



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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HARRISBURG, PA 17101**

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May, 15, 1998

Honorable James M. Seif, Chairman
Environmental Quality Board
Rachel Carson State Office Building
16th Floor, 400 Market Street
Harrisburg, PA 17105-2063

Re: IRRC Regulation #7-331 (#1924)
Environmental Quality Board
Surface and Underground Coal Mining

Dear Chairman Seif:

The Independent Regulatory Review Commission (Commission) has enclosed comments on your proposed regulation #7-331. These comments outline areas of concern raised by the Commission. The comments also offer suggestions for your consideration when you prepare the final version of this regulation. These comments should not, however, be viewed as a formal approval or disapproval of the proposed version of this regulation.

If you or your staff have any questions on these comments or desire to meet to discuss them in greater detail, please contact Mary Lou Harris at 772-1284. She has been assigned to review this regulation.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:cae

cc: Sharon Freeman
Barbara Sexton
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

ENVIRONMENTAL QUALITY BOARD REGULATION NO. 7-331

SURFACE AND UNDERGROUND COAL MINING

MAY 15, 1998

We have reviewed this proposed regulation from the Environmental Quality Board (Board) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act specify the criteria the Commission must employ to determine whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to economic impact, reasonableness, and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Regulatory Analysis Form (RAF) - Economic Impact

The description of the proposal in the RAF states the proposal amends provisions which "impose disproportionate costs on the regulated community." We question what specifically has changed in the regulation to diminish the "disproportionate costs." We request the Department provide an explanation of these changes when it submits its final-form rulemaking.

2. Section 86.1. Definitions - Consistency with Federal regulations and Clarity

Fragile lands

The proposed regulation includes a definition of "fragile lands." The definition tracks the Federal definition, but also includes the phrase "where surface mining operations are prohibited under Section 4.5(h) of the Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.4e(h))." However, many of the areas listed in 52 P.S. § 1396.4e(h) do not meet the criteria listed in the definition of "fragile lands." We therefore question why the citation is included in the definition.

We recommend the phrase referencing Section 52 P.S. § 1396.4e(h) be deleted in the final-form rulemaking. Alternatively, the Department should provide an explanation for including references to sections that include areas that are not "fragile lands" based on the proposed definition.

Surface mining operations

The definition currently includes a provision related to disturbance of "surface, air or water resources of the area." This proposal removes the word "air" from the definition.

The preamble to the proposal states the term is being revised to be consistent with language used in Federal regulations in 30 CFR Section 761.5. However, we question whether the Board is creating an inconsistency within its own regulations.

Section 86.123(c)(3) of the Board's existing regulations requires a petitioner to provide information including "a description of how mining may adversely affect people, land, *air*, water or other resources."

For consistency, we recommend the Department remove the word "air" from the description requirements at Section 86.123(c)(3) or explain the distinction between these provisions which justifies the apparent inconsistency.

3. Section 86.103(e)(2)(ii). Procedures - Reasonableness and Clarity

The existing regulation at Section 86.103(e)(2) states that "when the proposed surface mining operation may adversely affect a public park or a place included on the National Register of Historic Places, the Department will transmit to the Federal, State, or local agencies with jurisdiction..." a copy of the completed permit application. It further requires that agency to respond within 30 days.

The proposed regulation adds a provision at Section 86.103(2)(ii) which states that "failure to object within the comment period shall constitute an approval of the proposed permit by that agency." We question whether the Department intends that a mining operation which would adversely affect a public park or historic place could get a permit deemed approved through inaction of an agency. We recommend the Department clarify the intent of this provision in the regulation and provide an explanation of the Department's intent in its Preamble.

4. Section 86.125. Procedures: hearing requirements - Clarity

Section 86.125(i)

Existing language in the Board's regulation states the Board will receive and consider written comments on the petition 15 days after the conclusion of the public hearing. The revised language in Section 86.125(i) states that "written comments will be received and considered 15 days after the conclusion of the public hearing *or as otherwise established by the Department.*"

We question what other methods or timetables will be established by the Department. Further, we question how the public will know when the Department plans to "otherwise establish" a different time period rather than use the 15-day provision. We further question what the Department will use as criteria to deviate from the 15-day provision. The phrase "or as otherwise established by the Department" is too vague. Therefore, it should be deleted from the final-form rulemaking. Alternatively, the Department should revise or clarify how, and in what circumstances, a different time period will be applied.

Section 86.125(j)

The Preamble provides that the proposal's approach allows for final recommendation by the Department within 12 months of receipt of a complete petition. We note that Federal regulations at 30 CFR Section 764.19(b) state that "a final written decision shall be issued by the regulatory authority, including a statement of reasons, within 60 days of completion of the public hearing, or, if no public hearing is held, then within 12 months after receipt of the complete petition."

Section 86.125(j) of the proposal provides that the Department will prepare a recommendation to the Board within 60 days of the close of the public comment period. We question how this proposal meets the 12-month time period requirement. Since the Board still has to act on the Department's recommendation by promulgating a rulemaking, we request the Department explain how the 12-month requirement is met.

5. Section 86.126(b). Procedures: decision - Clarity

Existing requirements at Section 86.126(b) provide that "a final written decision in the form of a regulation will be issued by the Board within 60 days following the public hearing, including a statement of reasons for the decision." The proposal deletes the language stating the written decision will be in the form of a regulation issued by the Board. Instead, the proposed regulation refers to the Board's regulatory decision.

We have several concerns with the language of this subsection. First, we question the definition of the term "regulatory decision." Second, the regulation is ambiguous as to whether the Board will promulgate a regulation to designate the area unsuitable for mining (UFM). Third, we question what process will occur if the Board determines not to designate the area UFM.

It is our understanding that the Department intends a dichotomy in the process to distinguish the process used when the Department recommends an area not be designated UFM and the process where the Department recommends a designation as UFM. The proposal does not clearly state this distinction.

We recommend that the term "regulatory decision" be deleted and the Board revise Section 86.126(b) to add separate subsections. Subsection 126(b)(1) should address the procedure used when the Department recommends an area not be designated UFM. Then, a Subsection 126(b)(2) should address the procedures the Board will follow when the Department has recommended designation of an area as UFM. As part of this subsection, the proposal should clarify that when an area is recommended to be designated as UFM, the Board will promulgate a regulation in accordance with the Commonwealth Documents Law and the Regulatory Review Act.

We further question what procedures would occur if the Board, rather than accepting a Department recommendation to designate or not to designate, requested the Department to provide additional information or conduct further study. We request the Board explain how this situation would be addressed.

As part of this subsection, the proposal should clarify that when an area is recommended to be designated as UFM, the board will promulgate a regulation in accordance with the Commonwealth Documents Law and the Regulatory Review Act.

INDEPENDENT REGULATORY REVIEW COMMISSION

RECEIVED
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DEP SECRETARY'S OFFICE

To: Shirley Hartman
or Patty Johnson
or Denise Henke
or Jocelyn Darrow

Agency: Department of Environmental Protection
Phone: 7-2814
Fax: 3-8926

From: Kristine M. Shorper, Executive Assistant
Company: Independent Regulatory Review
Commission

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Date: May 15, 1998
of Pages: 5

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-331. Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Shirley Hartman Date: 5/15/98