the regulations are a result of the Department's experiences with reviewing applications for the permitting of coal refuse disposal sites. Confusing or incorrect requirements in the regulations have resulted in applications being considered technically deficient and sent back to the permittee for corrections. The clarifications will improve the quality of the applications and reduce the amount of correction letters sent to address these items. This includes the existing performance standards for terraces and surface water runoff at coal refuse disposal sites which, as written, have led to confusion on the purpose and intent. The terrace requirements are revised to state that terraces must be constructed as they are needed to control erosion and prevent cascading failures of the final cap rather than just being an optional use. The use of the terms "off of the fill" and "adjacent to and above the fill" in this section are amended to clarify the original intent and resolve the existing conflicts with other parts of the section.

The Department worked with the Mining and Reclamation Advisory Board (MRAB) to develop these regulations. The MRAB is composed of two licensed bituminous surface mine operators, one licensed anthracite surface mine operator, four public members of the Citizens Advisory Council, one anthracite or one bituminous licensed professional engineer, one county conservation district representative, one majority party State senator, one minority party State senator, one majority party State representative and one minority party State representative. The revisions were first mentioned at the January 23, 2020, MRAB meeting as part of the review of the current regulatory agenda. At the March 16, 2020, MRAB Regulation, Legislation and Technical (RLT) committee meeting, the draft language was reviewed and the MRAB RLT committee suggested changes to the language. A second meeting of the MRAB RLT committee took place

on May 18, 2020, to review the draft revised language resulting from the March 16, 2020, committee meeting. The Department reviewed the revised draft with the MRAB again at its meeting on July 16, 2020. A third meeting of the MRAB RLT committee took place on October 15, 2020, to review the revised draft and the committee recommended a minor revision to the permanent cessation section. At the MRAB meeting of October 22, 2020, the MRAB recommended that the Department proceed with the proposed rulemaking. At the MRAB meeting of January 20, 2022, the MRAB recommended that the Department proceed with the final-form rulemaking.

E. Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking

§ 88.310. Coal refuse disposal: general requirements

Subsection (k)(1) is amended to individually enumerate the triggers for installation of the system to prevent precipitation from encountering the coal refuse to reflect the list of triggers included in Act 74. This amendment includes the language in Act 74 which clarifies that there is not a 1-year upper limit on the length of temporary cessation.

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 88.332. Cessation of operations: temporary

Act 74 amended section 6.1 of the Coal Refuse Disposal Control Act to conform with the regulations and standards for temporary cessation under Federal law. To be consistent with the Federal regulations at 30 CFR 816.131, subsection (a) is amended, and the existing requirements for temporary cessation for anthracite coal refuse disposal sites are amended as follows.

Amendments to subsection (a), which are based on the Federal requirements, address temporary cessation status of operations lasting 30 days or more and will require a notice to be submitted to the Department. The list of items that must be included in this notice are enumerated as paragraphs (1)–(4) and include the affected acres in the permit area; a description of the extent and kind of reclamation of the area; a description of the activities that will continue during the temporary cessation status; and a description of the status of the operation or operations that is the source of the coal refuse. Paragraphs (1)–(3) are based on the Federal regulations and are in the existing subsection (a). Paragraph (4) is based on the language in Act 74 to provide for the connection of coal refuse or related material to the coal refuse disposal area. Act 74 removed the 1-year limitation on temporary cessation and that part of subsection (a) is deleted.

Amendments to subsection (b) address temporary cessation status of operations lasting 90 days or more and, in addition to the items required to be submitted in subsection (a), there are two additional items that must be included in the notice submitted to the Department. These items may be submitted at the same time as the subsection (a) notice or subsequent to that notice. These two additional items are enumerated as paragraphs (1) and (2) and include the confirmation that the current bond is adequate to complete reclamation and the timing of the installation of the phased system to prevent precipitation from contacting the refuse. The difference in requirements between subsections (a) and (b) ensures the operator does not need to address longer-term requirements if the temporary cessation will last less than 90 days. While this distinction is neither found in the Federal requirements nor Act 74, it has been addressed

here because the amendments now allow for an unlimited time for cessation. The confirmation that the bond amount is adequate to complete the reclamation of the site as it currently exists is necessary to assure that the site can be fully reclaimed if the site ends up in bond forfeiture. The requirement for a schedule for the system to prevent precipitation from coming into contact with the refuse is to assure that the potential water quality impacts of long-term cessation are mitigated. The existing statement about exemptions for a seasonal shutdown or labor strike is deleted from this subsection as a justification for a longer temporary cessation is no longer needed since the upper 1-year time limit is deleted.

Amendments to subsection (c) include the obligation to comply with the environmental protection statutes or “acts” as defined in § 86.1 (relating to definitions) and Chapters 86–90, in addition to the provisions of the permit. Previously, subsection (c) only required compliance with the provisions of the permit. The amendments clarify that operators are required to submit a permit renewal while under temporary cessation.

Subsection (d) states that temporary cessation status ends as a result of the resumption of coal refuse disposal operations and subsequent notices of temporary cessation status must include updated information that is outlined in § 88.332 (relating to cessation of operations: temporary).

Subsection (e) states that temporary cessation status for the coal refuse disposal operation ends when an operation that is a source of the coal refuse resumes its operations or ends by permanent cessation.

Subsection (f) states that temporary cessation status for the coal refuse disposal operation itself ends by permanent cessation as specified in § 88.333 (relating to cessation of operations: permanent).

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 88.333. Cessation of operations: permanent

While neither the Federal regulations nor statute address this, subsection (b) is added to this section to provide a trigger for when a temporary cessation has developed into a permanent cessation. This necessitates the lettering of the existing language as subsection (a). Subsection (b) describes the circumstances that will terminate the temporary cessation status of a coal refuse disposal facility for noncompliance, listed as paragraphs (1)–(3). The three circumstances which will terminate the temporary cessation status are failure to comply with a final adjudicated proceeding through an act or omission which violates the acts defined in § 86.1 or Chapters 86–90; failure to comply with a permit condition required by the acts or Chapters 86–90; and failure to comply with a consent order and agreement or a consent order. The intent of this new subsection is to trigger the reclamation requirement for sites where chronic noncompliance exists and allows the Department to have the ability to begin reclamation, if necessary. In these cases, it is unlikely that the permittee will be able to meet their obligations to complete the required reclamation. The termination of temporary cessation status constitutes a final action of the Department and the Department will provide notice and an opportunity to appeal to the operator when this status changes and triggers the reclamation requirements.

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 90.31. *General requirements*

The Act 74 amendments to the Coal Refuse Disposal Control Act provided for the Department to promulgate regulations to link operations generating coal refuse or related material to the coal refuse disposal area. Paragraph (6) requires the description of the operations that will be the source of the coal refuse to be disposed of in the application for a coal refuse disposal permit. As plans change, this facility information can be updated to include other related facilities.

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 90.50. *Design criteria: groundwater and surface water protection system*

In response to Act 74, amendments to subsection (b) add “as specified in the permit” as paragraph (1.1) to the list of triggers for the installation of the system for preventing precipitation from encountering coal refuse that will be installed to prevent adverse impacts to groundwater and surface water. Paragraph (2) is revised to update the reference to subsection (b) in § 90.167 (relating to cessation of operations: temporary) to reflect the amendments to that section.

