

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

Independent Regulatory Review Commission

SECTION I: PROFILE

RECEIVED
IRRC
2011 JUN 16 P 4:06

(1) Agency: Department of Environmental Protection

(2) Agency Number:

Identification Number: #7-456

IRRC Number: #2845

(3) Short Title:

Coal Mining – Unsuitable for Mining (Chapter 86)

(4) PA Code Cite:

25 Pa. Code Chapter 86

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: Michele Tate, 783-8727, mtate@state.pa.us

Secondary Contact: Patricia Allan, 783-8727, pmallan@state.pa.us

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation
- Emergency Certification Regulation;
 - Certification by the Governor
 - Certification by the Attorney General

Regulatory Analysis Form

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

This proposed regulation will add new language to Subsection 86.130(b) of Chapter 86. The new language will describe an area, within the headwaters of the Muddy Run watershed in Reade Township, Cambria County that is designated as unsuitable for surface mining operations. The regulation prohibits surface mining operations on the Lower Kittanning, Clarion, Brookville, and Mercer coals within the described area.

(9) Include a schedule for review of the regulation including:

- | | |
|---|---------------------|
| A. The date by which the agency must receive public comments: | <u>June 7, 2010</u> |
| B. The date or dates on which public meetings or hearings will be held: | <u>NA</u> |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | Second Quarter 2011 |
| D. The expected effective date of the final-form regulation: | Second Quarter 2011 |
| E. The date by which compliance with the final-form regulation will be required: | Second Quarter 2011 |
| F. The date by which required permits, licenses or other approvals must be obtained: | <u>NA</u> |

(10) Provide the schedule for continual review of the regulation.

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

Section 522 of the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1272, requires states, including Pennsylvania, with primary regulatory authority (primacy) over coal mining operations, establishing procedures designating areas as "unsuitable for mining." The state statutory authority for

Regulatory Analysis Form

this procedure was created in the 1980 amendments to authorizing acts as part of Pennsylvania's effort to obtain primacy. Chapter 86, Subchapter D (§§ 86.121 – 86.129), contains the Department's regulatory procedures and criteria for the designation of areas as unsuitable for surface mining. The Department is required to designate areas as unsuitable for surface mining when it determines that reclamation pursuant to the requirements of the Surface Mining Conservation and Reclamation Act (Act) is not technologically or economically feasible. Overburden analysis and past mining show that surface coal mining in this area is not technologically or economically feasible without producing acid mine water. In addition, there is a strong possibility that the acid mine water would contaminate the Reade Township Municipal Authority public water supply.

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

No and None.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The proposed regulation primarily serves to protect the quality of surface water and groundwater in the Muddy Run watershed, including source aquifers for the Reade Township Municipal Authority (RTMA) water supply wells. Protecting the surface waters of Muddy Run supports outdoor recreation including, fishing, hunting and hiking. Tourism from outdoor recreation is a major part of the local economy. Reade Township has many acres of State Game Lands and adjoins Prince Gallitzen State Park creating a major draw for tourists and outdoorsmen alike. A quality public water supply with excess capacity attracts both food and nonfood industry to the region benefiting the local economy and improving the quality of life. The cost of adversely impacting this resource would be a direct cost of over five million dollars and indirect costs of many more millions of dollars to citizens and businesses due to interrupted water service. The RTMA is fortunate to have wells that produce large amounts of high quality water with the ability to expand the customer base to adjoining townships that are in need of potable water. Having this quality water supply with additional capacity has a direct positive impact on property values in Reade Township. Because of previous mining activities and other land disturbances in the region, it is difficult to find large quantities of high quality water, making this resource even more valuable. A secondary purpose is to help coal mine operators plan future mining activities by alerting potential mine permit applicants to the adverse hydrologic impacts associated with mining certain coal seams within and adjacent to the designated area.

Regulatory Analysis Form

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

The DEP Bureau of Mining and Reclamation has prepared a technical study report, entitled "*A Petition to Designate Areas Unsuitable for Mining: Muddy Run Watershed.*"

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The proposed regulation would affect all persons who have mineral rights within the designated area and all coal operators who may be interested in conducting surface mining operations on the identified coal seams. There are approximately 130 licensed bituminous surface mine operators in the state. The remaining estimated coal reserves within the area are as follows: Lower Kittanning - 30 acres; Clarion - 200 acres; Brookville - 275 acres; and Mercer - 245 acres. The estimated mineable reserves total approximately 750 acres, representing approximately 2.75 million tons of coal. **[Note:** The reserve estimates are maximized by assuming persistent coal seams of uniform thickness. Coal seam thickness is variable. The estimated monetary and employment impacts assume that the coal reserves would be approved for mining through the normal permit application review process if the area were not designated unsuitable for mining. In fact, the high potential of these coal seams for causing pollution makes it highly unlikely that the Department would issue permits for surface mining on the coal seams.]

(16) 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.

All mine operators conducting surface coal mining operations within the Commonwealth must comply with the proposed regulation. There are approximately 130 licensed bituminous surface mine operators in Pennsylvania.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The regulation imposes no costs on the regulated community that would not be otherwise realized through the Department's permitting requirements concerning preventing pollution and adverse impacts to the hydrologic balance. Compliance with the regulation enables mine operators to avoid the costs of replacing a public water supply and the cost of perpetually treating acid mine drainage, which could cost millions of dollars. An exact figure cannot be calculated. The regulation benefits the regulated

Regulatory Analysis Form

community by helping coal operators plan future mining activities. The “unsuitable for mining areas” are explicitly delineated by regulation. This allows operators to avoid the cost of evaluating properties within designated areas, and to avoid the subsequent costs of preparing permit applications for mine sites that are highly unlikely to be approved for surface mining activities.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

No direct costs or savings to local government are imposed by this regulation. Compliance will protect the Reade Township Municipal Authority (RTMA) public water supply wells and prevent costs associated with treating well water polluted by mine drainage or developing new water wells to supply the public. Failure to protect this public water supply could result in significant future costs to replace this high quality and high volume source of potable water. Developing new potable water wells would be a difficult and an expensive process, possibly involving the purchase of additional lands and/or the piping of water long distances from areas not impacted by mining operations. The RTMA has spent five million dollars to date developing their water system.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

No costs are imposed by this regulation on state government other than those associated with the development of this regulation. There is a savings. The Department’s District Mining Operations staff will not have to spend staff time reviewing and processing pre-applications and permit applications within the designated area. It is estimated that the savings to the state would be in the form of review time with an associated cost of \$10,500 a year for each permit application.

