

RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 87 AND 88]

Water Supply Protection/Replacement (Mining)

The Environmental Quality Board (Board) by this order amends Chapters 87 and 88 (relating to surface mining of coal; and anthracite coal). These amendments address water supply replacement (coal surface mining) and revegetation of previously disturbed and unreclaimed areas.

This order was adopted by the Board at its meeting of January 20, 1998.

A. *Effective Date*

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

B. *Contact Persons*

For further information contact Roderick A. Fletcher, Bureau of Mining and Reclamation, P.O. Box 8461, Rachel Carson State Office Building, Harrisburg, PA 17105-8461, (717) 787-5103, or Joseph Pizarchik, Assistant Counsel, P.O. Box 8464, Rachel Carson State Office Building, Bureau of Regulatory Counsel, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final rulemaking is available electronically through the Department of Environmental Protection's (Department) Web site (<http://www.dep.state.pa.us>).

C. *Statutory Authority*

The final rulemaking is being made under the rulemaking authority of section 4.2(a) of the Surface Mining Conservation and Reclamation Act (SMCRA) (52 P.S. § 1396.4b(a)) which provides the Department's general rulemaking authority, sections 4(a) and 4.2(f) of SMCRA which establish requirements relating to water supply protection and revegetation and section 1920-A of The Administrative Code of 1929 (71 P.S. § 510-20) which authorizes the Board to adopt regulations necessary for the Department to perform its work.

D. *Background and Summary*

These amendments to Chapters 87 and 88 were developed in part to update the Department's coal mining regulations in light of the amendments to SMCRA (52 P.S. §§ 1396.1—1396.31) by the act of December 18, 1992 (P.L. 1384, No. 173) (Act 173) and the act of May 22, 1996 (P.L. 232, No. 43) (Act 43).

Act 173 amended section 4(a)(2)(C) of SMCRA to establish minimum vegetative cover requirements for areas previously disturbed by surface mining activities (that is, abandoned coal mine lands) which are proposed for remining. Section 4.2(f)(1) of SMCRA was amended to extend the water supply replacement requirement to anyone who affects a supply while performing government-financed reclamation. Also, section 4.2(f)(2) of SMCRA was amended by Acts 173 and 43 to provide rebuttable presumption provisions concerning replacement of water supplies affected by the surface coal

mining. Section 4.2(f)(2) of SMCRA, the presumption of liability provision, does not apply to persons engaged in government-financed reclamation contracts or to surface mining operations conducted under a mining permit issued by the Department before February 16, 1993.

These amendments are also based on several Commonwealth Court and Environmental Hearing Board (EHB) rulings which clarify the water supply replacement requirements of SMCRA and Department regulations. These clarifications address the character of the replacement water supply, including control, reliability and cost.

These amendments do not address water supply replacement requirements governing underground coal mining.

These regulatory changes were reviewed and discussed with the Mining and Reclamation Advisory Board (MRAB) which is the Department's advisory body for regulations pertaining to the surface mining of coal. A draft of the final-form regulations was reviewed and discussed with the MRAB's Regulation, Legislation and Technical Committee on October 23, 1997. The MRAB concurred with the rulemaking at its meeting on October 24, 1997.

The following summary identifies the sections of the regulations being amended along with a description of the specific change.

§§ 87.1 and 88.1 (Definitions)

A definition of "de minimis cost increase" is being added. A de minimis cost increase over the cost to operate and maintain the original water supply is one that is either no more than \$60 or no more than 15% of the cost to operate and maintain the original supply. For example, if the original supply cost \$500 per year to run and the replacement supply cost \$570 per year, the cost increase is \$70 or 14% of the original cost. Although \$70 is greater than \$60, it is less than 15% of the cost of the original. Consequently, the \$70 increase is a de minimis cost increase. The definition is needed when determining whether a replacement water supply is adequate.

A definition of "water supply" is being added to §§ 87.1 and 88.1. The definition is not new language but is existing language that is being relocated from §§ 87.119 and 88.107.

A definition of "water supply survey" is being added to §§ 87.1 and 88.1 for the purpose of clarity. The language of Act 173 simply refers to a survey. The term is used in the context of water supplies. What is intended is a water supply survey, as opposed to some other type of survey such as a property survey or an archeological survey. The definition of "water supply" survey also describes the contents of the survey.

The survey is to collect the specified information that is reasonably available. Information that is reasonably available is information which can be collected without extraordinary efforts or the expenditure of excessive sums of money. For example, if the well owner does not possess information on the length of the well casing, an operator would not be expected to spend the money for a borehole camera to determine the length of the casing or to remove a structure, such as a sunroom, that had been constructed over the well.

§§ 87.119(a) and 88.107(a) (Water Supply Replacement Obligations)

The phrase "or any person engaged in government-financed reclamation" has been added based on sections 4.2(f)(1) and 4.8(g) of SMCRA which establish water supply replacement requirements for persons engaged in government-financed reclamation, including reclamation under a no-cost government-financed reclamation contract.