Subsection (c) is amended in this final-form rulemaking to update the title of technical guidance Document Number 563-2112-656, which was revised on July 17, 2021, to “Liners and Caps for Coal Refuse Disposal Areas.”

§ 90.122. *Coal refuse disposal*

Amendments to subsection (h) parallel the language from Act 74 relating to when the system to prevent precipitation from encountering the coal refuse is to be implemented. Paragraphs (1)—(4) are deleted and reserved and paragraphs (5)—(8) are added to list the instances when an operator must install the system to prevent precipitation from contacting the coal refuse. These include when each phase of the operation reaches capacity; when specified in the permit; when an operator temporarily ceases operation for a period of 90 days or more; or when the operation permanently ceases. The construction and design requirements currently contained in paragraphs (1) and (3) of subsection (h) are moved to the introductory paragraph of subsection (h).

The Department observed confusion among applicants regarding the purpose of terraces at coal refuse disposal sites and the need for clarification in the regulations. Subsection (m) is revised to require terraces to control erosion and enhance stability and make their use as roads optional. Previously, terraces were not required if the maximum overall completed out slopes in subsection (m) are not exceeded, but terraces are required to break up lengthy out slopes of very large coal refuse embankments to control erosion and prevent cascading failures of the final cap and soil on an entire embankment out slope. An amendment changed the reference in this subsection from subsection (n) to (o) because terraces are needed to divert the drainage off of the fill and not as a diversion adjacent to or above the fill.

The Department’s experience with reviewing the applications for coal refuse disposal sites noted that part of the subsection referenced for diverting surface water runoff cannot be satisfied as written and the intent of the subsection is confusing. Subsection (n) is amended to clarify the design requirements for diverting surface water runoff away from the fill. The reference to all subsections of § 90.104 (relating to hydrologic balance: diversions) are amended by deleting the reference to

§ 90.104(b) as the design requirements of § 90.104(b) conflict with the hydraulic requirements in this section and the requirement to maintain diversion channels located above the refuse fills in perpetuity.

When reviewing coal refuse disposal site applications, the Department has observed that the applications often require technical deficiency letters due to confusion caused by incorrect or nonapplicable section references in the existing regulations. Subsection (o) is amended to require surface water runoff diverted off of the fill to be conveyed in channels in natural ground or suitable engineered fill. The reference to § 90.104 and § 90.105 (relating to stream channel diversions) has been deleted as they were confusing and conflicted with the design requirements in this section. Diverted off the fill is a different function than a diversion channel located adjacent to or above the fill and § 90.105 is not related to the management of disposal area runoff.

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 90.167. *Cessation of operations: temporary*

Act 74 amended section 6.1 of the Coal Refuse Disposal Control Act to conform with the regulations and standards for temporary cessation under Federal law. To be consistent with the Federal regulations at 30 CFR 816.131, subsection (a) is amended, and the existing requirements for temporary cessation for bituminous coal refuse disposal sites are amended as follows.

Amendments to subsection (a), which are based on the Federal requirements, address temporary cessation status of operations lasting 30 days or more and will require a notice to be submitted to the Department. The list of items that must be included in this notice are enumerated as paragraphs (1)—(4) and include the affected acres in the permit area; a description of the extent and kind of reclamation of the area; a description of the activities that will continue during the temporary cessation status; and a description of the status of the operation or operations that is the source of the coal refuse. Paragraphs (1)—(3) are based on the Federal regulations and are in the existing subsection (a). Paragraph (4) is added based on the language in Act 74 to provide for the connection of coal refuse or related material to the coal refuse disposal area.

Amendments to subsection (b) address temporary cessation status of operations lasting 90 days or more and in addition to the items required to be submitted in subsection (a), there are two additional items that must be included in the notice submitted to the Department. These items may be submitted at the same time as the subsection (a) notice or subsequent to that notice. These two additional items are enumerated as paragraphs (1) and (2) and include the confirmation that the current bond is adequate to complete reclamation and the timing of the installation of the phased system to prevent precipitation from contacting the refuse. The difference in requirements between subsections (a) and (b) ensures the operator does not need to address longer-term requirements if the temporary cessation will last less than 90 days. While this distinction is neither found in the Federal requirements nor Act 74, it has been addressed here because the amendments now allow for an unlimited time for cessation. The confirmation that the bond amount is adequate to complete the reclamation of the site as it currently exists is necessary to assure that the site can be fully reclaimed if the site ends up in bond forfeiture. The requirement for a schedule for the system

to prevent precipitation from coming into contact with the refuse is to assure that the potential water quality impacts of long-term cessation are mitigated. The existing statement about exemptions for a seasonal shutdown or labor strike is deleted from this subsection as a justification for a longer temporary cessation is no longer needed since the upper time limit is deleted.

Amendments to subsection (c) include the obligation to comply with the environmental protection statutes or “acts” as defined in § 86.1 and Chapters 86—90, in addition to the provisions of the permit. Previously, subsection (c) only required compliance with the provisions of the permit. The amendments clarify that operators are required to submit a permit renewal while under temporary cessation.

Subsection (d) is deleted and reserved since Act 74 removed the 1-year limitation on temporary cessation. The installation of the system preventing precipitation from contacting the coal refuse is included in subsection (b), which addresses the requirements for temporary cessation of 90 days or more.

Subsection (e) states that temporary cessation status ends as a result of the resumption of coal refuse disposal operations and any subsequent notices of temporary cessation status must include updated information that is outlined in § 90.167.

Subsection (f) states that temporary cessation status for the coal refuse disposal operation ends when an operation that is a source of the coal refuse resumes its operations or ends by permanent cessation.

Subsection (g) states that temporary cessation status for the coal refuse disposal operation ends when the coal refuse disposal operation itself ends by permanent cessation as specified in § 90.168 (relating to cessation of operations: permanent).

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 90.168. *Cessation of operations: permanent*

While neither the Federal regulations nor statute address this, subsection (b) is added to this section to provide a trigger for when a temporary cessation has developed into a permanent cessation. This necessitates the lettering of the existing language as subsection (a). Subsection (b) describes the circumstances that will terminate the temporary cessation status of a coal refuse disposal facility for noncompliance, listed as paragraphs (1)—(3). The three circumstances which will terminate the temporary cessation status are failure to comply with a final adjudicated proceeding through an act or omission which violates the acts defined in § 86.1 or Chapters 86—90; failure to comply with a permit condition required by the acts or Chapters 86—90; and failure to comply with a consent order and agreement or a consent order. The intent of this new subsection is to trigger the reclamation requirement for sites where chronic noncompliance exists and allows the Department to have the ability to begin reclamation, if necessary. In these cases, it is unlikely that the permittee will be able to meet their obligations to complete the required reclamation. The termination of temporary cessation status constitutes a final action of the Department and the Department will provide notice and an opportunity to appeal to the operator when this status changes and triggers the reclamation requirements.

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

§ 90.202. *General requirements*

Amendments to subsection (b)(1) changed the reference from a “coal preparation facility” to a “coal mining activity.” This change was made because not all coal refuse is the result of coal preparation. For example, some surface mines will take their refuse to a refuse disposal site. The existing language is also inconsistent with the language in section 4.1 of the Coal Refuse Disposal Control Act (52 P.S. § 30.54a).

