

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p>(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <p>2018 SEP 14 P 12: 35</p> <p>RECEIVED IRRC</p>	
(1) Agency: Department of Environmental Protection		IRRC Number: 3190	
(2) Agency Number: 7 Identification Number: 523			
(3) PA Code Cite: 25 Pa. Code §§ 77.1 and 77.106			
(4) Short Title: Noncoal Mining Program Fees			
(5) Agency Contacts (List Telephone Number and Email Address): Primary Contact: Laura Edinger, 717.783.8727, ledinger@pa.gov Secondary Contact: Jessica Shirley, 717.783.8727, jessshirley@pa.gov			
(6) Type of Rulemaking (check applicable box):			
<input type="checkbox"/> Proposed Regulation <input checked="" type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation		<input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General	
(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)			
<p>The final-form rulemaking revises current regulations to increase permit application fees and annual administration fees. It is necessary to increase fees because the revenue from the current fees, which were put in place 2012, does not adequately fund the implementation provisions of the Noncoal Surface Mining Conservation and Reclamation Act ("Noncoal Act"), 52 P.S. § 3301 <i>et seq.</i></p>			
(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.			
<p>This final-form rulemaking is promulgated under the authority of sections 7(a) and 11(a) of the Noncoal Act (52 P. S. §§ 3307(a) (authorizing permit filing fee) and 3311(a) (authorizing rulemaking)); section 6 of the Clean Streams Law (35 P.S. § 691.6 (authorizing filing fee)); and section 1920-A of the Administrative Code of 1929 (71 P. S. § 510-20 (authorizing rulemaking)).</p>			
(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.			
<p>This final-form rulemaking is not mandated by any federal or state law. However, the rulemaking is necessary to ensure that there is adequate revenue to implement the provisions of the Noncoal Act.</p>			

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

This final-form rulemaking is necessary because sufficient money is not available for the Department of Environmental Protection (DEP or Department) to support the implementation of the Noncoal Act, the purpose of which is to, among other things, prevent water pollution, maintain water supply, provide for the conservation and improvement of areas of land affected in the surface mining of noncoal minerals, and eliminate hazards to health and safety and generally to improve the use and enjoyment of the lands. See 52 P.S. § 3302. The Department is also responsible for issuing, administering, and enforcing permits pursuant to the Clean Streams Law (CSL), 35 P.S. § 691.1 *et seq.*, the objective of which is "not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." 35 P.S. § 691.4(3). The Department fulfills its responsibilities under the Noncoal Act and CSL through the implementation of its noncoal mining program and collects fees from noncoal mining permit applicants and permittees to cover the costs incurred by the Department to implement the program.

The vast majority of residents in Pennsylvania will benefit from the adequate implementation of the Noncoal Act. Noncoal mining operations occur in every county in Pennsylvania except Philadelphia. The residents of Pennsylvania will directly benefit from this regulation because the additional fees will allow the Department to adequately implement the provisions of the Noncoal Act and the CSL. As a result, the purposes of the Acts which are to protect public health and the environment will be fulfilled. Additionally, industry will benefit because there will be sufficient Department staff to issue permits to allow operators to mine and generate revenue for their businesses.

The Department implements the noncoal mining program through the review of permit applications for the various types of noncoal mining operations and the inspection of these operations to ensure operators' compliance with their permits. There are approximately 1,200 noncoal mining operators in Pennsylvania. These operations range from small quarries that produce less than 2,000 tons of material per year to large quarries that produce millions of tons of aggregate per year. The Department issues permits for the term of the expected mining activity, which also varies from a few years to decades. Operators can request modifications of their permits if their plans change, which require further staff review. The Department inspects permitted noncoal mines for compliance with their permits and environmental and safety laws and regulations, including the Noncoal Act, the CSL, Chapter 77 and Chapter 209a (relating to surface mining).

The imbalance between the revenues and expenditures of the noncoal mining program is attributable to several factors. The personnel costs for Department staff in the noncoal mining program have increased over time. In addition, the workload has changed, because the time necessary to review new noncoal mining permit applications has increased due to the complexity of the review of newly proposed noncoal mining operations. Finally, certain indirect costs and overhead costs (offices, computers, other equipment and supplies) were not accounted for in the prior cost analysis.

The fees in the final regulation are more closely aligned with the Department's workload than previous rulemakings. Based on the final rulemaking analysis, an average of three hours is needed to inspect a small noncoal mine operation, rather than the two hours estimated in a cost analysis from prior years. An average of five hours is needed to inspect the larger operations rather than the seven hours used in

the prior analysis. Accordingly, the final-form rulemaking includes different fee levels for small and large operations.

The final-form rulemaking will provide additional funding to sustain the program. The current rate of revenues and expenditures will likely exhaust the reserves by 2020 in the Noncoal Surface Mining Fund, resulting in inadequate funding and potential curtailment of the program. Without the stable funding realized through the imposition of the increased fees, the Department will not be capable of timely issuance, administration, and enforcement of permits to 1,200 operators as required by the Noncoal Act and the CSL. As a result, applicants will not be able to conduct lawful mining activities, which will have a negative impact on the economy. Additionally, inadequate enforcement of existing permits will have a deleterious effect on public health and safety, and the environment.

Because Noncoal Act prohibits noncoal mining without a permit issued by the Department, timely processing of noncoal operator permits (approximately 500 annually) is vital for Pennsylvania's economy as the noncoal industry is currently a \$20 billion dollar per year industry in the state, which consistently ranks among the top ten noncoal mineral producers in the nation. Citizens who live in affected areas will be protected by adequate inspections, enforcement, and oversight, and citizens across the Commonwealth will benefit from a healthy and protected natural environment.

(11) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

No provisions are more stringent than federal standards because noncoal mining is not subject to federal standards.

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

Pennsylvania will remain in a competitive position when compared with other states. Direct comparison is not possible because states have differing approaches to assessing fees, like fees assessed based on permitting actions, size of the permit, production, or other factors. Based on an analysis of neighboring states' fees, for a 50-acre mine producing minerals for 30 years, the estimated amounts paid are:

State	Permit Fees	Other Fees	Total	Additional Costs
Maryland	\$18,000	\$1,500	\$19,500	
New York	(None)	\$240,000	\$240,000	
Ohio	\$1,500	\$18,750	\$20,250	Plus Severance Tax
Virginia	\$24,750	\$9,900	\$34,650	
West Virginia	\$2,500	(None)	\$4,500	Plus Severance Tax
Pennsylvania	\$16,125	\$51,100	\$67,225	

In addition to fees, Ohio and West Virginia charge a tax based on the quantity of minerals extracted. In Ohio, operators pay an additional four cents per ton of salt, two cents per ton of limestone and gravel, and one cent per ton for sandstone, shale, and quartzite. West Virginia assesses a tax based on the value of the mineral at five cents per \$100. These are not included in the table as permit fees, but are noted as additional costs to the operator.

New York assesses an annual fee based on the size of the disturbed area, applied in ranges:

- \$400 for minor projects
- \$700 for mines less than or equal to 5 acres
- \$900 for mines between 5 and 10 acres
- \$1,500 for mines between 10 and 20 acres
- \$4,000 for mines between 20 and 30 acres
- \$8,000 for mines greater than 30 acres

Maryland and Virginia charge permit fees of \$12 per acre and \$16 per acre, respectively, and these are paid with the one-year renewal of the permit. Virginia also charges an annual fee of \$330 if filed electronically (used here), or \$400 if filed on paper. Maryland charges a one-time reclamation fee of \$30 per acre. Ohio charges a one-time fee of \$75 per acre and an annual reporting fee of \$500 per year.

It is important to note that the markets for noncoal minerals are localized and not driven by state-by-state markets. Mineral materials are a low-cost commodity and the transportation of the minerals represent a substantial portion of the cost to the consumer. It is unlikely out-of-state sources of noncoal minerals can compete within Pennsylvania industry due to increased transportation costs. Further, noncoal mines exist in every county of Pennsylvania (except for Philadelphia) allowing for materials to be readily available at a low cost throughout the state.

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

This regulation will not impact any other regulations.

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

The Department conducted extensive outreach on both the proposed and final rulemaking packages. For instance, the proposed rulemaking was discussed at multiple meetings with the Aggregate Advisory Board, which includes representation from the Pennsylvania House of Representatives, Pennsylvania Senate, Pennsylvania Aggregate and Concrete Association, Citizens Advisory Council, and private industry. This interaction, which ultimately resulted in a recommendation to move forward with presenting the proposed rulemaking to the Environmental Quality Board, ("EQB") took place over a period of 15 months at six meetings of the full board and seven meetings of the Aggregate Advisory Board's Regulation, Legislation and Technical Committee.

The Department presented revenue and cost data to the Pennsylvania Aggregate and Concrete Association periodically since the fee collections established in the 2012 final rulemaking. The Aggregate Advisory Board reviewed the draft 2015 cost analysis at its initial meeting on May 13, 2015.

In addition, the Department provided detailed data about the mining program's expenses and revenue at this meeting. The Aggregate Advisory Board conducted additional review of the cost and revenue data at its meeting on August 21, 2015.

By letter dated June 12, 2015, the Pennsylvania Concrete and Aggregate Association and the Pennsylvania Bluestone Association requested detailed information about the revenue and expenses for both the coal mining and noncoal mining programs. The Department posted data responding to this request on the Aggregate Advisory Board webpage and reviewed the data with the Aggregate Advisory Board's Regulatory, Legislative, and Technical ("RLT") Committee on September 22, 2015, and October 23, 2015. The Department also provided its workload analysis for the mining program, the total fees collected, the number and types of applications and inspections, and the hours worked by Department employees for the coal and noncoal mining programs. The Department reviewed the data, including additional revenue data, with the Aggregate Advisory Board at its November 10, 2015 meeting.