For years, section 4.2(f)(1) of SMCRA and §§ 87.119(a) and 88.107(a) have required an operator who affects a water supply to replace the affected supply with an alternate source adequate in water quantity and quality for the purpose served by the supply. Neither the statute nor the regulations defined the term "adequate." This resulted in litigation. The resulting court decisions provide guidance in determining whether a replacement water supply is "adequate." The court decisions addressed increased operation and maintenance costs, increased maintenance and the control, accessibility, reliability and permanence of the replacement water supply. These sections are amended to incorporate these court decisions and clarify what is meant by "adequate" for the purposes of a restored or replaced water supply.

In *Carlson Mining Co. v. DER*, 639 A.2d 1332 (Pa. Cmwlth. 1994) and *Carlson Mining Co. v. DER*, EHB 91-547-E the courts addressed increased operating and maintenance costs of a restored or replacement water supply. The courts found that for a replacement water supply to be adequate, any increase in operation and maintenance costs must be de minimis. The coal company is permanently responsible for any increase in operation or maintenance costs that are not de minimis. The term "de minimis cost increase" is defined in §§ 87.1 and 88.1 and is addressed in §§ 87.119 and 88.107.

Other decisions have also dealt with cost differentials for water supplies. These cases are *Gioia Coal Co. v. DER*, 1986 EHB 82 and *Buffy & Landis v. DER*, 1990 EHB 1665. In *Gioia*, the EHB held that, unless operation and maintenance costs were excessive, the Department could not require the operator to pay for the additional costs of the replacement supply. What would be "excessive" was not defined. In *Buffy & Landis*, the EHB held that: ". . . (a) proposal for a replacement water supply cannot be considered as an alternative source of water adequate in quantity and quality unless it demonstrates that either the O&M (operation and maintenance) costs for the proposed replacement source are substantially the same as the existing system and the existing supply's users agree to shoulder these costs or that the miner has included in its proposal a satisfactory method for compensating the users of the existing supply for the replacement supply's increased costs." In *Carlson*, the EHB found that costs were excessive if there is more than a de minimis cost increase. The costs of the replacement supply included an annual increase of \$200.24 and a five-fold increase between the costs of operating and maintaining the original supply and the replacement supply. The EHB found these costs to be more than marginally higher and excessive.

"De minimis cost increase" has been defined in these amendments as an annual cost increase which is either less than 15% of the annual operating and maintenance costs of the previous supply or less than \$60 per year. The factor of 0.15 is based on the fact that multiple cost estimates for the same water supply can vary by a factor of 15%. This factor is clearly less than the five-fold increase which was found to be excessive in *Carlson*. The

amount of \$60 is also based on *Carlson*, where the amount of \$200.24 was found to be excessive. Sixty dollars is less than three-tenths of the cost increase for *Carlson* and is an average of \$5 per month, which is an amount less than typical discretionary expenditures for most households. The definition of "de minimis" given above is much less than the values disputed in *Carlson* and is intended to avoid disagreements over amounts that are essentially the same, or of insignificant difference.

A cost increase less than 15% of the annual operating and maintenance costs of the previous supply is a de minimis cost regardless of the amount. For example, if the annual operation and maintenance costs of the previous supply were \$1,000 and the annual operation and maintenance costs of the replacement supply are \$1,140, the increase of \$140 is a de minimis cost because it is less than 15% of the annual operation and maintenance costs of the previous water supply. This is true even though the increased costs are more than \$60.

Similarly, an annual cost increase of less than \$60 is a de minimis cost. This is true even though the increase may be 15% or more of the annual operation and maintenance costs of the previous supply. For example, if the annual operation and maintenance costs of the previous supply were \$120 and the annual operation and maintenance costs of the replacement supply are \$144 (an increase of \$24 or 20%) the increase is still de minimis because it is less than \$60.

It does not matter whether the increase in annual operation and maintenance costs exceeds the previous supply's operation and maintenance costs by 15% or more or if they are \$60 or more as long as the increase in annual operation and maintenance costs is less than one of these amounts. If it is less than one of these amounts, and it does not matter which one, the cost increase is de minimis.

The new provision concerning adequacy of the replacement supply in regards to maintenance, control, accessibility, reliability and permanence is being added to address a portion of the decisions in *Gioia*, *Buffy & Landis* and *Haydu v. DER & PBS Coals Co., Inc.*, 1994 EHB 826. In *Gioia* the EHB found that: ". . . the user of a replacement water supply-who originally had complete control over his supply-be able to avoid having the replacement supply cut off at any time by the acts of another person." In *Buffy & Landis*, the EHB ruled that ". . . when *Buffy & Landis*, exclusively control their existing private sources of supply, the proposal for a community replacement source of water must demonstrate that *Buffy & Landis* retain substantially equal control over it or consent thereto, if it is to be judged an adequate replacement proposal." It should be noted here that the term "community replacement source of water" in *Buffy & Landis* refers to a well that was to service five homes, and does not refer to a public water supply. In *Haydu*, the EHB found that: ". . . (t) to satisfy the requirements of section 4.2(f) of the SMCRA, a replacement water supply: must have an adequate quantity and quality; must not be unreliable; must not require excessive maintenance; and must provide the property owner with as much control as he exercised over his previous supply." The provisions in these regulations at §§ 87.119(a)(1) and (2) and 88.107(a)(1) and (2), address these decisions.