There are no changes made to this section from the proposed rulemaking to this final-form rulemaking.

F. *Summary of Comments and Responses on the Proposed Rulemaking*

Two comments were submitted to the Department during the public comment period. Aside from general support for the proposed rulemaking, neither of the comments specifically addressed any particular aspects of the rulemaking. Changes or modifications are not made to this final-form rulemaking in response to comments.

One commentator suggested a change to the proposed rulemaking to require the Department to publish a notice in the *Pennsylvania Bulletin* when the status of a coal refuse disposal site changes. The Board notes that there are hundreds of mine sites currently permitted in the Commonwealth and an individual site’s status can change frequently throughout the year. Due to the frequency of these changes and the timing of the formal publication process, notifying the public of these changes through the *Pennsylvania Bulletin* would be both inefficient and untimely. The Board suggests a more effective method for the public to access the real-time status of any permitted operation, as well as other relevant information on permitted mining activities, is through the Department’s database, Environmental Facilities Application Compliance Tracking System, known as eFACTS, available at <https://www.ahs.dep.pa.gov/eFactsWeb/default.aspx>.

G. *Benefits, Costs and Compliance*

Benefits

This final-form rulemaking makes the Department’s regulations consistent with Federal regulations and State law related to the operation of coal refuse disposal areas. This final-form rulemaking clarifies when an operator must install a system for preventing precipitation from encountering coal refuse, which will improve environmental protection by reducing the likelihood that precipitation will generate a pollutional discharge from the site. This final-form rulemaking establishes a relationship between the coal refuse disposal area and the source of the refuse, which will improve environmental protection by ensuring that disposal areas do not remain unreclaimed long after the source has ceased generating refuse. This final-form rulemaking is not expected to directly improve public health, although it may have an indirect public health benefit to the extent that it reduces the likelihood of pollutional discharges from coal refuse disposal areas.

Compliance costs

Existing and future permittees of coal refuse disposal sites are required to comply with this final-form rulemaking, which does not create any new compliance costs and it is not expected to prevent or avoid costs. This final-form rulemaking clarifies the existing requirements which may avoid costs associated with navigating unclear requirements that could be inconsistently interpreted or applied.

Compliance assistance plan

Compliance assistance for this final-form rulemaking will be provided through the Department's routine interaction with trade groups and individual applicants. Financial assistance will not be necessary or provided.

Paperwork requirements

This final-form rulemaking does not require additional paperwork.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) established a National policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking incorporates the following pollution prevention incentives: it clarifies when an operator must install a system for preventing precipitation from encountering coal refuse, which will improve environmental protection by reducing the likelihood that precipitation will generate a pollutational discharge from the site; and requires some relationship between the coal refuse disposal area and the source of the refuse, which will improve environmental protection by ensuring that disposal areas do not remain unreclaimed long after the source has ceased generating refuse.

I. Sunset Review

The Board is not establishing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to closely monitor these regulations for their effectiveness and recommend updates to the Board as necessary.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on October 20, 2021, the Board submitted a copy of the notice of proposed rulemaking, published at 51 Pa.B. 6914 (November 6, 2021), and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Board shall submit to IRRC and the Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on July 20, 2022, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, IRRC met on July 21, 2022, and approved the final-form rulemaking.

K. Findings of the Board

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law, and the regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law, and all comments were considered.

(3) This final-form rulemaking does not enlarge the purpose of the proposed rulemaking published at 51 Pa.B. 6914.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Board, 25 Pa. Code Chapters 88 and 90, are amended by amending §§ 88.310, 88.332, 88.333, 90.31, 90.50, 90.122, 90.167, 90.168 and 90.202 to read as set forth in Annex A.

(b) The Chairperson of the Board shall submit this final-form regulation to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this final-form regulation to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this final-form regulation and deposit it with the Legislative Reference Bureau, as required by law.

(e) This final-form regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

RAMEZ ZIADEH, P.E.,
Acting Chairperson

(*Editor's Note:* See 52 Pa.B. 4479 (August 6, 2022) for IRRC's approval order.)

Fiscal Note: Fiscal Note 7-565 remains valid for the final adoption of the subject regulations.

Annex A

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

**Subpart C. PROTECTION OF NATURAL
RESOURCES**

ARTICLE I. LAND RESOURCES

CHAPTER 88. ANTHRACITE COAL

**Subchapter D. ANTHRACITE REFUSE DISPOSAL:
MINIMUM ENVIRONMENTAL PROTECTION
PERFORMANCE STANDARDS**

§ 88.310. Coal refuse disposal: general requirements.

(a) Coal refuse shall be hauled or conveyed to and placed in designated disposal areas authorized for that purpose. The refuse shall be placed in a controlled manner to ensure the following:

(1) The land mass designated as the disposal area is suitable for reclamation and revegetation compatible with the natural surroundings.

(2) Stability of the disposal area.

(3) Leachate and surface runoff from the disposal area will not degrade surface waters or groundwaters or exceed the established effluent limitations.

(b) The disposal area shall be designed using recognized professional standards and approved by the Department. The design shall be certified by a registered professional engineer.

(c) Trees, grasses, shrubs and other organic materials shall be removed for a distance of 50 feet from the current disposal area concurrent with the placement of refuse.

(d) Slope protection shall be provided to minimize surface erosion at the site. The disturbed areas, including diversion ditches that are not riprapped, shall be vegetated upon completion of construction.

(e) The coal refuse to be placed in the fill shall be hauled or conveyed and placed in horizontal lifts in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered and graded to allow surface and subsurface drainage to be compatible with the natural surroundings, and ensure a long-term static safety factor of 1.5 and seismic safety factor of 1.2.

(f) The final configuration of the disposal shall be suitable for the approved postmining land uses.

(g) Terraces may be utilized to control erosion and enhance stability if approved by the Department.

(h) If the disposal area contains springs, natural or manmade water-courses or wet-weather seeps, an underdrain system consisting of durable rock shall be constructed from the wet areas in a manner that prevents infiltration of the water into the spoil material. The underdrain system shall be designed and constructed using standard geotechnical engineering methods.

(i) Coal refuse may be returned to underground mine workings, but only in accordance with a disposal program approved by the Department and the Mine Safety and Health Administration.

(j) The system to prevent adverse impacts to the surface water and groundwater shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles or cross-sections approved in the permit and shall function to prevent adverse impacts to surface water and groundwater.

(k) The system to prevent precipitation from coming in contact with the coal refuse shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles and cross-sections approved in the permit and shall function to prevent precipitation from contacting the coal refuse. The following apply:

(1) The system shall be installed:

(i) as phases reach capacity;

(ii) as specified in the permit;

(iii) when the operation temporarily ceases for a period in excess of 90 days unless the Department approves an operator's request for a longer period for installation of the system; or

(iv) when the operation permanently ceases.

(2) The system shall be designed to allow for revegetation of the site in accordance with the standard of success under § 88.330 (relating to revegetation: standards for successful revegetation) and for prevention of erosion.

