

# Regulatory Analysis Form

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(1) Agency

Environmental Protection

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(2) I.D. Number (Governor's Office Use)

7-331

REGULATORY  
REVIEW COMMISSION

**McGinley**

IRRC Number: # 1924

(3) Short Title

Surface and Underground Coal Mining:  
General Provisions and Areas Unsuited for Mining

(4) PA Code Cite

25 PA Code Chapter 86

(5) Agency Contacts & Telephone Numbers

Primary Contact: Sharon Freeman, 783-1303

Secondary Contact: Barbara Sexton, 783-1303

(6) Type of Rulemaking (Check One)

- Proposed Rulemaking  
 Final Order Adopting Regulation  
 Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No  
 Yes: By the Attorney General  
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

This proposed regulation amends provisions dealing with definitions and procedures for designating areas unsuitable for mining which were found to be more stringent than federal law, lack clarity or impose disproportionate costs on the regulated community.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

These amendments are proposed under the authority of the following provisions of the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1-19a); Section 4.2(a), 52 P.S. § 1396.4b(a), which promotes general rulemaking authority; Section 4.5, 52 P.S. §§ 1396.4e, which provides for the designation of an area as unsuitable for all or certain types of surface mining operations; and under the following provisions of the Coal Refuse Disposal Control Act (52 P.S. §§ 30.51-66); Section 3.2(a), 52 P.S. § 30.53b(a), which authorizes the adoption of rules and regulations; Section 6.1, 52 P.S. § 30.56a, which provides for the designation of an area as unsuitable for all or certain types of coal refuse disposal operations; and under the following provisions of the Clean Streams Law (35 P.S. §§ 691.1-1001); Section 5, 35 P.S. § 691.5, which authorizes the adoption of rules and regulations, Section 315(h)-(o), 35 P.S. § 691.315(h)-(o), which provides for the designation of an area as unsuitable for all or certain types of surface mining operations; and under Sections 1920-A and 1930-A of the Administrative Code of 1929, 71 P.S. §§ 510-20 and 510-30, which authorizes the adoption of regulations necessary for the Department of Environmental Protection (Department) to perform its work and which require the Environmental Quality Board to review petitions for, and to designate, areas as unsuitable for mining.

## Regulatory Analysis Form

- (10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

These regulations are being amended under the Department's Regulatory Basics Initiative to address areas found to be more stringent than federal requirements, lacking clarity or imposing disproportionate costs on the regulated community.

- (11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The regulations being amended were found to contain requirements which were more stringent than federal law, lack clarity or impose disproportionate costs on the regulated community.

The proposed revisions will assure that these particular regulations will not contribute to putting Pennsylvania's coal industry at a competitive disadvantage, and will eliminate confusion concerning the regulatory requirements. The public interest will be served by earlier involvement in the decision making process and through expanded opportunity to express their concerns to the Department.

- (12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Non-regulation is not an option in order for the Commonwealth to continue to maintain primary jurisdiction over coal mining under the federal Surface Mining Control and Reclamation Act.

- (13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Pennsylvania's 700 coal mining operators and the general public could benefit from the proposed amendments. Each year the Department receives an average of three requests from individuals or groups to have areas designated as unsuitable for mining. Each of these requests may affect several coal operators and several hundred citizens. Benefits include greater flexibility and opportunity for public input. Additionally, regulatory requirements will be more consistent with federal requirements.

## Regulatory Analysis Form

- (14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

These amendments are not expected to produce any adverse impacts on the regulated community.

- (15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Anyone who might file a petition to have an area designated unsuitable for mining and any person who has an interest within the petition area will be affected by these amendments. Each year the Department receives an average of three requests from individuals or other groups to have areas designated as unsuitable for mining. Each of these requests may affect several mine operators and several hundred citizens.

- (16) Describe the communications with and inputs from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

Through the Regulatory Basics Initiative, public comments and suggestions were solicited by notice in the *Pennsylvania Bulletin* and on the Department's web site. The proposed rulemaking was published February 14, 1998. Input was received from the Pennsylvania Coal Association, the Independent Regulatory Review Commission and from the Mining and Reclamation Advisory Board.

An Advance Notice of Final Rulemaking was developed to provide comment on changes made to the proposed rulemaking. Notice was sent to the Pennsylvania Coal Association, the Independent Regulatory Review Commission and to members of the Mining and Reclamation Advisory Board. Notice was published in the *Pennsylvania Bulletin* on January 30, 1999, with a 30-day comment period. Sixteen comment documents were received from corporations, organizations and individuals. The Mining and Reclamation Advisory Board discussed the comments received and approved the draft final rulemaking changes at its meeting of April 22, 1999.

- (17) Provide a specific estimate of the cost and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

These amendments are not expected to impose any additional costs on the regulated community.

There may be some savings to the regulated community through a more timely decision. Where the Environmental Quality Board decision is not to designate an area as unsuitable for mining the petition process will end with publication of the decision in the *Pennsylvania Bulletin*. The savings is not quantifiable as a dollar amount.

## Regulatory Analysis Form

- (18) Provide a specific estimate of the cost and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

Local governments will not be affected by these regulations.

- (19) Provide a specific estimate of the cost and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

There will be no additional costs to state government resulting from these amendments. Although there may be some savings in time required to read and understand the program requirements associated with the clarification of the regulatory language, the savings are not quantifiable.



## Regulatory Analysis Form

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

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
Regulated Community	0	0	0	0	0	0
Local Government	N/A	---	---	---	---	---
State Governments	0	0	0	0	0	0
<b>Total Savings</b>	0	0	0	0	0	0
<b>COSTS:</b>						
Regulated Community	0	0	0	0	0	0
Local Government	N/A	---	---	---	---	---
State Governments	0	0	0	0	0	0
<b>Total Cost</b>	0	0	0	0	0	0
<b>REVENUE LOSSES:</b>						
Regulated Community	0	0	0	0	0	0
Local Government	N/A	---	---	---	---	---
State Governments	0	0	0	0	0	0
<b>Total Revenue Losses</b>	0	0	0	0	0	0

(20a) Explain how the cost estimates listed above were derived.

Although there may be some savings associated with the clarification of regulatory language and as a result of adoption of less stringent federal requirements, there is insufficient data to determine specific dollar amounts.

## Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3 95/96	FY-2 96/97	FY-1 97/98	Current FY 98/99
Coal Mining	21,393,173	19,085,867	23,884,957.61	7,404,207.50 as of February 28, 1999

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and cost.

No additional costs should result from these changes. The coal industry may experience some cost savings, as outlined in #17. The principal benefit of these amendments, however, is that the revised requirements will be no more stringent than federal law, will provide for more timely decision making and will be more easily understood by the regulated community and the general public. The change will also benefit the public from involvement in the decision making process and opportunity for expressing concerns.

(22) Describe the nonregulatory alternative considered and the cost associated with those alternatives. Provide the reasons for their dismissal.

No non-regulatory alternatives were considered since the Department must maintain regulations which are equivalent to the corresponding federal regulations in order to retain primary regulatory authority over coal mining in Pennsylvania.

(23) Describe alternative regulatory schemes considered and the cost associated with those schemes. Provide the reasons for their dismissal.

Consideration was given to changing the process for making decisions concerning designation of areas as unsuitable for mining from the present Environmental Quality Board legislative rulemaking process to a Department decision process. This change was not proposed because it would reduce public participation in the decision making process.

Consideration was also given to retaining the existing regulatory language. The changes proposed offer clarification of language with no reductions in public participation or environmental protection.

## Regulatory Analysis Form

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

The changes to these regulations are no more stringent than federal standards.

- (25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Since these amendments are based on federal standards, the regulations are expected to be no more stringent than those of other states. These amendments will not put Pennsylvania at a competitive disadvantage.

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

The regulations being amended are 25 PA Code §§ 86.1, 86.101-86.103, 86.121, and 86.123-86.130 which pertain to surface and underground coal mining. Regulations of other state agencies will not be affected.

- (27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No public hearings have been scheduled on these amendments.

## Regulatory Analysis Form

- (28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The amendments will require minor revisions to a few existing forms and technical guidances.

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

Due to the nature and purpose of these changes, no special provisions are needed.

- (30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulations will go into effect upon publication in the *Pennsylvania Bulletin* as final rulemaking. A specific date cannot be predicted. No new permits, licenses or other approvals will be required by these regulations.

- (31) Provide the schedule for continual review of the regulation.

The 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.

FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU  
(Pursuant to Commonwealth Documents Law)

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LEGISLATIVE REFERENCE BUREAU  
REVENUE DEPARTMENT

#1924

DO NOT WRITE IN THIS SPACE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>_____ (DEPUTY ATTORNEY GENERAL)</p> <p>_____ DATE OF APPROVAL</p> <p>Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p>DEPARTMENT OF ENVIRONMENTAL PROTECTION ENVIRONMENTAL QUALITY BOARD (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. <u>7-331</u></p> <p>DATE OF ADOPTION: _____</p> <p>BY: <u>James M. Seif</u> JAMES M. SEIF, CHAIRMAN</p> <p>TITLE: _____ (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY: <u>Ormaleli</u></p> <p><u>7/20/99</u> DATE OF APPROVAL</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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ORDER ADOPTING REGULATIONS

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ENVIRONMENTAL QUALITY BOARD

Surface and Underground Coal Mining:  
General Provisions and Areas Unsuitable for Mining

25 Pa. Code Chapter 86

**NOTICE OF FINAL RULEMAKING  
ENVIRONMENTAL QUALITY BOARD  
25 PA CODE, CHAPTER 86  
SURFACE AND UNDERGROUND COAL MINING: GENERAL**

**ORDER**

The Environmental Quality Board (Board) by this order amends 25 Pa. Code, Chapter 86 (relating to surface and underground coal mining: general). The amendments are the result of the Department of Environmental Protection's Regulatory Basics Initiative and Executive Order 1996-1, which directed the Department to revise regulations which are more stringent than federal law, unless there is a compelling state interest; lack clarity; or which impose disproportionate costs on the regulated community.

This order was adopted by the Board at its meeting of July 20, 1999.

**A. Effective Date**

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

**B. Contact Persons**

For further information, contact David C. Hogeman, Chief, Division of Environmental Analysis and Support, Bureau of Mining and Reclamation, Rachel Carson State Office Building, P.O. Box 8461, Harrisburg, PA 17105-8461, 717-787-4761, or Joseph Pizarchik, Assistant Director, Bureau of Regulatory Counsel, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, 717-787-7060. Persons with a disability may use the AT&T Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This order is available electronically through the DEP Website (<http://www.dep.state.pa.us>).

**C. Statutory Authority**

These amendments are proposed under the authority of the following provisions of the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1-19a); Section 4.2(a), 52 P.S. § 1396.4b(a), which provides general rulemaking authority; Section 4.5, 52 P.S. § 1396.4e, which provides for the designation of an area as unsuitable for all or certain types of surface mining operations; and under the following provisions of the Coal Refuse Disposal Control Act (52 P.S. §§ 30.51-66); Section 3.2(a), 52 P.S. § 30.53b(a), which authorizes the adoption of rules and regulations; Section 6.1, 52 P.S. § 30.56a, which provides for the designation of an area as unsuitable for all or certain types of coal refuse disposal operations; and under the following provisions of the Clean Streams Law (35 P.S. §§ 691.1-1001); Section 5, 35 P.S. § 691.5, which authorizes the adoption of rules and regulations, Section 315(h)-(o), 35 P.S. § 691.315(h)-(o), which provides for the designation of an area as unsuitable for all or

certain types of surface mining operations; and under Sections 1920-A and 1930-A of the Administrative Code of 1929, 71 P.S. §§ 510-20 and 510-30, which authorize the adoption of regulations necessary for the Department to perform its work and which provide that it is the Board's duty to review petitions for, and to designate, areas as unsuitable for mining.

#### **D. Background and Purpose**

These amendments are the result of the Department's Regulatory Basics Initiative, which was initiated in August 1995, and Governor Ridge's Executive Order 1996-1 dated February 6, 1996. Under both of these initiatives, the Department was directed to review its existing regulations to analyze which regulations were more stringent than federal law and regulations. Regulations that lacked clarity, and imposed disproportionate costs on the regulated community. The Department solicited public input concerning its existing regulations. Comments received by the Department, and the Department's own review of its existing regulations, have identified a number of provisions which need to be revised. These are contained in this rulemaking package. Regulations that are more stringent than federal requirements are proposed for revision, unless justified by a compelling and articulable Pennsylvania interest or required by state law.

As a result of this review, the Department developed two alternative proposals for consideration and presented them to the Mining and Reclamation Advisory Board (MRAB) at its meeting of October 3, 1996.

The first of these alternatives, in addition to providing clarity and changing those regulations found to be more stringent than federal requirements, would have changed the existing Board rulemaking process to a Department decision-making process. The existing rulemaking process involves substantial administrative and technical effort and requires 19 to 27 months to reach a final decision. This process does not allow a final regulatory decision on a designation to be made within 12 months. This "adjudicatory" version provided for a public hearing early in the petition review process, reduced the time necessary to make a final decision on the petition by approximately one year and would have subjected Department decisions to review by the Environmental Hearing Board. The Department rejected this alternative because it was found to conflict with Section 1930-A of the Administrative Code of 1929, 71 P.S. Section 510-30.

The second alternative, which is the subject of this final rulemaking, would retain the existing Board rulemaking process. Subsequent to the MRAB meeting, the Department modified this "legislative" version. Although this process does require additional time to reach a final decision, it also provides a more significant level of public participation in decisions concerning the designation of areas as unsuitable for mining, in keeping with this Administration's objective to improve public access to information and decision-making in the Department. Under this approach the Department makes a final recommendation to the Board within 12 months of the receipt and acceptance of a complete petition.

Numerous changes to the regulatory language in Section 86.1 and Sections 86.101-86.130 are being proposed to provide clarity and to enhance the consistency with the language

used in federal regulations. Sections 86.102(9), 86.103(e) and 86.129 are being changed because they were found to be more stringent than federal requirements. Metric equivalences have also been incorporated where appropriate.

The proposed rulemaking amendments were adopted by the Board as proposed rulemaking at its meeting of October 21, 1997, and published in the *Pennsylvania Bulletin* on February 14, 1998, with a 60-day public comment period (*Pennsylvania Bulletin* v. 28 No. 7, February 14, 1998). The public comment period ended on April 15, 1998. There were no public hearings.

Comments on the proposed rulemaking were received from the Pennsylvania Coal Association (PCA) and from the Independent Regulatory Review Commission (IRRC). The comments and the Department's responses were discussed with the MRAB at its meeting of July 10, 1998.

In response to comments received during the official public comment period on the proposed rulemaking, a draft final rulemaking was prepared. The draft final rulemaking amendments were discussed with the MRAB at its meeting of July 10, 1998. The MRAB suggested that the Department add an exemption to Section 86.102(9) concerning waivers to the restrictions of mining within 300 feet (91.44 meters) of an occupied dwelling. An exemption has been added to the final rulemaking consistent with the federal language in 30 CFR Section 761.12. The MRAB also suggested changing Section 86.125 to read that a public hearing be held within nine months of receipt of a petition. The Pennsylvania Surface Mining Conservation and Reclamation Act, and federal statute and regulations, require a public hearing to be held within 10 months of receipt of a complete petition and for a decision to be made within 60 days after that. The justification for a more stringent provision must be made by a compelling public interest, an articulable Pennsylvania interest, or be required by state law. None of these conditions is satisfied in this case and the Department has not changed this regulatory language.

After review of other related information by the Department, additional changes were made to the draft final rulemaking. On January 31, 1997, the federal Office of Surface Mining Reclamation and Enforcement (OSM) published a proposed interpretative rulemaking on activities applicable to Section 522(e), areas unsuitable for mining. In doing so, OSM presented its definition of surface coal mining operation – information that the Department had sought for over a year. Although OSM's action provided the Department with the guidance needed, it was subsequently recognized that there was an inconsistency between interpretation of the definition included in the federal proposed rulemaking and the Department's definition of surface mining operations found in Section 86.101. Consequently, the Department revised the definition of surface mining operations to eliminate the inconsistency.

An Advance Notice of Final Rulemaking (ANFR) was developed to provide for public comment on the changes made in the draft final rulemaking (Section 86.1, relating to the definition of surface mining operations and Section 86.126, relating to EQB actions) that had not been previously reviewed by the public. This notice was published in the *Pennsylvania Bulletin*



(*Pennsylvania Bulletin v. 29* No. 5, January 30, 1999) with a 30-day public comment period and was sent to the Pennsylvania Coal Association (PCA) and to the Independent Regulatory Review Commission (IRRC), who had commented on the proposed rulemaking. Sixteen comment letters were received during the comment period on the ANFR.

The draft final rulemaking and comments received on the ANFR were discussed with the MRAB at its meeting of April 22, 1999. The MRAB recommended that the amendments be adopted as final rulemaking by the Board.

#### **E. Summary of Comments and Responses on Proposed Rulemaking**

Comments on the proposed rulemaking were received from the PCA and from the IRRC. The following is a discussion of the comments received on the proposed rulemaking.