This evaluation is speculative. For the purpose of this evaluation, the figures suggest that there would be one application filed in a five-year period. The estimated potential cost to the applicant is about \$25,000. This is based on the average consultant fees associated with preparation of a surface coal mine application, as documented by mining consultants permit application preparation grants awarded through the DEP Small Operators Assistance Program. The approximate potential cost to review the application by the Department is about \$10,500. This is based on workload analysis of DEP permitting and administrative staff based on average time spent per permit application and average salaries of staff involved. The five years worth of costs are shown in the first year in the above table.

Designation will enable the regulated community to avoid millions of dollars of potential cost related to treating acid mine drainage and replacing private and public water supplies in the future.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs 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
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	\$25,000					
Local Government	0					
State Government	\$10,500					
Total Savings	\$35,500					
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

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

Program	FY -3 2007-2008	FY -2 2008-2009	FY -1 2009-2010	Current FY 2010-2011
Environmental Program Management (#161-10382)	\$39,685,000	\$37,664,000	\$31,100,000	\$29,357,000
Environmental Protection Operations (#160-10381)	\$98,574,000	\$98,544,000	\$84,218,000	\$79,344,000

Regulatory Analysis Form

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

This rulemaking incurs no anticipated costs.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

On March 21, 1996, pursuant to § 86.122 and § 86.123, the Reade Township Municipal Authority, Cambria County, submitted a petition to the Department requesting that approximately 3,200 acres of the Muddy Run watershed be designated as “unsuitable for mining.” The Department determined the petition to be complete and acceptable for technical study in April of 1997. The petitioner was notified accordingly on May 1, 1997. Pursuant to § 86.124, notification of the receipt and acceptance of the petition was made to persons with known mineral ownership, surface ownership, and other interested parties on May 12, 1997. Notification to the general public was made on May 10 and 17, 1997, in the Progress, Clearfield, Pennsylvania, on May 11 and 18, 1997 in The Tribune Democrat, Johnstown, Pennsylvania, and in the Pennsylvania Bulletin on May 17, 1997 (27 Pa.B. 2476). Pursuant to § 86.125, in early 1998 local landowners were notified by mail of an opportunity to provide comments on the petition at a public hearing. Notification of the hearing was made to the general public on December 31, 1997, and February 14 and 21, 1998, in the Progress, Clearfield, Pennsylvania, and on January 29, and February 12 and 19, 1998, in The Tribune Democrat, Johnstown, Pennsylvania. The hearing was held on February 26, 1998, at Glendale High School in Reade Township.

The Muddy Run UFM technical study process was suspended in early 1999 and was re-activated in December of 2003. This suspension occurred while the Department awaited the courts’ decision on a challenge to a previous UFM designation as an unconstitutional taking. The Pennsylvania Supreme Court decided, in *Machipongo Land and Coal Company, Inc. v. Dep’t of Environmental Resources*, 569 Pa. 3 (2002), that a UFM designation was not an unconstitutional taking. Subsequently, in May of 2004, a second round of notification letters was sent to mineral and surface property owners primarily to solicit input from new property owners within the technical study area. This was done to address surface and mineral tracts that may have been sold, transferred, or subdivided since 1998.

A Comment and Response Document was prepared to address the comments raised at the public hearing, as well as written comments received since the Department accepted the petition. There were sixteen (16) Commentors. Most comments dealt with degradation of private and public water supplies or the UFM petition process. In addition, the proposed regulation will be subject to a 30-day public comment period following publication in the Pennsylvania Bulletin.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

An alternative regulatory scheme that was considered was to designate all coal seams within the area as

Regulatory Analysis Form

unsuitable for mining. This alternative was dismissed because the Department could not technically support designation of certain middle and upper Allegheny Group coal seams because of the occasional presence of neutralizing strata within associated rock units.

(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 proposed amendment is no more stringent than the corresponding federal regulation.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

States that mine coal must maintain a coal mining regulatory program that conforms to federal requirements. As a result, the proposed amendment is no more stringent than that of other states and will not put Pennsylvania at a competitive disadvantage.

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

The proposed rulemaking amends existing Department regulations. The rulemaking will not affect existing or proposed regulations of other state agencies.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

None required.

(28) 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.

No special provisions were needed.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
BUREAU

(Pursuant to Commonwealth Documents Law)

RECEIVED
IRRC

2011 JUN 16 P 4: 06

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality.
Attorney General

By: _____
(Deputy Attorney General)

DATE OF APPROVAL

Check if applicable
Copy not approved. Objections attached.

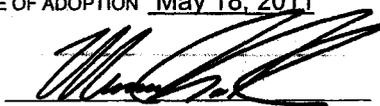
Copy below is hereby certified to be true and
correct copy of a document issued, prescribed or
promulgated by:

DEPARTMENT OF ENVIRONMENTAL
PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-456

DATE OF ADOPTION May 18, 2011

BY 

TITLE MICHAEL KRANCER
CHAIRMAN

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form and legality
Executive or Independent Agencies

BY 
Andrew C. Clark

DATE OF APPROVAL
JUN - 8 2011

(Deputy General Counsel)
(~~Chief Counsel - Independent Agency~~)
(~~Strike inapplicable title~~)

Check if applicable. No Attorney General Approval
or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

UNSUITABLE FOR SURFACE MINING (MUDDY RUN)

25 Pa. Code, Chapter 86

Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
(25 Pa. Code, Chapter 86)
(Coal Mining)

Order

The Environmental Quality Board (Board) proposes to amend 25 Pa. Code, Chapter 86.130 (relating to areas designated as unsuitable for mining). The amendment designates the surface mineable reserves of the Lower Kittanning, Clarion, Brookville, and Mercer coals within the headwaters of the Muddy Run watershed, Reade Township, Cambria County as unsuitable for surface mining operations.