§ 88.332. Cessation of operations: temporary.

(a) Before temporary cessation status of operations for a period of 30 days or more, an operator shall submit to the Department a notice of intention to temporarily cease operations. The notice shall include all of the following:

(1) A statement of the exact number of acres affected in the permit area.

(2) A description of the extent and kind of reclamation of the areas.

(3) Identification of the backfilling, regrading, revegetation, environmental monitoring and water treatment activities that will continue during the temporary cessation status.

(4) A description of the status of all operations that are a source of the coal refuse.

(b) Before temporary cessation status of operations for a period of 90 days or more, an operator shall submit to the Department a notice that may be included in, or submitted subsequent to, the notice required under subsection (a), that includes all of the following:

(1) Confirmation that the current bond under the permit is sufficient to complete the reclamation of the coal refuse area.

(2) The timing of the installation of the phased system to prevent precipitation from contacting the refuse.

(c) Temporary cessation status of operations does not relieve the operator of the obligations to comply with the acts as defined in § 86.1 (relating to definitions), this chapter or Chapters 86, 87, 89 or 90 or the approved permit, including the obligation to submit an application for permit renewal at least 180 days before the expiration of the existing permit. The Department may enforce these obligations during the temporary cessation status of operations.

(d) Temporary cessation status of a coal refuse disposal operation ends with the resumption of operations at that site. Subsequent notices of temporary cessation status following resumption of coal refuse operations must include updated information outlined in this section.

(e) Temporary cessation status of a coal refuse disposal operation ends with the resumption of operations at a source of the coal refuse or by permanent cessation at all sources of the coal refuse.

(f) Temporary cessation status of a coal refuse disposal operation ends with the permanent cessation of operations as specified in § 88.333 (relating to cessation of operations: permanent).

§ 88.333. Cessation of operations: permanent.

(a) Operations that are permanently ceased shall be backfilled or closed or otherwise permanently reclaimed in accordance with this chapter and the permit. All underground openings, equipment, structures or other facilities not required for monitoring, unless approved by the Department as suitable for the postmining land use, shall be removed and the affected land reclaimed.

(b) Unless coal refuse disposal operations resume as specified in § 88.332(d) or (e) (relating to cessation of operations: temporary), termination of temporary cessation status will place the mining operation in permanent

cessation status and subject to the provisions of subsection (a). Temporary cessation status will terminate for operations that fail to comply with any of the following:

(1) A final adjudicated proceeding as defined under § 86.355(e) (relating to criteria for approval of application) as a result of an act or omission which violates the acts as defined in § 86.1 (relating to definitions), this chapter or Chapters 86, 87, 89 or 90.

(2) A permit condition required by the acts, this chapter or Chapters 86, 87, 89 or 90.

(3) A consent order and agreement or a consent order.

CHAPTER 90. COAL REFUSE DISPOSAL

Subchapter C. MINIMUM OPERATION AND RECLAMATION PLAN INFORMATION REQUIRED IN APPLICATIONS FOR COAL REFUSE DISPOSAL

§ 90.31. General requirements.

An application shall contain a description of the coal refuse disposal activities proposed to be conducted during the life of the coal refuse disposal operations within the proposed permit area, including, at a minimum, the following:

(1) A narrative description of the type and method of coal refuse disposal procedures and proposed engineering techniques and the major equipment to be used during operations.

(2) A narrative explaining the construction, modification, use, maintenance and removal of the following facilities and structures, unless retention of the facility or structure is necessary for postdisposal land use as specified in § 90.166 (relating to postdisposal land use):

- (i) Dams, embankments and other impoundments.
- (ii) Overburden and topsoil handling and storage areas.
- (iii) Coal removal, handling, storage, cleaning, processing and transportation areas and structures.
- (iv) Spoil, coal refuse, mine development waste and noncoal waste removal, handling, storage, transportation and disposal areas and structures.
- (v) Mine facilities.
- (vi) Water and air pollution control facilities.
- (vii) Erosion and sediment control facilities.

(3) A description of the measures to be employed to ensure that all debris, potential acid-forming and potential toxic-forming materials, and materials constituting a fire hazard are disposed of in accordance with this chapter and a description of the contingency plans which have been developed to preclude combustion of the materials.

(4) A description, including appropriate cross sections and maps, of the measures to be used to seal or manage mine openings, and to plug, case, line or manage exploration holes, other boreholes, wells and other openings within the proposed permit area.

(5) A demonstration that the notification requirements of § 86.31(e) (relating to public notices of filing of permit applications) have been satisfied.

(6) A description of the operations that are proposed to be the source or sources of the coal refuse to be disposed of at the coal refuse disposal facility and the types of refuse to be disposed.

§ 90.50. Design criteria: groundwater and surface water protection system.

(a) The application shall include a description of the system that will be installed to prevent adverse impacts to groundwater and surface water. The description shall include maps, plans and other information necessary to evaluate the design of the system.

(b) The application shall include a description of the system that will be installed to prevent precipitation from coming into contact with the coal refuse. The description shall include maps, plans and other information necessary to evaluate the design of the system. The coal refuse disposal operation shall be designed in phases to minimize the amount of time the entire coal refuse area is exposed to precipitation prior to the installation of the system to prevent precipitation from contacting the coal refuse. The application shall describe the design of the system for preventing precipitation from contacting coal refuse and how the system will be installed in accordance with the following:

(1) During routine coal refuse disposal as phases of the coal refuse disposal area reach capacity.

(1.1) As specified in the permit.

(2) During periods of temporary cessation as directed under § 90.167(b) (relating to cessation of operations: temporary).

(3) When the operation permanently ceases.

(c) The Department's technical guidance Document Number 563-2112-656, titled Liners and Caps for Coal Refuse Disposal Areas, shall be used as guidance for designing coal refuse disposal sites incorporating earthen, admixed or synthetic liners or caps for preventing adverse impacts to groundwater and surface water and for preventing precipitation from contacting coal refuse.

(d) The application shall include a description of the measures to be taken to ensure the long-term functionality of the systems described in subsections (a) and (b). The description shall address the site's susceptibility to mine subsidence and the potential impacts of mine subsidence on the systems described in subsections (a) and (b). The description shall also address the potential for deterioration of components of the systems described in subsections (a) and (b) due to other physical or chemical processes including but not limited to attack from sulfate-laden or acidic groundwater and/or leachate.

Subchapter D. PERFORMANCE STANDARD FOR COAL REFUSE DISPOSAL

§ 90.122. Coal refuse disposal.

(a) Coal refuse shall be transported and placed in designated disposal areas approved by the Department for this purpose. These areas shall be within the permit area. The coal refuse disposal area shall be designed, constructed and maintained to ensure:

(1) The leachate and surface runoff from the permit area will not degrade surface water or groundwater or exceed the effluent limitations of § 90.102 (relating to hydrologic balance: water quality standards, effluent limitations and best management practices).

(2) Prevention of combustion.

(3) Prevention of public health hazards.

(4) Stability of the fill.

(5) The land mass designated as the coal refuse disposal area is suitable for reclamation and revegetation compatible with the natural surroundings.

(b) The fill shall be designed using recognized professional standards, certified by a qualified registered professional engineer, and approved by the Department.