It has been Department practice for several years to allow a water supply owner to waive an operator's obligation to restore or replace an affected water supply. The waiver had to be in writing on a Department form

and had to be approved by the Department. The MRAB, after considerable debate, recommended that a waiver provision be included in these amendments. The debate revolved around who should be allowed to submit the waiver. For example, if the landowner had leased the property as a residence, could the landowner or the tenant waive the requirement to replace the water supply without considering the interests of the other or was it necessary for both to agree to the waiver?

The statutory obligation to replace an affected water supply extends to the use of the water resource. The obligation to replace is not conditioned upon the user also being the landowner. In recognition of the possibility that more than one person can have a legal interest in a water supply, the waiver provisions added as §§ 87.119(a)(3) and 88.107(a)(3) allow for the waiver of the obligation to replace a water supply if everyone possessing a legal interest in the water supply agrees to the waiver. This approach is necessary to protect everyone's rights and to avoid needless disputes. The waiver must be in writing on a form prepared by the Department. Everyone possessing an ownership interest in the affected water supply must sign the waiver. For example, if the landowner has leased the property as a residence, both the landowner and the tenant must sign the waiver.

It is also intended that the requirement to restore or replace a water supply can be waived in its entirety or in part. For example, if the affected water supply has been replaced with a water supply that is adequate in every respect except that the replacement supply costs more to operate and maintain, the owner may waive the requirement to pay the increased operation and maintenance costs. This would occur when the operator agrees to pay the future operation and maintenance costs in a lump sum instead of when costs are incurred. This is both more efficient and less onerous on the user and the operator.

§§ 87.119(b) and 88.107(b) (Presumption of Liability for Pollution)

Acts 173 and 43 added section 4.2(f)(2)–(7) to SMCRA which creates a presumption of liability on the part of a surface mine operator or mine owner for pollution or diminution of public or private water supplies located within 1,000 feet (304.80 meters) of areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads. This provision is not applicable to persons engaged in government-financed reclamation contracts. Section 4.2(f) of SMCRA also contains five conditions which a surface mine operator or surface mine owner may use to rebut the presumption of liability. The same presumption of liability applies to unpermitted surface mining activities.

It should be noted that, with or without a rebuttable presumption of liability, the Department will continue to carefully evaluate each instance of water supply contamination or diminution based on the best scientific and technical information available, prior to ordering a surface mine operator or mine owner to restore or replace a water supply.

§§ 87.119(c) and 88.107(c) (Defenses to Presumption of Liability)

The language for §§ 87.119(c) and 88.107(c) reflects the provisions of section 4.2(f) of SMCRA as amended by Acts 173 and 43. The language identifies conditions which may be applied by a mine operator in defense to a presumption of liability for pollution or diminution of a public or private water supply.

§§ 87.119(d) and 88.107(d) (Notification to the Department)

These provisions require the surface mine operator or mine owner to provide the Department with all information pertaining to available defenses. This will allow the Department to evaluate any defenses to the presumption of liability available to the surface mine operator or mine owner and will enable the Department to avoid issuing orders when there are defenses. Evaluating defenses before issuing orders will save the operator and the Department expenses related to appeals of these orders when there are defenses.

§§ 87.119(e) and (f) and 88.107(e) and (f) (Immediate Replacement of Water Supply and Department Cost Recovery)

These subsections were added to implement section 4.2(f)(3) of SMCRA. These requirements authorize the Department to restore or replace a water supply when the surface mine operator or mine owner fails to comply with an order issued by the Department to restore or replace a water supply which the Department determined had been affected by the operator. The requirements authorize the Department to recover incurred costs, including costs for providing a temporary water supply, from the surface mine operator or mine owner.

§§ 87.119(g) and 88.107(g) (Operator Cost Recovery)

These subsections reflect the provisions of section 4.2(f)(5) of SMCRA and allow a surface mine operator or mine owner who provides a successful defense to the presumption of liability to seek recovery of reasonable costs from the Department. These costs include costs incurred for providing a temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees.

§§ 87.119(h) and (j) and 88.107(h) and (j) (Other Remedies and Departmental Authority)

These subsections reflect section 4.2(f)(6) of SMCRA which allows a landowner, water supply user or water supply company who claims pollution or diminution of a water supply to pursue other legal remedies than are provided for by section 4.2(f) of SMCRA and these regulations. Subsections (j) in §§ 87.119 and 88.107 provide notice that the Department's authority to take other actions is not limited by those sections.

§§ 87.119(i) and 88.107(i) (Issuance of New Permits)

These subsections reflect section 4.2(f)(4) of SMCRA. If the Department issues an order under § 87.119 or § 88.107 and that order is appealed, the Department cannot use the appealed order as the basis for blocking the issuance of new permits to the operator or the release of bonds when all other requirements for bond release have been satisfied. If the operator does not appeal the Department order, the order can serve as the basis for blocking the issuance of new permits to the operator or releasing bonds on any site.

