

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p><i>(All Comments submitted on this regulation will appear on IRRC's website)</i></p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <p>RECEIVED</p> <p>FEB 25 2021</p> <p>Independent Regulatory Review Commission</p>
<p>(1) Agency: Department of Environmental Protection</p> <p>(2) Agency Number: 7 Identification Number: 558</p>		
		IRRC Number: 3292
<p>(3) PA Code Cite: 25 Pa. Code §§ 208.375—208.376</p>		
<p>(4) Short Title: Prohibiting Electronic Liquid-Vaporizing Devices at Underground Bituminous Coal Mines</p>		
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p>Primary Contact: Laura Griffin, 717.783.8727, laurgriffi@pa.gov Secondary Contact: Jessica Shirley, 717.783.8727, jessshirley@pa.gov</p>		
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> Proposed Regulation <input type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General</p>
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>This proposed rulemaking will amend the smoking prohibition at underground bituminous coal mines to expressly prohibit the use and/or possession of electronic liquid-vaporizing devices, including, but not limited to, electronic cigarettes, and will provide for the imposition of a penalty for violations of the prohibition.</p> <p>This proposed rulemaking will also separately distinguish the prohibition at surface work areas of underground bituminous coal mines from the prohibition in the underground areas of these mines. This proposed rulemaking addresses a safety hazard that the use and/or possession of these devices present at underground bituminous coal mining operations.</p>		
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>The proposed rulemaking is authorized under section 106.1(a) of the Bituminous Coal Mine Safety Act (BCMSA) (52 P.S. § 690-106.1(a)), which grants the Board of Coal Mine Safety (Board) the authority to adopt regulations that are necessary or appropriate to implement the requirements of the BCMSA and to protect the health, safety and welfare of miners and other individuals in and about mines. Section 106.1(f)(2) of the BCMSA (52 P.S. § 690—106.1(f)(2)), further provides that regulations may address any hazards not addressed by existing safety standards.</p>		

(9) 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.

This proposed rulemaking is not mandated by any Federal or State law, court order, or Federal regulation.

(10) 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.

Coal mine fires pose a constant danger to the safety of miners and to their livelihood. Underground mine fires pose an added hazard because of the confined environment with remote exits. The Federal government has enacted safety regulations for underground coal mines that have greatly improved the safety of miners. 30 CFR Part 75. However, mine fires and fire injuries remain serious hazards for all coal mining operations. The combination of an electronic cigarette and a lithium-ion battery is a new and unique hazard. There is no analogy among consumer products to the risk of a severe, acute injury presented by an e-cigarette. Fires or explosions caused by the batteries used in electronic cigarette are uncommon. However, the consequences can be devastating and life-altering for the victims. This is especially a concern in the underground mining environment, where explosions in underground mines are caused by accumulations of flammable gas and/or combustible dust mixed with air in the presence of an ignition source. While much progress has been made in preventing explosion disasters in coal mines, explosions still occur, sometimes producing multiple fatalities. Preventing fires is essential to the health and safety of mine workers.

To protect the health and safety of miners and other individuals, this proposed rulemaking will amend the smoking prohibition at underground bituminous coal mines to expressly prohibit the use and/or possession of electronic liquid-vaporizing devices, including, but not limited to, electronic cigarettes, and impose a penalty for violations of the prohibition. By prohibiting the use of and/or possession of electronic liquid vaporizing devices at underground bituminous coal mines, this proposed rulemaking addresses both explosive and distraction hazards these devices present at underground bituminous coal mining operations. This proposed rulemaking will also separately distinguish the prohibition at surface work areas of underground bituminous coal mines from the prohibition inside these mines.

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

(11) 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 relevant Federal standards do not expressly address the use or possession of electronic liquid-vaporizing devices. Therefore, the two provisions in this proposed rulemaking may be considered more stringent than Federal standards to the extent that the Federal standards do not expressly state whether they prohibit the use and/or possession of these devices.

Section 208.375 amends the existing smoking prohibition at surface work areas of underground bituminous coal mines to expressly prohibit electronic liquid-vaporizing devices and impose a penalty for violations of this section. The existing regulation incorporates the Federal standard under 30 CFR 77.1711. The penalty provided in this proposed rulemaking will refer to the penalty imposed under Federal law, so as not to be more stringent. See 30 CFR 100.5(d). Pursuant to the Federal Civil Penalties Inflation Adjustment Act, the maximum penalty is updated every year to reflect inflation and is currently set at \$338.00 as of January 15, 2020. See 85 FR 2299. However, the penalty will not be exclusive of any other enforcement option the Department believes is warranted under the particular circumstances of the violation.