This order was adopted by the Board at its meeting of May 18, 2011.

A. Effective Date

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

B. Contact Persons

For further information contact Geoffrey Lincoln, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Richard Morrison, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Information regarding submitting comments on this proposal appears in Section J of this preamble. 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 proposal is available electronically through the DEP Web site (<http://www.dep.state.pa.us>).

C. Statutory Authority

The proposed rulemaking is being made under the authority of Section 4.5 of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4e); Section 6.1 of the Coal Refuse Disposal Control Act (52 P.S. § 30.56a); and Sections 315 (h)-(o) of the Clean Streams Law (35 P.S. § 691.315 (h) – (o)).

D. Background and Summary

Section 522 of the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1272, requires each state seeking primary regulatory authority (primacy) over coal mining operations to establish a procedure for the designation of areas as unsuitable for mining. The state statutory authority for this procedure, referenced in Section C, was created in the 1980 amendments to the authorizing acts as part of Pennsylvania's effort to obtain primacy. On November 19, 1980, the Board adopted Chapters 86 through 90. Chapter 86, Subchapter D (§§ 86.121 – 86.129), contains the Department of Environmental Protection's (Department) regulation for procedures and criteria

for the designation of areas as unsuitable for surface mining. Chapter 86, Subchapter D (§ 86.130) also contains a description of each areas designated as unsuitable for mining by the Board.

The Department is required to designate areas as unsuitable for surface mining when it determines that reclamation pursuant to the requirements of the Surface Mining Conservation and Reclamation Act (Act) is not technologically or economically feasible. In addition, the Department may designate an area as unsuitable for all or certain types of surface coal mining operations if such operations will: 1) be incompatible with existing state or local land use plans or programs; 2) affect fragile or historic lands where such operations would result in significant damage to important historical, cultural, scientific, and aesthetic values and natural systems; 3) cause a substantial loss or reduction in long-range productivity of food or fiber products or water supply, including aquifers and aquifer recharge areas; or 4) substantially endanger life and property in natural hazard areas, including areas subject to frequent flooding and areas of unstable geology.

On March 21, 1996, pursuant to § 86.122, the Reade Township Municipal Authority (RTMA) submitted a petition to the Department requesting that approximately 3,200 acres of the Muddy Run watershed be designated as “unsuitable for mining.” RTMA’s stated purpose was the protection of their public water supply wells from potential, adverse mining-related impacts. RTMA’s petition alleged that surface mining activities could destroy or seriously degrade the source aquifers tapped by the township’s public water supply wells, and could adversely impact other local surface and groundwater resources. RTMA provided supporting evidence documenting mining-related impacts to a private water well within the Muddy Run watershed, and provided an outline of deleterious mining-induced impacts to Muddy Run and to adjacent watersheds.

The Department determined the petition to be complete and acceptable for technical study in April of 1997. The petitioner was notified accordingly on May 1, 1997.

Technical study fieldwork, including water sampling and site reconnaissance, began in 1997. The technical study process was suspended in early 1999 and was re-activated in December of 2003. This suspension occurred while the Department awaited the courts’ decision on a challenge to a previous UFM designation as an unconstitutional taking. The Pennsylvania Supreme Court decided, in *Machipongo Land and Coal Company, Inc. v. Dep’t of Environmental Resources*, 569 Pa. 3 (2002), that a UFM designation was not an unconstitutional taking. The Muddy Run study was completed in October of 2004. Copies of the two-volume technical study, entitled “*A Petition to Designate Areas Unsuitable for Mining: Muddy Run Watershed*,” as well as the Comment and Response Document prepared to address public input are available from Geoffrey Lincoln (Contact information for Mr. Lincoln is included in Section B of this preamble.) The key findings of the technical study are as follows:

- The recharge area for the RTMA wells appears to be primarily from the area east of the well field along the upper flank of the Allegheny Mountain, where the source aquifers are at, or near, the surface. Additional recharge to these aquifers is from downward infiltration from closely overlying coal-bearing units. The downward infiltration of water is enhanced by numerous fractures and two regional faults in the area.
- Based on available information, including regional geochemical tracer studies confirming acidic mine water traveling significant horizontal and vertical distances in the subsurface, there is a potential for mining-related pollution of the RTMA wells. Groundwater tests

conducted to date are not sufficient to characterize conditions beyond the immediate vicinity of the RTMA wells or to assess the impact of highly transmissive fractures. The potential exists for hydrologic exchange between the RTMA water supply aquifer and the potentially acidic overlying coal-bearing units. The only way to conclusively determine the existence of a hydrologic connection to the well is to conduct extensive draw down pump testing. However such tests create an unacceptable risk because establishing the connection would destroy the public water supply wells.

- Overburden analysis results indicate the presence of high sulfur zones, with little or no alkaline strata, associated with the Lower Kittanning, Clarion, Brookville, and Mercer coals. There is a very significant potential for production of acid mine water from surface mining of these coals.
- Coal mining has significantly impacted the water quality and aquatic community of Muddy Run. As a result of coal mining activities, all stream sections of Muddy Run and its tributaries within the study area, except for the headwaters in the eastern portion of the study area (the unmined RTMA wells' recharge area), are acidic with low pH and have high concentrations of aluminum, iron, and manganese.
- Surface mining activities have significantly degraded groundwater resources within the technical study area, including numerous domestic and private water supplies.

The purpose to the proposed regulation is to protect the quality of surface water and groundwater in the Muddy Run watershed, including source aquifers for the RTMA wells. A secondary purpose is to help coal mine operators plan future mining activities by alerting potential mine permit applicants to the adverse hydrologic impacts associated with mining certain coal seams adjacent to the designated area.