PCA believes decisions concerning designation of areas as unsuitable for mining should be made through an administrative adjudicatory process; the process should provide for cross-examination of expert witnesses as occurs in the federal program; and an adjudicatory process permits the possibility of resolution within 12 months. Although the Department considered an administrative adjudicatory process, it was decided to retain the regulatory process. First, the regulatory process provides more opportunities for public input in the decision making than does the adjudicatory process. Adopting the adjudicatory process would significantly reduce the opportunities for public participation in the decision process. Second, Section 1930-A of the Administrative Code of 1929, 71 P.S. Section 510-30, provides that the Board has the authority and the duty to review areas unsuitable for mining petitions and to designate areas as unsuitable for mining.

A recommendation was made that the regulations retain provisions for a verbatim transcript of the public hearing. The requirement for providing a verbatim transcript of the public hearing is contained in Section 86.125(d) of both the proposed rulemaking and in the final rulemaking.

It was also recommended that metric units of measurement be deleted or that an explanation be included in the preamble that they are a convenient reference, which impose no substantive requirements. Equivalent standard international metric system units have been inserted as a convenient reference and impose the same requirements as existing standard measurements.

Both PCA and IRRC noted that the reference to Section 4.5(h) of the Surface Mining Conservation and Reclamation Act in the definition of fragile lands is redundant. The reference to 4.5(h) has been deleted from the definition of fragile lands in the final rulemaking.

PCA suggested that Section 86.102(9)(ii) be revised to provide an exception so that waivers obtained prior to the effective date of the federal law do not need to be knowingly made. An exception to the requirement that a waiver of the right to restrict mining within 300 feet (91.44 meters) of an occupied dwelling be knowingly made if the waiver was obtained prior to

August 3, 1977 has been added to Section 86.102(9). This inclusion is consistent with federal regulatory language used in 30 CFR 761.12.

It was suggested that the definition of historic lands in Section 86.101 be revised to delete references to lands eligible for inclusion on the National Register of Historic Places in conformance with proposed revisions to Section 86.102(3) and that the word "air" should be deleted from Section 86.123(c)(3) in conformance with proposed revisions to the definition of surface mining operations in Section 86.1. The proposed rulemaking language in Sections 86.102(3) and in 86.123(c)(3) is consistent with the language in federal regulations. An informal inquiry to the federal Office of Surface Mining Reclamation and Enforcement's (OSM) Field Office indicated that the suggested changes would make the Department's regulations less effective than federal requirements. Therefore, no change has been made in the final rulemaking.

IRRC commented that the changes to Section 86.103(2)(ii) could result in a permit being issued through inaction of a reviewing agency. The proposed change is consistent with federal language in 30 CFR Section 761.12(f)(2). This proposed change provides that in the absence of an objection from an agency, the Department may make a decision concerning the proposed mining operation in conjunction with the requirements of Section 86.37(a)(5) and (6).

IRRC noted that the proposed change to Section 86.125(i) which adds the phrase, "or as otherwise established by the Department" is too vague and the term "regulatory decision" used in Section 86.126(b) is not defined. In addition, IRRC suggested that Section 86.126(b) should differentiate the procedures used when acting on the Department's recommendation to designate or not to designate an area as unsuitable for mining. The phrase "or as otherwise established by the Department" and the term "regulatory decision" have been deleted. In addition, two paragraphs have been added to Section 86.126(b), which provide the procedures the Board will use concerning designation decisions. Applicable statutory citations have been included.

IRRC also requested clarification of federal requirements at 30 CFR Section 764.19(b) that require a final written decision within 12 months of receipt of a complete petition. The proposed changes to Section 86.125(j) provide that the Department will prepare a recommendation to the Board within 60 days of the close of the public comment period. Since the Board must still act on the Department's recommendation, there is a concern as to how the 12-month requirement will be met. The areas unsuitable for mining process is established by separate statutes that contain somewhat conflicting provisions. Federal statutes and regulations require a final written decision by the regulatory authority within 60 days of a public hearing, or if no hearing is held, within 12 months of the receipt of a complete petition. Commonwealth statutes contain similar requirements. The Administrative Code of 1929, however, requires decisions concerning the designation of areas as unsuitable for mining to be made by the Board through the rulemaking process. Because this regulatory process requires mandatory legislative and administrative review schedules and an opportunity for additional public comment, it is not possible for the Board to issue a final written regulatory decision within 12 months. The changes will, however, provide a more timely decision-making process. Under this final rulemaking the 12-month statutory requirement will be met when the Department submits a written recommendation to the Board within 12 months of receipt of a complete petition. The

Department would also provide notification and a statement of the reasons for the recommendation to the petitioner and intervenors. If the Board decision is that an area should not be designated, the petition process would end with the publication of the Board decision. If the Board decision is that the area should be designated, the Department would submit a proposed rulemaking in accordance with the statutes and existing procedures. Although this process does require additional time to reach a final decision, it also provides a more significant level of public participation in decisions concerning designation of areas as unsuitable for mining and is consistent with the Administration's objectives to improve public access to information and decision-making in the Department.

IRRC requested an explanation of what procedure would occur if rather than accepting a Department recommendation, the Board requested additional information or study. If the Board determines that additional information or study is needed, the Department will be asked to provide an appropriate response. The Department routinely provides additional information in response to Board questions.

IRRC also asked that an explanation of the specific changes in the proposed rulemaking that diminish the disproportionate costs on the regulated community be identified in the Regulatory Analysis Form. An explanation has been provided in the Regulatory Analysis Form consistent with the revisions to Section 86.126(b) in the final rulemaking. The revisions will provide a more timely decision in those cases where the Board determines that an area should not be designated as unsuitable for mining and will allow issuance of mine permits which may have been delayed because of a petition to have the area designated as unsuitable for mining.

The MRAB suggested that the Department add an exemption to Section 86.102(9) to provide a waiver to the restriction on mining within 300 feet (91.44 meters) of an occupied dwelling if the waiver was obtained prior to August 3, 1997. An exemption has been added to the draft final rulemaking consistent with federal language in 30 CFR Section 761.12.

The MRAB also suggested that the Department consider changing Section 86.125 to read that a public hearing on a petition be held within nine months of receipt of a petition to designate an area as unsuitable for surface mining operations. Pennsylvania's Surface Mining Conservation and Reclamation Act and federal statutes and regulations require a public hearing to be held within 10 months of receipt of a complete petition and for a decision to be made within 60 days after that. The purpose of the suggested change was to provide an additional 30 days for the Department to present a recommendation to the Board. The suggested change, if implemented, would make this provision more stringent than the federal regulations. The justification for a more stringent provision must be made by a compelling public interest, an articulable Pennsylvania interest, or be required by state law. None of these conditions are satisfied in this case. In addition, the desired objective would still not be achieved, since there would continue to be a requirement to make a decision within 60 days of the hearing. For these reasons the Department has not changed this regulatory language.

## **F. Advance Notice of Final Rulemaking**

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

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

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

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

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

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

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

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

The following is a summary of comments relating to specific sections of the Advanced Notice of Final Rulemaking along with the Department's responses. Comments and responses on general issues are presented after the discussion on individual sections.

Commentators indicated that the reference to a definition in the Code of Federal Regulations in Section 86.1 is inappropriate and confusing because the federal definition of "valid existing rights" (VER) is not resolved. Pennsylvania statutes (52 P.S. §§ 1396.4e and 30.56a; 35 P.S. § 691.315) provide that VER is to be as defined under Section 522 of the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA). This change will conform Pennsylvania's regulations to the statutes and will make it unnecessary for Pennsylvania to change its definition if the federal definition is changed.

It was suggested that the existing definition in Section 86.1 of a "Complete application" is better than the change to "Administratively complete application" because under the proposed changes an application need only "address" each requirement, instead of needing to "demonstrate compliance with applicable statutes and regulations." The Department agrees that the proposed change does not adequately clarify this issue as intended, therefore, the definition of "Complete application" has been retained, and appropriate language will be considered in future rulemaking.

Several commentators said that it is premature and unsound to delete language pertaining to activities and impacts related to underground mining that affect the land surface from the definition in Section 86.101 of "surface mining operations." No final federal action has yet been taken on this issue. The definition of "surface mining operations," as proposed, is in accordance with OSM's proposed interpretive rulemaking published in the January 31, 1997 *Federal Register* (*Fed. Reg.*, v. 62, No. 21, Friday, January 31, 1997) and is consistent with the 1991 opinion of the federal Department of the Interior's Office of the Solicitor. While the federal government's position specifically addresses "subsidence" and Section 522(e), it does so through interpreting the definition of "surface coal mining operations." "Surface coal mining operations" is used both in Section 522(e) and in the areas unsuitable for mining provisions and must be interpreted consistently. Therefore, the federal government's interpretation of "surface coal mining operations" must also apply to the areas unsuitable for mining provisions.

One commentator believes that Section 522(e) of the federal SMCRA and the federal interpretation are limited to subsidence and should not be extended to water resource impact and Areas Unsuitable for Mining petitions. The commentator also believes that the Department's changes go beyond the proposed federal interpretation regarding subsidence and include water resources and the areas unsuitable for mining petition process. The Department believes the draft final rulemaking is consistent with federal requirements and that it addresses the difference between the physical characteristics of mining activities conducted on the surface as opposed to underground. The Department believes that protection of water resources from underground coal mining activities can only be accomplished on a case-by-case basis through the permit review process.

It was suggested that the word "significantly" should not be added to the definition of "fragile lands" in Section 86.101 because any impacts to fragile lands could be considered significant. Additionally, the last part of the existing definition, beginning with "and buffer zones adjacent to the boundaries of areas where surface mining operations are prohibited ...," should be retained to ensure effective environmental protection. The Department believes that

the addition of the term "significant" will not reduce environmental protections and the buffer zones in question will still be protected by mining prohibitions and limitations in Section 86.102.

Comments were received suggesting that the existing sentence defining nonprofit organizations as local agencies in this circumstance should not be deleted from Section 86.101. Where a nonprofit organization has designated lands for public recreational use, those lands should be treated as public parks. The Department believes that the proposed changes will not reduce the protection for publicly owned parks.

Several commentators stated that regulatory changes in Section 86.102(3) deleting the phrase "on or eligible for inclusion" to the National Register of Historic Places would limit protection only to those sites listed on the National Register. The recommended changes conform Pennsylvania's coal mining regulations to the federal coal mining regulations in 30 CFR 761.11. The impacts of proposed mining on sites eligible for listing on the National Register of Historic Places are to be addressed during the Department's permit application review process.

It was pointed out that the proposed changes to Section 86.102(9) reduce the protection of individuals whose dwellings are within 300 feet of proposed operations and thus should not be adopted. The change is consistent with federal regulations in 30 CFR 761.11(e) and makes it clear that the regulations will reflect the possession of property rights of the interested persons in accordance with Pennsylvania's property law.

Comments received noted that the proposed change from "may" to "will" in Section 86.103(e) reduces the protections currently afforded to public parks and National Register places. It is not always clearly evident that mining effects "will" affect a public or historic site. Additionally, the stipulation in Section 86.103(e)(2)(ii) that "failure of an agency to respond to a notification within a specified comment period constitutes an approval" is not acceptable. The Department notes that the regulatory changes provide a 30-day response time for the appropriate agency with allowance for an additional 30-day extension if requested by the agency. The Department believes that the regulatory changes provide sufficient time for the agency to respond to a notification.

It was suggested that a demonstration of an "injury in fact" test as changes to Section 86.123(c)(5) propose is entirely inappropriate and should not be added to the regulations because this would shift the burden of proof onto the injured party. The Department notes that previous petitions requesting areas to be designated were accepted by the Department for study based on the petitioners' demonstration of interests that were, or could have been, adversely affected and petitions based on similar demonstrations could meet the requirement of a demonstration of "injury in fact."

It was also suggested that the proposed sentence "A frivolous petition is one in which the allegations of harm lack serious merit" in Section 86.124(a)(2) is unnecessary because the existing meaning of the word "frivolous" is appropriate. The Department, during its initial review, determines the complete, incomplete, or frivolous nature of petitions and the change

would not materially affect the way unsuitable for mining petitions are processed. The new provision clarifies how the term will be interpreted and applied by the Department.

Several commentators stated that the agency identified in Section 86.125 conducting the public fact-finding hearings on areas unsuitable for mining petitions should not be changed from the Board to the Department. The Department responds that this revision simply clarifies the Department's responsibility for the administrative aspects of petitions. The Board will continue to have access to all information obtained from public fact-finding hearings.

One commentator asked whether the Board's final decision would by-pass the proposed rulemaking stage and public participation, or if the decision on the petition will be published as a proposed rule. The Department responds that final rulemaking changes to Section 86.126(b) retain the existing Board rulemaking process including proposed and final rulemaking provisions if the Board's initial decision is to designate an area unsuitable for mining. If the Board's decision is to not designate an area as unsuitable for mining, the rulemaking process will end with the publication of the decision in the *Pennsylvania Bulletin*.

It was suggested that the existing language pertaining to coal exploration in Section 86.129 that affords protection to areas under study for designation, as well as designated areas, should be retained. It is unclear how coal exploration activities can be consistent with uses and values of an area designated unsuitable for mining. The Department responds that coal exploration has never been prohibited on areas designated unsuitable for mining. The federal language in 30 CFR 762.14 provides for requirement of written approval and the protection of the values and uses of the area designated unsuitable for mining.

One commentator indicated that there was no preamble provided with the ANFR explaining the changes being proposed and there was no comment and response document, making it difficult to understand some of the changes made since the regulations were approved as proposed. Additionally, the 30-day public comment period was too short to allow for review. The Department responds that the purpose of the ANFR was to provide for public review of the draft final rulemaking and to obtain comment on two new issues that had not previously been considered by the public. Since the ANFR was solicited prior to development of the final rulemaking, a comment and response document on the proposed rulemaking was not yet available when the ANFR was released for comment. It is the Department's policy to present comments and responses for both the proposed rulemaking and the ANFR to the Board as part of the final rulemaking.

Comments received stated that federal approval by the OSM is needed for all changes to the Pennsylvania coal mining regulations before they become effective. In addition, in the administration, interpretation, and implementation of the state program the Department is obligated to conform to the federal laws and regulations. The Department notes OSM requires final state action on rulemaking changes before formal review of the changes by OSM. The rulemaking will be forwarded to OSM for review and approval when the changes have been approved by the Board.

## **G. Benefits, Costs and Compliance**

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

### Benefits

These amendments were proposed in order to reduce unnecessary requirements, provide clarity, eliminate redundant or outdated requirements or eliminate state requirements more stringent than their federal counterparts, where there is no compelling state interest in being more stringent.

No additional costs should result from these changes. The coal mining industry, the public and state government could see savings in the form of reduced time necessary to read and interpret regulations. There could also be some savings to the coal mining industry in reducing time for decisions not to designate an area as unsuitable for mining. The principal benefit of these amendments, however, is that the revised requirements will be no more stringent than federal law, will provide for more timely decisionmaking and will be more easily understood by the regulated community and the general public. The change will also benefit the public from involvement in the decisionmaking process and opportunity for expressing concerns.

### Compliance

The changes are procedural and administrative in nature. They will impose no additional compliance costs on the regulated community. The Department conducts public information workshops for persons or organizations who may be interested in having an area designated unsuitable for mining. These workshops will be modified to describe the changes to the designation process made by these amendments.

Coal mine operators who may be affected by a request to designate an area as unsuitable for mining are identified by the Department when a petition is received and are notified of the regulatory requirements, in writing.

### Costs

The amendments will impose no additional costs or paperwork requirements on the regulated community.

## **H. Sunset Review**

These 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.



**I. Regulatory Review**

Under Section 5(a) of the Regulatory Review Act (71 P.S. §745.5(a)), the Department submitted a copy of the proposed rulemaking on February 2, 1998 to the IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with Section 5(c), the Department also provided IRRC and the Committees with copies of all comments received, as well as other documentation.

In preparing this final-form regulation, the Department has considered all comments received from IRRC and the public. The comments are addressed in the comment and response document and Section E of this preamble. The Committees did not provide comments on the proposed rulemaking.

This final form regulation was (deemed) approved by the House Environmental Resources and Energy Committee on \_\_\_\_\_, 19\_\_ and was (deemed) approved by the Senate Environmental Resources and Energy Committee on \_\_\_\_\_, 19\_\_. The Commission met on \_\_\_\_\_, 19\_\_ and (deemed) approved the regulation in accordance with Section 5.1(e) of the Act.

**J. 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. 204) (45 P.S. §§1201 and 1202) and regulations promulgated thereunder at 1 Pennsylvania Code §§7.1 and 7.2.

(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 *28 Pennsylvania Bulletin* 941 (February 14, 1998).

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

**K. Order of the Board**

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

(a) The regulations of the Department of Environmental Protection, 25 Pennsylvania Code, Chapter 86, are amended by amending Section 86.1; 86.101 – 86.121; and 86.123 – 86.130 to read, as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

(c) The Chairman shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairman 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.

---

JAMES M. SEIF  
Chairman  
Environmental Quality Board

## NOTE

The following changes were made as a result of the ANFR:

- 86.1 (Definitions) “Administratively complete application” is deleted.
- 86.1 (Definitions) “Complete application” is retained.
- 86.121(2) (Areas exempt from designation) the word “and” has been deleted and replaced by the word “or”.
- 86.130(b)(13)(ii) (Areas designated as unsuitable for mining) the reference to subsection (a) has been deleted.
- 86.130(b)(14) (Areas designated as unsuitable for mining) the reference to subsection (a) has been deleted and a reference has been added.

