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## Final Regulation Agency Background Document

<b>Agency name</b>	Department of Mines, Minerals and Energy
<b>Virginia Administrative Code (VAC) citation</b>	4 VAC 25-130
<b>Regulation title</b>	Virginia Coal Surface Mining Reclamation Regulations
<b>Action title</b>	Amendments regarding the administrative hearing process, consistency with federal regulations, and civil penalties
<b>Date this document prepared</b>	11/13/06

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.*

The proposed action amends the Virginia Coal Surface Mining Reclamation Regulations to: revise references to sections in the Virginia Administrative Process Act to reflect its current numbering; provide direction as to where requests for formal administrative review and notices of judicial appeal shall be filed; maintain consistency with corresponding federal amendments regarding survey requirements and the rebuttable presumption of subsidence determinations; maintain consistency with federal regulations regarding thick overburden; maintain consistency between requirements for surface mines and underground mines; and increase the civil penalties for violations of the Virginia Coal Surface Mining Control and Reclamation Act that result in personal injury or fatality consistent with amendments to the Act.

### Statement of final agency action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

Action: Amendments regarding the administrative hearing process, consistency with federal regulations, and civil penalties

Date of Action: November 27, 2006

Name of Agency: Department of Mines, Minerals and Energy

Title of Regulation: 4 VAC 25-130 Coal Surface Mining Reclamation Regulations

## Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

The Department of Mines, Minerals and Energy (DMME) has authority to promulgate this regulation under authority found in § 45.1-161.3, Powers of the Department, § 45.1-230, Authority and duties of Director, and § 45.1-242, Performance standards.

- Section 45.1-161.3 empowers DMME, with the approval of the Director, to promulgate regulations necessary or incidental to the performance of duties or execution of powers under Title 45.1 of the Code of Virginia.
- Section 45.1-230 of the Code of Virginia empowers the DMME Director to promulgate regulations as may be necessary to carry out the provisions of the Virginia Coal Surface Mining Control and Reclamation Act, chapter 19 of Title 45.1 of the Code.

Section 45.1-242 of the Code of Virginia directs the DMME Director to, by regulation, establish performance standards applicable to all surface mining and reclamation operations. Establishment of these performance standards by regulation is mandatory.

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

Amendments of the administrative hearing regulations in the Coal Surface Mining Reclamation Regulations (4VAC25-130-700.12, 773.21, 775.11, 800.51, 842.15, 843.12, 843.13, 843.15, 845.18, and 845.19) are being made to update references to the Virginia Administrative Process Act. This is to ensure that the agency, industry, and public are provided with the correct and updated section references of the Virginia Administrative Process Act.

Amendments to 4VAC25-130-775.11, 775.13, 800.51, 843.13, 843.16, and 845.19 are made to provide direction as to where requests for formal administrative review and notices of judicial appeal shall be filed. These will ensure a consistent administrative and judicial review process for all parties to a contested action/decision and make this regulation consistent with recent changes to DMME's Public Participation Guidelines.

Amendments to 4VAC25-130-784.20 and 817.121 are made to be consistent with the corresponding federal amendments regarding survey requirements and the rebuttable presumption of subsidence determinations. The U. S. Court of Appeals vacated the federal rules on April 27, 1999, whereupon the Federal Office of Surface Mining suspended its rules effective December 22, 1999. As provided by 4VAC25-130-700.2 of the Virginia Coal Surface Mining Reclamation Regulation, "These regulations are

*promulgated pursuant to Chapter 19, Title 45.1 of the Code of Virginia (1950) as amended. In order for these regulations to receive approval by the United States Secretary of the Interior as part of the Commonwealth's permanent regulatory program, the Federal Surface Mining Control and Reclamation Act requires that these regulations be consistent with (as effective as) applicable regulations issued by the Secretary, contained in 30 CFR Chapter VII."*

Section 4VAC25-130-816.105 is being amended to ensure it addresses "thick overburden" conditions. The current version is essentially a duplication of 4VAC25-130-816.104, which pertains to "thin overburden" conditions. The amendment will ensure the Virginia regulation is consistent with the federal rule, 30 CFR 816.105.

Sections 4VAC25-130-817.11 and 817.64 are being amended to make requirements for signs and markers and blast monitoring for surface areas at underground coal mines consistent with those for surface coal mines.

Chapter 3 of the 2005 Virginia Acts of Assembly (HB 2573) increased the civil penalties for violations of the Virginia Coal Surface Mining Control and Reclamation Act that result in a personal injury or fatality. Sections 4VAC25-130-845.13, 845.15, and 846.14 are being amended to provide that a civil penalty up to \$70,000 may be assessed for a violation that results in personal injury or fatality, consistent with amendments to the Act.

## Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.*

The proposal involves changes to existing regulations. The proposed changes will: update references to Virginia Code sections to reflect the renumbering of the Administrative Processes Act; provide current information regarding the administrative hearing process; ensure regulations regarding subsidence are consistent with the federal rules; make regulations dealing with signs and markers and blast monitoring for surface areas at underground coal mines consistent with those for surface coal mines; ensure regulations regarding thick overburden are consistent with the federal rules; and revise the civil penalty system to address violations that result in personal injury or fatality. See "All Changes..." section below.

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If there are no disadvantages to the public or the Commonwealth, please indicate.*

The proposed changes correct and clarify a number of regulatory sections dealing with administrative hearings. These changes provide clearer instructions and will be advantageous to companies or individuals wishing to appeal agency regulations or decisions.

Proposed changes dealing with pre-mining survey requirements and the rebuttable presumption of subsidence determinations are being made to provide consistency with federal regulations.

Increased expenses for boundary markers and blast monitoring at underground coal mines may be considered disadvantages to businesses engaged in the mining of coal, however these changes are required to maintain consistency between requirement for underground mines and surface mines. Increased civil penalties for violations causing injury or death may also be considered disadvantages for the mining industry. These changes, however, represent important improvements to the safety of people living or working near coal mines and are required by the Virginia Coal Surface Mining Control and Reclamation Act.

These changes will have little impact on the agency, and no disadvantages are anticipated for the public or the Commonwealth.

**Changes made since the proposed stage**

*Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.*

No changes have been made since the proposed stage.

**Public comment**

*Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.*

Commenter	Comment	Agency response

No comments were received.

**All changes made in this regulatory action**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

The Department of Mines, Minerals and Energy is amending sections of 4VAC25-130, Coal Surface Mining Reclamation Regulations, as described in the following table.

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
<b>4VAC25-130-700.12(e)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act.
<b>4VAC25-130-773.21(c)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act
<b>4VAC25-130-775.11(b)(1)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
<b>4VAC25-130-775.11</b>	(d)	Requests for administrative review of the agency's decision shall be filed with the Director or his designee.	Add subsection (d) to inform that requests for hearings and appeals for review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.
<b>4VAC25-130-775.13</b>	(c)	Notice of appeal for judicial review would be filed with the Director or his designee.	Add subsection (c) to inform that a notice of appeal for judicial review of a Hearing Officer's final decision or final decision on review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
<b>4VAC25-130-784.20(a)(3)</b>	N/A	A permit applicant is required (unless denied access for such purposes by the owner) to conduct a survey of certain features, which were within the area that may be adversely impacted by proposed underground mine works (within a specific angle of draw from the outer most extent of). The features included non-commercial buildings, occupied dwellings and related structures, drinking, domestic and residential water supplies. The permit applicant was also required to notify owners of such features that a denial of access would remove the rebuttable presumption that subsidence from the operation caused any postmining damage to protected structures.	The U. S. Court of Appeals vacated the Federal rule on 4/27/1999 and the Federal Office of Surface Mining suspended its rule effective 12/22/1999. The regulation is amended to remove this subsection to be consistent with the Federal Rule (30 CFR 784.20(a)(3)) (64 FR 71652) .
<b>4VAC25-130-800.51(c)(1)</b>	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
<b>4VAC25-130-800.51(e)</b>	N/A	Requests for administrative review and notice of appeal for judicial review of the agency's decision shall be filed with the Director or his designee.	Insert "Department of Mines, Minerals and Energy" for clarification and consistency with other sections of the Act.

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
<p><b>4VAC25-130-816.105(a) &amp; (b)</b></p>	<p>N/A</p>	<p>The current regulation does not address “thick overburden” but instead reiterates the requirements for “thin overburden” situations of 4VAC250130-816.104. .</p>	<p>Correct the regulation so that it addresses “thick” overburden to be consistent with the Federal Rule (30 CFR 816.105). Thin overburden is addressed under Virginia Rule 4VAC25-130-816.104 and 30 CFR 816.104.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4 VAC 25-130-817.11(a)	N/A	Signs and markers on permitted coal mines must be made of durable material and be maintained during the conduct of all activities to which they pertain.	<p>In addition to being made of durable material and properly maintained, permit boundary markers on areas that are located on steep slopes above private dwellings or other occupied buildings will also be required to be made of or marked with fluorescent or reflective paint or material.</p> <p>This change is essential to protect the safety and welfare of persons living or in occupied buildings near coal mines. Workers on coal mines in areas located on steep slopes above residences or occupied buildings must have clear knowledge of the mine’s boundary location. If operations move beyond these boundaries, there is increased risk of releasing material off of the site. This change makes the regulation for surface areas at underground coal mines consistent with that for surface coal mines.</p>



Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4 VAC 25-130-817.64	(d)	When blasting with explosives on coal mines, the coal mine operator may use a formula, called the scaled distance equation, to determine the allowable charge weight of explosives to be detonated in any 8-millisecond period and not be required to monitor blast with a seismograph.	<p>Add subsection (d) to require that seismic monitoring be employed whenever blasting operations on a surface coal mine are conducted within 1,000 feet of a private dwelling or occupied building. This change will eliminate the exception for seismic monitoring when the scaled distance equation is used for blasting near occupied buildings.</p> <p>This amendment is essential to protect the safety and welfare of persons living near blasting operations on coal mines. Persons and property are at risk from blasting due to air blast, ground vibration, or fly rock from improper blasting. Blasting is the most common source of complaints about coal mining operations. Monitoring every blast close to occupied buildings will enable the Department of Mines, Minerals and Energy to better determine whether blasts on coal mines exceed the maximum air blast and ground vibration requirements in the regulation. This change makes the regulation for surface areas at underground coal mines consistent with that for surface coal mines.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-817.121(c)	N/A	(c)(4) (i) through (iv) of the regulation provided that if damage to any non-commercial building or occupied residential dwelling or structure related thereto occurred as a result of earth movement within an area determined by projecting a specific angle of draw from the outer most boundary of an underground mine workings to the surface of the land, a rebuttable presumption would exist that the permittee caused the damage.	The U. S. Court of Appeals vacated the Federal rule on 4/27/1999 and the Federal Office of Surface Mining suspended its rule effective 12/22/1999. This change will revise subpart (c)(4) of Virginia’s Rule to be consistent with the Federal Rule by deleting subsections 4(i) through (iv).
4VAC25-130-842.15(d)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act.
4VAC25-130-843.12(j)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:1 to 2.2-4000A to reflect the renumbering of the Administrative Process Act.
4VAC25-130-843.13(b)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-843.13(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Insert “Department of Mines, Minerals and Energy” for clarification and consistency with other sections of the Act.
4VAC25-130-843.15(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:11 to 2.2-4019 to reflect the renumbering of the Administrative Process Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-843.16(e)	N/A	Requests for administrative review and notice of appeal for judicial review of the agency’s decision shall be filed with the Director or his designee.	Insert “Department of Mines, Minerals and Energy” for clarification and consistency with other sections of the Act.
4VAC25-130-845.13(c), (d), (e) & (f)	N/A	Cessation Orders must be assessed civil penalties and notices of violation may be assessed civil penalties. In determining a penalty assessment a point system is used. The maximum daily penalty for a violation is \$5,000.	<p>This part is amended to correct typographical errors in (c)(1) and (d).</p> <p>Subparts (e)(1) and (f) are amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person. The penalty for an violation resulting in personal injury or fatality would exclude the history consideration and the penalty would be determined by multiplying the base penalty value (maximum of \$3,500) under the point system by a factor of 20, not to exceed \$70,000 per violation.</p>

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-845.15(a)	N/A	Cessation Orders must be assessed civil penalties and notices of violation may be assessed civil penalties. In determining a penalty assessment a point system is used. The maximum daily penalty for a violation is \$5,000. The Division may assess separately a civil penalty for each day from the date of issuance of the notice of violation or cessation order to the date set for abatement of the violation.	This rule is amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person.
4VAC25-130-845.18(b)(1)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:11 to 2.2-4019 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-845.19(c)	N/A	Administrative hearings are to be conducted in accordance with the Virginia Administrative Process Act.	Change Virginia Code section from 9-6.14:12 to 2.2-4020 to reflect the renumbering of the Administrative Process Act.
4VAC25-130-845.19(d)	(d)	Requests for administrative review and notice of appeal for judicial review of the agency's decision shall be filed with the Director or his designee.	Add subsection (d) to inform that requests for hearings and appeals for review and reconsideration and a notice of appeal for judicial review of a Hearing Officer's final decision or final decision on review and reconsideration be filed with the Director to be consistent with similar regulations under the Act.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
4VAC25-130-846.14(b)	N/A	Individuals of a corporate permittee may be subject the individual civil penalty assessment under this Part. The penalty shall not exceed \$5,000 for each violation.	This rule is amended to meet the requirements of HB 2573, enacted as emergency legislation in Chapter 3 of the 2005 Virginia Acts of Assembly. The maximum civil penalty was increased from \$5,000 to \$70,000 for a violation that resulted in injury or a fatality of a person.

**Regulatory flexibility analysis**

*Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.*

Less stringent compliance or reporting requirements, including the exemption of small businesses, would not meet the agency’s goal of assuring that mining occurs in a safe and environmentally sound manner. The existing regulations govern established practices in the mining industry; these amendments represent small changes to the existing regulations and therefore will have a minimal impact on businesses.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

The amendments are being promulgated as part of the recommendations from a Department of Mines, Minerals and Energy report of a coal mining accident in Wise County that resulted in the death of a three-year old child. By ensuring consistency and strengthening penalties for violations, the amendments will increase the safety and welfare of families in areas near coal mines.