(c) The foundation and abutment of the fill shall be stable under all conditions of construction and operation. Sufficient foundation investigations and laboratory testing of foundation materials and coal refuse shall be performed to determine the design requirements for stability of the facility. Analyses of foundation conditions shall include the effect of underground mine workings, if any, upon the stability of the structure.

(d) The coal refuse disposal fill shall be designed to attain a minimum long-term static factor of safety of 1.5 and a minimum seismic factor of safety of 1.2, based upon data obtained from subsurface exploration, geotechnical testing, foundation design, fill design and accepted engineering analyses.

(e) When the average slope of coal refuse disposal area exceeds 1v:2.8h—36%, or lesser slopes as may be designated by the Department based on local conditions, key way cuts, or excavation into stable bedrock or bedrock toe buttresses shall be constructed to stabilize the fill. When the toe of the fill rests on a downslope, stability analysis shall be performed in accordance with § 90.39 (relating to ponds, impoundments, banks, dams, embankments, piles and fills) to determine the size of rock toe buttresses and key way cuts.

(f) If the disposal area contains springs, natural or manmade watercourses, or wet-weather seeps, the Department may approve an underdrain/subdrainage system, consisting of durable rock or other materials, designed and placed in a manner that prevents infiltration of the water into the fill material and ensures continued free drainage from the wet areas.

(g) The disposal area shall be provided with a system to prevent adverse impacts to the surface water and groundwater. The system shall be constructed in accordance with design schematics, test results, descriptions, plans, maps, profiles or cross-sections approved in the permit and shall function to prevent adverse impacts to surface water and groundwater.

(h) The operator shall install a system to prevent precipitation from coming in contact with the coal refuse. The system shall be constructed in accordance with the design schematics, test results, descriptions, plans, maps, profiles or cross-sections approved in the permit, and designed to allow for revegetation of the site in accordance with the standard of success under § 90.159 (relating to revegetation: standards for successful revegetation) and for the prevention of erosion:

- (1) [Reserved].
 - (2) [Reserved].
 - (3) [Reserved].
 - (4) [Reserved].
 - (5) as phases reach capacity;
 - (6) as specified in the permit;
 - (7) if the operator temporarily ceases operation of the coal refuse disposal area for a period in excess of 90 days, unless the Department approves an operator's request for a longer period for the installation of the system; or
 - (8) when the operation permanently ceases.
- (i) An underdrain/subdrainage system for the fill shall be designed in accordance with the following:

(1) It shall include an underdrain system which will ensure continued free drainage of anticipated seepage from precipitation and from spring or wet-weather seeps, and meet the following:

(i) Anticipated discharges from springs and seeps due to precipitation shall be based on records or field investigation or both, to determine seasonal variation. The design of the underdrain system shall be based on maximum anticipated discharges.

(ii) Granular material used for the drainage system shall be nondegradable, nonacid-forming or nontoxic-forming rock free of clay, and consist of durable particles such as natural sands and gravels, sandstone, limestone or other durable rock which will not flake in water.

(2) The underdrain system shall be designed to be installed along the natural drainage system; extend from toe to head of fill; and contain lateral drains to each area of potential drainage or seepage.

(3) A filter system to ensure the proper functioning of the rock underdrain system shall be designed and constructed using standard geotechnical engineering methods.

(j) The final configuration of the fill shall be suitable for the post disposal land use approved under § 90.165 (relating to prime farmland: revegetation), except that no depression or impoundment may be allowed on the completed fill. New coal refuse disposal piles and area of piles active since May 17, 1973, shall blend into the local surroundings. Unless otherwise approved by the Department, the fill may not be designed to exceed the approximate elevation of the surrounding ridgeline.

(k) The maximum overall completed slope of the coal refuse disposal pile measured from toe of the fill to crest of upper terrace may not exceed 33% or 18 degrees.

(l) The top surface of the completed fill shall be graded so that the final slope after settlement will be no steeper than 1v:20h—5.0% toward properly designed drainage channels in natural ground along the periphery of the fill. Surface runoff from the top surface of the fill may not be allowed to flow over the outslope of the fill.

(m) Terraces must be utilized to control erosion and enhance stability, and may be utilized for roads included in postmining land use.

(1) The slope of the outslope between terraces may not exceed 1v:2h—50%. The vertical distance between terraces may not exceed 50 feet.

(2) To control surface runoff, each terrace bench will be a minimum of 20 feet wide, shall be graded to a slope of 1v:20h—5.0% toward the embankment. Runoff shall be collected by a ditch along the intersection of each terrace bank and the toe of the next higher outslope.

(3) Terrace ditches shall have a maximum 5.0% slope toward the channels specified in subsection (o) unless steeper slopes are necessary in conjunction with approved roads.

(n) Surface water runoff from areas adjacent to and above the fill shall be diverted away from the fill in stabilized channels which are designed to safely pass the peak runoff from a 100-year precipitation event. Diversion channels shall also comply with § 90.104(a) and (c)—(h) (relating to hydrologic balance: diversions).

(o) Surface water runoff from the fill shall be collected and conveyed in properly designed channels constructed in natural ground or engineered fill of inert material

along the periphery of the fill. The channels must safely pass the peak runoff from a 100-year precipitation event.

(p) Slope protection shall be provided to minimize surface erosion at the site. Disturbed areas, including diversion ditches that are not riprapped, shall be vegetated upon completion of construction.

(q) Coal refuse shall be hauled or conveyed and placed in a controlled manner and concurrently compacted as approved by the Department in lifts no greater than 2 feet, or less, as required or approved by the Department, as the design to:

- (1) Achieve the densities designed to ensure mass stability.
- (2) Prevent mass movement.
- (3) Avoid contamination of the rock underdrain.
- (4) Prevent formation of voids.

(r) Vegetative and organic materials shall be removed from the area where coal refuse is disposed of, and for a distance of 50 feet from the perimeter of the area where coal refuse is disposed, the topsoil shall be removed, segregated and stored or replaced as provided in §§ 90.96—90.100. If approved by the Department, organic material may be used a mulch or may be included in the topsoil to control erosion, promote growth of vegetation or increase the moisture retention of the soil.

§ 90.167. Cessation of operations: temporary.

(a) Before temporary cessation status of operations for a period of 30 days or more, an operator shall submit to the Department a notice of intention to temporarily cease operations. The notice shall include all of the following:

- (1) A statement of the exact number of acres affected in the permit area.
- (2) A description of the extent and kind of reclamation of the areas.
- (3) Identification of the backfilling, regrading, revegetation, environmental monitoring and water treatment activities that will continue during the temporary cessation status.
- (4) A description of the status of all operations that are a source of the coal refuse.

(b) Before temporary cessation status of operations for a period of 90 days or more, an operator shall submit to the Department a notice that may be included in, or submitted subsequent to, the notice required under subsection (a) and shall include all of the following:

- (1) Confirmation that the current bond under the permit is sufficient to complete the reclamation of the coal refuse area.
- (2) The timing of the installation of the phased system to prevent precipitation from contacting the refuse.