## COAL MINING - AREAS UNSUITABLE FOR MINING

25 Pa. Code Chapter 86 Subchapters A and D

Regulatory Basics Initiative

Annex A

Title 25. Environmental Protection

Part I. Department of Environmental Protection

Subpart C. Protection of Natural Resources

Article I. Land Resources

Chapter 86. Surface and Underground Coal Mining: General

Subchapter A. General Provisions

§86.1. Definitions.

\* \* \* \* \*

**[ADMINISTRATIVELY COMPLETE APPLICATION - AN APPLICATION FOR A PERMIT WHICH CONTAINS COMPLETED FORMS, STANDARD REPORTS AND INFORMATION ADDRESSING EACH APPLICATION REQUIREMENT OF THE DEPARTMENT WHICH HAVE BEEN PROPERLY SIGNED AND WITNESSED, A FILING FEE AND PROOF OF PUBLICATION NECESSARY FOR THE DEPARTMENT TO INITIATE PROCESSING AND PUBLIC REVIEW.]**

\* \* \* \* \*

*Complete application* – An application for a permit which contains an application form properly completed, signed and witnessed, a filing fee, proof of publication, the standard reports

or forms required by the Department to process a permit and which demonstrates compliance with applicable statutes and regulations.

\* \* \* \* \*

*Valid existing rights* - [Includes the following:

(i) Except for haul roads and activities enumerated in subparagraph (iii), property rights in existence on August 3, 1977, that were created by a legally binding conveyance, lease, deed, contract or other document which authorizes the applicant to produce minerals by a surface mining operation. The person proposing to conduct surface mining operations on the lands shall hold current State and Federal permits necessary to conduct the operations on those lands and either have held those permits on August 3, 1977, or had made by that date a complete application for the permits, variances and approvals required by the Department.

(ii) For haul roads, the term includes:

(A) A recorded right-of-way, recorded easement, or a permit for a haul road recorded as of August 3, 1977.

(B) Another road in existence as of August 3, 1977.

(iii) Coal preparation activities, and their associated haul roads, which were not subject to this chapter and Chapters 87 - 90 prior to August 25, 1989, were in existence on or before July 6, 1984, and were operating in compliance with applicable laws prior to that date.

(iv) Interpretation of the terms of the document relied upon to establish valid existing rights shall be based upon the usage and custom at the time and place where it came into existence, and upon a showing by the applicant that the parties to the document actually contemplated a right to conduct the same underground or surface mining activities for which the applicant claims a valid existing right and that the document has been signed by the surface owner.

(v) The term does not include the mere expectation of a right to conduct surface mining operations or the right to conduct underground coal mining.]

RIGHTS WHICH EXIST UNDER THE DEFINITION OF "VALID EXISTING RIGHTS" IN 30 CFR SECTION 761.5 (RELATING TO AREAS UNSUITABLE FOR MINING).

\* \* \* \* \*

## Subchapter D. AREAS UNSUITABLE FOR MINING

### GENERAL PROVISIONS

#### §86.101. Definitions.

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

\* \* \* \* \*

*Fragile lands* - Geographic areas containing natural, ecologic, scientific or esthetic resources that could be SIGNIFICANTLY damaged or destroyed by surface mining OPERATIONS. Examples include, but are not limited to, valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, PALEONTOLOGICAL SITES, National Natural Landmark sites, areas where mining may cause flooding, environmental corridors containing a concentration of ecologic and esthetic features[,] AND areas of recreational value due to high environmental quality. [and] [buffer zones adjacent to the boundaries of] [areas where surface mining operations are prohibited under section 4.5(h) of the Surface Mining Conservation and Reclamation Act (52 P.S. §1396.4e(h)).]

*Historic lands* - [Historic or cultural districts, places, structures or objects, including archaeological and paleontological sites, National Historic Landmark sites, sites listed] AREAS

CONTAINING HISTORIC, CULTURAL OR SCIENTIFIC RESOURCES. EXAMPLES OF HISTORIC LANDS INCLUDE ARCHAEOLOGICAL SITES, PROPERTIES LISTED ON or eligible for listing on a State or National Register of Historic Places, [SITES] NATIONAL HISTORIC LANDMARKS, PROPERTIES having religious or cultural significance to [native] NATIVE Americans or religious groups[ or sites], AND PROPERTIES for which historic designation is pending.

\* \* \* \* \*

*Public building* - A structure that is owned [by a public agency or used principally] OR LEASED AND PRINCIPALLY USED BY A GOVERNMENT AGENCY for public business[,] OR meetings [or other group gatherings].

*Public park* - An area OR PORTION OF AN AREA dedicated or designated by a Federal, State or local agency PRIMARILY for public recreational use, whether or not the use is limited to certain times or days, including land leased, reserved or held open to the public because of that use. [For the purposes of this subchapter, local agency shall include nonprofit organizations owning lands which are dedicated or designated for public recreational use.]

\* \* \* \* \*

*Renewable resource lands* - [Aquifers and areas for the recharge of aquifers and other underground waters, areas for agricultural or silvicultural production of food and fiber, and



grazing lands]. AREAS WHICH CONTRIBUTE SIGNIFICANTLY TO THE LONG-RANGE PRODUCTIVITY OF WATER SUPPLY OR OF FOOD OR FIBER PRODUCTS, SUCH LANDS TO INCLUDE AQUIFERS AND AQUIFER RECHARGE AREAS.

*Significant recreational, timber, economic or other values incompatible with surface mining OPERATIONS* - Significant values which could be damaged by, and are not capable of existing together with, surface mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on [offsite] OTHER AFFECTED areas which could be affected by mining. Values to be evaluated for their importance include:

\* \* \* \* \*

*Surface mining operations* -- The extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip and auger mining, dredging, quarrying and leaching and surface activity connected with surface or underground coal mining, including, but not limited to, exploration, site preparation, entry, tunnel, slope, drift, shaft and borehole drilling and construction and activities related thereto, coal refuse disposal, coal processing and preparation facilities [and activities involved in or related to underground coal mining which are conducted on the surface of the land, produce changes in the land surface, or disturbs the surface, air or water resources of the area].

§ 86.102. Areas where mining is prohibited or limited.

Subject to valid existing rights as defined in §86.1 (relating to definitions), surface mining operations except those which existed on August 3, 1977, are not permitted:

(1) On lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic [River] RIVERS Act (16 U.S.C.A. § 1276(a)) OR STUDY RIVERS OR STUDY RIVER CORRIDORS AS ESTABLISHED IN GUIDELINES UNDER THAT ACT and National Recreation Areas designated by act of Congress.

\* \* \* \* \*

(3) Which will adversely affect a publicly-owned park or a place included [on or eligible for inclusion] on the National Register of Historic Places, unless approved jointly by the Department and the Federal, State or local governmental agency with jurisdiction over the park or places.

(4) On lands within the State park system. Surface mining activities may be permitted if THE DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

AND the Department [finds] FIND that significant land and water conservation benefits will result when remining of previously mined land is proposed.

(5) On lands within State forest picnic areas, State forest natural areas and State forest wild areas. Surface mining operations may be permitted on State forest lands other than picnic areas, natural areas and wild areas, if the DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES AND THE Department [finds] FIND that one or more of the following apply:

\* \* \* \* \*

(7) On lands within the authorized boundaries of Pennsylvania Scenic River Systems which have been legislatively designated as such under the Pennsylvania Scenic Rivers Act (32 P.S. §§ 820.21 - 820.29). Surface mining operations may be permitted if the DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES AND THE Department [finds] FIND that significant land and water conservation benefits will result when remining of previously mined lands is proposed, [or when the Department finds] AND that the surface mining operation is consistent with the Scenic Rivers System designation and will not adversely affect the values which the designation is designed to protect.

(8) Within 100 feet (30.48 METERS) measured horizontally of the outside right-of-way line of a public road, except:

\* \* \* \* \*

(ii) When the Department, with concurrence of the agency with jurisdiction over the road, allows the public road to be relocated or the area affected to be within 100 feet (30.48 METERS) of the road, after the following:

\* \* \* \* \*

(9) Within 300 feet (91.44 METERS) measured horizontally from an occupied dwelling, unless ONE OR MORE OF the FOLLOWING EXIST:

(i) THE only part of the surface mining operations which is within 300 feet (91.44 METERS) of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling [or unless the current],

(ii) THE owner thereof has provided a written waiver [consenting] BY LEASE, DEED OR OTHER CONVEYANCE CLARIFYING THAT THE OWNER AND SIGNATORY HAD THE LEGAL RIGHT TO DENY SURFACE MINING OPERATIONS AND KNOWINGLY WAIVED THAT RIGHT AND CONSENTED to surface mining operations closer than 300 feet (91.44 METERS) OF THE DWELLING AS SPECIFIED. [The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.]

(A) A VALID WAIVER SHALL REMAIN IN EFFECT AGAINST  
SUBSEQUENT OWNERS WHO HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF  
THE EXISTING WAIVER AT THE TIME OF PURCHASE.

(B) SUBSEQUENT OWNERS SHALL BE DEEMED TO HAVE  
CONSTRUCTIVE KNOWLEDGE IF THE WAIVER HAS BEEN PROPERLY FILED IN  
PUBLIC PROPERTY RECORDS OR IF THE SURFACE MINING OPERATIONS HAVE  
PROCEEDED TO WITHIN THE 300 FOOT (91.44 METERS) LIMIT PRIOR TO THE DATE  
OF PURCHASE.

(iii) A NEW WAIVER IS NOT REQUIRED IF THE APPLICANT FOR  
A PERMIT HAD OBTAINED A VALID WAIVER PRIOR TO AUGUST 3, 1977, FROM  
THE OWNER OF AN OCCUPIED DWELLING TO MINE WITHIN 300 FEET  
(91.44 METERS) OF SUCH DWELLING.

(10) Within 300 feet (91.44 METERS) measured horizontally of a public building,  
school, church, community or institutional building or public park.

(11) Within 100 feet (30.48 METERS) measured horizontally of a cemetery,  
CEMETERIES MAY BE RELOCATED UNDER THE ACT OF APRIL 18, 1877 (P.L. 54, No.  
54 (9 P.S. §§41-52)).

(12) Within 100 feet (30.48 METERS) measured horizontally of the bank of a perennial or intermittent stream. The Department may grant a variance from this distance requirement if the operator demonstrates beyond a reasonable doubt that there will be no adverse hydrologic impacts, water quality impacts or other environmental resources impacts as a result of the variance. The variance will be issued as a written order specifying the methods and techniques that shall be employed to prevent adverse impacts. Prior to granting a variance, the operator is required to give public notice of application thereof in two newspapers of general circulation in the area once a week for 2 successive weeks. If a person files an exception to the proposed variance within 20 days of the last publication thereof, the Department will conduct a public hearing with respect thereto. The Department will also consider information or comments submitted by the Fish and Boat Commission prior to taking action on a variance request.

§86.103. Procedures.

\* \* \* \* \*

(c) If the proposed surface mining operations are to be conducted within 100 feet (30.48 METERS) measured horizontally of the outside right-of-way line of a public road—except where mine access road or haulage roads join the right-of-way line – or if the applicant proposes to relocate a public road, the Department will:

\* \* \* \* \*

(d) When the proposed surface mining operations would be conducted within 300 feet (91.44 METERS) measured horizontally of any occupied dwelling, the applicant shall submit with the application a written waiver [from the current owner of the dwelling, consenting to the surface mining operations within a closer distance of the dwelling] as specified in [the waiver. The waiver shall be knowingly made and separate from a lease or deed unless the lease or deed contains an explicit waiver from the current owner.] § 86.102(9) (RELATING TO AREAS WHERE MINING IS PROHIBITED OR LIMITED).

(e) When the proposed surface mining operations [may] WILL adversely affect a [public] PUBLICLY OWNED park or a place included on the National Register of Historic Places, the Department will transmit to the Federal, State or local agencies with jurisdiction over, or a statutory or regulatory responsibility for, the park or [historic] place, a copy of the completed permit application containing the following:

\* \* \* \* \*

(2) A notice to the appropriate agency that it shall respond within 30 days from receipt of the request.

(i) UPON REQUEST BY THE APPROPRIATE AGENCY A 30-DAY EXTENSION MAY BE GRANTED.

(ii) FAILURE TO OBJECT WITHIN THE COMMENT PERIOD  
SHALL CONSTITUTE AN APPROVAL OF THE PROPOSED PERMIT BY THAT AGENCY.

\* \* \* \* \*

CRITERIA AND PROCEDURES FOR DESIGNATING AREAS AS UNSUITABLE  
FOR SURFACE MINING

§ 86.121. Areas [designated] EXEMPT FROM DESIGNATION AS unsuitable for surface  
mining operations.

[(a) The requirements of this] THIS section and §§ 86.122–86.129 do not apply to  
[permit] areas on which [surface mining operations were being conducted on August 3, 1977, or  
are being conducted under a permit issued under the Surface Mining Conservation and  
Reclamation Act (52 P.S. §§ 1396.1 - 1396.19a), or if substantial legal and financial  
commitments as defined by the Office of Surface Mining Reclamation and Enforcement, United  
States Department of the Interior under section 522 of the Surface Mining Control and  
Reclamation Act of 1977 (30 U.S.C.A. § 1272) if the surface mining operations were in  
existence prior to January 4, 1977.

(b) Permits for surface mining operations will not be issued in areas designated  
unsuitable under this subchapter. The permits may be issued in areas where the applicant has  
prior substantial legal and financial commitments in a surface mining operations if the applicant



establishes the existence of the commitments to the satisfaction of the Department. In considering the permit applications in designated areas, the Department will impose terms and conditions to preserve and protect the applicable values and uses of the area.];

(1) SURFACE MINING OPERATIONS WERE BEING CONDUCTED ON AUGUST 3, 1977.

(2) SURFACE MINING OPERATIONS HAVE BEEN AUTHORIZED BY A VALID PERMIT ISSUED UNDER THE SURFACE MINING CONSERVATION AND RECLAMATION ACT (52 P.S. §§1396.1 - 1396.19A), THE COAL REFUSE DISPOSAL CONTROL ACT (52 P.S. §§30.51 - 30.66), THE CLEAN STREAMS LAW (35 P.S. §§691.1 - 691.1001), [AND] OR THE BITUMINOUS MINE SUBSIDENCE AND LAND CONSERVATION ACT (52 P.S. §§1406.1-1406.21).

(3) A PERSON ESTABLISHES THAT SUBSTANTIAL LEGAL AND FINANCIAL COMMITMENTS IN SURFACE MINING OPERATIONS WERE IN EXISTENCE PRIOR TO JANUARY 4, 1977.

§86.123. Procedures: petitions.

\* \* \* \* \*

(c) The petitioner shall provide the following information [to the Department's Bureau of Mining and Reclamation (Bureau)] on forms developed by [that Bureau] THE DEPARTMENT:

\* \* \* \* \*

(5) Identification of the petitioner's interest which is or may be adversely affected. A PERSON HAVING AN INTEREST WHICH IS OR MAY BE ADVERSELY AFFECTED MUST DEMONSTRATE AN "INJURY IN FACT" BY DESCRIBING THE INJURY TO THE SPECIFIC AFFECTED INTEREST AND DEMONSTRATING HOW THEY ARE AMONG THE INJURED.

\* \* \* \* \*

§ 86.124. Procedures: initial processing, recordkeeping and notification requirements.

(a) Within 30 days of receipt of a petition, the Department will notify the petitioner by certified mail whether or not the petition is complete as required by § 86.123 (relating to procedures: petitions). If the 30-day requirement of this subsection cannot be met due to the staff

limitations of the Department, the Department may process the petitions in accordance with the priority system authorized by subsection (b)(2). Within this 30-day period, the Department will also notify an applicant with pending surface mining operation permit applications in the area covered by the petition.

\* \* \* \* \*

(2) The Department may reject petitions for designations or terminations of designations which are frivolous. A FRIVOLOUS PETITION IS ONE IN WHICH THE ALLEGATIONS OF HARM LACK SERIOUS MERIT. Once the requirements of § 86.123 are met[, no party may bear a burden of proof, but] each accepted petition shall be considered and acted upon by the Department under the procedures of this part.

\* \* \* \* \*

(c) Until 3 days before the [EQB] DEPARTMENT holds a hearing under § 86.125 (relating to procedures: hearing requirements), a person may become an intervenor in the proceeding by filing allegations of facts DESCRIBING HOW THE DESIGNATION DETERMINATION DIRECTLY AFFECTS THE INTERVENOR, supporting evidence, a short statement identifying the petition to which the allegations pertain, a request for intervenor status[,] and THE name, address and telephone number.

(d) Beginning immediately after a complete petition is filed, the Department will compile and maintain a record consisting of documents relating to the petition filed with or prepared by the Department. The Department will make the record available for public inspection[,] free of charge, and copying at reasonable cost, during normal business hours at the [Bureau of Mining and Reclamation] DEPARTMENT'S district MINING office in the county or multicounty area in which the land petitioned is located, and at the main office of the Department.

\* \* \* \* \*

(f) The Department will prepare a recommendation [in the form of a proposed rulemaking] on each complete petition received under this section and submit it to the EQB [as a proposed regulation under this section] WITHIN 12 MONTHS OF RECEIPT OF THE COMPLETE PETITION.

§ 86.125. Procedures: hearing requirements.

(a) Within 10 months of the receipt of a complete petition, the [EQB] DEPARTMENT will hold a public hearing in the locality of the area covered by the petition. If all petitioners and intervenors agree, the hearing need not be held.