§§ 87.119(k) and 88.107(k) (Exception)

These subsections reflect section 4.2(f)(7) of SMCRA which provides that the provisions relating to the presumption of liability for replacement of water supplies do not apply to surface coal mine permits issued before February 16, 1993.

§§ 87.147(b), 88.121(b) and 88.209(b) (Revegetation)

These sections were revised to provide for a different vegetative cover requirement. Section 4(a)(2)C of SMCRA allows the Department to approve a lesser vegetative

cover requirement for areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and Chapters 87 and 88 and are proposed for re-mining.

E. Summary of Comments and Responses on the Proposed Rulemaking

The proposed rulemaking was published at 27 Pa.B. 2245 (May 3, 1997). Public hearings on the proposed rulemaking were held by the Board on June 10, 1997, in Greensburg, PA and June 12, 1997, in Pottsville, PA. The public comment period expired on July 2, 1997.

This section contains a summary of comments received by the Board during the public comment period. Comments were received from three commentators and the Independent Regulatory Review Commission (IRRC). A detailed description of comments, along with responses, is contained in the Department's Comment and Response Document which is available from the Bureau of Mining and Reclamation at the address shown in Section B of this Preamble.

The Department submitted the proposed rulemaking to the Federal Office of Surface Mining (OSM) on May 13, 1997, for their informal review as an amendment to Pennsylvania's Federally-approved mining regulatory program. The OSM's comments were received subsequent to the close of the public comment period. A discussion of the OSM's comments is, nevertheless, included in this section.

A summary of the comments and responses on the proposed rulemaking is presented as follows:

§§ 87.1 and 88.1. Definitions

One commentator stated that the definition of "water supply survey" is unclear because it references "reasonably available information" without providing any direction on what is considered "reasonably available." The commentator recommended criteria be included in the regulation to improve clarity and provide guidance for determining whether information to be collected when conducting a water supply survey is reasonably available. The Board agrees and additional language has been added to the definition of "water supply survey" in §§ 87.1 and 88.1 providing this guidance.

§§ 87.119 and 88.107. Hydrologic balance: water rights and replacement.

§§ 87.119(a)(1)(iii) and 88.107(a)(1)(iii)

One commentator indicated that the requirement that a replacement water supply not require "excessive maintenance" was unclear. IRRC recommended defining "excessive maintenance" to improve the clarity of the regulation. The OSM indicated that the requirement that the replacement water supply not require excessive maintenance may be inconsistent with the Federal rule which requires that the replacement water supply be an equivalent water delivery system. The Department believes the regulation is as effective as the Federal rule.

Inclusion of this requirement in the regulations was the result of the *Haydu* EHB decision which found that a replacement water supply "must not require excessive maintenance." The court did not define what was "excessive." Due to the variable factual situations encountered, the Board has not developed a definition that would address all circumstances. Therefore, the Board feels it is in the best interest of all parties to leave the term undefined and to apply a common sense approach.

§§ 87.119(a)(3) and 88.107(a)(3)

One commentator identified the requirement of § 87.119(a)(3) that restoration or replacement of an affected water supply may be waived upon approval by the Department and indicated that there are no provisions in SMCRA which address waivers. The commentator agreed that a landowner may elect to negotiate an agreement with the surface mining operator in lieu of restoration or replacement of its water supply. The commentator disagreed with a requirement that water supply waiver agreements between two private parties must be approved by the Department. The Board agrees that water supply waiver agreements between two private parties should not require Department approval but that the Department simply be informed that a solution acceptable to the owners of interest has been reached. The regulation has been revised to delete the requirement for Department approval.

One commentator suggested that the language in § 87.119(a)(3), "everyone who possesses an ownership interest," should be defined. Another commentator suggested § 87.119(a)(3) be modified to limit who has ownership rights in a water supply. The Board believes it is inappropriate and unnecessary to define who possesses an ownership interest in a water supply. Whether someone possesses an ownership interest in a water supply is a matter of Pennsylvania law and it is inappropriate for these regulations to establish property rights. No changes were made to the regulations based upon these comments.

One commentator noted that § 87.119(a)(3) should be amended. The commentator indicated § 87.119(a)(3), as written, could be construed to only allow complete waivers of the water supply replacement obligation. The Board agrees and has amended the provision to allow waivers of any of the requirements of § 87.119(a).

The OSM indicated that waiver of the requirement to restore or replace a water supply under certain circumstances appears to be less effective than Federal requirements. The Department believes the amendments are as effective as Federal requirements.

§§ 87.119(c) and (d) and 88.107(c) and (d)

One commentator questioned why "water supply user" in §§ 87.119(c)(1) and 88.107(c)(1) was included as a party who could refuse access to property. The commentator also questioned how the landowner, who could potentially lose the protection of the presumption of the operator's liability, would be aware that the "water supply user" had refused access to the property. The commentator noted that SMCRA limits the parties to "the landowner or water supply company" and recommended the Board remove the phrase "water supply user" for consistency with SMCRA. The Board agrees and the language "water supply user" has been deleted from §§ 87.119(c)(1) and 88.107(c)(1). In addition, §§ 87.119(d) and 88.107(d) have been revised by adding language to ensure that the landowner or water supply company is aware that the refusal to provide access to a surface mine operator or mine owner to conduct a water supply survey could be used by the mine operator or mine owner to rebut a presumption of liability.