Section 208.376 incorporates the smoking prohibition in underground bituminous coal mines from Section 268(b) of the BCMSA (52 P.S. § 690-268(b)). The proposed regulation expressly prohibits the use and possession of electronic liquid-vaporizing devices and imposes the same penalty for violations as explained above.

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

Other states have mine safety statutes or regulations prohibiting smoking and smoking articles, including West Virginia, Ohio, and Kentucky. Of these, only Kentucky expressly prohibits electronic liquid-vaporizing devices. See Section 352.170(3) of the Kentucky Revised Statutes (KRS 352.170(3)) (“... including but not limited to electronic cigarettes, cigars, or any component that heats liquid or other material to produce vapor”).

This proposed rulemaking will not affect Pennsylvania's ability to compete with other states. Compliance with this proposed rulemaking does not impose any cost on operators and operators already prohibit their employees from carrying and/or using these devices in all states.

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

No, this proposed rulemaking does not affect any other regulations of the promulgating agency or other state agencies.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. (“Small business” is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

This proposed rulemaking was prepared at the direction of the Board which was established pursuant to BCMSA. The seven-member Board is chaired by the Secretary of the Department of Environmental Protection and consists of three members who represent mine workers and three members who represent coal mine operators. Three of the members of the Board were nominated by the United Mine Workers of America (UMWA) to represent miners, and three were nominated by the Pennsylvania Coal Alliance (PCA) to represent coal mine operators.

The Board developed and drafted this proposed rulemaking with input and advice on the rulemaking from the regulated community. The three members of the Board nominated by the UMWA provided input on the regulations on behalf of mine workers. Likewise, the three representatives on the Board

nominated by PCA made recommendations on the regulation on behalf of the seven underground bituminous coal mining companies and affiliates that currently operate in Pennsylvania. As such, both UMWA and PCA participated in the decision of the Board to prepare this regulation.

The Board has determined that no small businesses, as that term is defined under Section 3 of the Regulatory Review Act, will be affected by this proposed rulemaking because this proposed rulemaking addresses the individual conduct of miners, mine officials, and other persons in and about mines and not the actual operations of a mine itself, which requires the expenditure of money. According to the Small Business Size Regulations under 13 CFR Part 121, for NAICS Code 212112 (bituminous coal underground mining) a small business is one that employs fewer than 500 persons. The Board determined that this rulemaking would apply to seven underground bituminous coal mining companies currently operating in Pennsylvania, four of which employ fewer than 500 persons. The Board made this determination by reviewing its own internal data and publicly available data from the companies.

It is also important to note that all underground mining operations are already subject to the Federal smoking prohibition under 40 CFR 75.1702. Under that provision companies are required to institute a program, approved by the U.S. Labor Secretary, to ensure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters. While this Federal prohibition does not extend to electronic liquid-vaporizing devices, extending this plan to include these devices will not increase costs.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Approximately seven underground bituminous coal mine companies operate in Pennsylvania. Four of these seven companies are small businesses. This proposed rulemaking will not affect the actual operations of those underground bituminous coal mining companies and is limited to the conduct of certain individuals like miners, mine officials, and other persons in and about mines. This proposed rulemaking will affect individuals in and about mines to the extent that they engage in conduct that presents a safety hazard. It does not impact the actual operations of the mines by requiring operational or equipment requirements.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Approximately seven underground bituminous coal mine companies operate in Pennsylvania. Four of these seven companies are small businesses. This proposed rulemaking will not impose any additional operational requirements on underground bituminous coal mining companies because it is limited to prohibit certain individual conduct by miners, mine officials, and other persons in and about mines.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

Smoking, and smoking related activities at underground bituminous coal mine companies are already prohibited under Federal law at 30 CFR 75.1702 and 77.1711. The inclusion of a regulatory prohibition on electronic liquid-vaporizing devices will not have any additional financial, economic, or social impact on the public or regulated community. The potential benefits of the proposed rulemaking include

the continued prevention of bodily harm and loss of life at underground bituminous coal mine sites by avoiding the explosive hazard and distraction hazard that these devices pose.