(b) The hearing shall be legislative and fact-finding in nature, without cross examination of witnesses. [The EQB will make a verbatim transcript of the hearing].

(c) NO PERSON SHALL BEAR THE BURDEN OF PROOF OR PERSUASION.

(d) A VERBATIM TRANSCRIPT OF THE HEARING WILL BE MADE AND INCLUDED IN THE PUBLIC RECORD.

[(b)](e) The [EQB] DEPARTMENT will give notice of the date, time and location of the hearing BY FIRST CLASS MAIL POSTMARKED NOT LESS THAN 30 DAYS BEFORE THE SCHEDULED HEARING to:

\* \* \* \* \*

(2) [The petitioner and the intervenors.

(3) A person with] PERSONS KNOWN TO THE DEPARTMENT TO HAVE an ownership or other interest [made known to the Department] in the area covered by the petition.

[(4) Notice of the hearing shall be sent by first class mail and postmarked not less than 30 days before the scheduled date of the hearing.]

(f) THE DEPARTMENT WILL GIVE NOTICE OF THE DATE, TIME AND LOCATION OF THE HEARING BY CERTIFIED MAIL POSTMARKED NOT LESS THAN

30 DAYS BEFORE THE SCHEDULED HEARING TO THE PETITIONER AND TO THE INTERVENORS.

[(c)](g) The [EQB] DEPARTMENT will notify the general public of the date, time and location of the hearing by placing a newspaper advertisement once a week for 2 consecutive weeks in the locale of the area covered by the petition and once during the week prior to the scheduled date of the public hearing. The consecutive weekly advertisement [shall] WILL begin between 4 and 5 weeks before the scheduled date of the public hearing.

[(d)](h) The [EQB] DEPARTMENT may consolidate in a single hearing the hearings required for each of several petitions which relate to areas in the same locale.

[(e)](i) [The EQB will receive and consider written] WRITTEN comments on the petition WILL BE RECEIVED AND CONSIDERED 15 days after the conclusion of the public hearing FOR AS OTHERWISE ESTABLISHED BY THE DEPARTMENT. If a hearing will not be held on a petition, the comments may be received and considered for 45 days following publication of a notice that there will be no public hearing.

(j) Within 60 days of the close of the public comment period, the [EQB] DEPARTMENT will [make a final decision] PREPARE A RECOMMENDATION TO THE EQB, INCLUDING A STATEMENT OF THE REASONS FOR THE RECOMMENDATION AND PROVIDE WRITTEN NOTICE OF ITS RECOMMENDATION TO THE PETITIONER AND INTERVENORS.

[(f)](k) If [that] all petitioners and intervenors so stipulate, the petition may be withdrawn from consideration prior to the hearing.

§ 86.126. Procedures: decision.

(a) In [reaching its decision on the proposed rule] DECIDING WHETHER TO DESIGNATE AN AREA AS UNSUITABLE FOR SURFACE MINING OPERATIONS, the EQB will consider:

\* \* \* \* \*

(b) [A final written decision in the form of a regulation will be issued by the EQB within 60 days following the public hearing, including a statement of reasons for the decision]. The EQB will promptly send the REGULATORY decision by certified mail to the petitioner, intervenors[,] and to the [Regional Director of the] Office of Surface Mining Reclamation and Enforcement.[AND]

(1) IF THE DECISION IS TO DESIGNATE AN AREA AS UNSUITABLE FOR SURFACE MINING OPERATIONS, THE EQB will deposit and publish its REGULATORY decision as a regulation in the manner required by the REGULATORY REVIEW ACT (71 P.S. §§ 745.1 et. seq.); THE COMMONWEALTH DOCUMENTS LAW [act of July 31, 1968 (P.L. 769, No. 240)] (45 P.S. §§1102, 1201 - 1208 and 1602); AND 45 Pa.

C.S. §§501-907[; and Sections 3 and 4 of the act of July 9, 1976 (P.L. 877, No. 160) (45 Pa. Sp. Pamph. 84 page 35)].

**(2) IF THE DECISION IS NOT TO DESIGNATE AN AREA AS UNSUITABLE FOR SURFACE MINING OPERATIONS, THE EQB WILL PUBLISH ITS DECISION IN THE PENNSYLVANIA BULLETIN WITHIN 30 DAYS.**

§ 86.127. [Data base] DATABASE and inventory system requirements.

\* \* \* \* \*

(b) The Department will include in the system information relevant to the criteria in §86.122 (relating to criteria for designating lands as unsuitable), including, but not limited to, information received from the United States Fish and Wildlife Service, the State Historic Preservation Office, the Fish and Boat Commission, the Department of Conservation and Natural Resources' Scenic Rivers Program, the Game Commission, [the Department of Community and Economic Development,] private conservancies and the agency administering Section 127 of the Clean Air Act (42 U.S.C.A. §7470).

\* \* \* \* \*



§86.128. Public information.

The Department will:

- (1) Make the information and data base system developed under §86.127 (relating to [data base] DATABASE and inventory system requirements) available to the public for inspection free of charge and for copying at reasonable cost during established office hours.

\* \* \* \* \*

§86.129. Coal exploration ON AREAS DESIGNATED AS UNSUITABLE FOR SURFACE MINING OPERATIONS.

[The submission of a petition to designate an area unsuitable for all or certain types of surface mining operations or designation]

(a) DESIGNATION of an area as unsuitable for all or certain types of surface mining operations under this chapter does not prohibit coal exploration operations in the area.

(b) Coal exploration may [not] be conducted on an area designated as unsuitable for surface mining operations [or where a petition to designate an area unsuitable for surface mining operations has been received by the Department] in accordance with this chapter [unless the exploration is] IF THE FOLLOWING APPLY:

(1) THE EXPLORATION IS consistent with the designation, [or the purposes of the submitted petition and will]

(2) THE EXPLORATION WILL be conducted to preserve and protect the applicable values and uses of the area[.] UNDER SUBCHAPTER E (RELATING TO COAL EXPLORATION), [Exploration may not be conducted unless] AND the Department has [been notified in advance and has] issued written approval for the exploration [under §86.133(f) (relating to general requirements). Approval will not be issued unless the person seeking the approval has described the nature and extent of the proposed operation, and has described in detail the measures to be employed to prevent adverse effects].

§86.130. Areas designated as unsuitable for mining.

\* \* \* \* \*

(b) The following is a list of descriptions of areas which are unsuitable for all or certain types of surface mining operations and where all or certain types of surface mining operations will not be permitted:

(1) The tract of approximately 233 acres (APPROXIMATELY 94.29 HECTARES) in Blacklick Township, Cambria County, described as follows:

Beginning at the northwest corner of the land owned by the Griffithtown Water Association and proceeding to the southwest corner, then easterly towards the southeast corner of the property and continuing in the same easterly direction to a point located 100 feet horizontal distance west of the Lower Freeport outcrop; then continuing in a southerly direction, remaining 100 feet (30.48 METERS) from and paralleling the Lower Freeport outcrop as the outcrop proceeds easterly to intersect the 2,040 foot (621.79 METER) elevation contour; then along a straight line extending in a northeasterly direction intersecting the 2,282-foot (695.55 METER) elevation point and continuing to US 422; then west along US 422 to an intersection formed by a road, driveway or farmlane approaching US 422 from the north and located approximately 1.86 miles east (APPROXIMATELY 2.99 KILOMETERS) of the junction of US 422 and Pa. Route 271 in Belsano; then continuing southwesterly in a straight line to the northwest corner of the Griffithtown Water Association property.

(2) The surface area overlying surface mineable coal reserves in a tract of approximately 11,200 acres (APPROXIMATELY 4,532 HECTARES) in Rush Township, Centre County, which tract is described as follows:

The surface water drainage basin of Cold Stream upstream from the mouth of Tomtit Run, including the surface water drainage basins of all tributaries to Cold Stream upstream from and including Tomtit Run except for the surface water drainage of a tributary known locally as Big Spring Run that enters Cold Stream from the west approximately 500 feet

(APPROXIMATELY 152.4 METERS) upstream from the Stony Point Road (Township Road 600) bridge over Cold Stream.

(3) The tract of approximately 119 acres (APPROXIMATELY 48.16 HECTARES) in Logan Township, Blair County and Gallitzin Township, Cambria County within the Mill Run watershed, that is underlain by surface mineable coal reserves, and that has not been previously disturbed by surface or deep mining. The tract is more particularly described as follows:

Beginning at the summit of a hill in the northwest corner of the Mill Run-Little Laurel Run watershed divide, southwest of the village of Buckhorn on or near the Cambria-Blair County line, and being at the eastern edge of the previously surface mined area; then along the watershed divide in a northeasterly direction for a distance of approximately 2,500 feet (APPROXIMATELY 762 METERS) to the point of intersection of the watershed divide with the Mercer coal seam outcrop; then proceeding in a southeasterly and southerly direction along the Mercer coal outcrop, and running roughly parallel to and 100 to 200 feet (30.48 TO 60.96 METERS) easterly of the old Loudon deep mine railroad grade, for a distance of approximately 5,500 feet (APPROXIMATELY 1.68 KILOMETERS) to the northern terminus of the Loudon deep mine, then proceeding westerly and northwesterly along the edge of the Loudon deep mine, exclusive of an approximately 2-acre (APPROXIMATELY 0.81 HECTARES) ungraded surface mine, to its intersection with the toe of spoil of the previously surface mined area; then in a northwesterly direction along the spoil

banks remaining from previous surface mining activity a distance of approximately 3,800 feet (APPROXIMATELY 1.16 KILOMETERS) to the summit of the hill, being the place of beginning.

(4) The surface mineable coal reserves in a tract of approximately 5,600 acres (APPROXIMATELY 2,266.32 HECTARES) in Rush, Centre County, which tract is the surface water drainage basin of Black Bear Run.

\* \* \* \* \*

(9) The tract of approximately 525 acres (APPROXIMATELY 212.46 HECTARES) in Elder Township, Cambria County, described as follows:

Beginning at the northern edge of a raw water storage tank located approximately 2,000 feet (APPROXIMATELY 609.60 METERS) south of Township Route 551 and 2,150 feet (655.32 METERS) west of State Route 36; then proceeding in a northeasterly direction, intersecting the Borough of Hastings Water Authority access road at a point approximately 1,450 feet (APPROXIMATELY 441.96 METERS) from the access road's junction with Township Route 551; then continuing due north, intersecting Township Route 551 at a property, fence or tree line located approximately 1,250 feet (APPROXIMATELY 381 METERS) west of the junction of Township Route 551 and State Route 36; then north along the property, fence or tree line to a point located on Legislative Route 221 approximately 1,100 feet

(APPROXIMATELY 335.28 METERS) west of State Route 36 in St. Boniface; then continuing in a southeasterly direction to the junction of State Route 36 and Legislative Route 11056; then along Legislative Route 11056 to a point approximately 1,300 feet (APPROXIMATELY 396.24 METERS) east of State Route 36; then continuing south along a property, fence or tree line to another property, fence or tree line that is approximately 475 feet (APPROXIMATELY 144.78 METERS) south of Legislative Route 11056; then 575 feet (175.26 METERS) due west along this property, fence or tree line to a point located approximately 350 feet (APPROXIMATELY 106.68 METERS) east of State Route 36; then due south to meet State Route 36 at its junction with a private road, driveway or farm lane approaching State Route 36 from the east, located approximately 950 feet (APPROXIMATELY 289.56 METERS) south of the junction of Township Route 551 and State Route 36; then south along State Route 36 for approximately 900 feet (APPROXIMATELY 274.32 METERS) to a tree, fence or property line; then along the line, intersecting the Laurel Hill anticline axis at a point approximately 1,575 feet (APPROXIMATELY 480.06 METERS) due east of State Route 36; then south along the anticlinal axis (which trends approximately N 40° E) intersecting State Route 36 approximately 625 feet (APPROXIMATELY 190.5 METERS) north of the junction of Legislative Routes 221 and 11077 and intersecting Legislative Route 11076 approximately 600 feet (APPROXIMATELY 182.88 METERS) north of its junction with Legislative Routes 221 and 11067 for 6,800 feet (2,072.64 METERS) to a point approximating the edge of an Upper Kittanning underground coal mine complex known as the Pardee No. 29; then continuing in the same southwesterly direction to a

point located 200 feet (60.96 METERS) horizontal distance southwest of the Pardee No. 29 Mine complex; then proceeding in a northerly direction remaining 200 feet (60.96 METERS) from and paralleling the edge of the Pardee No. 29 Mine complex for approximately 4,250 feet (APPROXIMATELY 1,295.4 METERS) to a point that is approximately 200 feet (APPROXIMATELY 61.96 METERS) horizontal distance west of the Upper Kittanning coal outcrop (intersecting an unnamed tributary to a farm pond located approximately 3,300 feet (APPROXIMATELY 1,005.84 METERS) due south of Township Route 551 and 3,300 feet (1,005.84 METERS) due west of State Route 36); then continuing north, remaining 200 feet (60.96 METERS) from and parallel to the coal outcrop to a property, fence or tree line located approximately 1,820 feet (APPROXIMATELY 554.74 METERS) south of Township Route 551; then due east along the line to the northwest corner of the land owned by the Borough of Hastings; then returning to the point of origin.

(10) The tract of 527 acres (213.28 HECTARES) of surface mineable coal reserves in the southern surface water drainage basin of North Fork Tangascootack Creek watershed. The 527 acres (213.28 HECTARES) encompass the Mercer coal crop line to the southern watershed divide of the North Fork Tangascootack Creek watershed, which tract is located in Bald Eagle, Grugan and Beech Creek Townships, Clinton County.

\* \* \* \* \*

(12) The surface mineable coal reserves in the surface water drainage basins of Rankin Hollow Run and the East Fork Brewster Hollow Run, tributaries of Sixmile Run, upstream of the water supplies for the Coaldale Borough-Six Mile Run Area Water Corporation. The two tracts, totaling approximately 525 acres (APPROXIMATELY 212.47 HECTARES), are located in Broad Top Township, Bedford County.

(13) The surface mineable coal reserves of the Lower Kittanning, Clarion and Mercer coals in the surface water drainage basin of Bells Gap Run, which tract is located in Antis and Logan Townships, Blair County and Dean and Reade Townships, Cambria County; except that the surface mineable coal reserves of the three designated seams are not designated unsuitable for surface mining operations in the following areas:

(i) A tract of approximately 41 acres (APPROXIMATELY 16.59 HECTARES) of abandoned mine lands located northwest of the town of Highland Fling, said tract being described as follows:

Beginning at the point where Township Route 502 intersects the surface water drainage divide between Tubb Run and Brubaker Run approximately 750 feet (APPROXIMATELY 228.6 METERS) northwest of the intersection of Township Route 502 and State Route 1016; then proceeding due east, to a point on State Route 1016 approximately 475 feet (APPROXIMATELY 144.78 METERS) north-northeast of the intersection of State Route 1016 and Township Route 502; then continuing to a point approximately 2,250 feet (APPROXIMATELY



685.8 METERS) north along State Route 1016; then due west to a point on the surface water drainage divide between Tubb Run and Brubaker Run approximately 2,800 feet (APPROXIMATELY 853.44 METERS) north-northwest of the intersection of Township Route 502 and State Route 1016; then in a southerly direction along the said surface water drainage divide to the point of origin.

(ii) The permit areas of Cambria Coal Company SMP #11783035, Cambria Coal Company SMP #11823006, Swistock Associates Coal Corp. MDP #4278BC10, E. P. Bender Coal Co. SMP #11793025, and Benjamin Coal Company MDP #4278SM2, in accordance with §86.121[(a)] (RELATING TO AREAS EXEMPT FROM DESIGNATION AS UNSUITABLE FOR SURFACE MINING OPERATIONS).

(14) The surface mineable coal reserves within the Goss Run watershed upstream of the Brisbin Dam, including a small tract of land within the watershed of the West Tributary to Goss Run, a total of approximately 555 acres (APPROXIMATELY 224.61 HECTARES), are designated unsuitable for all types of surface mining operations. This includes a land area beginning at the breast of the Brisbin Dam, thence due southwest to Pa. Route 153, thence north along the centerline of Pa. Route 153 to the intersection of Pa. Route 153 with township route T-657, thence north along the watershed divide between the Brisbin Dam drainage and the West Tributary drainage to a point at the intersection of the Goss Run and Little Beaver Run watershed divide, thence southwest along the Goss Run and Little Beaver Run watershed divide to a point at the intersection of the Brisbin Dam drainage divide, thence southwest along the Brisbin Dam drainage divide to the point of beginning; except that

the surface mineable coal reserves are not designated unsuitable for surface mining operations in the following areas:

The permit areas of the James I. Cowfer Contracting, Inc. SMP 17663037 and James I. Cowfer Contracting, Inc. SMP 17820152, in accordance with §86.121[(a)] (RELATING TO AREAS EXEMPT FROM DESIGNATION AS UNSUITABLE FOR SURFACE MINING OPERATIONS).