One commentator indicated §§ 87.119(c)(1) and (5) and 88.107(c)(1) and (5) refer to surface mine operators or owners having reasonable access to conduct a water supply survey or determine the cause of pollution; however, the sections do not address the meaning of "reasonable access." The commentator recommended that the

regulations include criteria which will outline what is "reasonable access." The Board has deleted the word "reasonable" from these sections so as to conform with the statutory provision relating to these sections.

§§ 87.119(g) and 88.107(g)

One commentator indicated § 87.119(g) should be amended to delete the word "seek" from the language indicating a mine operator or owner be entitled to seek recovery of reasonable costs after providing a successful defense to a Department order to the presumption of liability. The Board agrees and has deleted the word "seek" from § 87.119(g) as well as § 88.107(g).

Another commentator noted that §§ 87.119(g) and 88.107(g) provide a mine owner or operator who appeals a Department order and provides a successful defense to the presumptions of liability, is entitled to seek recovery of reasonable costs. The commentator also noted that the mine owner or operator is entitled to recovery of costs only if the owner or operator "is not otherwise held responsible for the pollution or diminution." Although the commentator indicated section 4.2(f)(5) of SMCRA creates an absolute entitlement for a mine owner or operator to recovery of legal fees and agreed with the Department that a mine owner or operator who is ultimately held responsible for contaminating a water supply should not be entitled to legal fees, it believed that the Board cannot incorporate the phrase "and not otherwise held responsible" in the regulations unless SMCRA is amended. Section 4.2(a) of SMCRA requires mining to be conducted in accordance with reasonable regulations deemed necessary by the Department for fulfillment of the purposes of SMCRA. This regulation is necessary to carry out the purpose of fulfilling the provisions allowing an aggrieved operator to appeal a Department order and if successful, to be awarded costs and fees. An operator who appeals a Department order, successfully rebuts the presumption of liability but is ultimately found to be legally responsible has not been aggrieved by the Department. The Board has made no change in the regulations based upon these comments.

Chapters 87 and 88: Water Supply Protection/Replacement Rulemaking

One commentator asked whether the proposed rule-making will eventually apply to noncoal (industrial minerals) surface mining activities in this Commonwealth. The commentator indicated a major concern with respect to presumption of liability for water supplies within 1,000 feet (304.80 meters) if the requirements ultimately applied to noncoal (industrial mineral) mining. These changes are based upon amendments to SMCRA which only apply to coal mining. This rulemaking does not apply to noncoal (industrial mineral) mining.

F. Benefits, Costs and Compliance

Executive Order 1996-1 requires a cost/benefit analysis of the final-form regulations.

Benefits

The benefits of these final-form regulations are that water supplies within 1,000 feet (304.80 meters) of land affected by surface mining activities (under a permit issued after February 16, 1993) should be replaced more expeditiously. The final-form regulations relating to revegetation impose no additional costs to surface coal mine operators and could save operators an estimated \$32,000 annually (\$40 reclamation cost savings per acre × 800 acres of abandoned mine land remined per year = \$32,000). In addition, the regulations relating to revegetation should pro-

vide some additional incentive for surface coal mine operators to remined previously mined and unreclaimed lands.

Compliance Costs

The final-form regulations impose no additional mandatory costs on the coal operator other than those currently required under the statutory provisions of SMCRA. Operator costs for permanent replacement or restoration of degraded water supplies would be approximately \$7,500 per supply. Operator costs for providing a temporary water supply (until permanent replacement or restoration) would be approximately \$1,000 based upon providing a household with four residents with 75 gallons (283.88 liters) a day per resident for 2 months. The annual costs for water supply replacement would amount to an estimated \$40,800, assuming 5% of the operators degrade one water supply during a 5-year period ($\$8,500 \text{ per supply} (\$7,500 + \$1,000) \div 5 \text{ years} = \$1,700 \text{ per year} \times 24 \text{ operators (5\% of 480 operators)} = \$40,800 \text{ per year}$).

The Commonwealth's costs of administering and enforcing these requirements will not change significantly beyond what is currently required under the statutory provisions of SMCRA. The statutory provisions could significantly increase the Commonwealth's costs if the Department is unsuccessful in defending appeals by mine operators of Department orders to replace water supplies. The Department currently investigates approximately 80 complaints annually concerning degraded water supplies in the vicinity of surface coal mine operations. If the Department issued two compliance orders annually for replacement or restoration of a degraded water supply within 1,000 feet (304.80 meters) of a mining operation and the mine operator was successful in defending an appeal of the orders under the rebuttable presumption provisions, the estimated minimum annual costs to the Department would be \$17,000 ($\$8,500 \text{ per water supply} \times 2 \text{ supplies per year} = \$17,000 \text{ per year}$). These are minimum costs and do not account for attorney fees and expert witness fees which the operator would also be entitled to recover under the statutory provisions relating to rebuttable presumption and under these final-form regulations. These costs represent a very conservative estimate of what the overall costs may be to the Department if litigation costs are taken into account.