(c) Temporary cessation status of operations does not relieve the operator of the obligations to comply with the acts as defined in § 86.1 (relating to definitions), this chapter or Chapters 86, 87, 88 or 89 or the approved permit, including the obligation to submit an application for permit renewal at least 180 days before the expiration of the existing permit. The Department may enforce these obligations during the temporary cessation status of operations.

(d) [Reserved].

(e) Temporary cessation status of a coal refuse disposal operation ends with the resumption of operations at that

site. Subsequent notices of temporary cessation status following resumption of coal refuse operations must include updated information outlined in this section.

(f) Temporary cessation status of a coal refuse disposal operation ends with the resumption of operations at a source of the coal refuse or by permanent cessation at all sources of the coal refuse.

(g) Temporary cessation status of a coal refuse disposal operation ends with the permanent cessation of operations as specified in § 90.168 (relating to cessation of operations: permanent).

§ 90.168. Cessation of operations: permanent.

(a) Operations that are permanently ceased shall be backfilled or closed or otherwise permanently reclaimed in accordance with this chapter and the permit. All underground openings, equipment, structures or other facilities not required for monitoring, unless approved by the Department as suitable for the postmining land use, shall be removed and the affected land reclaimed.

(b) Unless coal refuse disposal operations resume as specified in § 90.167(e) or (f) (relating to cessation of operations: temporary), termination of temporary cessation status will place the mining operation in permanent cessation status and subject to the provisions of subsection (a). Temporary cessation status will terminate for operations that fail to comply with any of the following:

- (1) A final adjudicated proceeding as defined under § 86.355(e) (relating to criteria for approval of application) as a result of an act or omission which violates the acts as defined in § 86.1 (relating to definitions), this chapter or Chapters 86, 87, 88 or 89.
- (2) A permit condition required by the acts, this chapter or Chapters 86, 87, 88 or 89.
- (3) A consent order and agreement or a consent order.

Subchapter E. SITE SELECTION

§ 90.202. General requirements.

(a) A preferred site shall be used for coal refuse disposal unless the applicant demonstrates to the Department that an alternate site is more suitable based upon engineering, geology, economics, transportation systems, and social factors and is not adverse to the public interest.

(b) The applicant is required to determine whether the search area contains a preferred site.

(1) For a new coal refuse disposal area that will support an existing coal mining activity, the applicant shall examine the geographic area within a 1-mile radius of the existing coal mining activity.

(2) For a proposed coal refuse disposal area that will support a proposed coal preparation facility, the applicant shall examine a 25-square mile geographic area encompassing the proposed coal preparation facility. In defining the 25-square mile area, consideration shall be given to environmental, technical, transportation, economic and social factors where applicable.

(c) If there are no preferred sites located within the search area, the applicant shall conduct a comparative analysis of the potential coal refuse disposal sites in accordance with § 90.204(b) (relating to proposing an alternate site).

(d) The Department will not approve a site proposed by the applicant for coal refuse disposal activities when the Department finds that the adverse environmental im-

pacts of using the site for coal refuse disposal activities would clearly outweigh the public benefits.

(e) Except on preferred sites, the Department will not approve coal refuse disposal on or within any of the following areas:

- (1) Prime farmlands.
- (2) An exceptional value watershed as defined under Chapter 93 (relating to water quality standards).
- (3) Sites known to contain threatened or endangered animals listed exclusively under the Commonwealth's protection programs.
- (4) An area that is hydrologically connected to and contributes at least 5% of the drainage to wetlands designated as exceptional value under Chapter 105 (relating to dam safety and waterway management) unless a larger percentage contribution is authorized by the Department after consultation with the Fish and Boat Commission.
- (5) A watershed less than 4 square miles in area upstream of the intake of a public water supply.
- (6) A watershed less than 4 square miles in area upstream of the upstream limit of a public recreational impoundment.
- (7) Sites known to contain Federally listed threatened or endangered plants or animals. At preferred sites known to contain Federally listed threatened or endangered species, approval will be granted only when the Department concludes and the United States Fish and Wildlife Service concurs that the proposed activity is not likely to adversely affect Federally listed threatened or endangered species or result in the take of Federally listed threatened or endangered species in violation of section 9 of the Endangered Species Act of 1973 (16 U.S.C.A. § 1538).
- (f) As part of the site selection process, an applicant may request approval for more than one site. The Department will evaluate each site proposed for coal refuse disposal and, if the Department finds that a proposed site meets the requirements of this subchapter, it will designate it as an approved site. The applicant will then have the option of choosing a selected site from among the approved sites and submitting an application for coal refuse disposal for that site.

[Pa.B. Doc. No. 22-1380. Filed for public inspection September 9, 2022, 9:00 a.m.]

Title 25—ENVIRONMENTAL PROTECTION

**BOARD OF COAL MINE SAFETY
[25 PA. CODE CH. 208]**

Prohibiting Electronic Liquid-Vaporizing Devices at Underground Bituminous Coal Mines

The Board of Coal Mine Safety (Board) amends Chapter 208 (relating to underground coal mine safety) to read as set forth in Annex A.

This final-form rulemaking was adopted by the Board at its meeting on June 15, 2022.

A. Effective Date

This final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*.

B. Contact Persons

For further information, contact Richard Wagner, PE, Director, Bureau of Mine Safety, P.O. Box 133, New Stanton, PA 15672, (724) 404-3154; or Richard Marcil, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, 9th Floor, Rachel Carson State Office Building, Harrisburg, PA 17105, (717) 783-8504. Persons with a disability may use the Pennsylvania Hamilton Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available on the Department of Environmental Protection's (Department) web site at www.dep.pa.gov (select "Public Participation," then "Advisory Committees," then "Mining," then "Board of Coal Mine Safety" and then navigate to the Board meeting of June 15, 2022).

C. Statutory Authority

This final-form rulemaking is authorized under section 106.1(a) of the Bituminous Coal Mine Safety Act (BCMSA) (52 P.S. § 690-106.1(a)), which grants the Board the authority to adopt regulations that are necessary or appropriate to implement the requirements of the BCMSA and to protect the health, safety and welfare of miners and other individuals in and about mines. Section 106.1(f)(2) of the BCMSA further provides that regulations may address any hazards not addressed by existing safety standards. This final-form rulemaking imposes a civil penalty. The Department is authorized to assess civil penalties under section 105(16) of the BCMSA (52 P.S. § 690-105(16)), regarding powers and duties of the Department.

D. Background and Purpose

On July 7, 2008, the BCMSA was enacted, which was the first significant update of the Commonwealth's underground bituminous coal mine safety laws since 1961. Section 106 of the BCMSA (52 P.S. § 690-106) establishes the Board, which consists of three members representing mine workers, three members representing underground bituminous coal mine operators and the Secretary of the Department who serves as the Board's chairperson.

The purposes of the BCMSA, enumerated under section 103(b) (52 P.S. § 690-103(b)), include the establishment and promulgation of improved mandatory standards to protect the health and safety of miners and other individuals in and about mines. To protect the health and safety of miners and other individuals, this final-form rulemaking amends the smoking prohibition at underground bituminous coal mines to expressly prohibit the use or possession, or both, of electronic liquid-vaporizing devices, including electronic cigarettes, and impose a penalty for violations of the prohibition. By prohibiting the use of or possession, or both, of electronic liquid vaporizing devices at underground bituminous coal mines, this final-form rulemaking addresses both explosive and distraction hazards these devices present at underground bituminous coal mining operations.