The Department posted additional data on the Aggregate Advisory Board webpage and reviewed the data with the RLT Committee at its January 19, 2016 meeting. The data included the Department's spend plan, which analyzed existing and projected revenue and expenses for the noncoal mining program. At this meeting, the Department introduced the concept of phasing in fee increases and presented a preliminary draft of the proposed revisions to § 77.106, which included a proposed fee schedule.

On February 18, 2016, the RLT Committee met to review the preliminary draft revisions to § 77.106. At a meeting of the full Aggregate Advisory Board, also on February 18, 2016, the Board discussed recommendations to the draft revisions. On May 4, 2016, the Aggregate Advisory Board met and referred the draft fee revisions to the RLT Committee for further review. The RLT Committee met on June 9, June 30, July 18, and August 3, 2016, and provided its recommendation to the full Aggregate Advisory Board on November 2, 2016. The RLT Committee recommended to the full Board that the rulemaking proceed with the fee schedule as drafted. Further, the RLT Committees recommendation would coincide with continued collaboration with the Department on programmatic issues identified by the Aggregate Advisory Board. These issues are outlined in a "Framework Document" presented at the Board's meeting on August 3, 2016. By letter dated October 3, 2016, the Secretary of the Department sent notice to the Aggregate Advisory Board of the Department's "commitment to fully collaborate with the Aggregate Advisory Board on prioritizing and resolving the issues identified in the Framework Document."

Following the Aggregate Advisory Board's acceptance of the RLT Committee's report, the Department recommended that the proposed rulemaking move forward for EQB consideration, and the Aggregate Advisory Board concurred. The data the Department provided to the Aggregate Advisory Board during the development of the noncoal fee rulemaking are available on the Aggregate Advisory Board's webpage: <http://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Aggregate-Advisory-Board/Pages/default.aspx>

The proposed rulemaking was adopted by the EQB on October 17, 2017. It was published in the *Pennsylvania Bulletin* on February 3, 2018 with a 30-day comment period. Comments were received from one public commentator and IRRC.

This final-form rulemaking was reviewed with the Aggregate Advisory Board at its May 9, 2018 meeting. The Board, with the proviso that the actual dates be inserted in the language for when the

various schedules come into effect, concurred with the Department's recommendation to proceed with the final-form rulemaking process.

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

See also the response to question #10 above. Approximately 1,200 licensed noncoal mine operators operate in Pennsylvania. Most of these entities who conduct noncoal mining in Pennsylvania are small businesses. Only a few of the licensed noncoal mine operators are not small businesses.

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

See also the response to question #10 above. The 1,200 licensed noncoal mine operators in Pennsylvania will be required to comply with the final-form rulemaking.

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

See also the response to question #10 above. The amendments increase the cost for permit application fees and annual administration fees. These will impose an added cost to the regulated community, which are approximately 1,200 small businesses. However, the amendments also benefit regulated entities by appropriately funding the regulatory program, which will allow them to continue their operations smoothly. A fully-staffed program can review and issue permits in a timely manner, provide technical assistance, and produce necessary technical guidance documents and policies. This funding also protects public health and the environment from spills or accidents by ensuring the appropriate inspection staff are available. Noncoal mining operations affect many members of the public, as they occur in every county in Pennsylvania except Philadelphia.

To mitigate the impacts on the noncoal operators, the Department introduced an approach that will incrementally increase the fees in three, two-year phases. Also, consistent with current practice, fees vary for different types of operations. For example, permit applications for large noncoal surface mining operations that propose to pump groundwater take significantly more time to review because of their potential hydrologic impact. Therefore, the permit application fee for these operations is higher than for an operation that does not include groundwater pumping. Similarly, if blasting is proposed, then the blasting inspector is involved in the review of the blast plan for the permit application. Therefore, the fee schedule includes a permit application fee for review of blast plans, based on the cost to review those plans. These strategies both account for the Department's workload and avoid charging smaller or simpler operations a higher fee than necessary. In addition, the first phase of the fees has an effective date of January 1, 2020, which provides time for permittees to plan for the increases.

The existing fee structure inadequately covers the cost for DEP to review permit applications, perform inspections, provide compliance assistance, and track permittee reporting requirements. Without an adjustment to the fee schedule, the gap between the fees and program costs will continue to grow and the program will need to curtail the vital programmatic operations that implement the Noncoal Act. A fee sufficient to support the implementation of the Noncoal Act will allow the Department to achieve those purposes for the benefit of the citizens of the Commonwealth.

The total increased cost to the regulated community will be approximately \$1.3 million when all phases of the fee are implemented on January 1, 2024.

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

See also the responses to questions #10 and #17 above. Adequate permit review staff allow the Department to prevent environmental problems before they occur by ensuring how operations plan to comply with the environmental laws and regulations. Adequate inspection staff allow the Department to both prevent problems at permitted sites before they occur and discover problems that have occurred in order to ensure they are timely remedied. Timely permit reviews also allow the industry to plan operations smoothly and thereby secure investment. Therefore, timely processing of noncoal operator permits (approximately 500 annually) is vital for Pennsylvania's economy as the noncoal industry is currently a \$20 billion per year industry in the state, which consistently ranks among the top ten noncoal mineral producing states in the nation.

Environmental risks from noncoal mining operations could possibly result from collapsed highwalls, mine drainage, dust, noise, or abandoned equipment. The Department's ability to mitigate such environmental risks through implementation of the Act outweighs the cost to the regulated community from the fees adjusted under the regulation. This is because the increased costs (approximately \$1.3 million) pay for services that are vital for the \$20 billion industry, and at the same time are protective of the Commonwealth's 12.7 million residents.

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

See also the responses to questions #10 and #17 above. The fees are increased in three, two-year phases initially, with an inflation factor to be applied after these three phases. This is to avoid a sudden increase in cost for the regulated community. The cost increases for small operators will be the most dramatic. Permit application fee increases for small noncoal permittees, as compared to the current fee schedule, are about 14% in the first phase, 26% in the second phase and 48% in the third phase. The annual administration fees for these small permittees will increase by 100% in the first phase, 125% in the second phase and 150% in the third phase of the fee schedule. This substantial increase in annual fees for small permittees is attributable to three primary factors. First, the workload analysis used to manage the workforce for the mining program was revised. The number of hours needed to inspect a small noncoal mine site was adjusted from 2 hours (this is from the workload analysis from 2009) to 3 hours (in 2015). Second, the cost per hour for inspection work increased from about \$52 to \$66 from 2009 to 2015. Finally, the second and third phases of the fee schedule include additional cost factors, indirect costs and overhead which were not previously accurately accounted for.

For large noncoal permittees, the permit application fee increases range from about 8% to 16% in the first phase, 22% to 33% in the second phase and 42% to 63% in the third phase. Annual fee increases for these large noncoal permittees are about 0% for the first phase, 3.5% for the second phase and 21% for the third phase. The primary reason that these fees are not increased as much as for the small permittees is that the workload analysis included a reduction for the number of hours (from 7 hours per inspection in 2009 to 5 hours per inspection for 2015) needed to inspect a large noncoal mining permit.

The total increased costs to the industry for the fees is about \$1,150,000 four years after the finalization of the fee schedule. After this point, the fees will be adjusted to reflect inflation. For context regarding the cost, this industry brings in approximately \$20 billion per year in revenue.

While no direct savings to the regulated community are expected, the Department has taken measures to ensure that the burden of the fee is allocated fairly among operators, according to the workload presented by each permit application. As mentioned in the responses to questions #10 and #17 above, the Department proposes separate fees for large and small operators, and separate fees for operations that use groundwater pumping and blasting. This ensures that operations with minimal complexity (usually smaller ones) owe a lower permit application fee.

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

The Department expects no impact on local governments, because these entities are not engaged in noncoal mining activities regulated under the Noncoal Act.

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

The regulation will not create any additional costs or savings to the state government because the administration involved in the collection of fees will remain the same as it does under the current regulations in Chapter 77.

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The Department does not anticipate any additional reporting, recordkeeping or other paperwork because the administration involved in the collection of fees will remain the same as it does under the current regulations in Chapter 77.

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

The regulation does not require new forms. The Department will revise existing forms to reflect the final fee schedule once it is adopted.

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

The Large Industrial Mineral Mine Permit Application form (5600-PM-BMP0315) includes a fee schedule in Module 1:

<http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-98752/5600-PM-BMP0315-1.pdf>

The Small Industrial Mineral Mine Permit Application (5600-PM-BMP0316) does not include a fee section. <http://www.depgreenport.state.pa.us/elibrary/GetFolder?FolderID=3871>

The Department collects annual administration fees with the license renewal application. These applications are generated by the Department's database. Each application includes a customized annual administration fee section that calculates the fee for the applicant. The Department expects applicants to confirm that the information provided by the Department from the database is correct. The Department resolves any discrepancies during the license renewal review process. When the final-form regulations are approved, the Department will update the database to reflect the final fee amounts.

(23) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY 2018-19	FY +1 Year 2019-20	FY +2 Year 2020-21	FY +3 Year 2021-22	FY +4 Year 2022-23	FY +5 Year 2023-24
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Savings	\$0	\$0	\$0	\$0	\$0	\$0
COSTS:						
Regulated Community	\$0	\$175,000	\$350,000	\$650,000	\$900,000	\$1,150,000
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Costs	\$0	\$175,000	\$350,000	\$650,000	\$900,000	\$1,150,000
REVENUE LOSSES:						
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0
State Government	\$0	\$0	\$0	\$0	\$0	\$0
Total Revenue Losses	\$0	\$0	\$0	\$0	\$0	\$0

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

Program	FY -3 2015/16	FY -2 2016/17	FY -1 2017/18	Current FY 2018/19
Noncoal Surface Mining Conservation & Reclamation Fund	\$3,195,984 (Actual)	\$4,485,000 (Actual)	\$4,122,000 (Actual)	\$3,940,000 (Budget)

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

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

The Department estimates that there are about 1,200 small businesses which will be subject to this regulation.