Compliance Assistance Plan

The coal mining regulatory program has existed for several years in this Commonwealth. Compliance assistance will inform the coal surface mining industry of the specific changes resulting from this rulemaking through technical guidance and fact sheets. Regional roundtable meetings with the industry will be arranged if needed.

Paperwork Requirements

These amendments will not result in additional forms or reports. Additional recordkeeping to document access to water supplies and costs associated with temporary and permanent replacement supplies will be necessary to implement section 4.2(f) of SMCRA.

G. Sunset Review

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

H. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on April 16, 1997, the Department

submitted a copy of the proposed rulemaking to IRRC and the Chairpersons of the Senate and House Environmental Resources and Energy Committees. In compliance with section 5(b.1) of the Regulatory Review Act, the Department also provided IRRC and the Committees with copies of the comments, as well as other documentation.

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

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), these final-form regulations were deemed approved by the House and Senate Environmental Resources and Energy Committee on March 16, 1998. IRRC met on March 26, 1998, and approved the final-form regulations.

I. 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 Pa. Code §§ 7.1 and 7.2.

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

(3) These final-form regulations do not enlarge the purpose of the proposal published at 27 Pa. B. 2245 (May 3, 1997).

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

J. Order of the Board

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

(a) The regulations of the Department, 25 Pa. Code Chapters 87 and 88, are amended by amending §§ 87.1, 87.119, 87.147, 88.1, 88.107, 88.121 and 88.209 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

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

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

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

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

JAMES M. SEIF,
Chairperson

Fiscal Note: Fiscal Note 7-315 remains valid for the final adoption of the subject regulations.

Annex A

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

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 87. SURFACE MINING OF COAL

Subchapter A. GENERAL PROVISIONS

§ 87.1. Definitions.

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

* * * * *

De minimis cost increase—For purposes of § 87.119 (relating to hydrologic balance: water rights and replacement), a cost increase which meets one of the following criteria:

(i) Is less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced.

(ii) Is less than \$60 per year.

* * * * *

Water supply—For the purpose of § 87.47 (relating to alternative water supply information) and § 87.119, an existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses.

Water supply survey—

(i) The collection of reasonably available information for a water supply to establish:

(A) The location, type and use of the water supply.

(B) The chemical and physical characteristics of the water.

(C) The quantity of the water.

(D) The physical description of the water supply, including the depth and diameter of the well, length of casing and description of the treatment and distribution systems.

(E) Hydrogeologic data such as the static water level and yield determination.

(ii) Reasonably available information is information which can be collected without extraordinary effort or the expenditure of excessive sums of money.

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Subchapter E. SURFACE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 87.119. Hydrologic balance: water rights and placement.

(a) *Water supply replacement obligations.* The operator of any mine or a person engaged in government-financed reclamation who affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quantity and water quality, for the purpose served by the water supply.

(1) To be adequate, the restored or replacement water supply, at a minimum, shall:

- (i) Be as reliable as the previous water supply.
- (ii) Be as permanent as the previous water supply.
- (iii) Not require excessive maintenance.

(iv) Provide the owner and the user with as much control and accessibility as exercised over the previous water supply. The use of a public water supply as a replacement water supply provides the owner and the user adequate control and accessibility.

(v) Not result in more than a de minimis cost increase to operate and maintain.

(2) If the operating and maintenance costs of the restored or replacement water supply are more than a de minimis cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance costs of the restored or replacement water supply.

(3) The requirement contained in this subsection to restore or replace an affected water supply or an individual requirement of paragraphs (1) and (2) may be waived. The waiver shall be in writing on a form prepared by the Department. Everyone who possesses an ownership interest in the water supply shall sign the waiver. The form shall be recorded at the office of the recorder of deeds in the county in which the water supply is situated and a notarized copy of the form shall be provided to the Department.

(b) *Presumption of liability for pollution.*

(1) It shall be presumed, as a matter of law, that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads.

(2) If surface mining activities are conducted on areas which are not permitted or bonded, it shall be presumed, as a matter of law, that the surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the land affected by the surface mining activities.

(c) *Defenses to presumption of liability.* There are only five defenses to the presumption of liability provided in subsection (b). For any of the five defenses to apply, the mine operator or mine owner shall affirmatively prove by a preponderance of evidence that one or more of the following conditions exists:

(1) The landowner or water supply company refused to allow the surface mine operator or mine owner access to conduct a water supply survey prior to commencing surface mining activities.

(2) The water supply is not within 1,000 linear feet (304.80 meters) of:

(i) The boundaries of areas bonded and affected by coal mining operations, areas of overburden removal and storage and areas used for support but not including haul and access roads.

(ii) The boundaries of areas affected by surface mining activities in areas which are not bonded.

(3) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(4) The pollution or diminution occurred as a result of some cause other than the surface mining activities.

(5) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner access to determine the cause of pollution or diminution or to replace or restore the water supply.