\* \* \* \* \*

(17) All types of surface mining operations within a tract of 450 acres (182.12 HECTARES) located in Slippery Rock and Wayne Townships, Lawrence County described as follows:

Beginning at the intersection of Township Road T-347 and Township Road 5-472; then in a northerly direction following Township Road T-472 for a distance of approximately 4,800 feet (APPROXIMATELY 1,643.04 METERS) to the Wayne Township and Slippery Rock Township boundary line; then in a westerly direction following the township line for a distance of approximately 800 feet (APPROXIMATELY 243.84 METERS) to the southwest corner of a land parcel owned, or formerly owned, by Edris Ann Thalgott; then in a northerly direction following the Edris Ann Thalgott property line for a distance of approximately 2,050 feet (APPROXIMATELY 624.84 METERS) to the southwest corner of a land parcel owned, or formerly owned, by Lois Mackey; then following the Lois Mackey

property line in a northerly direction for a distance of approximately 950 feet (APPROXIMATELY 289.56 METERS) to the intersection of the Lois Mackey property line with State Road SR2024; then in an easterly direction following State Road SR 2024 for a distance of approximately 2,100 feet (APPROXIMATELY 640.08 METERS) to the intersection with the southwest corner of a land parcel owned, or formerly owned, by Dale Mackey; then in a northerly direction following the Dale Mackey property line for a distance of approximately 1,650 feet (APPROXIMATELY 502.92 METERS) to the northwest corner of the Dale Mackey property; then in an easterly direction following the Dale Mackey property line for a distance of approximately 600 feet (APPROXIMATELY 182.88 METERS) to the northeast corner of the Dale Mackey property; then following the Dale Mackey property line in a southerly direction for a distance of approximately 1,250 feet (APPROXIMATELY 381.00 METERS) to the Dale Mackey property line intersection with the northeast corner of a land parcel owned, or formerly owned, by Richard E. Michaels; then following the Richard E. Michaels property line in a southerly direction for a distance of approximately 250 feet (APPROXIMATELY 76.20 METERS) to the Richard E. Michaels property line intersection with State Road SR 2024; then following Township Road T-478 in a southerly direction for a distance of approximately 7,200 feet (APPROXIMATELY 2,194.56 METERS) to the intersection of Township Road T-478 with Township Road T-347; then in a westerly direction following Township Road T-347 for a distance of approximately 2,000 feet (APPROXIMATELY 609.60 METERS) to the point of origin.

**PENNSYLVANIA STATUTE CITED  
SURFACE MINING CONSERVATION AND RECLAMATION ACT**

\* \* \* \* \*

§4.5 (h) Subject to valid existing rights as they are defined under § 522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 et seq., no surface mining operations except those which existed on August 3, 1988 shall be permitted:

\* \* \* \* \*

**FEDERAL REGULATIONS CITED – 30 CFR**

§761.5 Definitions.

\* \* \* \* \*

*Public park* means an area or portion of an area dedicated or designated by any Federal, State, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

\* \* \* \* \*

§761.11 Areas where mining is prohibited or limited.

\* \* \* \* \*

(c) On any lands where mining will adversely affect any publicly owned park or any places included in the National Register of Historic Places, unless jointly approved by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or place;

\* \* \* \* \*

(e) Within 300 feet, measured horizontally, of any occupied dwelling, except when—  
(1) The owner thereof has provided a written waiver consenting to surface coal mining operations closer than 300 feet; or  
(2) The part of the mining operation which is within 300 feet of the dwelling is a haul road or access road which connects with an existing public road on the side of the public road opposite the dwelling;

\* \* \* \* \*

§761.12 Procedures.

\* \* \* \* \*

(e)(1) Where the proposed surface coal mining operations would be conducted within 300 feet, measured horizontally, of any occupied dwelling, the permit applicant shall submit with the application a written waiver by lease, deed, or other conveyance from the owner of

the dwelling, clarifying that the owner and signator had the legal right to deny mining and knowingly waived that right. The waiver shall act as consent to such operations within a closer distance of the dwelling as specified.

- (e)(2) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver prior to August 3, 1977, from the owner of an occupied dwelling to mine within 300 feet of such dwelling, a new waiver shall not be required.
- (e)(3)(i) Where the applicant for a permit after August 3, 1977, had obtained a valid waiver from the owner of an occupied dwelling, that waiver shall remain effective against subsequent purchasers who had actual or constructive knowledge of the existing waiver at the time of purchase.
- (e)(3)(ii) A subsequent purchaser shall be deemed to have constructive knowledge if the waiver has been properly filed in public-property records pursuant to State laws or if the mining has proceeded to within the 300-foot limit prior to the date of purchase.
- (f)(1) Where the regulatory authority determines that the proposed surface coal mining operation will adversely affect any publicly owned park or any place included in the National Register of Historic Places, the regulatory authority shall transmit to the Federal, State, or local agency with jurisdiction over the park or place a copy of applicable parts of the permit application, together with a request for that agency's approval or disapproval of the operation, and a notice to that agency that it has 30 days from receipt of the request within which to respond and that failure to interpose a timely objection will constitute approval. The regulatory authority, upon request by the appropriate agency, may grant an extension to the 30- day period of an additional 30 days. Failure to interpose an objection within 30 days or the extended period granted shall constitute an approval of the proposed permit.

\* \* \* \* \*

§762.5 Definitions.

\* \* \* \* \*

*Fragile lands* means areas containing natural, ecologic, scientific, or esthetic resources that could be significantly damaged by surface coal mining operations. Examples of fragile lands include valuable habitats for fish or wildlife, critical habitats for endangered or threatened species of animals or plants, uncommon geologic formations, paleontological sites, National Natural Landmarks, areas where mining may result in flooding, environmental corridors containing a concentration of ecologic and esthetic features, and areas of recreational value due to high environmental quality.

\* \* \* \* \*

§762.14 Exploration on land designated as unsuitable for surface coal mining operations.

Designation of any area as unsuitable for all or certain types of surface coal mining operations pursuant to Section 522 of the Act and regulations of this Subchapter does not prohibit coal exploration operations in the area, if conducted in accordance with the Act, this Chapter, any approved State or Federal program, and other applicable requirements. Exploration operations on any lands designated unsuitable for surface coal mining operations must be approved by the

regulatory authority under Part 772 of this Chapter, to ensure that exploration does not interfere with any value for which the area has been designated unsuitable for surface coal mining.

\* \* \* \* \*

§764.13 Petitions.

- (a) *Right to petition.* Any person having an interest which is or may be adversely affected has the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations, or to have an existing designation terminated. For the purpose of this action, a person having an interest which is or may be adversely affected must demonstrate how he or she meets an "injury in fact" test by describing the injury to his or her specific affected interests and demonstrate how he or she is among the injured.

\* \* \* \* \*

§764.15 Initial processing, recordkeeping, and notification requirements.

\* \* \* \* \*

- (a)(3) If the regulatory authority determines that the petition is incomplete, frivolous, or that the petitioner does not meet the requirements of Section 764.13(a), it shall return the petition to the petitioner with a written statement of the reasons for the determination and the categories of information needed to make the petition complete. A frivolous petition is one in which the allegations of harm lack serious merit.

\* \* \* \* \*

**Office of Surface Mining Reclamation and Enforcement**

30 CFR Part 761

RIN 1029-AB82

**Prohibitions of 522(e)**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Department of the Interior.

**ACTION:** Proposed interpretative rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is proposing an interpretative rulemaking to address the question of whether subsidence due to underground mining is a surface coal mining operation and thus prohibited in areas enumerated in section 522(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSM proposes to interpret SMCRA and implementing rules to provide that subsidence due to underground mining is not a surface coal mining operation, and therefore is not prohibited in areas protected under SMCRA section 522(e). OSM proposes to construe the definition of "surface coal mining operations" at SMCRA section 701(28)(A) and in the analogous portion of the existing rules at 30 CFR 700.5 not include subsidence, and to include only (1) surface activities in connection with a surface coal mine and (2) surface activities in connection with those surface operations and impacts of an underground coal mine subject to section 516. Similarly, OSM would construe the second part of this definition, at SMCRA section 701(28)(B) and in the analogous portion of the existing rules at 30 CFR 700.5, to include only the areas upon which such surface activities occur, and the areas where such surface activities disturb the surface and to holes or depressions resulting from or incident to such surface activities. Only "surface coal mining operation" are prohibited within the areas protected by section 522(e). Therefore, neither subsurface activities that may result in subsidence, nor actual subsidence, would be prohibited on lands protected by section 522(e). Rather, such underground activities and their impacts, including subsidence, would be subject to regulation under sections 516 and 720.

**DATES:** *Electronic or written comments:* OSM will accept electronic or written comments on the proposed rule until 5:00 p.m. Eastern time on June 2, 1997.

*Public hearings:* Anyone wishing to testify at a public hearing must submit a request on or before 5:00 p.m. Eastern time on March 17, 1997. Because OSM

will hold a public hearing at a particular location only if there is sufficient interest, hearing arrangements, dates and times, if any, will be announced in a subsequent Federal Register notice. Any disabled individual who needs special accommodation to attend a public hearing should contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

**ADDRESSES:** *Electronic or written comments:* Submit electronic comments to [osmruleso@smre.gov](mailto:osmruleso@smre.gov). Mail written comments to the Administrative Record, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240 or hand-deliver to the person listed under **FOR FURTHER INFORMATION CONTACT**.

*Public hearings:* If there is sufficient interest, hearings may be held in Billings, MT; Denver, CO; Lexington, KY; Washington, DC; and Washington, PA. To request a hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by the time specified under **DATES** using any of the methods listed for "*Electronic or written comments*".

**FOR FURTHER INFORMATION CONTACT:**

Nancy R. Broderick, Rules and Legislation, Office of Surface Mining Reclamation and Enforcement, Room 115, South Interior Building, 1951 Constitution Avenue, N.W., Washington, DC 20240. Telephone: (202) 208-2700.

E-mail address: [nbroderi@osmre.gov](mailto:nbroderi@osmre.gov). Additional information concerning OSM, this rule, and related documents may be found on OSM's home page at <http://www.osmre.gov>.

**SUPPLEMENTARY INFORMATION:**

- I. Public Comment Procedures
- II. Discussion of Proposed Rule
  - A. Background
  - B. Statutory Analysis
- III. Procedural Matters

**I. Public Comment Procedures**

*Electronic or Written Comments*

Comments should be specific and confined to issues pertinent to the proposed rule. They also should include explanations in support of the commenter's recommendations. OSM appreciates any and all comments, but those most useful and likely to influence decisions on the content of a final rule will be those that either involve personal experience or include citations to and analyses of the Act, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations,

technical literature, or other relevant publications.

Except for comments provided in an electronic format, commenters should submit two copies of their comments if it is practicable. Comments received after the time indicated under **DATES** or at locations other than the OSM office listed under **ADDRESSES** will not necessarily be considered in the final decision or included in the administrative record.

*Public Hearing*

Persons wishing to testify at a public hearing must contact the person listed under **FOR FURTHER INFORMATION CONTACT** by the time indicated under **DATES**. If no one requests an opportunity to comment at a public hearing, no hearing will be held.

If a public hearing is held, it will continue until all persons scheduled to speak have been heard. Persons in the audience who were not scheduled to speak but who wish to do so will be heard following the scheduled speakers. The hearing will end after all scheduled speakers and any other persons present who wish to speak have been heard.

Filing of a written statement at the time of the hearing will assist the transcriber and facilitate preparation of an accurate record. Submission of electronic or written statements to OSM in advance of the hearing will allow OSM officials to prepare appropriate questions.

*Public Meeting*

If there is only limited interest in a hearing at a particular location, a public meeting, rather than a public hearing, may be held. Persons wishing to meet with OSM representatives to discuss the proposed rule may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if possible, notice of the meetings will be posted at the appropriate locations listed under **ADDRESSES**. A written summary of each public meeting will be made a part of the administrative record for this rulemaking.

**II. Discussion of Rule**

*A. Background*

On March 13, 1979, OSM promulgated permanent program rules as required by section 501(b) of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-57, 39 U.S.C. 1271 et seq.) (SMCRA or the Act). See 44 FR 14902. The Act prohibits surface coal mining operations on all lands designated in section 522(e), subject to valid existing rights

and except for those operations which existed on August 3, 1977. Lands designated in section 522(e)(1) include any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act (16 U.S.C. 1276(a)) or study rivers or study river corridors as established in any guidelines pursuant to that Act, and National Recreation Areas designated by Act of Congress. Additional lands designated by sections 522(e) (2), (3), (4), and (5) include National Forests; publicly owned parks; properties listed on the National Register of Historic Places; 100 foot buffer zones around public roads and cemeteries; and 300-foot buffer zones around occupied dwellings, public buildings, schools, churches, community or institutional buildings, and public parks. The term "valid existing rights" (VER) is not defined in SMCRA. In a separate rulemaking, published in this issue of the Federal Register OSM intends to define VER and address requirements and procedures for the submission and processing of VER claims.

Under section 522(e), if a person who proposes to conduct a surface coal mining operation on protected lands does not qualify for one of the statutory exceptions, then the person cannot conduct the intended operation on such lands. See 30 CFR section 773.15(c)(3)(ii) (1990). Section 522(e) does not specifically mention subsidence as a prohibited activity.

The need for this interpretative rulemaking derives in part from litigation concerning the applicability of the sections 522(e) (4) and (5) prohibitions to underground mining. The issue is whether and to what extent subsidence and underground coal extraction operations which cause or are expected to cause subsidence are prohibited. In 1988, OSM issued a proposed rule to address the issue. See 53 FR 52374, December 27, 1988. However, the entire proposed rule was withdrawn for further study in 1989. 54 FR 30557, July 21, 1989. The withdrawal was based on comments received on the proposed rule, and on OSM's analysis of the issues, which indicated to OSM that this was fundamentally a legal issue. OSM therefore decided to seek a formal opinion from the Office of the Solicitor, U.S. Department of the Interior, on this matter. The Solicitor completed his review of this issue in July, 1991, and

concluded that the best interpretation of SMCRA is that subsidence is not a surface coal mining operation subject to the prohibitions of § 522(e).

The Solicitor's Memorandum of Opinion (M-Op.) is based on an extensive analysis of the statute, the legislative history, relevant case authority and OSM's regulatory actions with respect to the applicability of section 522(e) to subsidence from underground mining. The M-Op. concluded that Congress did not intend for the prohibitions of section 522(e) to apply to subsidence from underground mining and noted that OSM may regulate subsidence solely under section 516 of SMCRA and not under section 522(e). While the M-Op. recognizes that regulation under section 516 may not have precisely the same effect as regulation under section 522(e), the analysis provides support for the conclusion that regulation under section 516 will achieve full protection of the environmental values which Congress sought to protect from subsidence under the Act while encouraging longwall mining.

On July 18, 1991, OSM published a Notice of Inquiry (NOI) which stated that, based on OSM's review of the Act and the legislative history, the comments received on the December 27, 1988, proposal, and the M-Op., OSM concluded that no further rulemaking action was necessary in regard to the applicability of section 522(e) prohibitions to underground mining. OSM concluded that the regulations, at 30 CFR 761.11 (d), (e), (f) and (g), adequately address underground mining and appropriately apply the statutorily-established buffer zones in a horizontal dimension only.

On September 6, 1991, the National Wildlife Federation (NWF) filed legal action against the Secretary challenging the July 18 NOI and the July 10 M-Op., on the applicability of 522(e) of SMCRA to subsidence. *National Wildlife Federation (NWF) v. Babbitt*, No. 91-2275-TAF (D.D.C. September 22, 1993). The NWF contended that both the M-Op. and the NOI violated the requirements of the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and SMCRA. NWF requested, among other things, that the court order OSM to undertake rulemaking to determine the applicability of Section 522(e) to subsidence, and vacate the M-Op. and the NOI. In addition, a motion was filed by the Interstate Mining Compact Commission (IMCC) and a number of industry groups, including the National Coal Association (NCA) and American Mining Congress (AMC), to intervene as

defendants in this action. That motion was granted by the court.

The district court vacated the NOI on September 23, 1993, on procedural grounds, and remanded the case to the Secretary for rulemaking on the applicability of section 522(e) to subsidence, in accordance with the notice and comment procedures of the APA, 5 U.S.C. section 551 *et seq.* *National Wildlife Federation (NWF) v. Babbitt*, No. 91-2275-TAF (D.D.C. September 22, 1993).

#### B. Statutory Analysis

Title V of the Act sets forth the basic regulatory requirements for coal mining operations for which permits are required under the Act. Title V includes provisions which establish regulatory schemes for surface coal mining, the surface effects of underground coal mining, and protection of lands unsuitable for surface coal mining operations.

Analysis of the structure of Title V and the Act as a whole confirms that Congress set out related but separate regulatory schemes for surface and underground mining. Congress had received ample testimony prior to the passage of the Act regarding the differences in both the nature and consequences of the two types of coal mining. The legislative history emphasizes that the differences in the nature and consequences of the two types of mining require significant differences in regulatory approach. See SMCRA section 516(a), 30 U.S.C. 1266(a); see also SMCRA sections 516 (b)(10) and (d), 30 U.S.C. 1266 (b)(10) and (d). See, e.g., H.R. Rep. No. 2 18, 95th Cong., 1st Sess. 59 (1977); S. Rep. No. 128, 95th Cong., 2nd Sess. 50 (1977); H.R. Rep. No. 1445, 94th Cong., 2nd Sess. 19 (1976); S. Rep. No. 402, 93rd Cong., 2nd Sess. 83 (1973); H.R. Rep. No. 1072, 93rd Cong. 2nd Sess. 57, 108 (1974); H.R. Rep. No. 1462, 92nd Cong., 2d Sess. 32 (1972); 123 Cong. Rec. 8083, 8154 (1977); 123 Cong. Rec. 7996 (1977); 123 Cong. Rec. 3726 (1977).