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

The benefits of this rulemaking include the protection of life and property. The combination of an electronic cigarette and a lithium-ion battery is a new and unique hazard. Fires or explosions caused by the batteries used in electronic cigarette are uncommon. However, the consequences can be devastating and life-altering for the victims. This is especially a concern in the underground mining environment, where explosions in underground mines are caused by accumulations of flammable gas and/or combustible dust mixed with air in the presence of an ignition source.

(19) 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.

Costs and/or savings as the result of the implementation of this proposed rulemaking are not anticipated since individuals in and about mines must already comply with the relevant BCMSA provisions prohibiting smoking and possession of smoking materials. Moreover, although the proposed rulemaking is intended to protect miners, it may also minimize unnecessary expenses to the regulated community by reducing the risk of accidents. Worker accidents can result in significant costs to a mine operator since it typically takes an operator time to resume operations after such accidents. This could lead to expenses for the mine operator incurred through lost wages, lost production capacity, payment for services associated with mine rescue operations, and other related expenses.

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

This question does not apply because local governments do not engage in underground bituminous coal mining.

(21) Provide a specific estimate of the costs and/or savings to the **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.

The costs incurred by the state government as a result of this proposed rulemaking are expected to be negligible because the Commonwealth already conducts mine safety inspections. Nothing in this proposed rulemaking will alter current state government practices or costs.

(22) For each of the groups and entities identified in items (19)-(21) above, 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.

This proposed rulemaking does not require any additional accounting or consulting procedures, additional reporting, recordkeeping, or other paperwork other than that which is already being performed on a routine basis as required under BCMSA requirements.

(22a) Are forms required for implementation of the regulation?

No new forms are required for implementation of the proposed rulemaking.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

No new forms are required for implementation of the proposed rulemaking.

(23) 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	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Savings	\$0	\$0	\$0	\$0	\$0	\$0
COSTS:						
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$0	\$0	\$0	\$0	\$0
REVENUE LOSSES:						
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

(23a) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY-3 2017-18	FY-2 2018-19	FY-1 2019-20	Current FY 2020-21
Environmental Program Management	\$29,413,000	\$30,932,000	\$28,420,000	\$35,504,000
Environmental Protection Operations	\$89,215,000	\$93,190,000	\$84,523,000	\$100,020,000

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

(a) An identification and estimate of the number of small businesses subject to the regulation.

Four small businesses operate underground bituminous coal mines in Pennsylvania. The proposed rulemaking is not anticipated to have an adverse operational impact on these businesses.

(b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed rulemaking, including the type of professional skills necessary for preparation of the report or record.

No additional costs will be incurred with respect to reporting, recordkeeping, and other administrative costs required for compliance with the proposed rulemaking because this proposed rulemaking does not require any additional reporting, recordkeeping, or other paperwork other than that which is already being performed on a routine basis as required under BCMSA requirements.

(c) A statement of probable effect on impacted small businesses.

This proposed rulemaking is not expected to have any effect on the four small businesses subject to this regulation because this proposed rulemaking addresses the individual conduct of miners, mine officials, and other persons in and about mines and not the operational activities of the mine companies.

According to the Small Business Size Regulations under 13 CFR Part 121, for NAICS Code 212112 (bituminous coal underground mining) a small business is one that employs fewer than 500 persons. Four of the seven underground bituminous coal mining companies currently operating in Pennsylvania employ fewer than 500 persons.

(d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

Alternative methods for achieving the purpose of the proposed rulemaking were analyzed only with respect to the penalty of the violation. The basis for the violation, carrying and/or using smoking articles, including liquid vaporizing devices, is based upon similar existing BCMSA authority.

Regarding the penalty, the Department analyzed whether a person violating the regulation should

receive an automatic suspension rather than a penalty. The Department determined that an automatic suspension would not aid in deterring or enforcing the violation because not all persons at mines have credentials that may be suspended.

It is also important to note that all underground mining operations are already subject to the Federal smoking prohibition under 40 CFR 75.1702. Under that provision companies are required to institute a program, approved by the U.S. Labor Secretary, to ensure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters. While this Federal prohibition does not extend to electronic liquid-vaporizing devices, extending this plan to include these devices will not increase costs.

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

No special provisions were developed to meet the particular needs of affected groups or persons because the Board was unable to identify any such groups.

(26) 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.