E. Summary of Comments and Responses

The only comment the Board received during the 30 day public comment period for the proposed rulemaking was from the Pennsylvania State Association of Township Supervisors (PSATS). In their comments, PSATS stated their support of the rulemaking and noted that without the rulemaking, there most likely would be a detrimental effect on those municipalities within the watershed that rely on ground water for human consumption. In their comments, PSATS also acknowledged the responsibility of the Reade Township Municipal Authority to remedy any water contamination that may occur by potential mining activities, which, in their estimation, would result in substantial costs to the customers of the system. The Board appreciates the commentator's support of the rulemaking and notes that the Department has addressed the potential impacts of mining activities in the area in an Unsuitable for Mining (UFM) technical study, which is available from the Department upon request.

The Independent Regulatory Review Commission (IRRC) issued no objections, comments or recommendations on the rulemaking and noted that the rulemaking would be deemed approved if the regulation is not amended and is retained in its proposed form. The Board has not made any changes to the rulemaking based upon public comments.

F. Benefits, Costs and Compliance

Benefits

The proposed regulation would benefit the RTMA's customers by restricting mining on coal seams with high acid mine drainage potential in areas in close proximity to the RTMA water supply aquifers. Mining in close proximity could pollute the public water supply wells. The RTMA presently provides potable water to approximately 550 service accounts and provides water for local fire protection to Reade Township, including the towns of Blandburg, Hollentown, Fallentimber, Flinton, and Van Ormer. The RTMA wells were drilled in 1993 and 1994, using part of a nearly \$5 million-dollar grant provided by the Rural Economic Development Agency. The location and construction of the Reade Township Municipal Authority water supply wells was the result of several years of effort. Two previous attempts to develop water supply wells were not successful because of insufficient quantity or quality of local groundwater resources, in part due to aquifer degradation from previous surface coal mining. Based on available information, alternative well sites would be limited or nonexistent should the existing wells become contaminated.

The designation process also serves to aid coal operators in planning future mining activities. The unsuitable for mining areas are explicitly delineated by regulation. This allows operators to avoid the cost of evaluating properties within designated areas, and to avoid the subsequent costs of preparing permit applications for mine sites on similar coal seams adjacent to the designated area that are highly unlikely to be approved for surface mining activities.

The designation restricts mining by seam, and by type, within the boundaries of the technical study area. Therefore, the designation will benefit the surface water and groundwater quality of the Muddy Run watershed by eliminating or limiting the mining-related disturbance of high-sulfur acid mine drainage producing rock formations that have minimal or no neutralizing potential.

Compliance Costs

The regulation imposes no costs on the regulated community. The regulation benefits the regulated community by helping coal operators plan future mining activities. The unsuitable for mining areas are explicitly delineated by regulation. This allows operators to avoid the cost of evaluating properties within designated areas, and to avoid the subsequent costs of preparing permit applications for mine sites on similar coal seams adjacent to the designated area that are highly unlikely to be approved for surface mining activities.

Compliance Assistance Plan

The Department will provide written notification of the changes to the coal mining industry.

Paperwork Requirements

The only paperwork requirements imposed by the proposed regulation are those necessary to make operators and Department personnel aware of the location of the designated area. Copies of the regulation containing a description of the area and a map of the location of the area will be held on file at the appropriate Department offices.

G. Pollution Prevention

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. DEP encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This regulation has incorporated the following pollution prevention incentives:

The proposed designation of the headwaters of Muddy Run as unsuitable for mining prevents pollution by prohibiting further coal mining in the area. The intent of the designation is to protect the public water supply wells of RTMA.

H. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

I. Regulatory Review

Under Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 27, 2010, the Department submitted a copy of the proposed rulemaking to IRCC and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. In addition to submitting the proposed rulemaking, the Department has provided IRRC and the Committees with a copy of a detailed regulatory analysis form prepared by the Department. A copy of this material is available to the public upon request.

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

Under section 5.1(j.2) of the Regulatory Review Act, on _____, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved the final-form regulations.

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. 240) (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 40 *Pennsylvania Bulletin* 2425 (May 8, 2010).

(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 to read as set forth in Annex A.

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

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

(e) This order shall take effect immediately.

BY:

MICHAEL KRANCER
Chairman
Environmental Quality Board

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

Subpart D. Areas Unsuitable for Mining

Criteria and Procedures for Designating Areas as Unsuitable for Surface Mining

§ 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:

* * * * *

- (18) **The surface mineable coal reserves of the Lower Kittanning, Clarion, Brookville, and Mercer coals in the Muddy Run watershed, Cambria County, located south of State Route 253, including Muddy Run and its eastern tributary, Curtis Run.**

Comment and Response Document

**Final Rulemaking;
Designation of Areas as Unsuitable for Surface Mining
Muddy Run Watershed, Reade Township, Cambria County
25 Pa. Code Chapter 86
40 Pa.B. 2425 (May 8, 2010)
Environmental Quality Board Regulation # 7-456**

The Environmental Quality Board approved the proposed rulemaking at its March 16, 2010, meeting. The proposal was published for a 30-day public comment period in the *Pennsylvania Bulletin* on May 8, 2010, at 40 *Pa.B.* 2425. The following summarizes the comments received during the public comment period.

ID	Name/Address	One Page Summary Submitted for Distribution to EQB	Provided Testimony	Requested Copy of Final Rulemaking after EQB Action
1.	Mr. Elam M. Herr Assistant Executive Director PSATS 4855 Woodland Drive Enola, PA 17025-1291			

Comment: There is no direct impact or cost to the Pennsylvania State Association of Township Supervisors (PSATS) members. PSATS would like to support this rulemaking because of the potential detrimental effects on those municipalities within the watershed that rely on ground water for human consumption. Should the ground water become contaminated by potential mining activities, the Reade Township Municipal Authority would have to remedy the problem at substantial cost to customers of the water system. (1)

Response: The Department's UFM technical study addresses probable impacts to the Reade Township Municipal Authority (RTMA) public water supply well field, as well as to private water supply springs and wells. The responsibilities of mine operators to replace water supplies that are impacted is clearly outlined in the Surface Mining Regulations 25 Pa. Code § 87.119. Hydrologic balance: water rights and replacement.