Coal mine fires pose a constant danger to the safety of miners and to their livelihood. Underground mine fires pose an added hazard because of the confined environment with remote exits. The Federal government has enacted safety regulations for underground coal mines that have greatly improved the safety of miners. See 30 CFR Part 75 (relating to mandatory safety standards—underground coal mines). However, mine fires and fire

injuries remain serious hazards for all coal mining operations. The combination of an electronic cigarette and a lithium-ion battery is a new and unique hazard. There is no analogy among consumer products to the risk of a severe, acute injury presented by an e-cigarette. Fires or explosions caused by the batteries used in electronic cigarettes are uncommon. However, the consequences can be devastating and life-altering for the victims. This is especially a concern in the underground mining environment, where explosions in underground mines are caused by accumulations of flammable gas or combustible dust, or both, mixed with air in the presence of an ignition source. While much progress has been made in preventing explosion disasters in coal mines, explosions still occur, sometimes producing multiple fatalities. Preventing fires is essential to the health and safety of mine workers.

Miners, their families, mining companies and others will benefit from the additional safety ensured by the avoided hazards associated with the use or possession of electronic liquid-vaporizing devices at underground bituminous coal mines. Additionally, miners, mine officials, mine operators and the Department will benefit from clarity regarding how the use and possession of these devices are regulated at underground bituminous coal mines.

Section 105(1) and (2) of the BCMSA (52 P.S. § 690-105(1) and (2)), authorizes the Department to interview individuals at a mine site, investigate them and conduct inspections of their property to ensure compliance with the BCMSA. Specifically for smoking-related items, section 268(b) of the BCMSA (52 P.S. § 690-268(b)), also allows an operator to search individuals in a mine or about to enter a mine, including their clothing and material belongings, for smoking-related items. Additionally, Federal regulations require all operators to have a Mine Safety and Health Administration (MSHA) approved program to insure persons entering underground mines do not carry in smoking materials, matches or lighters. See 30 CFR 75.1702 (relating to smoking; prohibition). An operator's MSHA approved plan would dictate the frequency of searches and other procedures that would uncover smoking-related items. If an operator finds a smoking-related article at a surface work area, they are not required under the BCMSA to report it to the Department. The Department would become involved in a situation where the violation was reported by an operator, forwarded to the Department as a tip through the MSHA hotline for anonymous tips or uncovered by a Department inspector. The Department would conduct a follow-up investigation as appropriate, which may include an inspection of the operator's smoke search and violation log kept under an MSHA approved smoking safety plan, or interviews with the operator and its employees.

When a search or investigation results in evidence that an individual had smoking-related items at or around an underground mine site, the BCMSA's statutory enforcement provisions currently provide the Department limited options. For a mine operator or mine official, the Department may issue an administrative penalty under section 503 of the BCMSA (52 P.S. § 690-503). Section 503 does not apply to other employees at a mine site who are not mine operators or officials. The Department may also decertify an individual for failure to comply with provisions of, or regulations promulgated under section 510(b) of the BCMSA (52 P.S. § 690-510(b)). This is the typical sanction for individuals who engage in conduct, such as bringing combustible material into an underground mine, that puts mine workers at significant risk. However, this sanction cannot be utilized for individuals who do not yet

have a certification, such as apprentice miners. Additionally, in some circumstances, initiating a decertification action for violating a smoking, or smoking-related, provision would be unduly harsh and punitive.

To remedy the Department's currently limited options to appropriately penalize the use or possession of e-cigarettes, this final-form rulemaking, promulgated under the Department's statutory authority to assess civil penalties and the Board's authority to promulgate regulations to improve mine worker safety, gives the Department additional regulatory authority to assess a civil monetary penalty. Under this final-form rulemaking, the Department may assess a civil penalty for the regulatory maximum amount for each violation, which is currently \$342. This amount is the maximum civil penalty available under Federal law. The civil penalty provides the Department with flexibility to punish smoking safety standard violations where decertification may not be appropriate. As an action taken by the Department, the penalty would be appealable to the Environmental Hearing Board.

This final-form rulemaking also separately distinguishes the prohibition at surface work areas of underground bituminous coal mines from the prohibition inside these mines.

E. Summary of Final-Form Rulemaking and Changes from Proposed to Final-Form Rulemaking

This final-form rulemaking amends the existing smoking prohibition at § 208.375 (relating to smoking prohibition), which applies at surface work areas of underground bituminous coal mines and adds § 208.376 (relating to smoking prohibition: underground areas).

§ 208.375. Smoking prohibition: surface work areas

Subsection (a) retains the existing smoking prohibition at surface work areas of underground bituminous coal mines, which incorporates the Federal regulation at 30 CFR 77.1711 (relating to smoking prohibition). There are no changes made to this subsection from the proposed rulemaking to this final-form rulemaking.

Subsection (b) expressly prohibits electronic liquid-vaporizing devices and authorizes the imposition of a penalty for violations of this section. The penalty refers to the penalty imposed under Federal law at 30 CFR 100.5(d) (relating to determination of penalty amount; special assessment), which is adopted and incorporated herein by reference, so as not to be more stringent. Under the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. §§ 2461—2467), the maximum penalty is updated every year to reflect inflation and is currently set at \$342, as of January 14, 2021. See 86 FR 2970 (January 14, 2021). The penalty is not exclusive of any other enforcement option the Department determines is warranted under the particular circumstances of the violation. The Department will review whether to pursue other enforcement actions, in addition to levying a civil penalty, on a case by case basis as warranted by the particular facts giving rise to the violation.

Subsection (b) is changed from the proposed rulemaking. The Board has determined that violating a smoking, or smoking-related, prohibition is severe enough of an offense that no circumstances would warrant deviating from the relatively small Federal maximum civil penalty. See 30 CFR 100.5(d). Therefore, the Board has opted to promulgate this final-form rulemaking without discretion to reduce the civil penalty from the Federal maximum amount.

§ 208.376. *Smoking prohibition: underground areas*

Subsections (a)—(c) are based on the existing provisions of the smoking prohibition in underground bituminous coal mines from section 268(b) of the BCMSA and add clarification that this prohibition applies to the use and possession of electronic liquid-vaporizing devices. Subsection (a) prohibits smoking or the use of an open flame, subsection (b) prohibits the possession of smoking materials and subsection (c) authorizes operators to search any individual entering the mine. There are no changes made to these subsections from the proposed rulemaking to this final-form rulemaking.

Subsection (d) authorizes the imposition of a penalty for violations of this section. Just as in § 208.375, described previously, the penalty refers to the penalty imposed under Federal law, so as not to be more stringent. See 30 CFR 100.5(d). Under the Federal Civil Penalties Inflation Adjustment Act of 1990, the maximum penalty is updated every year to reflect inflation and is currently set at \$342 as of January 14, 2021. See 86 FR 2970 (January 14, 2021). The penalty is not exclusive of any other enforcement option the Department determines is warranted under the particular circumstances of the violation. The Department will review whether to pursue other enforcement actions, in addition to levying a civil penalty, on a case by case basis as warranted by the particular facts giving rise to the violation.