Alternative regulatory provisions were not considered because this rulemaking is based on the current statutory provisions under Chapter 208 of the BCMSA, which prohibit smoking and the possession of smoking materials.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

According to the Small Business Size Regulations under 13 CFR Part 121, for NAICS Code 212112 (bituminous coal underground mining) a small business is one that employs fewer than 500 persons. Four of the seven underground bituminous coal mining companies currently operating in Pennsylvania employ fewer than 500 persons. This proposed rulemaking is not expected to have any effect on the four small businesses subject to the regulation because this proposed rulemaking addresses the individual conduct of miners, mine officials, and other persons in and about mines, and not that of the operation of those small businesses.

- a) Less stringent compliance and reporting requirements were not considered because this proposed rulemaking does not impose additional compliance or reporting requirements.
- b) Less stringent schedules or deadlines for compliance or reporting requirements were not considered because this proposed rulemaking does not impose any schedules or deadlines for compliance or reporting.
- c) The consolidation or simplification of compliance or reporting requirements for small business was not considered because this proposed rulemaking does not impose any compliance or reporting requirements.
- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation was not considered because this proposed rulemaking does not impose design or operational standards.
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation was not considered because this proposed rulemaking does not apply to the businesses' conduct, only that of individuals in and about the mine.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

While this regulation did not rely on any data there are numerous studies detailing the hazards of mine fires and the explosive risks related to electronic liquid-vaporizing devices. Two examples of such studies include - Electronic Cigarette Fires and Explosions in the United States 2009 – 2016, July 2017, U.S. Fire Administration, Federal Emergency Management Agency, available at https://www.usfa.fema.gov/downloads/pdf/publications/electronic_cigarettes.pdf; and Explosion Prevention in United States Coal Mines, Jürgen F. Brune, Kenneth L. Cashdollar and R. Karl Zipf, available at <https://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/epius.pdf>

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

- | | |
|---|------------------------|
| A. The length of the public comment period: | <u>30 days</u> |
| B. The date or dates on which any public meetings or hearings will be held: | <u>N/A</u> |
| C. The expected date of delivery of the final-form regulation: | <u>Quarter 4, 2021</u> |
| D. The expected effective date of the final-form regulation: | <u>Quarter 1, 2022</u> |
| E. The expected date by which compliance with the final-form regulation will be required: | <u>Quarter 1, 2022</u> |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | <u>N/A</u> |

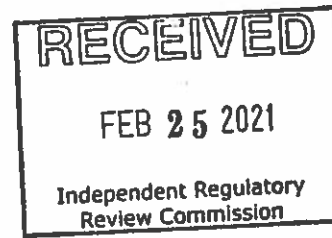
(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

The Department will continue to closely monitor these regulations for their effectiveness and recommend updates as necessary.

CDL-1

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

By: **Amy M. Elliott**
(Deputy Attorney General)

Digitally signed by Amy M. Elliott
DN: c=US, o=Department of Environmental Protection, ou=Office of the Attorney General, email=elliott@dep.state.pa.us, cn=Amy M. Elliott
Date: 2021.01.19 09:42:10 -0500

1/19/21
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
BOARD OF COAL MINE SAFETY

(AGENCY)

DOCUMENT/FISCAL NOTE NO 7-558

DATE OF ADOPTION SEPTEMBER 1, 2020

BY

TITLE **PATRICK MCDONNELL**
CHAIRPERSON

EXECUTIVE OFFICER CHAIRPERSON OR SECRETARY

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

BY

11/4/2020

DATE OF APPROVAL

(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 PROPOSED RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
BOARD OF COAL MINE SAFETY

Prohibiting Electronic Liquid-Vaporizing Devices at Underground Bituminous Coal Mines

25 Pa. Code Chapter 208

**PROPOSED RULEMAKING
BOARD OF COAL MINE SAFETY
25 PA. CODE CH. 208
PROHIBITING ELECTRONIC LIQUID-VAPORIZING DEVICES AT
UNDERGROUND BITUMINOUS COAL MINES**

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

The proposed rulemaking was adopted by the Board at its meeting of September 1, 2020.

A. Effective Date

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

B. Contact Persons

For further information, contact Richard Wagner, Director, Bureau of Mine Safety, P.O. Box 133, New Stanton, PA 15672, (724) 925-5551; or Christopher Minott, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, 9th Floor, Rachel Carson State Office Building, Harrisburg, PA 17105, (717) 787-9372. Information regarding submitting comments on this proposal appears in Section J of this preamble. Persons with a disability may use the Hamilton Relay Service by calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users).