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

The Department does not anticipate any additional reporting, recordkeeping or other paperwork because the administration involved in the collection of fees will remain the same. Each business's determination of the fee amount to be paid is based on simple categories such as whether the mining permit is "large" or "small," and whether blasting or groundwater pumping are involved.

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

It is possible that some small businesses may suspend operations due to the fee increases. This industry is quite diverse and large. Some operators are well capitalized and operate on a continuous basis and others are undercapitalized and operate on an occasional basis. When the Department imposed its initial fee schedule in 2012, 100 operators suspended business between 2011 and 2016. While not all of these closures can be attributed to the fee requirement alone, the Department remains sensitive about how fee increases may impact smaller operators. As a result, the fee schedule in this final rulemaking is not effective until 2020, which gives all operators some time to prepare for the increase. Additionally, the fee schedule is phased in from 2020 through 2024, which will also provide operators the ability to plan ahead for the increases.

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

No alternative method exists to accomplish the revenue generation and public safety elements of this final-form rulemaking. The fee amounts are based upon the actual cost for the Department to do the work, so while every effort is made to reduce the impact for small businesses, it is not possible to eliminate the effect because the fees reflect the cost of implementing the Noncoal Act. Without another funding source, which is not available, it is not possible to mitigate the impact on small businesses. Phasing in the fee increases in two-year increments, beginning in 2020, provides an opportunity for small businesses to plan for the increased costs. Also, the fees

are now different for large and small operators. Certain technologies (i.e., groundwater pumping and blasting) require separate fees as well. This ensures that smaller and less complex operations pay a lower cost, which is commensurate with the lower workload their applications require of the Department.

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

See also the responses to questions #10, #17, #19, and #24 above. The regulation contains no special provisions focused on the needs of minorities, the elderly, or farmers. Current Department policies do take into account the needs of minorities and low-income citizens in areas of noncoal mining. The Department's Enhanced Environmental Justice Public Participation Policy includes large industrial mineral surface mines on the list of permits that may be subject to additional outreach by Department staff if the proposed mine is within an area whose population is either 30% racial minority or 20% low-income. This outreach involves a plain-language summary of the permit application in terms understandable to a majority of readers, and at least one public meeting organized by the Department and the applicant to explain the underlying issues to the community.

Smaller operators will now pay a lower fee than large operators. The phased in approach built into the fee schedules allows permittees to plan for the increases. Also, the fee schedule takes into account specific operations such as groundwater pumping. In this way, the Department has allowed smaller operators, which do not typically use such technologies, to avoid that fee.

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

Because the premise of this rulemaking is full cost recovery to implement the Department's noncoal program, the final permit fee for each permit category reflects the Department's cost and workload analysis. The Noncoal Act authorizes the Department to adjust fees in this manner and the Department did not consider alternative regulatory provisions outside of the fee schedule provision as a less burdensome alternative. However, the Department did consider the impact that an all-at-once fee adjustment would have on the regulated community and determined that a three-phase roll out of the fee adjustment over four years would be a less burdensome acceptable alternative.

The Department has implemented measures to decrease costs for the noncoal mining program, which reduce the need for funding. For example, the noncoal mining program has partnered with the coal mining program to reduce overhead costs and has reduced its administrative costs to less than 5% of the total program costs. However, while the efficiencies have reduced the cost of administering the noncoal mining program, these efficiencies alone could not offset the projected shortfall in funding.

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

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;

- d) The establishment of performance standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

See also the responses to questions #10, #17, #19, #24, and #25. The Department did not consider other regulatory methods that will minimize adverse impacts specifically on small businesses, because the focus of this rulemaking relates to fee schedules to generate sufficient revenue to implement the noncoal mining program. However, consistent with current practice, the Department scaled the fees based on the size and scope of the regulated operation, which may to some extent correlate with the size of the business. The Department also considered the impact that an all-at-once fee adjustment would have on the regulated community and determined that a three-phase roll out of the fee adjustment over four years would be a less burdensome acceptable alternative. Again, the Department considered this flexibility in relation to the industry as a whole and not specifically with regard to small businesses as defined by the Regulatory Review Act. However, the Department anticipates that small businesses will be more likely to benefit from the three-phase roll out of the regulation.

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

The data used in the development of the final-form rulemaking is related to the calculations of the fees. The fee amounts are based on a workload planning tool used by the Department to manage staffing levels. The Department reviewed the time necessary to administer the noncoal mining program and the associated staff costs (salary and benefits) and overhead costs (offices, computers, other equipment, supplies, and the like). Revenues used in the analysis were actual revenues received in prior years, and future revenues projected by known expenses and a conservative growth rate. No external data sources were used.

Current calculations of DEP’s noncoal mining program reveal a substantial deficit between incoming revenue and expenses used to permit and administer the noncoal mining program:

Fiscal Year	Revenue	Expenses
2011-12	\$1,081,051	\$3,381,851
2012-13	\$1,704,234	\$3,059,000
2013-14	\$2,452,449	\$3,045,286
2014-15	\$2,569,751	\$2,912,237
2015-16	\$2,532,838	\$3,195,984
2016-17	\$2,437,195	\$4,485,000
2017-18	\$2,617,771	\$3,589,781

As part of the workload analysis, the Department reviewed the number of hours required to review permit applications and issue permits for each type of noncoal mining operation. The Department also reviewed the wage rate for the employees that conduct the permit reviews, along with the cost of

employee benefits and associated overhead costs. The workload analysis data the Department used in the development of the proposed rulemaking is included in a spreadsheet with multiple pages available on the Aggregate Advisory Board's webpage at <http://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Aggregate-Advisory-Board/Pages/2015.aspx> (under "Aggregate Advisory Board RLT Meeting Agenda (9-22-15) (PDF)" select "2015 Inspection Staff Analysis (XLSM)"). Workload data for the Department's review of permit applications (labeled "authorizations" in the spreadsheet) as well as its administration and enforcement of permits is included in this document.

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

- | | |
|---|-----------------|
| A. The length of the public comment period: | 30 Days |
| B. The date or dates on which any public meetings or hearings will be held: | NA |
| C. The expected date of delivery of the final-form regulation: | Quarter 3, 2018 |
| D. The expected effective date of the final-form regulation: | January 1, 2020 |
| E. The expected date by which compliance with the final-form regulation will be required: | January 1, 2020 |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | NA |

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

The Department will gauge the regulation's effectiveness through ongoing interaction with the industry, advisory boards and the public. The ultimate test of effectiveness is whether the fees providing sufficient funding for the implementation of the Noncoal Act. The Department tracks this on a monthly basis as it receives revenue and incurs costs. The Department will also evaluate the continuing effectiveness of the regulations as it complies with 25 Pa. Code § 77.106(d), under which the Department evaluates every three years the fees income and the costs of implementing the Noncoal program.



pennsylvania
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

COMMENT AND RESPONSE DOCUMENT

NONCOAL MINING PROGRAM FEES

25 Pa. Code Chapter 77
48 Pa. B. 733 (February 3, 2018)
Environmental Quality Board Rulemaking #7-523
(Independent Regulatory Review Commission #3190)

LIST OF COMMENTATORS ON THE PROPOSED RULEMAKING

1. Peter Vlahos, President
Pennsylvania Aggregates and Concrete Association
3509 North Front Street
Harrisburg, PA 17110
2. Independent Regulatory Review Commission
333 Market St., 14th Floor
Harrisburg, PA 17101

INTRODUCTION

The Environmental Quality Board (Board) adopted the proposed noncoal mining program fees rule at its October 17, 2017 meeting. On January 17, 2018, the Department of Environmental Protection (the Department) submitted a copy of the proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the Senate and House Environmental Resources and Energy Committees for review and comment in accordance with Section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)). The proposed rulemaking was published in the *Pennsylvania Bulletin* on February 3, 2018 (48 Pa.B. 733) with provision for a 30-day public comment period that closed on March 5, 2018. Comments were received from two commentators, including IRRC.

COMMENTS AND RESPONSES

1. **Comment:**

Department personnel worked with stakeholders to ensure their complete understanding of the fiscal and resource needs behind the fees. We encourage you to consider this type of stakeholder involvement with all advisory boards and upcoming fee packages. (1)

Response:

The Department acknowledges this comment.

2. **Comment:**

The Environmental Quality Board (Board) should provide a projection of the expenses for the program in order to ensure that the revised fees will not exceed the cost of reviewing, administering and enforcing permits. The projections should, at a minimum, cover seven years. (2)

Response:

The Department designed the noncoal permit application fees and annual administration fees to correlate to the workload of the noncoal program to which the permit application fees and annual administration fees relate – reviewing, administering, and enforcing permits. For example, permit application fees accompany permit applications that the Department reviews, and so the number of permit applications and the associated amount of work (*i.e.*, Department costs) are reflected in the fees charged. Similarly, the annual administration fees correlate to the workload associated with the

inspection and compliance activities the Department is required to perform. However, the workload analysis that the Department used to calculate permit application fees and annual administration fees includes additional work related to these functions for which the Department cannot impose fees because the work is too variable among permits to accurately capture in an up-front fee. For example, it is not possible to impose fees for complaint investigations because there is no reliable correlation between the number or type of complaints a particular operation might generate. The fact that the Department cannot account for these costs in the annual administration fee eliminates the likelihood that the Department will collect more money in permit application fees and annual administration fees than it costs to review, administer, and enforce permits. That these permit application fees and annual administration fees are established through the rulemaking process, which takes substantial time, also makes it unlikely that revenue will exceed costs. The last comprehensive cost and workload analysis was done in 2015, based on costs from fiscal year 2013-2014. The first phase of the incremental fee increases will be effective January 1, 2020. This time lag creates a situation where the revenue lags behind the costs.

The three-year report presented to the Board in May 2015 was the basis for the initial discussion of this fee increase with the Aggregate Advisory Board in 2015. That report included an analysis that the costs were increasing each year at a rate of about 3.3%.