**AREAS UNSUITABLE FOR MINING
PETITION NUMBER 11969901**

**MUDDY RUN WATERSHED
CAMBRIA COUNTY**

COMMENT AND RESPONSE DOCUMENT

INTRODUCTION

On March 21, 1996, pursuant to § 86.122 and § 86.123, the Reade Township Municipal Authority, Cambria County, submitted a petition to the Department requesting that approximately 3,200 acres of the Muddy Run watershed be designated as “unsuitable for mining.” The Department determined the petition to be complete and acceptable for technical study in April of 1997. The petitioner was notified accordingly on May 1, 1997.

Pursuant to § 86.124, notification of the receipt and acceptance of the petition was made to persons with known mineral ownership, surface ownership, and other interested parties on May 12, 1997. Notification to the general public was made on May 10 and 17, 1997, in the Progress, Clearfield, Pennsylvania, on May 11 and 18, 1997 in The Tribune Democrat, Johnstown, Pennsylvania, and in the Pennsylvania Bulletin on May 17, 1997 (27 Pa.B. 2476). Pursuant to § 86.125, in early 1998 local landowners were notified by mail of an opportunity to provide comments on the petition at a public hearing. Notification of the hearing was made to the general public on December 31, 1997, and February 14 and 21, 1998, in the Progress, Clearfield, Pennsylvania, and on January 29, and February 12 and 19, 1998, in The Tribune Democrat, Johnstown, Pennsylvania. The hearing was held on February 26, 1998, at Glendale High School in Reade Township.

The Muddy Run UFM technical study process was suspended in early 1999 and was re-activated in December of 2003. This suspension occurred while the Department awaited the courts’ decision on a challenge to a previous UFM designation as an unconstitutional taking. The Pennsylvania Supreme Court decided, in *Machipongo Land and Coal Company, Inc. v. Dep’t of Environmental Resources*, 569 Pa. 3 (2002), that a UFM designation was not an unconstitutional taking. Subsequently, in May of 2004, a second round of notification letters was sent to mineral and surface property owners primarily to solicit input from new property owners within the technical study area. This was done to address surface and mineral tracts that may have been sold, transferred, or subdivided since 1998.

The following comment and response document was prepared to address the comments raised at the public hearing, as well as written comments received by the Department on the petition.

LIST OF COMMENTATORS

1. Mr. James W. Thompson
Reade Township Municipal Water Authority
Box 131
Blandburg, PA 16619
2. Ms. Elaine Wilkinson
A. W. Lewis Coal Corporation
Box 458
Lilly, PA 15938
3. Mr. Anthony Spanik
Reade Township Road District
P.O. Box 154
Blandburg, PA 16619
4. Mr. Robert T. Noel
1581 Glendale Valley Boulevard
Fallentimber, PA 16639
5. Mr. Jon R. Williams
P.O. Box 111
Ramey, PA 16671
6. Mr. Norman Johns
Reade Township Municipal Water Authority
P.O. Box 76, Blandburg, PA 16619
7. Mr. William O'Shall
Beccaria Township Supervisor
R.D. 1, Box 51
Fallentimber, PA 16639
8. Ms. Jane Hommer Renshaw
170 Westover Drive
New Cumberland, PA 17070
9. Mr. Robert L. Robeson
2361 Skyline Drive
Glasgow, PA 16644
10. Mr. Orange L. Mulhollen
604 North West Street
Ebensburg, PA 15931-1235
11. Mr. Richard W. Hegarty
Samuel Hegarty Heirs
P.O. Box 377
Coalport, PA 16627
12. Mr. John G. Foreman
Indian Village Plaza
111 East Walton Avenue
Altoona, PA 16602
13. Curtis Run Land Co., Inc.
Mr. Duane Potaley
P.O. Box 103
Houtzdale, PA 16657
14. Mr. Walter H. Miller
1215 25th Avenue
Altoona, PA 16602
15. Mr. David A. DePastina
501 Garber Street
Hollidaysburg, PA 16648
16. Mr. Alan J. Mathew
Box 357
Irvona, PA 16656

Many of the following comments have been condensed and/or paraphrased. Similar comments have been grouped. The numbers in parentheses following each comment correspond to the commentators (listed on page 3).

COMMENTS AND RESPONSES

1. **Comment:** Surface coal mining within this watershed has destroyed private water supply springs and wells. Mining has degraded surface and groundwater and we must protect the remaining unpolluted water resources as a source of water supply. All of the coal in this study area has been stripped and re-stripped. The designation process is too little, too late. (1) (13) (16)

Response: The Department agrees that past mining activity has adversely impacted surface water and groundwater resources within the Muddy Run watershed. The Department's Areas Unsuited for Mining (UFM) technical study documents historical mining-induced degradation of surface waters and degradation of groundwater within private water supply springs and wells. The UFM technical study indicates that geologic strata associated with the Lower Kittanning, Clarion, Brookville and Mercer coals have a high potential to produce acidic mine drainage and that acid mine drainage has impacted streams and groundwater. The UFM technical study has further determined that remaining mineable reserves of these coal seams still occur within the study area.

2. **Comment:** It would be very difficult to find alternative sources of water if the existing public water supply wells are degraded by mining. (3)

Response: The Department's technical study did not include a volumetric assessment of viable alternative groundwater sources for Reade Township and is not required to do so under the requirements of the UFM regulations. The DEP recognizes that the construction of the Reade Township Municipal Authority water supply wells was the result of several years of effort to locate and develop an adequate public water supply. Two previous attempts to develop water supply wells were not successful because of insufficient quantity or quality of groundwater resources.

3. **Comment:** The people of Reade Township have spent in excess of five million dollars and significant effort to develop a good quality water supply. There is no objection to taking minerals if it does not affect the quantity or quality of the water. (6)

Response: Pennsylvania and federal areas unsuitable for mining regulations and statutes specifically address renewable water resources, which include water supply aquifers and aquifer recharge areas. The Department's UFM technical study addresses probable impacts to the Reade Township Municipal Authority (RTMA) public water supply well field, as well as to private water supply springs and wells.