For instance, Congress was aware that the types of environmental risks associated with underground mining are, for the most part, significantly different from those associated with surface mining. Environmental impacts associated with (pre-SMCRA) unregulated or unreclaimed underground mines included subsidence and hydrological problems that were hidden deep underground and not observable at the surface for an unpredictably long time. Such surface consequences could be severe and long-lasting. The problems in some cases remained fundamentally inaccessible or



unchangeable because of adverse technological, geological and hydrological conditions.

By contrast, most of the impacts of unregulated pre-SMCRA surface mining resulted from surface activities that were more immediate and more readily observable, and the resulting conditions were relatively accessible for reclamation. See H.R. Rep. NO. 1445, 94th Cong., 2d Sess. 20-22 (1976).

This proposed rulemaking addresses whether the provisions of section 522(e), which expressly apply to "surface coal mining operations," should be construed as applying to subsidence from underground mining, which is not specifically referenced in the definition of that term. Addressing this issue requires interpretation of the phrase "surface coal mining operations" as used in section 522(e) and defined in section 701(28). See 30 U.S.C. 1272(e); 1291(28).

In the past, OSM has not taken a definitive position on the issue of the applicability of section 522(e) to subsidence. In some documents, OSM has apparently taken the position that section 522(e) does apply to subsidence from underground mining. In the 1979 rulemaking which first established permanent program rules under SMCRA, OSM dealt with this issue in two provisions. Concerning the definitions at 30 CFR 761.5, OSM rejected a comment that "surface operations and impacts incident to an underground mine" should be limited to subsidence. 44 FR 14990, March 13, 1979. Such operations and impacts are permitted in some circumstances in National Forests under an exception to section 522(e)(2). The negative implication would appear to be that such operations and impacts (including subsidence) are otherwise prohibited by section 522(e).

In the preamble discussion of the regulation at 30 CFR 761.11(d), which concerned the section 522(e)(4) prohibition on mining within 100 feet of the right-of-way of a public road, OSM accepted a comment that the 100 feet should be measured horizontally "so that underground mining below a public road is not prohibited." OSM stated its belief that mining under a road should not be prohibited "where it would be safe to do so." 44 FR 14994, March 13, 1979. The negative implication from this last clause would appear to be that mining under a public road should be prohibited where it would be unsafe to do so, but the preamble does not discuss whether such prohibition would come from section 516 or from an interpretation that section 522(e)

prohibits subsidence that causes material damage.

See also letter of Patrick Boggs, Office of Surface Mining, to Ralph Albright, Jr., regarding *Otter Creek Coal Co. v. United States*, January 19, 1981; and *Determination of Valid Existing Rights Within the Otter Creek Wilderness Area of Monongahela National Forest*; Notice, 49 FR 31228, 31231, 31233 (August 3, 1984), characterizing subsidence as a prohibited surface impact under section 522(e); and Federal Defendant's Supplemental Memorandum on the Relationship Between section 522(e) and the Surface Impacts of Underground Coal Mining at 8, *In re Permanent Surface Mining Regulation Litigation II*, No. 79-1144 (D.D.C. 1985).

However, in its approvals of State regulatory programs, OSM has not required states to apply the lands unsuitable prohibitions to subsidence. In fact, OSM has accepted both the policy of some states not to apply the prohibitions to subsidence, and the policy of other states to apply the prohibitions only to subsidence causing material damage. See Statement of Interstate Mining Compact Commission Re Oversight Hearing on Subsidence Issues, Before the Mining and Natural Resources Subcommittee, Committee on Interior and Insular Affairs, U.S. House of Representatives, June 28, 1990. With the exception of Colorado, Illinois, Indiana, and Montana, states with active underground coal mining do not apply the prohibitions of section 522(e) to subsidence. The states regulate the effects of subsidence through state regulations which implement section 516 of SMCRA. Those regulations provide for the restriction, repair, and compensation for subsidence and material damage to certain structures and lands. Colorado does not allow material damage to structures even with landowner waivers or VER. Illinois prohibits planned subsidence in section 522(e) areas. The mineral owner must possess the right to subside through applicable waiver or VER. Indiana regulations prohibit material damage from subsidence to certain structures and lands. Indiana has not approved planned subsidence in past permits, and has not developed specific policies related to the approval of planned subsidence. Information obtained from Indiana indicates that it anticipates that it would prohibit subsidence unless the mineral owner possesses the specific right through applicable waiver or VER. Also, Montana has no defined policy regarding the regulation of subsidence. This is due in part to the fact that the State has one inactive underground mine that has not begun production.

Montana is sparsely populated, and has not encountered conditions that require it to determine whether subsidence is prohibited in section 522(e) areas. See Proposed Revision to the Permanent Program Regulations Implementing section 522(e) of the Surface Mining Control and Reclamation Act of 1977, Draft Environmental Impact Statement: OSM-EIS-29 (June, 1995), prepared by U.S. Office of Surface Mining Reclamation and Enforcement, Table II-1 at pages II-2,3.

Because OSM arguably has taken conflicting or unclear positions in the past, OSM is proposing to develop a definitive position on this issue, consistent with the Act. For the reasons set forth below, OSM proposes to interpret SMCRA as regulating subsidence under sections 516 and 720; and proposes to interpret section 522(e) in light of the statutory definition of "surface coal mining operations" in section 701(28), as not applying to subsidence from underground mining.

#### Section 516

Section 516 establishes the regulatory requirements for the surface effects of underground coal mining, including provisions for the control of subsidence from underground coal mining. SMCRA section 516 provides in relevant part:

(a) The Secretary shall promulgate rules and regulations directed toward the surface effects of underground coal mining operations, embodying the following requirements and in accordance with the procedures established under section 501 of this Act: *Provided, however,* That in adopting any rules and regulations the Secretary shall consider the distinct difference between surface coal mining and underground coal mining. \* \* \*

(b) Each permit issued under any approved State or Federal program pursuant to this Act and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: *Provided,* That nothing in this subsection shall be construed to prohibit the standard method of room-and-pillar mining;

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and major impoundments, or permanent streams if he finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

(d) The provisions of Title V of this Act relating to State and Federal programs.

permits, bonds, inspections and enforcement, public review, and administrative and judicial review shall be applicable to surface operations and surface impacts incident to an underground coal mine with such modifications to the permit application requirements, permit approval or denial procedures, and bond requirements as are necessary to accommodate the distinct difference between surface and underground coal mining. . . .

30 U.S.C. section 1266.

Section 516 is implemented in large part at 30 CFR Part 817, which sets forth the performance standards for underground coal mining. The provisions concerning subsidence control in Part 817 include performance standards which require the prevention of material damage and maintaining the value and reasonably foreseeable use of surface lands, or using mine technology for planned subsidence in a predictable and controlled manner; compliance with the subsidence control plan; repair of material damage; and a detailed plan of underground workings.

Section 516(b) sets the foundation for a regulatory scheme intended to control subsidence to the extent technologically and economically feasible in order to protect the value and use of surface lands. Section 516(c) authorizes suspension of underground mining under urban areas and water bodies, when there is imminent danger to inhabitants. Section 516(c) applies in those situations in which an underground mine has been permitted because all applicable permitting standards, including standards for prevention of material damage, have been met, but actual underground mining poses a serious subsidence danger to inhabitants of urban areas and water bodies.

#### Section 515

Section 515 of the Act sets out the environmental protection performance standards for surface coal mining, including standards for backfilling and grading to approximate original contour; revegetation; reconstruction of prime farmlands; impoundments; augering; protecting the hydrologic balance; protecting fish and wildlife values; disposal of excess spoil, mine waste, and acid-forming and toxic materials, and use of explosives; and construction of roads. This section is implemented in large part at 30 CFR Part 816.

#### Section 720

Section 720 of SMCR was added by the Energy Policy Act of 1992, Public Law 102-486, 106 Stat. 2776 (1992). The statute was enacted on October 24, 1992. Section 720 provides, in relevant part:

(a) Underground coal mining operations conducted after the date of enactment of this section shall comply with each of the following requirements:

(1) Promptly repair, or compensate for, material damage resulting from subsidence caused to any occupied residential dwelling and structures related thereto, or non-commercial building due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto, or non-commercial building and shall be in the full amount of the diminution in value resulting from the subsidence. . . .

(2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations. Nothing in this section shall be construed to prohibit or interrupt underground coal mining operations.

30 U.S.C. 1310.

On March 31, 1995, OSM published final regulations implementing these provisions. The implementing regulations are set forth primarily in Parts 701, 784, and 817. Amendments to Part 701 provide definitions of key terms. The regulations require a presubsidence survey to document the condition of protected structures and the quantity and quality of protected water supplies, that could be damaged by subsidence. The regulations also clarify that, if the proposed mining would provide for planned subsidence in a predictable and controlled manner, then, with certain exceptions, the permittee must take measures consistent with the mining method, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings dwellings and related structures.

#### Section 522(e)

In addition to the regulation of surface and underground coal mining under sections 515, 516, and 720, SMCR section 522(e) imposes certain prohibitions on surface coal mining operations on lands designated by Congress as unsuitable for those operations. Congress determined that the nature and purpose of certain areas and land uses were incompatible with surface coal mining operations. See S. Rep. No. 128, 95th Cong., 1st Sess. 55 (1977). Therefore, SMCR section 522(e) states that, with certain exceptions, surface coal mining operations are prohibited on or within specified distances of those lands and uses.

Section 522(e) provides, in relevant part, as follows:

After the enactment of this Act and subject to valid existing rights no surface coal mining operations except those which exist on the date of enactment of the Act shall be permitted—

(1) on any lands within the boundaries of units of the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including study rivers designated under section 5(a) of the Wild and Scenic Rivers Act and National Recreation Areas designated by Act of Congress:

(2) on any Federal lands within the boundaries of any national forest: *Provided, however,* That surface coal mining operations may be permitted on such lands if the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations and—

(A) surface operations and impacts are incident to an underground coal mines or

(B) where the Secretary of Agriculture determines, with respect to lands which do not have a significant forest cover within those national forests west of the 100th meridian, that surface mining is in compliance with the Multiple-Use Sustained-Yield Act of 1969, the Federal Coal Leasing Amendments Act of 1975, the National Forest Management Act of 1976, and the provisions of this Act: *And provided further,* that no surface coal mining operations may be permitted within the boundaries of the Custer National Forests:

(3) which will adversely affect any publicly owned park or places included in the National Register of Historic Sites unless approved jointly by the regulatory authority and the Federal, State, or local agency with jurisdiction over the park or the historic site:

(4) within one hundred feet of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the regulatory authority may permit such roads to be relocated or the area affected to lie within one hundred feet of such road, if after public notice and opportunity for public hearing in the locality a written finding is made that the interests of the public and the landowners affected thereby will be protected; or (5) within three hundred feet from any occupied dwelling, unless waived by the owner thereof, nor within three hundred feet of any public building, school, church, community, or institutional building, public park, or within one hundred feet of a cemetery.

30 U.S.C. 1272(e) (emphasis added).

Section 522(e) is implemented primarily at 30 CFR Part 761. That part provides definitions of key terms concerning SMCR section 522(e) and describes the procedures to be followed in implementing the prohibitions of section 522(e). Sections 522(e) (4) and (5) are implemented by 30 CFR 761.11 (d) through (g) which provides that

subject to valid existing rights and an exemption for mines existing on August 3, 1977, no surface coal mining operations shall be conducted within the specified distances, "measured horizontally," of the listed features and facilities. The regulation implementing section 522(e) requires a determination, as a prerequisite for permit issuance under section 515 or 516, whether a requester has the right to conduct a surface coal mining operation of such lands. 30 CFR 761.12 (1990).

The language "measured horizontally," was added in response to a comment which requested that OSM clarify that underground mining beneath a public road would not be prohibited. Although, OSM explained that it did not believe mining under a road should be prohibited when it would be safe to do so, OSM provided no clarification as to what is meant by "safe to do so."

#### Section 701(28)

Section 522(e) of SMCRA establishes that subject to VER and except for operations existing on August 3, 1977, "surface coal mining operations" are prohibited in each of the five areas set out in subparagraphs (e)(1) through (e)(5). Thus an understanding of the definition of the term "surface coal mining operations" in section 701(28) is required to determine the scope of the prohibitions. The term "surface coal mining operations" is defined in section 701(28) and includes certain aspects of underground coal mining. However, section 701(28) does not specifically mention subsidence.

Section 701(28) provides in full as follows:

"surface coal mining operations" means—

(A) activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 516 surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affected Interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site: *Provided, however,* That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16 2/3 per centum of the tonnage of minerals removed for purposes of commercial use or sale or coal explorations subject section 512 of this Act; and

(B) the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

30 U.S.C. 1291(28).

#### Interpretation of Section 701(28)

While the definition of "surface coal mining operation" in SMCRA section 701(28) is not a clearly drafted provision, OSM believes that paragraph (A) of the definition includes only surface activities which are connected with a surface coal mine, and surface activities connected with those surface operations and surface impacts that are incident to an underground mine and that are subject to section 516. This proposed interpretation is consistent with the description of the effect of section 701(28) in the Senate Report on the version of the definition that was adopted:

"Surface [coal] mining operations" \* \* \* includes all areas upon which occur surface mining activities and *surface activities incident to underground mining*. It also includes all roads, facilities, structures, property, and materials on the surface resulting from or incident to *such activities* S. Rep. No. 128, 95th Cong. 1st Sess. 98 (1977) (emphasis added).

Paragraph (B) of section 701(28) supports this interpretation. Paragraph (A) refers to "activities conducted on the surface of lands in connection with a surface coal mine or \* \* \* *surface operations and surface impacts* incident to an underground coal mine \* \* \*." Paragraph (B) refers to "the areas upon which *such activities* occur or where *such activities* disturb the natural land surface" and to holes or depressions "resulting from or incident to *such activities* \* \* \*" (emphasis added). The only "activities" to which paragraph (B) could refer are those described in paragraph (A), namely those conducted on the surface of lands in connection with a surface coal mine or in connection with the surface operations and impacts incident to an underground coal mine.

Under this construction, subsidence would not be included within the term "surface coal mining operations"

because it is not an activity conducted on the surface of lands, and it is not an area on which surface activities occur, or an area where surface activities disturb the surface, or a hole or depression resulting from or incident to surface activities. Surface activities associated with surface operations incident to underground mining, and surface activities associated with surface impacts incident to underground mining would be included in the definition. While subsidence is clearly a surface impact incident to underground mining, it is not a surface activity under the definition of surface coal mining operations. This reading of subsection 701(28), however, would not mean that subsidence would be exempt from regulation under the Act, since Congress specifically provided for regulation of subsidence under section 516 of SMCRA.

#### Relationship of Section 522(e) to Sections 516 and 720

OSM believes, based on its interpretation of the language of section 516 and of the legislative history, that Congress intended section 516(c), in combination with other regulatory provisions under section 516 and section 720, to offer sufficient prohibition, prevention, or repair of subsidence damage to those features that Congress considered vulnerable to significant impairment from subsidence. The existence of this comprehensive regulatory scheme in section 516 make it unlikely that Congress also intended to prohibit subsidence under section 522(e).

The legislative history of section 516 contains ample references to Congress' focus on control rather than prohibition. The following is pertinent House Report language:

Surface subsidence has a different effect on different land uses. Generally, no appreciable impact is realized on agricultural land and similar types of land and productivity is not affected. On the other hand when subsidence occurs under developed land such as that in an urbanized area, substantial damage results to surface improvements be they private homes, commercial buildings or public roads and schools. One characteristic of subsidence which disrupts surface land uses is its unpredictable occurrence in terms of both time and location. Subsidence occurs, seemingly on a random basis, at least up to 60 years after mining and even in those areas it is still occurring. It is the intent of this section to provide the Secretary with the authority to require the design and conduct of underground mining methods to control subsidence to the maximum extent technologically and economically feasible in order to protect the value and use of surface lands.

H.R. Rep. No. 213, 95th Cong., 1st Sess. 126 (1977).

In those extreme cases in which Congress felt that prohibition could be necessary, it provided broad authority under section 516(c):

"In order to prevent the creation of additional subsidence hazards from underground mining in developing areas, subsection (c) provides permissive authority to the regulatory agency to prohibit underground coal mining in urbanized areas, cities, towns and communities, and under or adjacent to industrial buildings, major impoundments or permanent streams. S. Rep. No. 128 at 84-85.

It is reasonable to conclude that Congress addressed specifically, in section 516(c), the limited types of surface features that might be so significantly affected by subsidence from underground mining that a subsidence prohibition could be appropriate. This conclusion that prohibition was to be imposed solely under 516(c) is buttressed by the discussion in the House report quoted above, that subsidence has no appreciable impact on agricultural land and similar types of land. It is not necessary to impose the prohibitions of section 522(e) on subsidence because the surface features that might need such protection are covered by section 516(c).

This conclusion is also supported by the discussion in the 1977 Senate report on section 522(e) which notes that "surface coal mining" is prohibited within the specified distances of public roads, occupied buildings, and active underground mines, "for reasons of public health and safety." S. Rep. No. 128 at 55. Clearly, one of Congress' purposes in section 522(e)(4)-(5) was to protect public health and safety. Prohibition of subsidence in all section 522(e) areas would be unnecessary, however, given that an underground mine must meet the requirements of section 516 to prevent material damage and to maintain the value and use of lands, and those requirements should prevent risks to public health and safety. Moreover, if an unforeseen and imminent subsidence danger were to arise, section 516(c) requires that underground mining be suspended as necessary, thus providing a second level of protection for public health and safety. Therefore, Congress had already addressed in section 516 those subsidence control measures necessary to address public health and safety.