Recent fiscal year expenses are as follows:

Fiscal Year	Expenses	Percent Change
2013-14	\$3,045,286	-
2014-15	\$2,912,237	-4.4%
2015-16	\$3,195,984	9.7%
2016-17	\$4,485,000	40.3%

In response to the request to project costs for a seven-year period, the following estimate of expenses and fee revenue is provided:

Fiscal Year	Estimated Expenses	Estimated Fee Revenue
2018-19	\$3,984,000	\$2,266,130
2019-20	\$4,074,000	\$2,265,000
2020-21	\$4,001,550	\$2,850,000
2021-22	\$4,121,597	\$3,150,000
2022-23	\$4,245,244	\$3,400,000
2023-24	\$4,372,602	\$3,700,000
2024-25	\$4,503,780	\$3,885,000

Estimated expenses are based on special fund spend plan preliminary numbers through fiscal year 2021-2022. Projections of expenses for fiscal year 2022-2023 through fiscal 2024-2025 are estimated to increase at about 3% per year. The revenue estimate is based on the assumption that

the fee-generating activity (*i.e.*, mining applications and current mining activities) will remain the same.

3. Comment:

We are concerned that the proposed automatic incremental fee increases could conflict with the existing regulation that requires the Department to, at least every three years, recommend to the Board regulatory changes to the fees to address and disparity between program income and costs. Automatic fee increases would potentially make the regulation at § 77.106(d) obsolete. (2)

Response:

The automatic adjustment under proposed § 77.106(g) does not conflict with the requirement under subsection § 77.106(d) that the Department recommend regulatory changes to the fees every three years to the Board so that it may address any disparity between the fees and the program costs. The Department's triennial recommendation under § 77.106(d) does not mandate any particular action other than the Department's recommendation based on whether any disparity exists at the time of DEP's analysis of program costs and fee revenue.

By keeping fees on pace with inflation § 77.106(g) reduces the likelihood of any disparity and the need to recommend that the Board proceed with a rulemaking to adjust the fees. The three-year review provides a check on the effectiveness of the automatic adjustment. If a disparity arises in the programs costs and fee revenue, the three-year review will provide an opportunity to address that disparity on a regular basis. Because the Department will still rely on a three-year review and recommendation, § 77.106(d) will not be amended or deleted.

4. Comment:

How much reserve is currently in the Noncoal Surface Mining Fund? Is there a statutory minimum that must be kept in reserve? In lieu of the proposed fee increases, has the Board considered spending down the reserve? (2)

Response:

The Noncoal Surface Mining Fund (Fund) serves several purposes - holding cash deposited by permittees as bond; earmarking the proceeds of bond forfeitures; and for conservation purposes provided by the Noncoal Act. As a result, there are three accounts established in the Fund. The first account includes the Mining Permit Collateral Guarantee Restricted Receipt Account for collateral deposits made by permittees for their bonding obligations under the Noncoal Act. Money in this account is returned to the permittees when they complete the required reclamation of their permitted area. The second account includes the Forfeiture of Bonds Account, where bonds forfeited because of non-compliance with the Noncoal Act are deposited. Money in this account is required to be used to reclaim abandoned mine sites for which the bond was posted. *See* 52 P.S. § 3317. The third account includes the Noncoal General Operations Account, which is used to manage the day-to-day operations of the Noncoal Program and support the Payment-in-Lieu-of-Bond program.

The Noncoal General Operations Account had a balance of \$3,802,581.54 as of July 1, 2018. The fiscal year-end (June 30) balances in this account are as follows:

Fiscal Year	Year-end Balance
2010-2011	\$10,565,327.87
2011-2012	\$8,309,176.34
2012-2013	\$7,750,609.74
2013-2014	\$7,261,735.92
2014-2015	\$6,954,553.85
2015-2016	\$6,425,248.72
2016-2017	\$4,472,979.69

The balance of the Noncoal General Operations Account, out of which the program budget is drawn, covers less than two years' worth of program costs. A portion of the money in the General Operations Account must be retained by the Commonwealth to provide funds for reclamation under the Payment-in-Lieu-of-Bond program. Under this program, the account underwrites bonding obligations of permittees who pay an annual fee, deposited into the General Operations Account, in lieu of posting a surety or collateral bond. See 52 P.S. § 3309(i) (relating to payment in lieu of bond). In 2018, the Payment-in-Lieu-of-Bond program underwrites between three and four million dollars of bond liability. While there is no statutory requirement to maintain a specific amount of reserve, it is necessary to maintain a reasonable reserve to support the Payment-in-Lieu-of-Bond program.

As the Board noted in the proposed rulemaking, in order to lessen the financial burden on noncoal operators, most of which are considered small businesses, the proposed rulemaking phases in the fee increase over four years, followed by a cost adjustment every two years thereafter to keep pace with inflation or deflation. Under this system, only a portion of the actual costs are recovered between years 1 and 4. In other words, the proposed fee schedule is already effectively a temporary draw-down of the fund until the 4th year.

5. Comment:

The new language in § 77.106(g) states that the permit application and administrative fees will be adjusted by the Department every two years. Use of the word "will" would require fees to be raised or lowered, regardless of the findings of the Department during the three-year review required under § 77.106(d). To provide discretion, we suggest that "will" be changed to "may." (2)

Response:

The requirements in §§ 77.106(d) and 77.106(g) are intended to work in concert with one another. The use of the word "will" in § 77.106(g) is intentional to require that the changes be made rather than provide discretion to the Department, in order to ensure fee revenue keeps pace with costs so as alleviate future fee increases. The Board is satisfied that the adjustment will unlikely exceed the

costs of reviewing, administering, and enforcing the permit due to the following factors: the long historical trend in the noncoal program of costs greatly outpacing fee revenue, the adjustment factor only accounts for employee-related costs, and not all costs associated with reviewing, administering, and enforcing permits are reflected in the permit application fees and annual administration fees. If during the three-year review a disparity is identified between the results of the index adjustment and the needs of the program, then the rulemaking process will be initiated to address the issue.

6. **Comment:**

The Board should include in the final-form regulation a definition for the Aggregate Advisory Board.

Response:

The final-form rulemaking includes a definition of the Aggregate Advisory Board at 25 Pa. Code § 77.1 to reflect its creation by 2014 amendments to Section 18 of the Pennsylvania Surface Mining Conservation and Reclamation Act (52 P.S. § 1396.18), creating the Aggregate Advisory Board, establishing its makeup, and defining its duties.

7. **Comment:**

Does the Department have the statutory authority to make the adjustments contemplated by § 77.106(g)? What specific statutory authority would allow DEP to amend a regulation by publishing notice in the *Pennsylvania Bulletin*? (2)

Response:

The adjustment is a product of subsection (g) itself, not of decision-making by the Department. In January 2026, subsection (g) supersedes, in part, subsections (e) and (f) such that the fees therein are subject to an automatic adjustment, and directs the Department to publish the adjusted fees in the *Pennsylvania Bulletin* to demarcate their effective date. Subsection (g) is the Board's exercise of its rulemaking authority under Section 11(a) of Noncoal Surface Mining Conservation and Reclamation Act ("Noncoal Act"), which provides, in relevant part:

The Environmental Quality Board may promulgate such regulations as it deems necessary to carry out the provisions and purposes of this act. . . .

52 P.S. § 3311(a).

Moreover, no provision of the Noncoal Act requires fees to be set by regulations promulgated by the Board. In fact, as IRRC notes, Section 7(a) of Noncoal Act provides, in relevant part:

The department is authorized to charge and collect from persons a reasonable filing fee, which shall not exceed the cost of reviewing, administering and enforcing the permit.

52 P.S. § 3307(a) (emphasis added)

Nothing in either of these provisions limits the type of fee schedule that can be established by regulation. In fact, from 1990 to 2012, the Board used its general statutory authority under the Noncoal Act to promulgate § 77.106, which at that time provided that "... a permit application for noncoal mining activities shall be accompanied by a check. . . in the amount set forth by the Department. The Department may require other fees set by the act, the environmental acts, this title or the Secretary." 20 Pa.B. 1653, (March 17, 1990). This discretionary approach was modified in 2012, and § 77.106 established sum-certain fees that must be collected. 42 Pa.B. 6536 (October 13, 2012). These various regulatory designs are similar to regulations deemed valid and binding by the Commonwealth Court in *Naylor v. Dep't of Public Welfare*, 54 A.3d 429 (Pa. Cmwlth. 2012), *aff'd*, 76 A.3d 563 (Pa. 2013), which allowed an agency to adjust the amounts of certain payments through publication in the *Pennsylvania Bulletin* absent statutory language that would limit that practice. In *Naylor*, the Commonwealth Court found, among other things, that regulations allowing the Department of Public Welfare to reduce State Supplementary Payments (SSP) through notice in the *Pennsylvania Bulletin* were authorized by the Public Welfare Code and reasonable because no provision of the Code "restricts or directs the manner by which the Department must establish SSP payment amounts." 54 A.3d at 435. Accordingly, the general statutory authority here under the Noncoal Act is sufficient authority to establish the fee adjustment provision in this final-form rulemaking.

8. Comment:

Why does the Board believe that the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation is the most appropriate for adjusting fee amounts? This subsection also indicates that another index could be used if it is found to be more appropriate. We ask the Board to clarify how it will implement the use of a different index. (2)

Response:

The primary cost for implementing the noncoal mining program is personnel. For this reason, the Department chose the Employment Cost Index for State and Local Government Compensation as the appropriate index to make adjustments to the fees. This index is tailored to the labor costs of government employees. The regulation provides the Department with very limited discretion/authority to choose an alternative index. This would only occur if the United States Department of Labor terminates the Employment Cost Index for State and Local Government Compensation, so an alternative will be necessary, or renames it.