4. **Comment:** Much of the mineable coal within the watershed has been recovered by the C & K Coal Company and others and they are treating degraded water discharges. These areas should not be designated unsuitable for mining. (5)

Response: The C & K Coal Company no longer exists and its mine sites within the UFM technical study area were forfeited in 2005 and still are in need of treatment. Twenty surface coal mines located within Reade Township have forfeited their permit bonds and are now abandoned. Pennsylvania UFM regulations clearly state that the process for designating areas as unsuitable for mining does not apply to areas on which surface mining activities are being conducted or for areas for which a permit application was submitted prior to the Department's receipt of an UFM petition.

5. **Comment:** There are unreclaimed surface mines within the watershed with good water entering from highwalls and red degraded water discharging from the spoil. Remining these areas would improve the water quality. (4)

Response: There are areas within the study area that may benefit from remining activity. However, there have been recent surface mining operations within the technical study area that have involved the remining of previously mined surface mines. Most, if not all, of these operations have produced postmining acidic discharges and several have further degraded private water supply springs and wells. The Department's recommendation does consider the possible beneficial effects from remining, but only recognizes this potential for future mining of coal seams that are not included as part of this designation.

6. **Comment:** The Reade Township water supply wells are located in the center of our property which includes several mines. Surface mining did not change the excellent water quality. (8)
(14)

Response: The Department's UFM technical study found that the RTMA wells were designed and constructed to be reasonably well isolated from local coal-bearing units. Tests conducted during the development of the RTMA wells indicate increasing pressure with depth and upward flow from their lower water supply source aquifers to the overlying coal-bearing units. The pollution potential in the immediate vicinity of the RTMA wells would therefore appear to be low. However, groundwater tests conducted to date are not sufficient to characterize conditions beyond the immediate vicinity of the RTMA wells or to assess the localized impact of discrete, highly transmissive rock fractures and faults observed within the study area. Therefore, the potential does exist for hydrologic exchange between the RTMA supply aquifer and the overlying coal-bearing units. The elevated sulfate and specific conductance levels measured at the McElheny test well appear to confirm some degree of communication from the coal-bearing strata to the lower aquifer units. Furthermore, the Department's hydrologic and geochemical assessment of existing surface discharges of acid mine drainage located updip and nearer the headwaters of the Muddy Run watershed shows that discharge waters have infiltrated downward stratigraphically into much deeper underlying geologic formations and also traveled considerable distances downdip and down slope within the watershed to areas in close proximity to the

RTMA water supply wells.

7. **Comment:** Once a designation is made, it is there forever and nothing can be done with the property. An unsuitable for mining status should be reviewed periodically to determine any need to maintain this UFM status. (4) (5) (15)

Response: The regulations at 25 Pa. Code § 86.123(d) outline procedures for petitioning to terminate a designation. The process to terminate an UFM designation is similar to the process for designation, in that it requires a new petition to be submitted which must contain allegations of fact and supporting evidence that indicate that the area could be successfully mined and reclaimed without adverse impacts to the resource(s) identified in the original designation. Designation of an area as unsuitable for mining limits only one use and portion of a property and does not affect or apply to any other use of the property.

8. **Comment:** If the concern of the petitioners is water quality control, why limit the designation to surface mining when underground mining could also be a factor? (5)

Response: Pennsylvania's unsuitable for mining statutes and the Department's implementing regulations documented within 25 Pa. Code §§86.101 — 86.130, are specific to "surface mining operations," which includes surface activity connected with surface or underground coal mining. Surface activities connected with underground mining include entry, shaft and tunnel construction and borehole drilling. The unsuitable for mining statutes and regulations do not apply to the extraction of coal by the underground mining method. There is no law that authorizes area to be designated unsuitable for underground mining.

9. **Comment:** If the area is designated unsuitable for mining, property owners should be compensated for the cost mineral resources. (2) (4) (5) (7) (9) (10) (11) (12) (15)

Response: A designation of the area as unsuitable for mining would be to prohibit mining that would cause acid mine drainage pollution and to prevent the public water supply from being polluted by mine drainage. Government action that limits how property is used in order to prevent pollution of the streams and wells is a valid constitutional action that does not require compensation. The constitution only requires compensation be paid to property owners when their property is taken by the government or when government action limits every use of a property and the government action is not designed to prohibit pollution or a public nuisance. The Pennsylvania Supreme Court decided, in *Machipongo Land and Coal Company, Inc. v. Dep't of Environmental Resources*, 569 Pa. 3 (2002), that a challenge to a UFM designation as an unconstitutional taking is subject to the regulatory takings analysis set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). An owner of property within an area designated unsuitable for mining must prove that the parcel of land as a whole (including both surface and mineral rights) has been subjected to an unconstitutional taking under the *Penn Central* test. If the court finds the regulation is an unconstitutional taking of the property, the remedy is to invalidate the designation and the property owner may be entitled to compensation for the temporary period of time the regulation was in effect. In addition, the *Machipongo* Court explained that if a regulation prohibits behavior that could be abated or prohibited by general principles of State property law (e.g., the law of public nuisance), the government action is

constitutional and compensation is not required. The Pennsylvania Supreme Court has expressly held that the public has a right not to suffer acid mine discharge into its public waters, and that such discharges constitute a public nuisance as a matter of statutory and common law. *Machipongo*, 569 Pa. at 41 (citing *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392 (1974)). The government is not required to pay property owners for taking action on their land that would have the effect of preventing the pollution of public waters. The Department has determined that there is a significant potential for pollution of public waters from the mining of coals designated in this proposed UFM designation. The Department carefully evaluated the facts and law and is confident that the proposed UFM designation would not affect a regulatory taking under the applicable Pennsylvania and U.S. Supreme Court rulings. Therefore, the regulation would be valid and property owners would not be entitled to compensation.