Sections 516 and 720, the sections of the Act expressly dealing with subsidence, treat subsidence as a surface impact to be regulated only to the extent that it:

(1) Causes material damage (section 516(b)(1) and section 720(a)(1)), or

(2) Diminishes the value or the reasonably foreseeable uses of the surface (section 516(b)(1)) or

(3) Creates imminent danger (section 516(c)), or

(4) Contaminants, diminishes, or interrupts a domestic water supply (section 720(a)(2)).

The legislative history of SMCRA indicates that Congress was only concerned with subsidence insofar as it causes environmental or safety problems, disrupts land uses, or diminishes land values. Congress has repeatedly recognized that there is little concern about subsidence that causes no significant damage to a surface use or facility or danger to human life or safety. See H.R. Rep. No. 218, 95th Cong., 1st Sess. 126 (1977); H.R. Rep. No. 1445, 94th Cong., 2d Sess. 71-72 (1976); H.R. Rep. No. 896, 94th Cong., 2d Sess. 73-74 (1976); H.R. Rep. No. 45, 94th Cong., 1st Sess. 115-116 (1975); H.R. Rep. No. 1072, 93rd Cong., 2d Sess. 108-109 (1974); H.R. Rep. No. 776, 102nd Cong., 2d Sess. 102-474 (1992).

#### Congressional Intent

OSM's proposed interpretation is consistent with Congress' intent to encourage underground mining and full coal resource recovery. The statute and legislative history express Congress' intent to "encourage the full utilization of coal resources through the development and application of underground extraction technologies." SMCRA section 102(k), 30 U.S.C. section 1202(k). Similarly, Congress found that:

The overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry.

SMCRA section 101(b), 30 U.S.C. section 1201(b).

In fact, there is evidence that Congress wished to encourage longwall mining in particular:

Underground mining is to be conducted in such a way as to assure appropriate permanent support to prevent surface subsidence of land and the value and use of surface lands, except in those instances where the mining technology approved by the regulatory authority at the outset results in planned subsidence. Thus, operators may use underground mining techniques, such as long-wall mining, which completely extract the coal and which result in predictable and controllable subsidence.

S. Rep. No. 128, 95th Cong., 1st Sess. 84 (1977). See also S. Rep. No. 28, 94th Cong., 1st Sess. 215 (1975).

Clearly, if subsidence is likely to occur from room-and-pillar

underground mining and is a virtually inevitable consequence of longwall mining, then prohibiting all subsidence below homes, roads, and other features specified in section 522(e) could make it substantially less feasible to mine and could substantially reduce the level of coal recovery in areas where such features are common on the surface.

Thus, inclusion of subsidence in the definition of "surface coal mining operations" at section 701(23), and application of the section 522(e) prohibitions to subsidence could be regarded as failing to accommodate congressional recognition of the importance of underground mining and longwall mining in particular. The application of the prohibitions in section 522(e) to subsidence could substantially impeded longwall and other full-extraction mining methods. As discussed above, the language of SMCRA demonstrates that Congress intended to encourage underground mining and especially full-extraction methods such as longwall mining. Congress intended that longwall and other mining techniques that completely remove the coal be used as subsidence control measures. See H.R. Rep. No. 218, *supra*. Such techniques involve planned subsidence.

#### Comparison of Underground Mining Techniques

Mine productivity improved significantly during the 1980's thus reversing the declining trend of the earlier decade. Productivity increased by an average of 6.6 percent per year between 1980 and 1990 (Department of Energy, Energy Information Administration (EIA), 1990). Improvement in underground mine productivity was particularly impressive. While surface mining productivity rose 86 percent during the 1980's, productivity at underground mines more than doubled.

The increases in productivity can be attributed to intense competition between coal producers, technology advancement, changing market conditions, improved labor/management relations, and a matured and more experienced labor force. The three primary underground mining methods principally used to extract coal are room-and-pillar, room-and-pillar with secondary mining, and longwall mining. Room-and-pillar is the predominant underground mining method, although longwall mining has increased in use in the United States since 1960.

### Room and Pillar Mining

Room and pillar mining is the predominant method of coal extraction in the United States. The room and pillar method in its basic form consists of leaving entries, rooms and cross-cuts into the coal seam to extract coal. Pillars of coal are left to support the mine roof, or for haulage and ventilation. This procedure is called "development" mining. Movements of the ground surface during this procedure are nearly always imperceptible.

To increase the extraction of coal where conditions allow, development mining is followed by "pillar recovery," where the pillars are systematically extracted. This is called secondary (or retreat) mining. Secondary mining occurs when the coal pillars left to support the mine roof are extracted during the retreat mining phase to obtain maximum recovery of the coal.

Pillar extraction is invariably accompanied by subsidence of the ground surface as the overburden sags into the mined-out area in response to the removal of mine-level support. Where pillar extraction is not conducted and the operator intends to leave surface support, the pillars must be designed to permanently support the overburden.

During the development mining phase, 30 to 50 percent of the coal may be extracted from the panel. In order to prevent subsidence, the remainder of the coal may not be recovered from a mine panel. However, when the roof collapses in a controlled fashion and the surface subsidence is not a limiting factor, secondary mining can be practiced to increase the coal recovery up to 85 percent.

### Longwall Mining

Longwall mining is a high extraction mining method that maximizes the recovery of coal resources. The development of the mains and sub-mains for access and ventilation of the longwall panels is essentially identical to the development of room and pillar mining. However, the longwall mining methods differs from room-and-pillar mining in that the mine working panel is fully extracted during mining by a fully automated shearer or plow. The mineral extraction ratio for longwall mining operation can be as high as 90 percent in each panel. Retreat mining on a longwall panel results in 100 percent coal extraction.

In longwall mining, groups of three or four parallel entries are driven perpendicular to the main entry on either side of the proposed panel. The width of the panel varies from 500 to 1,200 feet, and length from 4,000 to

15,000 feet. Longwall mining removes the coal in one operation by means of a long working face or wall that advances, or retreats, in a continuous line. The coal is cut by a shearer or coal plough which travels up and down along the face and makes 27 to 39 inch deep cuts. The broken coal falls on to an Armored Flexible Conveyor (AFC) which transfers the coal to the Stage Loader. The coal is then conveyed to the surface through several belt conveyors. Mechanical steel supports known as Sniields or Chocks are used to support the mine roof along the entire longwall face. After each cutting cycle of the shearer/plough, the steel supports and AFC are hydraulically advanced. The mine roof immediately behind the AFC is allowed to cave. The space from which the coal has been removed is either allowed to collapse or is completely or partially filled with stone and debris. The roof rock that falls into the mined out area is referred to as the "gob." As the overburden continues to collapse, effects of subsidence progresses upwards to the surface. However, solid coal barriers and pillars are left in the mine for haulage, ventilation, and other purposes. Ninety percent of the surface subsidence caused by longwall mining occurs within 4 to 6 weeks of mining.

*Significance of Longwall Mining.* Longwall mining has a long history of use in Europe and has been tried at various times in the United States. In early attempts—some prior to 1900—labor costs associated with moving manual supports made the methods less competitive than room and pillar mining. But, in the past two decades, longwall mining has become the safest, most productive and most economic underground mining method. While overall underground production remained relatively flat between 1980 and 1993, longwall production grew at an annual rate of 6.1 percent. Longwall mining is anticipated to continue to be an important and expanding type of mining. In 1993, it accounted for 38 percent of the coal extracted by underground mining methods, were recovered by longwall mining. The Economic Analysis (EA) estimates that longwall mining will account for 48 percent of production by 2015. See (Proposed Revision to the Permanent Program Regulations Implementing section 522(e) of the Surface Mining Control and Reclamation Act of 1977, and Proposed Rulemaking Clarifying the Applicability of section 522(e) to Subsidence from Underground Mining prepared by OSM and USGS. (September 1, 1995)

Longwall mining operations require large investments in capital equipment, but are less labor intensive than room-and-pillar operations. It is estimated that longwall mining requires only one-third of the manpower at the face as does room-and-pillar mining. The high capital costs associated with longwall mining are generally offset with lower operating costs, due primarily to the higher productivity of longwall mining. The average operating costs for a coal mine operation include the operating cost per ton and the return on the capital cost allocated per ton. The operating costs for longwall mine range from \$0.50 to \$2.00 per ton, while operating costs for room-and-pillar range from \$2.00 to \$7.00 per ton, while Room-and-pillar mining operation costs average an additional \$3.25 per ton more than longwall mining because of increased labor and material costs associated with mine operation.

In some instances, use of the longwall mining method is the most economical and safest means to extract the coal in particular geologic areas. For example, when a coal seam is 1,000 feet or more below the surface, the cost of mining would be so high that it would effectively prevent coal from being mined by any method other than longwall. Another example are those areas where the high limestone content in particular coal seams creates fragile roof conditions which make room-and-pillar mining impossible. Longwall mining provides the economy of scale so that mining costs are lowered and a relatively safe working environment is created.

### Implications of Applying 522(e) Prohibitions to Subsidence From Underground Mining

Currently, owners of coal reserves, who hold valid deeds, typically have the property right to mine coal beneath dwellings without obtaining explicit permission in the form of waivers from owners of the dwellings.

However, under SMCRA when the coal is mined, the mining companies must meet all existing subsidence performance standards, take steps to minimize damage to dwellings, repair or compensate for damage that does occur to dwellings, assure adequate domestic water supplies, and take other measures as set out in OSM's recent regulations on subsidence (60 FR 16722 (Friday, March 31, 1995)).

If Section 522(e) were to apply to subsidence from underground mining, the operator would be required to plan the operation to preclude mining in all portions of the underground workings where mining would cause subsidence

affecting a protected surface feature. The surface area affected by subsidence is usually considerably larger than the area actually mined underground. Because subsidence typically occurs in a funnel shape radiating upward and outward from the underground mine cave-in, any surface impacts may extend well beyond the area directly above the mine. Thus, to ensure that subsidence would not take place within a surface area specified in section 522(e), underground mine operations would be required to leave coal in place around each protected feature for a horizontal distance much larger than the protected area. The amount of coal left in-place to support dwellings would result in a pattern of irregular mined areas that would in effect, eliminate the contiguous coal reserves needed to sustain the economic advantage of longwall operations. Consequently, few new longwall mines would be opened. Over time, existing longwall mines could continue those operations that would extract coal reserves pursuant to the "needed for and adjacent to" valid existing rights provisions implementing SMCRA.

Mining could be allowed in some cases in lands protected by 522(e) (2), (3), and (4), and some (5) areas, if an appropriate waiver or approval were obtained by the permit applicant for mining coal directly underneath the protected feature. The coal for which a mining company would have to obtain a waiver would include the coal directly under the dwelling, a 300-foot buffer around the house, and an additional buffer area based on the predicted angle of draw and the depth of the coal seam. However, homeowners could decide to withhold waivers denying access to the coal under their dwellings and within the surrounding buffer area. Both the Environmental Impact Statement and the Economic Analysis indicate that the withholding of dwelling waivers has the potential to significantly alter coal mining operations. The waiver authority would apply to new longwall operations. Consequently, OSM estimated that if 10 percent or more of homeowners withheld waivers, longwall mining operations would not be economically viable. The economic impacts of applying the prohibitions of section 522(e) to subsidence are discussed in more detail in the draft Economic Analysis.

In summary, longwall mining is an important and expanding type of mining. It accounted for 38 percent of the underground mining in 1993, and is forecasted to increase its share to 48 percent by 2015. Longwall mining is a low-cost underground mining method,

and in some instances, may be the only economically feasible underground mining method when the coal seam is deep or the roof is extremely fragile. The key to the competitive advantage of longwall mining is access to large blocks of uninterrupted coal. If the prohibitions of 522(e) were to apply to subsidence, longwall mining would no longer be economically feasible if as few as 10 percent of the owners of occupied dwellings denied waivers for mining. A more detailed discussion of impacts on mining is provided in the Draft Environmental Impact Statement (DEIS) on the Proposed Revision to the Permanent Program Regulations Implementing Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, and Proposed Rulemaking Clarifying the Applicability of Section 522(e) to Subsidence from Underground Mining OSM-EIS-29 (September, 1995) and Draft Economic Analysis prepared for this rulemaking. OSM also evaluated the impact of various policy options for this rulemaking in the DEIS and EA prepared for this proposed interpretative rulemaking. OSM encourages comments on the DEIS and EA.

#### Summary of Analysis

Under Section 516, OSM has ample authority to regulate surface effects of underground mining under existing regulations or under any additional regulations that OSM might reasonably conclude are necessary to implement the Act. There would be no regulatory hiatus if section 522(e) does not apply to subsidence. However, if OSM were to identify any environmental values or public interests that warrant additional protection, OSM has full authority under section 516 and other SMCRA provisions, to develop standards to protect such values or interests, without the disruption in the longwall mining industry that would result from applying section 522(e) prohibitions to subsidence.

Based on analysis of the language and the legislative history of sections 516, 522(e) and 701(28) of SMCRA, and a consideration of the congressional findings and purposes set out in sections 101 and 102, OSM proposes to interpret section 522(e) as not applying to subsidence from underground mining activities, or to the underground activities that may lead to subsidence. OSM bases this proposal in part on its conclusion that subsidence is not included in the term "surface coal mining operations" as defined in SMCRA section 701(28). OSM's interpretation is also based in part on a

conclusion that subsidence from underground mining is properly and adequately regulated under sections 516 and 720. OSM believes that this interpretation will promote the general statutory scheme of SMCRA and fully protect the environment and public interest. OSM is soliciting comments on the need to amend 30 CFR to indicate that section 522(e) does not apply to subsidence from underground coal mining activities, or the underground activities that may lead to subsidence.

#### III. Procedural Matters

##### *Federal Paperwork Reduction Act*

This rule does not contain collections of information which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

##### *Executive Order 12630*

In accordance with E.O. 12630, the Department has determined that the proposed interpretative rule does not have significant takings implications.

##### *Executive Order 12866*

This rule has been reviewed under E.O. 12866. It is considered significant and OSM has prepared an economic analysis which is now available to the public for review and comment.

##### *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Department of the Interior has determined that this rule would not have a significant economic impact on a substantial number of small entities.

##### *National Environmental Policy Act*

On April 28, 1994 (59 FR 21996), OSM published a notice of intent to prepare a revised environmental impact statement (EIS) analyzing both VER and the applicability of the prohibitions in section 522(e) of the Act to underground coal mining. OSM has completed a revised draft EIS (OSM-EIS-29), which is now available to the public for review and comment.

##### *Executive Order 12988 (Civil Justice Reform)*

This proposed rule has been reviewed under the applicable standards of section 3(b)(2) of E.O. 12988, "Civil Justice Reform", (61 FR 4729). In general, the requirements of section 3(b)(2) are covered by the preamble discussion of this rule. Individual elements of the order are addressed below:

1. What is the preemptive effect, if any, to be given to the regulation?

This interpretative rule is not intended to have a preemptive effect on



existing state law. To the extent that this rule might ultimately result in a preemption of state law, the provisions of SMCRA are intended to preclude inconsistent State laws and regulations unless they provide for more stringent land use or environmental controls and regulations. This approach is established in SMCRA and has been judicially affirmed.

2. What is the effect on existing federal laws or regulations, if any, including all provisions repealed or modified?

This proposed rule would affect the implementation of SMCRA as described in the preamble. It is not intended to modify the implementation of any other federal statute. The preamble discussion specifies the federal regulatory provisions that would be affected by this rule.

3. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?

As discussed in the preamble, the standards proposed in this rule are as clear and certain as practicable, given the complexity of the topics covered, the mandates of SMCRA and the legislative history of section 522(e) of SMCRA.

4. What is the retroactive effect, if any, to be given to this regulation?

This proposed rule is not intended to have retroactive effect.

5. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

Since this rule is only in proposed form, these questions are not applicable. However, if the rule is adopted as proposed, the following answers would apply:

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, 30 U.S.C. 1276(a). However, administrative procedures must be exhausted prior to any judicial challenge to the application of this rule. In situations involving OSM application of this rule, applicable administrative procedures may be found at 30 CFR 775.11 and 43 CFR Part 4. In situations involving state regulatory authority application of provisions analogous to those contained in this rule, applicable administrative procedures are set forth in each state regulatory program.

6. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms important to the understanding of this rule are set forth in 30 CFR 700.5, 701.5 and 761.5.

7. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office

of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

#### *Unfunded Mandates*

For purposes of compliance with the Unfunded Mandates Reform Act of 1995, this rule will not impose any obligations that individually or cumulatively would require an aggregate expenditure of \$100 million or more by State, local, and Tribal governments and the private sector in any given year.

Author: The principal author of this proposed rule is Nancy Broderick, Rules and Legislation, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, N.W., Washington, DC 20240; Telephone (202) 203-2700.

#### *List of Subjects in 30 CFR Part 761*

Historic preservation, National forests, National parks, National trails system, National wild and scenic rivers system, Surface mining, Underground mining, Wilderness areas, Wildlife refuges.

Dated: April 30, 1996.