9. Comment:

Provide a ten-year history of the percentage increase or decrease for the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation. (2)

Response:

The following table lists the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation for each calendar year:

Year	End of Year Index
2007	4.1
2008	3.0
2009	2.3
2010	1.8
2011	1.3
2012	1.9
2013	1.9
2014	2.0
2015	2.5
2016	2.4
2017	2.5

The index applies to this rulemaking as follows. The first fee adjustment will be done in 2025 to be effective January 1, 2026. This adjustment will use the end-of-year indices from 2023 and 2024, since these will represent the most recent two-year period in 2025. To clarify, the following examples are provided. The highest fee amount in the fee schedule to be in effect in 2025 is \$29,500 for the Large Surface Mining Permit—Groundwater Pumping Authorized application. For the purpose of the example, using the two most recently available indices (2.4% for 2016 and 2.5% for 2017), results in a new fee amount of \$30,975 ($\$29,500 \times 1.024 \times 1.025 = \$30,963.20$) rounding to the nearest \$25 increment. However, the calculations may result in no change to the fee amount or a decrease to the fee amount. For example, for the annual administration fee for permits in the Not Started status in 2025 will be \$175. The fee amount will remain \$175 ($\$175 \times 1.024 \times 1.025 = \183.68) since this result rounds down.

FACE SHEET
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DEPARTMENT OF ENVIRONMENTAL
PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-523

DATE OF ADOPTION AUGUST 21, 2018

BY 

TITLE PATRICK MCDONNELL
CHAIRMAN

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

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Executive or Independent Agencies

BY 

SEP 06 2018

DATE OF APPROVAL

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

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

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD

Noncoal Mining Program Fees

25 Pa. Code Chapter 77

**NOTICE OF FINAL RULEMAKING
ENVIRONMENTAL QUALITY BOARD
[25 PA. CODE CH. 77]
Noncoal Mining Program Fees**

The Environmental Quality Board (Board) amends Chapter 77 (relating to noncoal mining) to read as set forth in Annex A. This final-form rulemaking increases noncoal mining permit application fees and annual administration fees to provide funds necessary for the Department of Environmental Protection (Department) to administer the noncoal mining program.

This final-form rulemaking was adopted by the Board at its meeting on August 21, 2018.

A. Effective Date

This final-form rulemaking will take effect on January 1, 2020, to give permittees and applicants additional time to plan for the new fees.

B. Contact Persons

For further information, contact William Allen, Acting Bureau Director, Bureau of Mining Programs, Rachel Carson State Office Building, 5th Floor, 400 Market Street, P.O. Box 8461, Harrisburg, PA 17105-8461, (717) 787-5015; or Joseph Iole, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. This final-form rulemaking is available on the Department's web site at www.dep.pa.gov (select "Public Participation," then "Environmental Quality Board (EQB)").

C. Statutory Authority

This final-form rulemaking has been developed under the authority of sections 7(a) and 11(a) of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act) (52 P.S. §§ 3307(a) and 3311(a)), which authorize the Department to charge and collect a reasonable permit filing fee, which may not exceed the cost of reviewing, administering and enforcing the permit, and authorize the Board to promulgate regulations as it deems necessary to carry out the provisions and purposes of the Noncoal Act; section 6 of the Clean Streams Law (CSL), which authorizes the Department to charge and collect reasonable filing fees for applications filed and for permits issued (35 P.S. § 691.6); and section 1920-A of the Administrative Code of 1929 (71 P.S. § 510-20), which authorizes the Board to adopt rules and regulations necessary for the performance of the work of the Department.

D. Background and Purpose

This final-form rulemaking is necessary because sufficient money is not available for the Department to support the implementation of the Noncoal Act, the purpose of which is to, among other things, prevent water pollution, maintain water supply, provide for the conservation and

improvement of areas of land affected in the surface mining of noncoal minerals, and eliminate hazards to health and safety and generally to improve the use and enjoyment of the lands. *See* 52 P.S. § 3302. The Department is also responsible for issuing, administering, and enforcing permits pursuant to the CSL, 35 P.S. § 691.1 *et seq.*, the objective of which is "not only to prevent further pollution of the waters of the Commonwealth, but also to reclaim and restore to a clean, unpolluted condition every stream in Pennsylvania that is presently polluted." 35 P.S. § 691.4(3). The Department fulfills its responsibilities under the Noncoal Act and CSL through the implementation of its noncoal mining program and collects fees from noncoal mining permit applicants and permittees to cover the costs incurred by the Department to implement that program.

The majority of residents in Pennsylvania will benefit from the adequate implementation of the Noncoal Act. Noncoal mining operations occur in every county in Pennsylvania, except Philadelphia. The residents of Pennsylvania will directly benefit from this regulation because the additional fees will allow the Department to adequately implement the provisions of the Noncoal Act and CSL. As a result, the purpose of these laws, which is to protect public health and the environment, will be fulfilled. Additionally, the regulated community will benefit because there will be sufficient Department staff to issue permits to allow operators to mine and generate revenue for their businesses.

The Department implements the noncoal mining program through the review of permit applications for the various types of noncoal mining operations and the inspection of these operations to ensure operators' compliance with their permits. There are approximately 1,200 noncoal mining operators in Pennsylvania. These operations range from small quarries that produce less than 2,000 tons of material per year to large quarries that produce millions of tons of aggregate per year. The Department issues permits for the term of the expected mining activity, which also varies from a few years to decades. Operators can request modifications of their permits if their plans change, which require further staff review. The Department inspects permitted noncoal mines for compliance with their permits and environmental and safety laws and regulations, including the Noncoal Act, the CSL, Chapter 77 and Chapter 209a (relating to surface mining).

The imbalance between the revenues and expenditures of the noncoal mining program is attributable to several factors. The personnel costs for Department staff in the noncoal mining program have increased over time. In addition, the workload has changed, because the time necessary to review new noncoal mining permit applications has increased due to the complexity of the review of newly proposed noncoal mining operations.

The Department has funded the activities necessary to administer the noncoal mining program through permit application fees, annual administration fees and funds appropriated by the General Assembly annually from general tax revenue through the budget process. The Board promulgated the current noncoal mine permit application fees and annual administration fees under § 77.106 (relating to fees) on October 13, 2012. 42 Pa.B. 6536. These fee regulations were based on a cost analysis performed by the Department in 2009, which estimated the annual cost to administer the noncoal mine program to be \$2.5 million. The noncoal mining program has not received support from General Fund monies since 2008.

The Department is required to review the noncoal mining program fees income relative to noncoal mining program costs every three years and recommend any necessary changes to the Board as provided under § 77.106(d). The fees in this final-form rulemaking were designed based on the three-year fee report and associated workload analysis from 2015, which is when discussions with stakeholders began.¹ Financial data from that report are shown below, under Tables 1A and 2A, which is followed by updated current data, under Tables 1B and 2B.² In its analysis, the Department reviewed the time necessary to administer the noncoal mining program and the associated staff costs (salary and benefits) and overhead costs (e.g., offices, computers, other equipment and supplies). Tables 1A and 1B clearly demonstrate that program costs exceed revenues. Tables 1B and 2B show that revenue sources remain constant. This analysis supports the fee schedule for this final-form rulemaking.

Table 1A: Revenues and Costs (as presented in 2015 Fee Report)

<i>Fiscal Year (FY)</i>	<i>Revenue</i>	<i>Program Costs</i>
2012-13	\$1,704,234.96	\$2,815,131.75
2013-14	\$2,452,449.76	\$3,019,992.63
2014-15 (estimated)	\$2,500,000.00	\$3,100,000.00

Table 1B: Revenues and Costs (current)

<i>Fiscal Year (FY)</i>	<i>Revenue</i>	<i>Program Costs</i>
2014-15	\$2,569,751.41	\$2,912,236.93
2015-16	\$2,532,837.75	\$3,195,984.00
2016-17	\$2,437,195.07	\$4,485,000.00
2017-18	\$2,617,771.00	\$3,589,781.00
2018-19 (projected)	\$2,266,130.00	\$3,984,000.00
2019-20 (projected)	\$2,265,000.00	\$4,074,000.00

¹ See the "3-Year Regulatory Fee and Program Cost Analysis Report to the Environmental Quality Board" presented at the May 20, 2015, meeting of the Board (available at <https://goo.gl/V1WszB>).

² Updated figures are from current spend plans and projections.

A breakdown of the sources of revenue for the noncoal mining program is as follows:

Table 2A: Revenue Sources (as presented in 2015 Fee Report)

<i>Category</i>	<i>Percentage</i>
Annual Administration Fees	53%
Permit Application Fees	11%
License Fees	7%
Civil Penalties	3%
Interest and Other	26%

Table 2B: Revenue Sources (from FY 2016-17)

<i>Category</i>	<i>Percentage</i>
Annual Administration Fees	53%
Permit Application Fees	11%
License Fees	7%
Civil Penalties	3%
Interest and Other	26%

Based on its analysis, the Department concluded that it would have insufficient funds to administer the noncoal mining program consistent with its statutory responsibilities without an increase in the permit application fees and annual administration fees. The Department has implemented measures to decrease costs for the noncoal mining program. For example, the noncoal mining program has partnered with the coal mining program to reduce overhead costs and has reduced its administrative costs to less than 5% of the total program costs. However, while the efficiencies have reduced the cost of administering the noncoal mining program, these efficiencies alone could not offset the projected shortfall in funding that was identified in the 2015 cost analysis. Based on the Department's cost analysis and recommendation, the Board is increasing the noncoal mining fees.

Permit application fee - § 77.106(e)

The Department is responsible for reviewing permit applications for noncoal mining operations and issuing permits consistent with both the Noncoal Act and the CSL. The permit application fees in this final-form rulemaking are based on the 2015 cost analysis. As part of that analysis, the Department reviewed the number of hours required to review permit applications and issue permits for each type of noncoal mining operation. The Department also reviewed the wage rate for the employees that conduct the permit reviews, along with the cost of employee benefits and associated overhead costs. The workload analysis data the Department used in the development of the proposed rulemaking is included in a spreadsheet with multiple pages available on the Aggregate Advisory Board's webpage at

<http://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Aggregate-Advisory-Board/Pages/2015.aspx> (under "Aggregate Advisory Board RLT Meeting Agenda (9-22-15) (PDF)" select "2015 Inspection Staff Analysis (XLSM)"). Workload data for the Department's review of permit applications (labeled "authorizations" in the spreadsheet) as well as its administration and enforcement of permits is included in this document.