(d) *Notification to Department.* The surface mine operator or mine owner shall notify the Department and provide all information which supports a defense to the presumption of liability when one or more of the five defenses to the presumption of liability provided in subsection (c) are met. If a surface mine operator's or mine owner's defense to the presumption of liability is based on the conditions of subsection (c)(1), the operator or owner shall submit evidence to the Department demonstrating that the landowner or water supply company was notified by certified mail or personal service that the refusal of access to conduct a water supply survey could be used to rebut a presumption of liability.

(e) *Immediate replacement of water supply.* If the Department finds that immediate replacement of an affected water supply used for potable or domestic purposes is required to protect public health or safety and the surface mine operator or mine owner has failed to comply with an order issued under section 4.2(f) of SMCRA (52 P.S. § 1396.4b(f)), the Department may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply.

(f) *Department cost of recovery.* The Department will recover the costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible surface mine operator or mine owner. Costs recovered will be deposited in the Surface Mining Conservation and Reclamation Fund.

(g) *Operator cost recovery.* A surface mine operator or mine owner who appeals a Department order, provides a successful defense during the appeal to the presumptions of liability and is not otherwise held responsible for the pollution or diminution is entitled to recovery of reasonable costs incurred, including, but not limited to, the costs of temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees from the Department.

(h) *Other remedies.* Nothing in this section prevents a landowner, water supply user or water supply company who claims pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or in equity.

(i) *Issuance of new permits.* A Department order issued under this section which is appealed will not be used to block issuance of new permits or the release of bonds when a stage of reclamation work is completed.

(j) *Department authority.* Nothing in this section limits the Department's authority under section 4.2(f)(l) of SMCRA.

(k) *Exception.* A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b)—(i), but is subject to subsections (a) and (j).

§ 87.147. **Revegetation: general requirements.**

(a) Vegetation shall be established on land affected by surface mining activities.

(b) Revegetation shall provide for a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area, except that introduced species may be used in the revegetation process when desirable and necessary to achieve the approved postmining land use plan. Vegetative cover shall be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the approved postmining land use, when compared with the utility of naturally occurring vegetation during each season of the year.

(1) For areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and this chapter, and are proposed to be reaffected or redisturbed, the Department may approve a vegetative cover which, at a minimum, may not be less than the vegetative cover existing before redisturbance and shall be adequate to control erosion and achieve the approved postmining land use.

(2) For areas designated as prime farmland, §§ 87.177—87.181 apply.

(c) Revegetation shall provide a quick-germinating, fast-growing vegetative cover capable of stabilizing the soil surface from erosion.

(d) Revegetation shall be completed in compliance with the plans submitted under § 87.68 (relating to reclamation information) as approved by the Department in the permit and carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with the approved postmining land use.

CHAPTER 88. ANTHRACITE COAL

Subchapter A. GENERAL PROVISIONS

PRELIMINARY PROVISIONS

§ 88.1. **Definitions.**

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

* * * * *

De minimis cost increase—For purposes of § 88.107 (relating to hydrologic balance; water rights and replacement), a cost increase which meets one of the following criteria:

(i) Is less than 15% of the annual operating and maintenance costs of the previous water supply that is restored or replaced.

(ii) Is less than \$60 per year.

* * * * *

Water supply—For the purpose of § 88.27 (relating to alternative water supply information) and § 88.107, an existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agriculture, commercial, industrial or other uses.

Water supply survey—

(i) The collection of reasonably available information for a water supply to establish:

(A) The location, type and use of the water supply.

(B) The chemical and physical characteristics of the water.

(C) The quantity of the water.

(D) The physical description of the water supply, including the depth and diameter of the well, length of casing and description of the treatment and distribution systems.

(E) Hydrogeologic data such as the static water level and yield determinations.

(ii) Reasonably available information is information which can be collected without extraordinary efforts or the expenditure of excessive sums of money.

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Subchapter B. SURFACE ANTHRACITE COAL MINES: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 88.107. **Hydrologic balance: water rights and replacement.**

(a) *Water supply replacement obligations.* The operator of any mine or a person engaged in government-financed reclamation who affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quality and water quantity for the purpose served by the water supply.

(1) To be adequate, the restored or replacement water supply, at a minimum, shall:

(i) Be as reliable as the previous water supply.

(ii) Be as permanent as the previous water supply.

(iii) Not require excessive maintenance.

(iv) Provide the owner and the user with as much control and accessibility as exercised over the previous water supply. The use of a public water supply as a replacement water supply provides the owner and the user adequate control and accessibility.

(v) Not result in more than a de minimis cost increase to operate and maintain.

(2) If the operating and maintenance costs of the restored or replacement water supply are more than a de minimis cost increase, the operator shall provide for the permanent payment of the increased operating and maintenance costs of the restored or replacement water supply.

(3) The requirement contained in this subsection to restore or replace an affected water supply or an individual requirement of paragraphs (1) and (2) may be waived. The waiver shall be in writing on a form prepared by the Department. Everyone who possesses an ownership interest in the water supply shall sign the waiver. The form shall be recorded at the office of the recorder of deeds in the county in which the water supply is situated and a notarized copy of the form provided to the Department.

(b) *Presumption of liability for pollution.*

(1) It shall be presumed, as a matter of law, that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads.