C. Statutory Authority

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

D. Background and Purpose

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

The purposes of BCMSA, enumerated under section 103(b) (52 P.S. § 690-103(b)), include the establishment and promulgation of improved mandatory standards to protect the health and

safety of miners and other individuals in and about mines. To protect the health and safety of miners and other individuals, this proposed rulemaking will amend the smoking prohibition at underground bituminous coal mines to expressly prohibit the use and/or possession of electronic liquid-vaporizing devices, including electronic cigarettes, and impose a penalty for violations of the prohibition. By prohibiting the use of and/or possession of electronic liquid vaporizing devices at underground bituminous coal mines, this proposed rulemaking addresses both explosive and distraction hazards these devices present at underground bituminous coal mining operations.

Currently, the Department decertifies individuals who violate smoking safety standards. *See* 52 P.S. § 690-510(b). The proposed regulation would give the Department additional authority to assess a civil monetary penalty, stating that the Department will assess a civil penalty of up to the regulatory maximum amount for each violation, which is currently at \$338. The civil penalty will provide the Department with flexibility to punish smoking safety standard violations where decertification may not be appropriate or sufficient as a standalone penalty. In determining whether to deviate from the maximum civil penalty, the Department will consider the number of smoking articles confiscated during a search, the number of previous violations, the experience level and certification status of the offending individual, and any unique circumstances that may constitute a mitigating factor. However, the Board is interested to hear from commentators on whether the proposed language should be modified to say that the Department shall assess a fine at the regulatory maximum amount for each violation. Such a change would take away the Department's discretion to assess a fine lower than the regulatory maximum amount.

This proposed rulemaking will also separately distinguish the prohibition at surface work areas of underground bituminous coal mines from the prohibition inside these mines.

Coal mine fires pose a constant danger to the safety of miners and to their livelihood. Underground mine fires pose an added hazard because of the confined environment with remote exits. The Federal government has enacted safety regulations for underground coal mines that has greatly improved the safety of miners. 30 CFR Part 75 (relating to mandatory safety standards – underground coal mines). However, mine fires and fire injuries remain serious hazards for all coal mining operations. The combination of an electronic cigarette and a lithium-ion battery is a new and unique hazard. There is no analogy among consumer products to the risk of a severe, acute injury presented by an e-cigarette. Fires or explosions caused by the batteries used in electronic cigarette are uncommon. However, the consequences can be devastating and life-altering for the victims. This is especially a concern in the underground mining environment, where explosions in underground mines are caused by accumulations of flammable gas and/or combustible dust mixed with air in the presence of an ignition source. While much progress has been made in preventing explosion disasters in coal mines, explosions still occur, sometimes producing multiple fatalities. Preventing fires is essential to the health and safety of mine workers.

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

mine operators, and the Department will benefit from clarity regarding how the use and possession of these devices are regulated at underground bituminous coal mines.

E. Summary of Regulatory Requirements

This proposed rulemaking amends the existing smoking prohibition at § 208.375, which applies at surface work areas of underground bituminous coal mines.

§ 208.375. Smoking Prohibition: Surface Work Areas

Subsection (a) retains the existing smoking prohibition at surface work areas of underground bituminous coal mines, which incorporates the Federal regulation at 30 CFR 77.1711 (relating to smoking prohibition).

Subsection (b) is a new subsection that expressly prohibits electronic liquid-vaporizing devices and authorizes the imposition of a penalty for violations of this section. The penalty refers to the penalty imposed under Federal law, so as not to be more stringent. *See* 30 CFR 100.5(d) (relating to determination of penalty amount; special assessment). Pursuant to the Federal Civil Penalties Inflation Adjustment Act, the maximum penalty is updated every year to reflect inflation and is currently set at \$338.00 as of January 15, 2020. *See* 85 FR 2299. The penalty will not be exclusive of any other enforcement option the Department determines is warranted under the particular circumstances of the violation.

§ 208.376. Smoking Prohibition: Underground Areas

Subsections (a) – (c) are based on the existing provisions of the smoking prohibition in underground bituminous coal mines from Section 268(b) of the BCMSA (52 P.S. § 690-268(b)) and add clarification that this prohibition applies to the use and possession of electronic liquid-vaporizing devices. Subsection (a) prohibits the use of smoking materials, subsection (b) prohibits the possession of smoking materials, and subsection (c) authorizes operators to search any individual entering the mine.