10. **Comment:** How can one person submit a petition to have an area designated unsuitable for mining? I thought a petition was supposed to have more people's names on it. (4)

Response: Federal and Pennsylvania statutes and regulations authorizing the designation of areas unsuitable for mining provide that any person having an interest, which is or may be adversely affected by mining, has the right to request that an area be designated. The term "petition" in these statutes and regulations means a formal written request to be submitted. The UFM petition may be initiated by an individual or group of individuals, or by a business or organization, or by any government agency or entity, including DEP.



pennsylvania

DEPARTMENT OF ENVIRONMENTAL PROTECTION
POLICY OFFICE

June 16, 2011

Ms. Fiona E. Wilmarth
Acting Executive Director
Independent Regulatory Review Commission
14th Floor
333 Market Street
Harrisburg, PA 17120

Re: Final-Form Rulemaking – Clarks Creek, et al Stream Redesignations (#7-438)
Final-Form Rulemaking – Fishing Creek, et al Stream Redesignations (#7-461)
Final-Form Rulemaking – Nonattainment New Source Review (#7-450)
Final-Form Rulemaking – Unsuitable for Surface Mining (Muddy Run) (#7-456)

Dear Ms. Wilmarth:

Pursuant to Section 5.1(a) of the Regulatory Review Act, please find enclosed copies of four final-form rulemakings for review and comment by the Independent Regulatory Review Commission (Commission). The Environmental Quality Board (EQB) approved these final-form rulemakings at its May 18, 2011, meeting.

The **Clarks Creek, et al Stream Redesignations** final rulemaking was initiated by the Department of Environmental Protection (Department) as a part of its on-going review of water quality standards. Studies in support of the recommendations contained in the rulemaking were conducted in response to four rulemaking petitions, as well as requests from the Department's Southcentral Regional Office (SCRO) and the Pennsylvania Fish and Boat Commission (PFBC). The rulemaking also includes a corrective amendment initiated by the Department's Bureau of Water Standards and Facility Regulation (BWSFR). The rulemaking package includes as follows:

Pine Creek (Schuylkill County) – Petition: Friends of Pine Creek
Cacoosing Creek (Berks County) – Request: SCRO
UNT 00926 to Schuylkill River; locally Spring Mill Run (Montgomery County) –
Petition: Steven S. Brown, (Chairman; Whitmarsh Twp Environmental Advisory Board)
UNT 28600 to Lackawanna River; locally Clarks Creek (Wayne County) – Petition:
Glen Abello
UNT 07792 to Conestoga River (Lancaster County) – Request: PFBC
Hammer Creek (Lebanon and Lancaster Counties) – Petition: Heidelberg Township
Toms Run (Clarion and Forest Counties) – Correction: BWSFR

The regulatory changes included in this rulemaking, which impact 43.89 stream miles, were developed as a result of aquatic studies conducted by the Department's Bureau of Water Standards and Facility Regulation. The physical, chemical, and biological characteristics and other information on these waterbodies were evaluated to determine the appropriateness of the

current and requested designations using applicable regulatory criteria and definitions. In reviewing whether waterbodies qualify as High Quality (HQ) or Exceptional Value (EV) waters, the Department considered the criteria in § 93.4b (relating to qualifying as HQ or EV Waters). Based on these data and appropriate regulatory criteria, the Department is proposing revisions to 25 *Pa. Code*, Sections 93.9f, 93.9j, 93.9o and 93.9r, as included in the final rulemaking.

The rulemaking was adopted as proposed by the EQB on February 16, 2010, and advertised for a 45-day public comment period in the *Pennsylvania Bulletin* on April 24, 2010 (40 *Pa.B.* 2122). During the comment period, 10 commentators provided comments to the EQB, a majority of which largely opposed the redesignation of a portion of Hammer Creek from HQ-Cold Water Fishes (CWF), Migratory Fishes (MF) to CWF, MF. The Independent Regulatory Review Commission (IRRC) also reviewed the proposed rulemaking, but did not raise any comments, recommendations or objections to the proposed rulemaking and noted that the rulemaking would be deemed approved if the regulation is not amended and is retained in its proposed form. Although comments were addressed by the Department in the Comment and Response Document, no changes were made to the final rulemaking from its proposed version.

The Fishing Creek, et al Stream Redesignations final rulemaking package was initiated by the Department in response to petitions submitted to the EQB as follows: Buck Hill Creek (Monroe County) - Buck Hill Conservation Foundation; Upper Lehigh River (Lackawanna, Monroe, Wayne and Luzerne Counties) - North Pocono Citizens Alert Regarding the Environment (CARE); Little Lehigh Creek (Lehigh and Berks Counties) – Mid-Atlantic Environmental Law Center; Gallows Run (Bucks County) – Gallows Run Watershed Association; French Creek and Beaver Run (Chester County) – Green Valleys Association; Tannery Hollow Run (Cameron County) – Cameron County Conservation District; Fishing Creek (Lancaster County) – Patrick McClure; and Deer Creek and Little Falls (York County) – Shrewsbury Township. If finalized as proposed, this final rulemaking will redesignate 251.35 stream miles in this Commonwealth to EV status.

The regulatory amendments included in the rulemaking were developed in response to aquatic studies conducted by the Department's Bureau of Water Standards and Facility Regulation. The physical, chemical, and biological characteristics and other information on these waterbodies were evaluated to determine the appropriateness of the current and requested designations using applicable regulatory criteria and definitions. In reviewing whether waterbodies qualify as HQ or EV waters, the Department considered the criteria in § 93.4b (relating to qualifying as HQ or EV Waters). Based on supporting data and appropriate regulatory criteria, the Department is proposing revisions to 25 *Pa. Code*, Sections 93.9c, 93.9d, 93.9f, 93.9l and 93.9o as set forth in the final rulemaking.

The proposed rulemaking was adopted by the EQB at its July 13, 2010, meeting. The proposed rulemaking was published in the *Pennsylvania Bulletin* on September 18, 2010, (40 *Pa.B.* 5337), where a 45-day public comment period was advertised. During the official comment period, 163 commentators submitted comments to the EQB on the rulemaking, including 162 commentators who provided their strong support of the redesignation of a portion of the French Creek basin to EV status. In addition, the U.S. Environmental Protection Agency (EPA) Region 3 submitted comments in which it commended the Department on its continuing efforts to upgrade streams



into its highest level of the Special Protection Waters Program. IRRC also reviewed the proposed rulemaking but did not raise any comments, recommendations or objections to the proposed rulemaking and noted that the rulemaking would be deemed approved if the regulation is not amended and is retained in its proposed form. Although comments were addressed by the Department in the Comment and Response Document, no changes were made to the final rulemaking from its proposed version.