The increases for noncoal mining permit application fees vary based on the nature of the permit application. The time required by the Department to review a permit application varies depending on the complexity of the proposed noncoal mining operation. For example, applications for large noncoal surface mining operations that propose to pump groundwater take significantly more time to review because of their potential hydrologic impact. Therefore, the permit application fees under § 77.106(e) for these operations is higher than for an operation that does not include groundwater pumping. Similarly, if blasting is proposed, then the blasting inspector is involved in the review of the blast plan for the application. Therefore, the fee schedule under § 77.106(e), includes an increase in the application fee for review of blast plans, based on the cost to review those plans.

As part of the 2015 workload analysis, the Department determined that the time necessary to review new noncoal mining permit applications has increased because of the complexity of the review of new noncoal mining operations being proposed. Thus, although the Department has experienced a decrease in the total number of permit applications received, it has experienced an overall increase in its permitting workload for noncoal mining operations.

Annual administration fee - § 77.106(f)

In addition to the Department's review of permit applications, it routinely inspects noncoal mining operations for which permits have been issued and takes appropriate actions to ensure these operations comply with their permits, and statutory and regulatory requirements. The Department has established inspection frequencies based upon the type of noncoal mining permit issued and the status of activity being conducted (*e.g.*, active, inactive, not started). Activities conducted by a Department inspector include review of the permit file for the noncoal mining operation, review of submissions made by the permittee under the permit and verification of compliance through a site review.

The Department categorizes noncoal mining operations based on size. Small operations are those authorized to produce up to 10,000 tons per year and large operations are those that produce more than this amount. The Department typically inspects large operations four times per year and small operations two times per year. For noncoal mining operations that are authorized through a permit to conduct blasting, the Department also conducts a blasting inspection each year. As a result, the fee schedules under § 77.106(f) reflect these operational differences.

The annual administration fees for noncoal mining operations are based on the Department's 2015 workload analysis for conducting inspections and taking actions necessary to ensure these operations comply with their permits. The Department provided its calculations for the annual administration fees to the Aggregate Advisory Board in 2016, available at

http://files.dep.state.pa.us/Mining/BureauOfMiningPrograms/BMPPortalFiles/AAB/Agendas_and_Handouts/2016/January%202016%20Noncoal%20Admin%20Fee%20Phases.pdf

Advisory board collaboration and outreach

The Department engaged in extensive outreach and collaboration efforts related to the fee schedules in both the proposed and final-form rulemakings. For example, the Department shared revenue and cost data with the Pennsylvania Aggregate and Concrete Association periodically since the fee schedule was revised in 2012. *See* 42 Pa.B. 6536 (October 13, 2012). In 2014, the Surface Mining Conservation and Reclamation Act (52 P.S. §§ 1396.1—1396.19b) was amended to create the Aggregate Advisory Board to advise the Department on matters pertaining to surface mining. *See* 52 P.S. § 1396.18(g.1). The Aggregate Advisory Board reviewed the draft 2015 cost analysis at its initial meeting on May 13, 2015. In addition, the Department provided detailed data about the mining program's expenses and revenue at this meeting. The Aggregate Advisory Board conducted additional review of the cost and revenue data at its meeting on August 12, 2015.

By letter dated June 12, 2015, the Pennsylvania Concrete and Aggregate Association and the Pennsylvania Bluestone Association requested detailed information about the revenue and expenses for the coal mining and noncoal mining programs, including information on Federal grants provided the Department to implement Title V of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C.A. §§ 1251—1279). The Department posted data responding to this request on the Aggregate Advisory Board webpage and reviewed the data with the Aggregate Advisory Board's Regulatory, Legislative and Technical (RLT) Committee on September 22, 2015, and October 23, 2015. The data included - the Department's Title V grant applications for the previous five years; the Federal Financial Reports for closing out its Title V grant for five years; and the five most recent annual reports regarding the Department's administration of the Title V program. The Department also provided its workload analysis for the mining program, the total fees collected, the number and types of applications and inspections, and the hours worked by Department employees for the coal and noncoal mining programs. The Department also reviewed the data, including additional revenue data, with the Aggregate Advisory Board at its November 10, 2015, meeting.

The Department posted additional data on the Aggregate Advisory Board webpage and reviewed the data with the RLT Committee at its January 19, 2016, meeting. The data included the Department's spend plan, which analyzed existing and projected revenue and expenses for the noncoal mining program. At this meeting, the Department introduced the concept of phasing in fee increases and presented a preliminary draft of the proposed revisions to § 77.106, which included a proposed fee schedule.

On February 18, 2016, the RLT Committee met to review the preliminary draft revisions to § 77.106. At a meeting of the full Aggregate Advisory Board on February 18, 2016, members discussed recommendations to the Department's draft revisions, but did not vote on a final recommendation it would make to the full Aggregate Advisory Board. On May 4, 2016, the Aggregate Advisory Board met and referred the draft fee revisions to the RLT Committee for

further review. The RLT Committee met on June 9, June 30, July 18, and August 3, 2016, and provided its recommendation to the full Aggregate Advisory Board at the November 2, 2016 meeting. The RLT Committee recommended to the full Board that the rulemaking proceed with the draft fee schedule as presented in January 2016, which phased in the proposed fee increases over six years, and adjust the fee schedule annually after the phased increases are implemented based on an index from the United States Bureau of Labor Statistics. Further, this recommendation would coincide with continued collaboration with the Department on programmatic issues identified by the Aggregate Advisory Board. These issues are outlined in a Framework Document presented at the Board's meeting on August 3, 2016. By letter dated October 3, 2016, the Secretary of the Department sent notice to the Aggregate Advisory Board of the Department's "commitment to fully collaborate with the Aggregate Advisory Board on prioritizing and resolving the issues identified in the Framework Document."

Following the Aggregate Advisory Board's acceptance of the RLT Committee's report, the Department recommended that the proposed rulemaking move forward for consideration by the Board, and the Aggregate Advisory Board concurred. The data the Department provided to the Aggregate Advisory Board during the development of the noncoal fee rulemaking is available on the Aggregate Advisory Board's webpage at <http://www.dep.pa.gov/Business/Land/Mining/BureauofMiningPrograms/Aggregate-Advisory-Board/Pages/default.aspx>.

This final-form rulemaking was reviewed with the Aggregate Advisory Board at its May 9, 2018 meeting. The Board, with the proviso that the actual dates be inserted in the language for when the various schedules come into effect, concurred with the Department's recommendation to proceed with the final-form rulemaking process.

E. Summary of Changes to the Proposed Rulemaking

This final-form rulemaking includes two revisions from the proposed rulemaking. A definition for the term *Aggregate Advisory Board* is added under § 77.1 (relating to definitions).

Additionally, dates have been inserted in § 77.106 (e) and (f) for when the various schedules come into effect in 2020, 2022, and 2024, respectively.

F. Summary of Comments and Responses on the Proposed Rulemaking

Comments were received from one public commentator and Independent Regulatory Review Commission (IRRC).

The public commentator observed that Department personnel worked with stakeholders to ensure their complete understanding of the fiscal and resource needs behind the fees and encouraged the Board to consider this type of stakeholder involvement with all advisory boards and upcoming fee packages.

IRRC suggested that the Board provide a projection of the expenses for the program in order to ensure that the revised fees will not exceed the cost of reviewing, administering and enforcing permits. The projections should, at a minimum, cover seven years.

The Department designed the noncoal permit application fees and annual administration fees to correlate to the workload of the noncoal program to which the permit application fees and annual administration fees relate – reviewing, administering, and enforcing permits. For example, permit application fees accompany permit applications that the Department reviews, and so the number of permit applications and associated amount of work (*i.e.*, Department costs) are reflected in the fees charged. Similarly, the annual administration fees correlate to the workload associated with the inspection and compliance activities. However, the workload analysis that the Department used to calculate these fees includes work related to these functions for which the Department cannot impose fees because the work is too variable among permits to accurately capture in an up-front fee. For example, it is not possible to impose fees for complaint investigations because there is no reliable correlation between the number or type of complaints a particular operation might generate. The fact that the Department cannot account for these costs in the annual administration fee eliminates the likelihood that the Department will collect more money in permit application fees and annual administration fees than it costs to review, administer, and enforce permits. Further, due to the fees being established through the rulemaking process, which takes substantial time, this also makes it unlikely that revenue will exceed costs.

The three-year fee report presented to the Board in May 2015 was the basis for the initial discussion of this fee increase with the Aggregate Advisory Board in 2015. That report included an analysis that the costs were increasing each year at a rate of about 3.3%.

Recent fiscal year expenses are as follows:

<i>Fiscal Year</i>	<i>Expenses</i>	<i>Percent Change</i>
2013-14	\$3,045,286	-
2014-15	\$2,912,237	-4.4%
2015-16	\$3,195,984	9.7%
2016-17	\$4,485,000	40.3%

In response to IRRC’s request to project costs for a seven-year period, the following estimate is provided:

<i>Fiscal Year</i>	<i>Estimated Expenses</i>	<i>Estimated Fee Revenue</i>
2018-19	\$3,984,000	\$2,266,130
2019-20	\$4,074,000	\$2,265,000
2020-21	\$4,001,550	\$2,850,000
2021-22	\$4,121,597	\$3,150,000
2022-23	\$4,245,244	\$3,400,000
2023-24	\$4,372,602	\$3,700,000
2024-25	\$4,503,780	\$3,885,000

This estimate is based on the assumption that the Department's workload will remain the same. Estimated expenses are based on special fund spend plan preliminary numbers through fiscal year 2021-2022. Projections of expenses for fiscal year 2022-2023 through fiscal 2024-2025 are estimated to increase at about 3% per year.