Section 208.376(d) is a new subsection that will authorize the imposition of a penalty for violations of this section. Just as in § 208.375, described above, the penalty refers to the penalty imposed under Federal law, so as not to be more stringent. *See* 30 CFR 100.5(d). Under the Federal Civil Penalties Inflation Adjustment Act, the maximum penalty is updated every year to reflect inflation and is currently set at \$338.00 as of January 15, 2020. *See* 85 FR 2299. The penalty will not be exclusive of any other enforcement option the Department determines is warranted under the particular circumstances of the violation.

F. Benefits, Costs and Compliance

Benefits

This proposed rulemaking will improve safety by expressly prohibiting the use and/or possession of electronic liquid-vaporizing devices, which present safety hazards, under the existing

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

Compliance Costs

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

Paperwork requirements

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

G. Pollution Prevention

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

H. Sunset Review

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

I. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on February 25, 2021, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey any comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Department, the General Assembly and the Governor.

J. Public Comments

Interested persons are invited to submit to the Board written comments, suggestions, support or objections regarding the proposed rulemaking. Comments, suggestions, support or objections must be received by the Board by April 12, 2021. Comments may be submitted to the Board online, by e-mail, by mail or express mail as follows.

Comments may be submitted to the Board by accessing the Board's online comment system, eComment, at <http://www.ahs.dep.pa.gov/eComment>.

Comments may be submitted to the Board by e-mail at RegComments@pa.gov. A subject heading of the proposed rulemaking and a return name and address must be included in each transmission.

If an acknowledgement of comments submitted online or by e-mail is not received by the sender within 2 working days, the comments should be retransmitted to the Board to ensure receipt. Comments submitted by facsimile will not be accepted.

Written comments should be mailed to the Board of Coal Mine Safety, P.O. Box 8477, Harrisburg, PA 17105. Express mail should be sent to the Board of Coal Mine Safety, Rachel Carson State Office Building, 16th Floor, 400 Market Street, Harrisburg, PA 17101-2301.

Patrick McDonnell,
Chairperson
Board of Coal Mine Safety

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION
PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION
SUBPART D. ENVIRONMENTAL HEALTH AND SAFETY
ARTICLE IV. OCCUPATIONAL HEALTH AND SAFETY
CHAPTER 208. UNDERGROUND COAL MINE SAFETY
MISCELLANEOUS

§ 208.375. Smoking prohibition: Surface Work Areas.

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

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

(1) **May not be more than the maximum civil penalty provided under 30 CFR 100.5(d) for each occurrence of such violation.**

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

§ 208.376. Smoking prohibition: Underground Areas.

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

(b) **An individual may not at any time enter a mine with or carry into the mine any smoking or smoker related articles, matches, pipes, cigars, cigarettes, electronic liquid-vaporizing devices, including e-cigarettes, or any device for making flames or fire not approved pursuant to Section 350 of the Act.**

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

(d) **An individual who violates the mandatory safety standards relating to smoking or the use or carrying of smoking materials, including electronic liquid-vaporizing devices, including e-cigarettes, matches, or lighters, shall be subject to a civil penalty assessed by the Department that:**

(1) May not be more than the maximum civil penalty provided under 30 CFR 100.5(d) (relating to determination of penalty amount; special assessment) for each occurrence of such violation.

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



February 25, 2021

David Sumner
Executive Director
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17120

Re: Proposed Rulemaking: Prohibiting Electronic Liquid Vaporizing Devices at Underground Bituminous Coal Mines (#7-558)

Dear Mr. Sumner:

Pursuant to Section 5(a) of the Regulatory Review Act, please find enclosed a copy of the Prohibiting Electronic Liquid Vaporizing Devices at Underground Bituminous Coal Mines (#7-558) proposed rulemaking for review by the Independent Regulatory Review Commission (Commission). This proposal is scheduled for publication in the *Pennsylvania Bulletin* on March 13, 2021, with a 30-day public comment period. The Board of Coal Mine Safety adopted this proposal on September 1, 2020.

This proposed rulemaking would amend the smoking prohibition at underground bituminous coal mines to expressly prohibit the use or possession of electronic liquid-vaporizing devices, including electronic cigarettes, and impose a penalty for violations of the prohibition. By prohibiting the use of or possession of electronic liquid vaporizing devices at underground bituminous coal mines, this proposed rulemaking addresses both explosive and distraction hazards these devices present at underground bituminous coal mining operations.