(2) If surface mining activities are conducted on areas which are not permitted or bonded, it shall be presumed, as a matter of law, that the surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the land affected by the surface mining activities.

(c) *Defense to presumption of liability.* There are only five defenses to the presumption of liability provided in subsection (b). For any of the five defenses to apply, a mine operator or mine owner shall affirmatively prove by a preponderance of evidence that one or more of the following conditions exists:

(1) The landowner or water supply company refused to allow the surface mine operator or mine owner access to conduct a water supply survey prior to commencing surface mining activities.

(2) The water supply is not within 1,000 linear feet (304.80 meters) of:

(i) The boundaries of areas bonded and affected by coal mining operations, areas of overburden removal and storage and areas used for support but not including haul and access roads.

(ii) The boundaries of areas affected by surface mining activities in areas which are not bonded.

(3) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(4) The pollution or diminution occurred as a result of some cause other than the surface mining activities.

(5) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner access to determine the cause of pollution or diminution or to replace or restore the water supply.

(d) *Notification to the Department.* The surface mine operator or mine owner shall notify the Department and provide all information which supports a defense to the presumption of liability when one or more of the five defenses to the presumption of liability provided in subsection (c) are met. If a surface mine operator's or mine owner's defense to the presumption of liability is based on the conditions of subsection (c)(1), the operator or owner shall submit evidence to the Department demonstrating that the landowner or water supply company was notified by certified mail or personal service that the refusal of access to conduct a water supply survey could be used to rebut a presumption of liability.

(e) *Immediate replacement of water supply.* If the Department finds that immediate replacement of an affected water supply used for potable or domestic purposes is required to protect public health or safety and the surface mine operator or mine owner has failed to comply with an order issued under section 4.2(f) of SMCRA (52 P. S. § 1396.5b(f)), the Department may use moneys from the Surface Mining Conservation and Reclamation Fund to restore or replace the affected water supply.

(f) *Department cost of recovery.* The Department will cover the costs of restoration or replacement, the costs of temporary water supply and costs incurred for design and construction of facilities from the responsible surface

mine operator or mine owner. Costs recovered will be deposited in the Surface Mining Conservation and Reclamation Fund.

(g) *Operator cost recovery.* A surface mine operator or mine owner who appeals a Department order, provides a successful defense during the appeal to the presumptions of liability and is not otherwise held responsible for the pollution or diminution is entitled to recovery of reasonable costs incurred, including, but not limited to, the costs of temporary water supply, design, construction, restoration or replacement costs, attorney fees and expert witness fees from the Department.

(h) *Other remedies.* Nothing in this section prevents a landowner, water supply user or water supply company who claims pollution or diminution of a water supply from pursuing any other remedy that may be provided for in law or in equity.

(i) *Issuance of new permits.* A Department order issued under this section which is appealed, will not be used to block issuance of new permits or the release of bonds when a stage of reclamation work is completed.

(j) *Departmental authority.* Nothing in this section limits the Department's authority under section 4.2(f)(1) of SMCRA.

(k) *Exception.* A surface mining operation conducted under a surface mining permit issued by the Department before February 16, 1993, is not subject to subsections (b)—(i) but is subject to subsections (a) and (j).

§ 88.121. Revegetation: general requirements.

(a) Vegetation shall be established on all land affected by surface mining activities.

(b) Revegetation shall provide for a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the revegetation process when desirable and necessary to achieve the approved postmining land use plan. For areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and this chapter, and are proposed to be reaffected or redisturbed, the Department may approve a vegetative cover which, at a minimum, may not be less than the vegetative cover existing before redisturbance and shall be adequate to control erosion and achieve the approved postmining land use.

(c) Revegetation shall provide a quick, fast-growing vegetative cover capable of stabilizing the soil surface from erosion.

(d) Revegetation shall be completed in accordance with the reclamation plan of the permit application as approved by the Department.

(e) Revegetation shall be consistent with the approved postmining land use and specified in the permit application.

Subchapter C. ANTHRACITE BANK REMOVAL AND RECLAMATION: MINIMUM ENVIRONMENTAL PROTECTION PERFORMANCE STANDARDS

§ 88.209. Vegetation: general requirements.

(a) Vegetation shall be established on all land affected by bank removal and reclamation activities.

(b) Seeding and planting shall provide for a diverse, effective and permanent vegetative cover of the same

seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area; except that introduced species may be used in the vegetation process when desirable and necessary to achieve the approved postmining land use plan. For areas previously disturbed by surface mining activities that were not reclaimed to the standards of SMCRA and this chapter, and are proposed to be reaffected or redisturbed, the Department may approve a vegetative cover which, at a minimum, may not be less than the vegetative cover existing before redisturbance and shall be adequate to control erosion and achieve the approved postmining land use.

(c) Seeding and planting shall provide a quick, fast-growing vegetative cover capable of stabilizing the soil surface from erosion.

(d) Seeding and planting shall be completed in accordance with the reclamation plan of the permit application as approved by the Department.

(e) Vegetation shall be consistent with and support the approved postmining land use as specified in the permit application.

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