IRRC expressed concern that the proposed automatic incremental fee increases conflict with the existing regulation that requires the Department to, at least every three years, recommend to the Board regulatory changes to the fees to address any disparity between program income and costs. The concern was that automatic fee increases would potentially make § 77.106(d) obsolete.

The automatic adjustment under § 77.106(g) does not conflict with the requirement under § 77.106(d) that the Department recommend regulatory changes to the fees every three years to the Board so that it may address any disparity between the fees and the program costs. The Department's triennial recommendation under § 77.106(d) does not mandate any particular action other than the Department's recommendation based on whether any disparity exists at the time of the Department's analysis of program costs and fee revenue.

By keeping fees at pace with inflation, § 77.106(g) reduces the likelihood of any disparity and the need to recommend that the Board proceed with a rulemaking to adjust the fees. The three-year review provides a check on the effectiveness of the automatic adjustment. If a disparity arises in the program costs and fee revenue, the three-year review will provide an opportunity to address that disparity on a regular basis. Because the Department will still rely on a three-year review and recommendation, it is not necessary to amend or delete § 77.106(d).

IRRC inquired as to whether there is a statutory minimum amount of money that must be kept in reserve in the Noncoal Surface Mining Fund. IRRC also suggested that, in lieu of the proposed fee increases, the Board consider spending down the reserve.

The Noncoal Surface Mining Fund (Fund) serves several purposes - holding cash deposited by permittees as bond; earmarking the proceeds of bond forfeitures; and for conservation purposes provided by the Noncoal Act. As a result, there are three accounts established in the Fund. The first account includes the Mining Permit Collateral Guarantee Restricted Receipt Account for collateral deposits made by permittees for their bonding obligations under the Noncoal Act. Money in this account is returned to the permittees when they complete the required reclamation of their permitted area. The second account includes the Forfeiture of Bonds Account, where bonds forfeited because of non-compliance with the Noncoal Act are deposited. Money in this account is required to be used to reclaim abandoned mine sites for which the bond was posted. *See* 52 P.S. § 3317. The third account includes the Noncoal General Operations Account, which is used to manage the day-to-day operations of the Noncoal Program and support the Payment-in-Lieu-of-Bond program.

The Noncoal General Operations Account had a balance of \$3,802,581.54 as of July 1, 2018. The fiscal year-end (June 30) balances for this unrestricted account are as follows:

<i>Fiscal Year</i>	<i>Year-end Balance</i>
2010-2011	\$10,565,327.87
2011-2012	\$8,309,176.34
2012-2013	\$7,750,609.74
2013-2014	\$7,261,735.92
2014-2015	\$6,954,553.85
2015-2016	\$6,425,248.72
2016-2017	\$4,472,979.69

These balances indicate that the Department has been spending down the balance while awaiting the required fee increases.

The balance of the Noncoal General Operations Account covers less than two years' worth of program costs. A portion of the money in the General Operations Account must be retained by the Commonwealth to provide funds for reclamation under the Payment-in-Lieu-of-Bond program. Under this program, the account underwrites bonding obligations of permittees who pay an annual fee, deposited into the General Operations Account, in lieu of posting a surety or collateral bond. In 2018, the Payment-in-Lieu-of-Bond program underwrites between three and four million dollars of bond liability. While there is no statutory requirement to maintain a specific amount of reserve, it is necessary to maintain a reasonable reserve to support the Payment-in-Lieu-of-Bond program.

As the Board noted in the proposed rulemaking, in order to lessen the financial burden on noncoal operators, most of which are considered small businesses, the fee increase phases in over four years, followed by an adjustment to account for the cost of inflation or deflation every two years thereafter. Under this system, only a portion of the actual costs are recovered between Years 1 and 4. In other words, the fee schedule is already effectively a temporary draw-down of the fund until the 4th year.

IRRC also observed that the new language in § 77.106(g) states that the permit application fee and annual administration fees will be adjusted by the Department every two years, requiring fees to be raised or lowered, regardless of the findings of the Department during the three-year review required under § 77.106(d). To provide discretion, IRRC suggested that "will" be changed to "may."

The requirements in §§ 77.106(d) and 77.106(g) are intended to work in concert with one another. The use of the word "will" in § 77.106(g) is intentional to require that the changes be made rather than provide discretion to the Department, in order to ensure fee revenue keeps pace with costs so as alleviate future fee increases. The Board is satisfied that the adjustment will unlikely exceed the costs of reviewing, administering, and enforcing the permit due to the following factors: the long historical trend in the noncoal program of costs greatly outpacing fee revenue, the adjustment factor only accounts for employee-related costs, and not all costs associated with reviewing, administering, and enforcing permits are reflected in the permit

application fees and annual administration fees. If during the three-year review a disparity is identified between the results of the index adjustment and the needs of the program, then the rulemaking process will be initiated to address the issue.

IRRC inquired as to whether the Department has the statutory authority to make the adjustments contemplated by § 77.106(g). Specifically, what specific statutory authority allows the Department to amend a regulation by publishing notice in the *Pennsylvania Bulletin* without going through the rulemaking process.

This provision was added at the request of the Aggregate Advisory Board. The adjustment is a product of subsection (g) itself, not of decision-making by the Department. In January 2026, subsection (g) supersedes, in part, subsections (e) and (f) such that the fees therein are subject to an automatic adjustment and directs the Department to publish the adjusted fees in the *Pennsylvania Bulletin* to demarcate their effective date. Under subsection (g), the Board exercising its rulemaking authority under Section 11(a) of the Noncoal Act, which provides, in relevant part:

The Environmental Quality Board may promulgate such regulations as it deems necessary to carry out the provisions and purposes of this Act. . . .52 P.S. § 3311(a).

Moreover, no provision of the Noncoal Act requires fees to be set by regulations promulgated by the Board. In fact, as IRRC notes, section 7(a) of the Noncoal Act provides, in relevant part:

The *department* is authorized to charge and collect from persons a reasonable filing fee, which shall not exceed the cost of reviewing, administering and enforcing the permit. 52 P.S. § 3307(a) (emphasis added).

Nothing in either of these provisions limits the type of fee schedule that can be established by regulation. In fact, from 1990 to 2012, the Board used its general statutory authority under the Noncoal Act to promulgate § 77.106, which at that time provided that “... a permit application for noncoal mining activities shall be accompanied by a check. . . in the amount set forth by the Department. The Department may require other fees set by the act, the environmental acts, this title or the Secretary.” 20 Pa.B. 1653 (March 17, 1990). This discretionary approach was modified in 2012, and § 77.106 established sum-certain fees that must be collected. 42 Pa.B. 6536 (October 13, 2012). These various regulatory designs are similar to regulations deemed valid and binding by the Commonwealth Court in *Naylor v. Dep’t of Public Welfare*, 54 A.3d 429 (Pa. Cmwlth. 2012), *aff’d*, 76 A.3d 563 (Pa. 2013), which allowed an agency to adjust the amounts of certain payments through publication in the *Pennsylvania Bulletin* absent statutory language that would limit that practice. In *Naylor*, the Commonwealth Court found, among other things, that regulations allowing the Department of Public Welfare to reduce State Supplementary Payments (SSP) through notice in the *Pennsylvania Bulletin* were authorized by the Public Welfare Code and reasonable because no provision of the Code “restricts or directs the manner by which the Department must establish

SSP payment amounts.” 54 A.3d at 435. Accordingly, the general statutory authority here under the Noncoal Act is sufficient authority to establish the fee adjustment provision in this final-form rulemaking.

IRRC also noted that, as written, under § 77.106(g), it appears that the Department would be the agency amending the regulation by publishing a revised fee schedule in the *Pennsylvania Bulletin*.

Prior to publication, the Department is required to provide the proposed fee schedule to the Aggregate Advisory Board. As a result, any Department action would be reviewed by the Aggregate Advisory Board. Moreover, any increases could not exceed the adjustment based on the Employment Cost Index.

IRRC also recommended that the final-form regulation include a definition for the Aggregate Advisory Board.

The final-form rulemaking reflects the addition of a definition for the Aggregate Advisory Board.

IRRC inquired as to why the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation is the most appropriate for adjusting fee amounts. Subsection 77.106(g) also indicates that another index could be used if it is found to be more appropriate.

IRRC also asked for clarification about how the Department will implement the use of a different index.

The primary cost factor in implementing the noncoal mining program is personnel costs. For this reason, the Employment Cost Index for State and Local Government Compensation was chosen as the appropriate index to make adjustments to the fees. This index is tailored to the labor costs of government employees. The regulation provides the Department with very limited discretion/authority to choose an alternative index. This would only occur if the United States Department of Labor terminates the Employment Cost Index for State and Local Government Compensation, so an alternative will be necessary, or renames it.

IRRC requested that the Board provide a ten-year history for the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation.

The following table lists the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation for each calendar year:

<i>Year</i>	<i>End of Year Index</i>
2007	4.1
2008	3.0
2009	2.3
2010	1.8
2011	1.3
2012	1.9
2013	1.9
2014	2.0
2015	2.5
2016	2.4
2017	2.5

The index applies to this rulemaking as follows. The first fee adjustment will be done in 2025 to be effective January 1, 2026. This adjustment will use the end-of-year indices from 2023 and 2024, since these will represent the most recent two-year period in 2025. To clarify, the following examples are provided. The highest fee amount in the fee schedule to be in effect in 2025 is \$29,500 for the Large Surface Mining Permit—Groundwater Pumping Authorized application. For the purpose of the example, using the two most recently available indices (2.4% for 2016 and 2.5% for 2017), results in a new fee amount of \$30,975 ($\$29,500 \times 1.024 \times 1.025 = \$30,963.20$) rounding to the nearest \$25 increment. However, the calculations may result in no change to the fee amount or a decrease to the fee amount. For example, for the annual administration fee for permits in the Not Started status in 2025 will be \$175. The fee amount will remain \$175 ($\$175 \times 1.024 \times 1.025 = \183.68) since this result rounds down.