As set forth in the Regulatory Review Act, the Department will consider any comments and recommendations made by the Commission, as well as the House and Senate Environmental Resources and Energy Committees and the public, prior to final adoption of the enclosed rulemaking.

Please contact me by e-mail at laurgriffi@pa.gov or by telephone at 717.783.8727 if you have any questions or need additional information.

Sincerely,

A handwritten signature in cursive script that reads "Laura E. Griffin".

Laura Griffin
Regulatory Coordinator

Enclosures

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

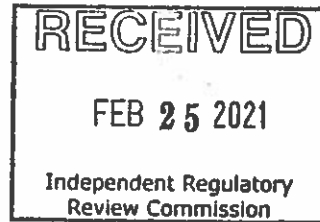
I.D. NUMBER: 7-558

SUBJECT: Prohibiting Electronic Liquid Vaporizing Devices of Underground Bituminous Coal Mines

AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION, Board of Coal Mine Safety

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



FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
2/25/21	[Signature]	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Representative Daryl Metcalfe
2/25/21	[Signature]	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Representative Greg Vitali
2/25/21	[Signature]	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Senator Gene Yaw
2/25/21	[Signature]	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY Senator Carolyn Comitta
		INDEPENDENT REGULATORY REVIEW COMMISSION David Sumner
		ATTORNEY GENERAL (for Final Omitted only)
2/25/21	[Signature]	LEGISLATIVE REFERENCE BUREAU (for Proposed only)

Stephen Hoffman

From: Bulletin <bulletin@palrb.us>
Sent: Thursday, February 25, 2021 2:19 PM
To: Griffin, Laura
Cc: Leah Brown; Adeline E. Gaydosh
Subject: [External] Re: Proposed Rulemaking #7-558 Preamble and Annex A

ATTENTION: This email message is from an external sender. Do not open links or attachments from unknown sources. To report suspicious email, forward the message as an attachment to CWOPA_SPAM@pa.gov.

Laura,

Thank you for sending this proposed rulemaking! We will schedule it for publication in the March 13th Bulletin.

Have a great evening!

Leah

From: Griffin, Laura <laurgriffi@pa.gov>
Sent: Thursday, February 25, 2021 1:06 PM
To: Bulletin <bulletin@palrb.us>
Cc: Leah Brown <lbrown@palrb.us>; Adeline E. Gaydosh <agaydosh@palrb.us>
Subject: Proposed Rulemaking #7-558 Preamble and Annex A

Good afternoon,

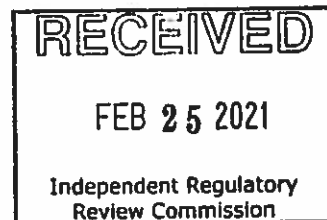
Please see the attached Face Sheet, Preamble, and Annex A for Proposed Rulemaking – Prohibiting Electronic Liquid Vaporizing Devices at Underground Bituminous Coal Mines (#7-558), for publication on March 13, 2021.

The transmittal sheet confirming receipt of the rulemaking by the House ERE Committee is attached. Email confirmation of receipt by both the Senate ERE Committee chairs is pending.

Please confirm that you received the rulemaking documents for publication.

Thank you!
Laura

Laura Griffin | Regulatory Coordinator
Department of Environmental Protection | Policy Office
Rachel Carson State Office Building
400 Market Street | Harrisburg, PA
Phone: 717.772.3277 | Fax: 717.783.8926
Email: laurgriffi@pa.gov
www.dep.pa.gov



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In order to prevent the further spread of COVID-19, all DEP offices will remain closed until restrictions are lifted. In the meantime, I will be working remotely to continue the mission of the Pennsylvania Department of Environmental Protection and frequently retrieving emails. Thank you for your patience.

Stephen Hoffman

From: Gilroy, Patricia <pgilroy@pasen.gov>
Sent: Thursday, February 25, 2021 11:44 AM
To: Bulletin; Shirley, Jessica; Reiley, Robert A.; Kauffman, Gregory; Troutman, Nick; Emily.Eyster@pasenate.com
Cc: Martin, Megan; DeLiberato, Vincent C. (LRB); A.J. Mendelsohn; Griffin, Laura
Subject: RE: Delivery of Proposed Rulemaking #7-558

Received.