Bob Armstrong,

*Assistant Secretary, Land and Minerals Management.*

[FR Doc. 97-2183 Filed 1-30-97; 9:45 am]

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**GENERAL PROVISIONS AND AREAS  
UNSUITABLE FOR MINING (#7-331)**

**REGULATORY BASICS INITIATIVE**

**25 PA CODE CHAPTER 86**

**SURFACE AND UNDERGROUND COAL MINING: GENERAL  
SUBCHAPTER A. GENERAL PROVISIONS  
SUBCHAPTER D. AREAS UNSUITABLE FOR MINING**

**COMMENT AND RESPONSE DOCUMENT**



## LIST OF COMMENTATORS

This is a list of corporations, organizations and interested individuals from whom the Environmental Quality Board has received comments regarding the above referenced proposed rulemaking.

ID	Name/Address	Zip	Submitted 1 pg Summary	Provided Testimony	Req Final Rulemaking
1	Mr. Michael G. Young Director of Regulatory Affairs Pennsylvania Coal Association 212 North Third Street, Suite 102 Harrisburg, PA	17101	S		R
2	Independent Regulatory Review Commission 14th Floor 333 Market Street Harrisburg, PA	17101			

## COMMENTS AND RESPONSES

### Adjudicatory Process

1. Comment: The DEP should adopt an adjudicatory process, rather than a rulemaking procedure, to resolve unsuitable for mining (UFM) petitions. The DEP has acknowledged that it is impossible to resolve a petition through rulemaking within 12 months of receipt, as required by both state and federal law. In fact, the record shows that the average time between submission and final decision is nearly three years. An adjudicatory process would provide for active public participation and input and would at least permit the possibility of resolution within 12 months. Finality and expedited review would also be enhanced. (1)

Response: The average time for petitions received and processed through the regulatory review process during the past five years has been 24 months. The Commonwealth makes every effort to process petitions as expeditiously as possible; however, there are many factors which contribute to the additional time required for some petitions. Although the process established by the Regulatory Review Act does require additional time to address a UFM petition, it also provides a more significant level of public participation than provided by an adjudicatory process. Furthermore, in 1992 the General Assembly enacted Section 1930-A of the Administrative Code of 1929, 71 P.S. Section 510-30. Section 1930-A specifically provides the Environmental Quality Board (EQB) with the authority and states it is the EQB's duty to review areas unsuitable for mining petitions and to designate areas unsuitable for mining. Consistent with the law and the Administration's objective to improve public access to information and decision making, no changes have been made to the proposed regulation.

2. Comment: If an adjudicatory procedure is selected, procedures at Section 86.125(b) should be revised to allow cross-examination of expert witnesses, as the federal program does. (1)

Response: An adjudicatory process has not been selected. Therefore, a provision providing for cross-examination of expert witnesses has not been included. The regulatory process does provide specific opportunities for public input. These opportunities consist of the public comment period during the petition study, the public hearing and public comment period following the public hearing on the petition, and in the case of a proposed designation, the public comment period provided following publication of the proposed designation in the *Pennsylvania Bulletin*. This process provides more opportunities for the public to point out problems or inconsistencies in the information provided by the expert or other witnesses than does the adjudicatory process.

3. Comment: PCA opposes the deletion of the requirement that a verbatim transcript be prepared. (86.125) (1)

Response: The requirement for providing a verbatim transcript of the public hearing has not been deleted. The proposed change provides clarification that it is the Department's responsibility to conduct public hearings on petitions and to provide notice of the hearings. The requirement for providing a verbatim transcript of the public hearing is contained in Section 86.125(d).

### Metric Units

4. Comment: Metric units of measurement should be deleted or explained in the preamble as a convenient reference, which imposes no substantive requirements. (1)

Response: The final rulemaking includes, where appropriate, equivalent measures in standard international metric system units. Although provided as a convenient reference, metric measurements impose the same requirements as existing standard measurements. Where the standard measurements are approximate, the metric measurements are also noted as approximate.

### Definitions

5. Comment: The definition of "fragile lands" should be revised to eliminate the inconsistent and/or redundant inclusion of areas where surface mining is excluded under Section 4.5(h) of the Pennsylvania Surface Mining Conservation and Reclamation Act. (1 and 2)

Response: The Department agrees. The reference to Section 4.5(h) of the Surface Mining Conservation and Reclamation Act has been deleted from the "fragile lands" definition in the final rulemaking.

6. Comment: The definition of "historic lands" should be revised to delete reference to lands "eligible for inclusion on the National Register of Historic Places" in conformance with the revision to Section 86.102(3). (1)

Response: The proposed definition of historic lands is consistent with the language found in federal regulations in 30 CFR Section 762.5, relating to the definition of historic lands. An informal inquiry to the federal Office of Surface Mining's Harrisburg Field Office indicated that deletion of the referenced language would make the definition of historic lands less effective than federal requirements. No change to the proposed regulatory language has been made.

7. Comment: The Department should remove the word "air" from the description in Section 86.123(c)(3) so that it is consistent with the proposed change in the definition of "surface mining operations" in Section 86.1. (2)

Response: The proposed regulatory language in Section 86.123(c) is consistent with the federal language in 30 CFR 764.13(b)(1)(iv). An informal inquiry to the Office of

Surface Mining's Harrisburg Field Office indicates that deletion of the word "air" from Section 86.123(c)(3) would make this section less effective than federal regulations. The existing language provides an opportunity for a petitioner to describe how surface mining operations have, or may, adversely affect air quality.

### **Occupied Dwelling Waivers**

8. Comment: Proposed Section 86.102(9)(ii) should be revised to match the corresponding federal provision. The proposed language does not provide an exception so that waivers obtained prior to the effective date of the federal Surface Mining Control and Reclamation Act do not require a knowing waiver of the 300-foot restriction. (1)

Response: An exception to the requirement for waivers, if the waiver was obtained prior to the effective date of the federal act, has been added to Section 86.102(9).

### **Economic Impact**

9. Comment: The specific changes in the proposed rulemaking that diminish the disproportionate costs on the regulated community should be identified in the Regulatory Analysis Form. (2)

Response: The Department has provided clarification of the proposed changes in Section 86.126(b) by adding paragraphs 1 and 2 and has added an explanation of the cost savings in the Regulatory Analysis Form. The final form regulation provides a more timely decision in those cases where the Environmental Quality Board does not designate an area as unsuitable for mining. The changes will allow the Department to consider issuance of mine permits which may have been delayed because of a petition to have the area designated as unsuitable for mining.

### **Reasonableness and Clarity**

10. Comment: The proposed changes to Section 86.103(2)(ii) could result in a permit being deemed approved through inaction of an agency. (2)

Response: The proposed change is consistent with federal language in 30 CFR Section 761.12(f)(2). This change provides that, in the absence of an objection from an agency, the Department may make a decision concerning the proposed mining operation in conjunction with the requirements of Department regulations in Section 86.37(a)(5) and (6).

11. Comment: We recommend that the term "regulatory decision" be deleted from Subsection 86.126(b) and that subparagraphs be added to differentiate the procedures used when acting on the Department's recommendation to designate or not to designate areas as unsuitable for mining. The language should include a statement that designations will be promulgated as a regulation in accordance with the Regulatory Review Act. (2)

Response: The Department deleted the term "regulatory decision" and has changed Section 86.126(b) to add two paragraphs, which provide procedures the Board will use for designating areas as unsuitable for mining and for those cases when the Board's decision is not to designate an area as unsuitable. Applicable statutory citations have been included.

12. Comment: The proposed change to Section 86.125(i), which adds the phrase "or as otherwise established by the Department" is too vague and should be deleted from the final form rulemaking. Alternatively, the Department should clarify how and under what circumstances a different time period will be applied. (2)

Response: The phrase has been deleted from the draft final rulemaking.

13. Comment: Federal requirements at 30 CFR Section 764.19(b) require a final written decision within 12 months of receipt of a complete petition. The proposed changes to Section 86.125(j) provide that the Department will prepare a recommendation to the Board within 60 days of the close of the public comment period. Since the Board must still act on the Department's recommendation, how will the 12-month requirement be met? (2)

Response: The areas unsuitable for mining process is established by separate statutes that contain somewhat conflicting provisions. Federal statutes and regulations require a final written decision by the regulatory authority within 60 days of a public hearing, or if no hearing is held, within 12 months of the receipt of a complete petition. Commonwealth statutes contain similar requirements. The Administrative Code of 1929, however, requires decisions concerning the designation of areas as unsuitable for mining to be made by the Environmental Quality Board (EQB) through the rulemaking process. Because this regulatory decision requires mandatory legislative and administrative review schedules and an opportunity for additional public comment, it is not possible for the EQB to issue a final written regulatory decision within 12 months. The proposed changes will, however, provide a more timely decision-making process. Under the proposed draft final rulemaking the 12-month statutory requirement will be met when the Department submits a written recommendation to the EQB within 12 months of receipt of a complete petition. The Department would also provide notification and a statement of the reasons for the recommendation to the petitioner and intervenors. If the EQB decision is that an area should not be designated, the petition process would end with the publication of the EQB decision. If the EQB decision is that the area should be designated, the Department would submit a proposed rulemaking in accordance with existing procedures. Although this process does require additional time to reach a final decision, it also provides a more significant level of public participation in decisions concerning designation of areas as unsuitable for mining and is consistent with the Administration's objectives to improve public access to information and decision making in the Department.

14. Comment: We request that the Board explain what procedure would occur if rather than accepting a Department recommendation, the Board requested additional information or study. (2)

Response: If the EQB requests additional information or study, the Department will provide an appropriate response. The Department routinely provides additional information in response to EQB questions.

One-Page Summary: Comments of Pennsylvania Coal Association To Proposed Rulemaking:  
Chapter 86 General Provisions and Areas Unsuitable for Mining

- The DEP should adopt an adjudicatory process, rather than a rulemaking procedure, to resolve unsuitable for mining (UFM) petitions. The DEP has acknowledged that it is impossible to resolve a petition through rulemaking within 12 months of receipt, as required by both state and federal law. In fact, the record shows that the *average* time between submission and final decision is nearly three years.
- An adjudicatory process would provide for active public participation and input and would at least permit the possibility of resolution within 12 months. Finality and expedited review would also be enhanced.
- Metric units of measurement would be deleted or explained in the preamble as a convenient reference which imposes no substantive requirements.
- The definition of “fragile lands” should be revised to eliminate the inconsistent and/or redundant inclusion of areas where surface mining is excluded under Section 4.5(h) of the Pennsylvania Surface Mining Conservation and Reclamation Act.
- The definition of “historic lands” should be revised to delete reference to lands “eligible for inclusion on the National Register of Historic Places” in conformance with the revision to Section 86.102(3).
- Proposed Section 86.102(9)(e)(2) should be revised to match the corresponding federal provision. The proposed language does not provide an exception so that waivers obtained prior to the effective date of the federal Surface Mining Control and Reclamation Act do not require a knowing waiver of the 300-foot restriction in SMCRA.
- If an adjudicatory procedure is selected (and it should be), procedures at Section 86.125(b) should be revised to allow cross-examination of expert witnesses, as the federal program does. PCA also opposes the deletion of the requirement that a verbatim transcript be prepared.

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

**General Provisions  
and  
Areas Unsuitable for Mining (#7-331)**

**Regulatory Basics Initiative**

**25 Pa. Code Chapter 86  
Surface and Underground Coal Mining: General  
Subchapter A. General Provisions  
Subchapter D. Areas Unsuitable for Mining**



**Advance Notice of Final Rulemaking  
25 Pa. Code Chapter 86**

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

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Langhorne, PA 19047-0723

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Washington, PA 15301-3186

William T. Hopwood  
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Daniel G. Roberts  
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Associate Director  
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## Summary of Issues and Discussion

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

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

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

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

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

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

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

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

The following is a summary of comments relating to specific sections of the draft final regulation along with the Department's responses. This discussion of comments is keyed to individual sections of the regulations and is presented in numerical order. Comments and responses on general issues are presented after the discussion on individual sections.

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

1. Issue:

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

Response:

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

2. Issue:

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

Response:

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

application be deleted from the rulemaking and that the definition of complete application be retained. This issue will be further evaluated and considered in future rulemaking.

3. Issue:

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

Response:

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

4. Issue:

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

limitations under Section 522(e), areas could be designated unsuitable for mining under the petition process.

Response:

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

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

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

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

5. Issue:

*Section 86.101. Definitions. Fragile lands.* Commentators indicated that the word “significantly” should not be added to the definition of “fragile lands” because any impacts to fragile lands could be considered significant. Additionally, the commentators state that the last part of the existing definition, beginning with “and buffer zones adjacent to the boundaries of areas where surface mining operations are prohibited ...”, should be retained. It will significantly reduce environmental protections to change the existing language.

Response:

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

6. Issue:

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

Response:

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

7. Issue:

*Section 86.102(3). Areas where mining is prohibited or limited.* Comments were received objecting to regulatory changes in Section 86.102(3) that would delete the phrase “on or eligible for inclusion on” the National Register of Historic Places. The commentators point out that this would limit protection only to those sites listed on the National Register. Several

commentators asserted that the changes reduce the consideration and protection given to historic and archaeological resources and, in some instances, conflict with the federal law.

Response:

The Department recommended the changes to the provisions concerning historic and archaeological resources in order to conform Pennsylvania's coal mining regulations to the federal coal mining regulations in 30 CFR 761.11. The impacts of proposed mining on sites eligible for listing on the National Register of Historic Places are to be taken into account by the Department during the permit application review process. These changes do not conflict with the federal law.

8. Issue:

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

Response:

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

9. Issue:

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



Response:

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

10. Issue:

*Section 86.123(c)(5). Procedures: petitions.* Several commentators said that demonstration of an “injury in fact” test is entirely inappropriate and should not be added to the regulations. Requiring a demonstration of “injury in fact” would shift the burden of proof onto the injured party. One commentator said it is unclear what constitutes “injury in fact” and suggested that the regulations should include a definition of the term.

Response:

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

11. Issue:

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

Response:

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

12. Issue:

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

Response:

The proposed revisions provide clarification that the Department is responsible for the administrative aspects of petitions. As such, the Department is interested in obtaining additional information relating to the petitions in order to prepare a comprehensive report and recommendation to the Board. The Board has the final decision-making authority over the designation of an area unsuitable for mining. This change is consistent with the existing administrative role of the Department and with the decision-making role of the Board, which will continue to have access to all information in the Departmental administrative record, including material obtained from public fact-finding hearings.

13. Issue:

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

Response:

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

14. Issue:

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

Response:

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

15. Issue:

*Advance Notice of Final Rulemaking.* Several commentators asserted that the ANFR approach was flawed because there was no preamble explaining the changes being proposed and there was no comment and response document. They say that these missing documents made it difficult to understand some of the changes made since the regulations were approved as proposed. In addition, they say that the 30-day public comment period was too short to allow for review.

Response:

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

16. Issue:

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

Response:

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

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

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

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

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

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

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

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

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

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





Pennsylvania Department of Environmental Protection

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August 17, 1999

The Secretary

717-787-2814

Mr. Robert E. Nyce  
Executive Director  
Independent Regulatory Review Commission  
14th Floor, Harrisstown II  
Harrisburg, PA 17101

RE: Final Rulemaking – Surface and Underground Coal Mining: General Provisions and Areas Unsuited for Mining (#7-331)

Dear Bob:

Pursuant to Section 5.1(a) of the Regulatory Review Act, enclosed is a copy of a final-form regulation for review by the Commission. This rulemaking was approved by the Environmental Quality Board (EQB) for final rulemaking on July 20, 1999.

This rulemaking amends various sections of Chapter 86 concerning definitions and procedures relating to Areas Unsuited for Mining (UFM). The amendments address regulations which, under the Regulatory Basics Initiative, were found to be lacking in clarity and more stringent than the federal requirements.

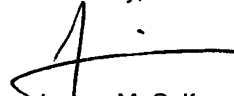
The proposed rulemaking was published February 14, 1998, with a 60-day public comment period. There were two commentators to the proposal. Prior to finalizing the rulemaking, DEP made a change to the definition of "surface mining operations" for consistency with the federal legal interpretation and with that interpretation provided in the federal proposed rulemaking in Section 522(e) of the Surface Mining Conservation and Reclamation Act (SMCRA). Comments on this change were solicited through an Advance Notice of Final Rulemaking (ANFR) published on January 30, 1999. The change clarifies that the UFM program is limited to the impacts of surface mining operations, which are surface and underground operations conducted on the land surface. Sixteen commentators responded to the ANFR. A summary of comments and responses on the ANFR is attached to the rulemaking.

The Mining and Reclamation Advisory Board (MRAB) supported a draft of the final rulemaking at its April 22, 1999, meeting.

The Department will provide the Commission with any assistance required to facilitate a thorough review of this final-form regulation. Section 5.1(e) of the Act provides that the Commission shall, within ten days after the expiration of the committee review period, approve or disapprove the final-form regulation.

For additional information, please contact Sharon Freeman, Regulatory Coordinator, at 783-1303.

Sincerely,



James M. Seif  
Secretary

Enclosure



TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT

PREP. DIVISION

99 AUG 17 PM 3:51

TELETYPE SECTION

I.D. NUMBER: 7-331  
SUBJECT: Surface & Underground Coal Mining: General Provisions and Areas Unsuitable for Mining  
AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
  - a. With Revisions
  - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
<i>Handwritten</i> 8-17-99	<i>Cindy Zinn</i>	HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
<i>White</i> 8-17-99	<i>Scott A. Caselli</i>	SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
8/17/99	<i>Kenn C. Garna</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
		LEGISLATIVE REFERENCE BUREAU