Subsection (d) is changed from the proposed rulemaking. At the suggestion of the Independent Regulatory Review Commission (IRRC), the list of prohibited items in subsection (d) was changed to a reference to “the items identified in subsection (b)” to improve clarity. Prior to the change, the lists in subsection (b) and subsection (d) were slightly different, which could have caused confusion for the regulated community. Additionally, a change was made to require the maximum allowable penalty under 30 CFR 100.5(d) for violating smoking-related mandatory safety standards, for the same reasons this change was made in § 208.375.

F. *Summary of Comments and Responses on the Proposed Rulemaking*

The proposed rulemaking was adopted by the Board at its meeting on September 1, 2020, and was published at 51 Pa.B. 1316 (March 13, 2021). Public hearings were not held. The 30-day public comment period closed on April 12, 2021.

The Board received one public comment from the American Lung Association (ALA) and comments from IRRC. The ALA comment was in support of the proposed rulemaking. IRRC had three comments. A summary of IRRC’s comments are as follows:

1. IRRC commented that the Board should explain its statutory authority to assess a civil penalty beyond the enforcement remedies listed in Chapter 5 of the BCMSA (52 P.S. §§ 690-501—690.511) regarding enforcement and remedies. IRRC also noted two additional concerns. First, the process to determine whether an individual has violated the section was not explained. Second, §§ 208.375(b)(2) and 208.376(d)(2) did not explain when the Department would or would not implement other remedies available to it.

2. IRRC noted that, for clarity, subsections (b) and (d) of § 208.376, which both state smoking-related articles that may not be carried into mines, should be revised to contain identical lists or explain why a revision should not take place.

3. IRRC commented that the number of individuals affected by the regulation should be included in the Regulatory Analysis Form (RAF) submitted with the final-form rulemaking. IRRC also asked the Board to estimate the cost to the regulated community and provide the number of individuals who have been decertified for violating existing smoking prohibitions.

In response to IRRC’s first comment, the Board has included in Section D of the preamble to this final-form rulemaking a more detailed description of its statutory authority to assess civil penalties and how the civil penalties in this final-form rulemaking would be assessed. In response to IRRC’s second comment, the list in subsection (d) of § 208.376 was modified to reference the list of items in subsection (b) to improve consistency. In response to IRRC’s third comment, the RAF was updated to include the number of individuals affected by this regulation and an accounting of individuals who have been decertified for violating existing smoking prohibitions.

G. *Benefits, Costs and Compliance*

Benefits

This final-form rulemaking will improve safety by expressly prohibiting the use or possession, or both, of electronic liquid-vaporizing devices, which present safety hazards, under the existing prohibitions against smoking and possession of smoking materials. The safety of miners in the workplace is a compelling public interest. Miners, their families, mining companies and others will benefit from the additional safety ensured by the avoided hazards associated with the use or possession of electronic liquid-vaporizing devices at underground bituminous coal mines, such as explosive hazards and distraction hazards. Additionally, miners, mine officials, mine operators and the Department benefit from clarity regarding how the use and possession of these devices are regulated at underground bituminous coal mines.

Compliance costs

This final-form rulemaking does not create any compliance costs and therefore does not minimize compliance costs. Because this final-form rulemaking prohibits the use or possession of certain items by persons at underground bituminous coal mines, the only requirement to comply is that persons not use or possess these items, which they can do at no cost.

Paperwork requirements

This final-form rulemaking does not generate additional paperwork because mining operators must comply with the existing statute and regulation.

H. *Pollution Prevention*

The Federal Pollution Prevention Act of 1990 (42 U.S.C.A. §§ 13101—13109) establishes a National policy that promotes pollution prevention as the preferred means for achieving State environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally friendly materials, more efficient use of raw materials and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This final-form rulemaking has minimal impact on pollution prevention since it is focused on mine safety.

I. *Sunset Review*

The Board is not proposing a sunset date for these regulations, since they are needed for the Department to carry out its statutory authority. The Department will continue to review these regulations for their effectiveness and recommend updates to the Board as necessary.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 25, 2021, the Department submitted a copy of the notice of proposed rulemaking, published at 51 Pa.B. 1316, to IRRC and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees, for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the House and Senate Committees were provided with copies of comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on July 20, 2022, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, IRRC met on July 21, 2022, and approved the final-form rulemaking.

K. *Findings of the Board*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202), referred to as the Commonwealth Documents Law and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2 (relating to notice of proposed rulemaking required; and adoption of regulations).

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These regulations do not enlarge the purpose of the proposal published at 51 Pa.B. 1316.

(4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

L. *Order of the Board*

The Board, acting under the authorizing statutes, orders that:

(1) The regulations of the Department, 25 Pa. Code Chapter 208, are amended by amending § 208.375 and adding § 208.376 to read as set forth in Annex A.

(2) The Chairperson of the Board shall submit this final-form regulation to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(3) The Chairperson of the Board shall submit this final-form regulation to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(4) The Chairperson of the Board shall certify this final-form regulation and deposit it with the Legislative Reference Bureau, as required by law.

(5) This final-form regulation shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

RAMEZ ZIADEH, P.E.,
Acting Chairperson

(*Editor's Note:* See 52 Pa.B. 4479 (August 6, 2022) for IRRC's approval order.)

Fiscal Note: Fiscal Note 7-558 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart D. ENVIRONMENTAL HEALTH AND SAFETY

ARTICLE IV. OCCUPATIONAL HEALTH AND SAFETY

CHAPTER 208. UNDERGROUND COAL MINE SAFETY

MISCELLANEOUS

§ 208.375. Smoking prohibition: surface work areas.

(a) The provisions of 30 CFR 77.1711 (relating to smoking prohibition) are incorporated by reference.

(b) An individual who violates the mandatory safety standards relating to smoking, including the use of electronic liquid-vaporizing devices or e-cigarettes, shall be subject to a civil penalty assessed by the Department, which penalty:

(1) Shall be the maximum civil penalty provided under 30 CFR 100.5(d) (relating to determination of penalty amount; special assessment) adopted and incorporated by reference for each occurrence of this violation.

(2) May not preclude the Department from exercising any other remedy available to it.

§ 208.376. Smoking prohibition: underground areas.

(a) An individual may not smoke or use an open flame in any underground bituminous coal mine.

(b) An individual may not at any time enter a mine with or carry into the mine any smoking or smoker related articles, matches, pipes, cigars, cigarettes, electronic liquid-vaporizing devices, including e-cigarettes, or any device for making flames or fire not approved under section 350 of the act (52 P.S. § 690-350).

(c) In all mines the operator may search or cause to be searched any individual, including the individual's clothing and material belongings, entering or about to enter the mine, or inside the mine, to prevent an individual from taking or carrying into the mine any of the articles prohibited by this section.

(d) An individual who violates the mandatory safety standards relating to smoking or the use or carrying of the items identified in subsection (b), shall be subject to a civil penalty assessed by the Department that:

(1) Shall be the maximum civil penalty provided under 30 CFR 100.5(d) (relating to determination of penalty amount; special assessment) adopted and incorporated by reference for each occurrence of this violation.

(2) May not preclude the Department from exercising any other remedy available to it.

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