From: Bulletin <bulletin@palrb.us>
Sent: Thursday, February 25, 2021 11:29 AM
To: Shirley, Jessica <jesshirley@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Kauffman, Gregory <grekauffma@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>; Emily.Eyster@pasenate.com; Gilroy, Patricia <pgilroy@pasen.gov>
Cc: Martin, Megan (OS) <mtmartin@os.pasen.gov>; DeLiberato, Vincent C. (LRB) <vdeliberato@palrb.us>; A.J. Mendelsohn <amendelsohn@palrb.us>; Griffin, Laura <laurgriffi@pa.gov>
Subject: Delivery of Proposed Rulemaking #7-558

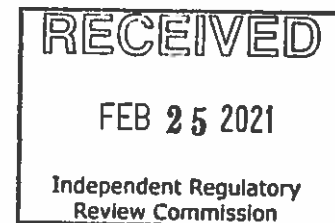
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We have attached Proposed Rulemaking No. 7-558 from the Department of Environmental Protection.
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Thank you.

The Pennsylvania Code & Bulletin Office



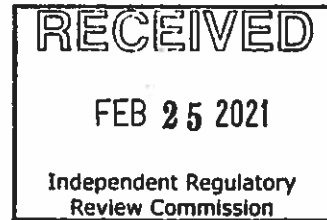
Stephen Hoffman

From: Eyster, Emily <Emily.Eyster@pasenate.com>
Sent: Thursday, February 25, 2021 3:30 PM
To: Gilroy, Patricia; Bulletin; Shirley, Jessica; Reiley, Robert A.; Kauffman, Gregory; Troutman, Nick
Cc: Martin, Megan; DeLiberato, Vincent C. (LRB); A.J. Mendelsohn; Griffin, Laura
Subject: Re: Delivery of Proposed Rulemaking #7-558

Received.

Emily Eyster
Legislative Director, Office of Senator Carolyn T. Comitta
Executive Director, Environmental Resources and Energy Committee
Cell: (717) 756-4702
Phone: (717) 787-5709

www.pasenatorcomitta.com
[@SenatorComitta](https://twitter.com/SenatorComitta)
[Facebook](#) – [Twitter](#) – [Instagram](#)



From: Gilroy, Patricia <pgilroy@pasen.gov>
Sent: Thursday, February 25, 2021 11:43 AM
To: Bulletin <bulletin@palrb.us>; Shirley, Jessica <jessshirley@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Kauffman, Gregory <grekauffma@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>; Eyster, Emily <Emily.Eyster@pasenate.com>
Cc: Martin, Megan <mtmartin@os.pasen.gov>; DeLiberato, Vincent C. (LRB) <vdeliberato@palrb.us>; A.J. Mendelsohn <amendelsohn@palrb.us>; Griffin, Laura <laurgriffi@pa.gov>
Subject: RE: Delivery of Proposed Rulemaking #7-558

■ EXTERNAL EMAIL ■

Received.

From: Bulletin <bulletin@palrb.us>
Sent: Thursday, February 25, 2021 11:29 AM
To: Shirley, Jessica <jessshirley@pa.gov>; Reiley, Robert A. <rreiley@pa.gov>; Kauffman, Gregory <grekauffma@pa.gov>; Troutman, Nick <ntroutman@pasen.gov>; Emily.Eyster@pasenate.com; Gilroy, Patricia <pgilroy@pasen.gov>
Cc: Martin, Megan (OS) <mtmartin@os.pasen.gov>; DeLiberato, Vincent C. (LRB) <vdeliberato@palrb.us>; A.J. Mendelsohn <amendelsohn@palrb.us>; Griffin, Laura <laurgriffi@pa.gov>
Subject: Delivery of Proposed Rulemaking #7-558

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Stephen Hoffman

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Sent: Thursday, February 25, 2021 11:29 AM
To: Shirley, Jessica; Reiley, Robert A.; Kauffman, Gregory; Troutman, Nick; Emily.Eyster@pasenate.com; pgilroy@pasen.gov
Cc: Martin, Megan; Vincent Deliberato; A.J. Mendelsohn; Griffin, Laura
Subject: [External] Delivery of Proposed Rulemaking #7-558
Attachments: 7-558_Proposed_Transmittal Sheet_House ERE.pdf; Comitta_Senate ERE_7-558_Proposed.pdf; Yaw_Senate ERE_7-558_Proposed.pdf

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