The **Nonattainment New Source Review for PM_{2.5}** final rulemaking includes amendments to existing nonattainment New Source Review (NSR) requirements at 25 *Pa Code* Chapters 121 and 127 in order to incorporate recently promulgated Federal requirements for PM_{2.5} and PM_{2.5} precursors. The amendments would limit the emissions of PM_{2.5} and PM_{2.5} precursors, including SO₂ and NO_x precursor emissions, from new major air contamination sources or major air contamination sources being modified in areas of the Commonwealth that are designated as nonattainment for the PM_{2.5} National Ambient Air Quality Standard (NAAQS). There are approximately 887 major facilities in Pennsylvania that may be subject to the existing NSR rules if major modifications to those facilities are proposed. This final rulemaking is reasonably required to attain and maintain the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. The final-form regulation, if published in the *Pennsylvania Bulletin* as final rulemaking, will be submitted to the EPA as a revision to the Commonwealth's State Implementation Plan (SIP).

The EQB approved the proposed rulemaking at its November 17, 2009, meeting. The rulemaking was published in the *Pennsylvania Bulletin* on February 6, 2010, at 40 *Pa B.* 703, for a 60-day public comment period. Three public hearings on the proposal were held in Pittsburgh, Norristown and Harrisburg. The EQB received comments from 8 commentators, a majority of which provided comments relating to the inclusion of fugitive emissions of certain pollutants, including PM_{2.5}, from all sources when determining whether a facility is defined as a "major facility" under § 121.1 and the treatment of projected actual emissions related to a project. Although these provisions are more stringent than Federal regulations, they are existing provisions previously promulgated by the EQB, which the EQB determined are reasonably necessary to achieve or maintain the PM_{2.5} NAAQS; therefore, no changes were made to the final rulemaking based on the specific comments. At final rulemaking, interpollutant trading ratios for PM_{2.5} and PM_{2.5} precursors were removed from the rulemaking. EPA is reconsidering its interpollutant trading approach, which the Department had incorporated in the proposed rulemaking, and will not approve the SO₂ and NO_x interpollutant trading ratios as a SIP revision. The amended provision in the final rulemaking allows the Department, based on a technical assessment, to establish interpollutant trading ratios for offsetting PM_{2.5} emissions or PM_{2.5} precursor emissions in a specific nonattainment area or geographic area in the state. The Department must provide a public comment period for at least 30 days prior to submitting the ratios to the EPA for approval as a SIP revision.

The Department consulted with the Air Quality Technical Advisory Committee (AQTAC) in the development of this rulemaking, as well as the Department's Citizens Advisory Council (CAC). On September 15, 2010, and October 18, 2010, AQTAC and the CAC, respectively, concurred with the Department's recommendation to move the final-form rulemaking forward to the EQB.

The **Unsuitable for Surface Mining (Muddy Run)** final rulemaking was initiated in response to a rulemaking petition submitted to the Department by the Read Township Municipal Authority (RTMA) under *25 Pa Code*, Chapter 86. The petitioner requested that approximately 3,200 acres of the Muddy Run watershed be designated as “unsuitable for mining”. RTMA’s purpose for pursuing the petition was the protection of public water supply wells from potential, adverse mining-related impacts. Pursuant to receipt of the complete petition, the Department initiated a technical study of the petition area, including water sampling and site reconnaissance and notified potentially interested parties about the petition and the Department’s technical study of the area. Interested parties were invited to provide comments to the Department, as well as provide testimony at a public hearing.

As a result of the technical study of the petition, the Department determined that there is a presence of high sulfur zones, with little or no alkaline strata, in the petition area and that there is a very significant potential for the production of acid mine water from surface mining of coal in the petition area. The technical study also confirmed that there is a potential for mining-related pollution of the RTMA wells and that surface mining activities significantly degraded groundwater resources within the technical study area, including numerous domestic and private water supplies.

In response to the rulemaking petition and as a result of technical studies, the final rulemaking amends *25 Pa Code* Chapter 86.130 to add subsection (b)(18), which designates the Lower Kittanning, Clarion, Brookville and Mercer coals within the upper portions of the Muddy Run watershed, Reade Township, Cambria County, as unsuitable for surface mining operations. The designation will protect the RTMA’s water supply wells by restricting mining on acid mine drainage producing coal seams situated in close proximity to the water supply’s source aquifers.

The EQB approved the proposed rulemaking on March 16, 2010, with a recommended 30-day public comment period. The proposed rulemaking was published in the *Pennsylvania Bulletin* on May 8, 2010, at 40 *Pa.B.* 2425. During the 30-day public comment period, the EQB received one comment from the Pennsylvania State Association of Township Supervisors (PSATS). In their comments, PSATS stated their support of the rulemaking and noted that without the rulemaking, there most likely would be a detrimental effect to those municipalities within the watershed that rely on groundwater for human consumption. IRRC issued no objections, comments or recommendations on the rulemaking and noted that the rulemaking would be deemed approved if the regulation is not amended and is retained in its proposed form. No changes are proposed to the final rulemaking.

The Department will provide assistance as necessary to facilitate the Commission’s review of the enclosed final-form rulemakings under Section 5.1(e) of the Regulatory Review Act.



Ms. Fiona E. Wilmarth, Acting Executive Director

- 5 -

June 16, 2011

Please contact me at the number above if you have any questions or need additional information.

Sincerely,

Michele L. Tate

Michele L. Tate
Regulatory Coordinator

Enclosures



**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO
THE REGULATORY REVIEW ACT**

I.D. NUMBER: 7-456
 SUBJECT: unsuitable for surface mining (muddy Run)
 AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- Proposed Regulation
- 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

RECEIVED
 IRRC
 2011 JUN 16 P 4:06

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
6-16-11	<i>R. Watters</i>	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Rep. Hutchinson
6-16-11	<i>D. Newkirk</i>	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
6-16-11	<i>M. Castelli</i>	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Senator Mary Jo White
6/16/11	<i>[Signature]</i>	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
6/16/11	<i>K. Cooper</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)