G. Benefits, Costs and Compliance

This final-form rulemaking updates the existing permit application fee and annual administration fee schedules for noncoal mining operations to provide funding for the Department to carry out its responsibilities under the Noncoal Act and the CSL. This final-form rulemaking will benefit the public and the noncoal mining operators by enabling the Department to provide timely permit review and effective oversight of permitted noncoal mining operations to achieve the purposes of the Noncoal Act. While this final-form rulemaking will increase the cost of compliance with the Noncoal Act, the fee increases will be phased in over four years to allow the noncoal mine operators to plan for these increased costs. However, these fee increases are necessary to administer the noncoal mining program consistent with the Department’s responsibilities under the Noncoal Act.

Benefits

As described in the purpose of the Noncoal Act discussed in Section D of this Notice of Final Rulemaking, the final-form rulemaking will ensure that the benefits of the Noncoal Act will be achieved, which are to ensure that noncoal mining operations conducted in this Commonwealth prevent pollution of Commonwealth rivers and streams, restore the land for

future beneficial use, protect water supplies, as well as soil and wildlife resources, and eliminate health and safety hazards. *See* 52 P.S. § 3302. The Department is also responsible for issuing, administering, and enforcing permits pursuant to the CSL, the purpose of which is to, among other things, prevent water pollution. 35 P.S. § 691.4(3). The Department fulfills its responsibilities under the Noncoal Act and CSL through the implementation of its noncoal mining program and collects fees from noncoal mining permit applicants and permittees to cover the costs incurred by the Department to review, administer, and enforce noncoal mining permits.

This final-form rulemaking is necessary to provide the Department with funding necessary to carry out the purposes of the Noncoal Act. Adequate funding for the Department is critical to ensuring that noncoal mining operations are conducted consistent with the Noncoal Act to protect the natural resources of this Commonwealth, restore the land for future beneficial uses, and ensure the health and safety of the public. With these additional funds, the Department will be able to continue to review permit applications, inspect permitted operations and take appropriate actions to ensure compliance in a timely manner.

The Department's ability to fulfill its responsibilities under the Noncoal Act is essential to the vitality of noncoal mining in this Commonwealth because this activity can only occur consistent with the mandates of the Noncoal Act when the Department can properly issue and administer noncoal mining permits. Each year, the Department processes approximately 500 noncoal mining permits and conducts approximately 5,000 inspections of noncoal mining operations to ensure this industry can benefit this Commonwealth's economy while protecting its natural resources consistent with the Noncoal Act. The noncoal mining industry generates approximately \$20 billion per year in this Commonwealth and consistently ranks among the top ten noncoal mineral producers in the United States.

Compliance costs

The permit application fees and annual administration fees for noncoal mining operations would increase incrementally over six years. For small noncoal surface mining operations, the permit application fee will increase from the current \$525 to \$775, with a \$75 increase for each of the first and second phases, and a \$100 increase for the third phase. The annual administration fee for these small noncoal operations will increase from \$200 to \$500, with a \$200 increase in the first phase, and a \$50 increase in each of the second and third phases.

The increase in fees for small noncoal mining operations is attributable to several factors. The salary and benefit costs for Department staff in the noncoal mining program have increased between 2009 and 2015. In addition, the Department determined an average of three hours is needed to inspect a small noncoal mine operation, rather than the two hours estimated in the prior analysis. Finally, certain indirect costs and overhead costs were not accounted for in the prior cost analysis.

For large noncoal surface mining operations, as well as underground noncoal mining operations, the permit application fees will also increase. For example, the permit application fee for large noncoal surface mining operations that require groundwater pumping will increase from \$20,225 to \$29,500, with a \$2,225 increase in the first phase, a \$3,075 increase in the

second phase and a \$3,975 increase in the third phase. The annual administration fee for active large surface mining operations with blasting will increase from \$1,850 to \$2,250, with an actual decrease of \$175 in the first phase, an increase of \$75 above the current fee in the second phase, and a further increase of \$325 in the third phase.

As with the increase in fees for small noncoal mining operations, the increases for the large noncoal surface mining operations and underground operations are attributable to several factors. As discussed in Section D of this Notice of Final Rulemaking, the salary and benefit costs for Department staff in the noncoal mining program have increased between 2009 and 2015. The percent increase to annual administration fees for large noncoal operations was less than that for small noncoal operations because the Department determined that an average of five hours is needed to inspect the larger operations rather than the seven hours used in the prior cost analysis.

The total increased costs to the industry for the fees in this final-form rulemaking is estimated to be about \$1.3 million when all phases of the increases are implemented. Fee increases beyond that time would depend on the change in the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation applied every two years.

Compliance assistance plan

Compliance assistance for this final-form rulemaking will be provided through routine interaction with the Aggregate Advisory Board, trade groups and individual applicants.

Paperwork requirements

No additional paperwork is required under this final-form rulemaking.

H. Pollution Prevention

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

I. Sunset Review

The Board is not establishing a sunset date for this regulation, since it is needed for the Department to carry out its statutory authority. The Department will continue to closely monitor this regulation for its effectiveness and recommend updates to the Board at least every three years according to 25 Pa. Code § 77.106(d).

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 17, 2018, the Department submitted a copy of this proposed rulemaking, published at 48 Pa.B. 733 (February 3, 2018), to IRRC and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees, for review and comment.

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

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on _____, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ and approved the final-form rulemaking.

K. 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 regulations do not enlarge the purpose of the proposal published at 48 Pa.B. 733 (February 3, 2018).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this preamble.

L. Order of the Board

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

- (1) The regulations of the Department, 25 Pa. Code Chapter 77, are amended by amending §§ 77.1, and 77.106 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (2) The Chairman 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.
- (3) The Chairman 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 (71 P.S. §§ 745.1—745.14).
- (4) The Chairman of the Board shall certify this order and Annex A, as approved for legality and form, and deposit them with the Legislative Reference Bureau, as required by law.
- (5) This order shall take effect on January 1, 2020.

PATRICK McDONNELL,
Chairperson

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE I. LAND RESOURCES

CHAPTER 77. NONCOAL MINING

Subchapter C. PERMITS AND PERMIT APPLICATIONS

GENERAL

§ 77.1. Definitions.

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

Adjacent area—Land located outside the permit area within 1,000 feet.

***AGGREGATE ADVISORY BOARD*—THE BOARD CREATED BY SECTION 18(g.1) OF THE SURFACE MINING CONSERVATION AND RECLAMATION ACT (52 P.S. § 1396.18(g.1)) (RELATING TO THE CREATION, COMPOSITION, AND DUTIES OF THE AGGREGATE ADVISORY BOARD).**

Annual administration fee—A nonrefundable filing fee assessed on an annual basis for the cost to the Department of inspecting a permitted activity or facility to administer the permit.

§ 77.106. Fees.

(a) **Payment.** A permit application for noncoal mining activities shall be accompanied by a nonrefundable payment for the permit application fee payable to the "Commonwealth of Pennsylvania." The applicable permit application fee amount is specified in subsection (e). For purposes of this subsection, permit applications include all of the applications listed in subsection (e).

(b) **Assessment.** The Department will assess an annual administration fee for each permitted activity and facility. For licensed mine operators, this annual administration fee will be assessed annually, will be collected as part of the mine operator's license renewal application and will include the appropriate annual administration fee for each of the licensee's permitted facilities. If the permittee is not required to maintain a mining license, a notice of the annual administration fee will be sent to the permittee for all of the permittee's permitted facilities and the fee must be paid within 30 days of receipt of the notice. The applicable fee amounts are specified in subsection (f).

(c) **Deposit of funds.** Fees collected under this section and all enforcement cost recovery funds will be deposited in the Noncoal Surface Mining Conservation and Reclamation Fund. The fees collected under this section will be used by the [department] **Department** for the purposes specified by the act.

(d) **Regulatory amendment.** At least every 3 years, the Department will recommend regulatory changes to the fees in this section to the EQB to address any disparity between the program income generated by the fees and program costs. The regulatory amendment will be based upon an evaluation of the program fees income and the Department's costs of administering the program.

[(e) The permit application fee schedule is as follows:

(1) <i>New permits</i>	<i>Fee</i>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$20,225
Large Surface Mining Permit—No Groundwater Pumping	\$13,500
Small Surface Mining Permit	\$525
Underground Mining Permit	\$20,225
(2) <i>Major amendments</i>	<i>Fee</i>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$3,850
Large Surface Mining Permit—No Groundwater Pumping	\$1,600
Underground Mining Permit	\$2,650
(3) <i>Minor Amendments</i>	<i>Fee</i>
Large Surface Mining Permit	\$700

Small Surface Mining Permit	\$175
(4) Transfers	Fee
Large Surface Mining Permit	\$900
Underground Mining Permit	\$900
(5) Other Actions	Fee
Bonding Increment	\$450
Completion Report Application	\$600
Blast Plan	\$475
Notice of Intent to Explore	\$60
Pre-applications	\$3,375

(f) The annual administration fee schedule will be as follows:

<i>Permit Category—Permit Status</i>	<i>Annual Fee</i>
Large Surface Mining Permit—Active	\$1,450
Large Surface Mining Permit—Active with Blasting	\$1,850
Small Surface Mining Permit—Active	\$200
Small Surface Mining Permit—Active with Blasting	\$300
Underground Mining Permit—Active	\$1,450
General Permit	\$200
All Permits—Not Started	\$100
All Permits—Inactive	\$100]

(e) Permit application fee schedule.

(1) Effective January 1, 2020, the permit application fee schedule is as follows:

<u>(i) New Permits.</u>	<u>Fee</u>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$22,450
Large Surface Mining Permit—No Groundwater Pumping	\$15,000
Small Surface Mining Permit	\$600
Underground Mining Permit	\$22,450
<u>(ii) Major Amendments.</u>	<u>Fee</u>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$4,250
Large Surface Mining Permit—No Groundwater Pumping	\$1,775
Underground Mining Permit	\$2,950
<u>(iii) Minor Amendments.</u>	<u>Fee</u>
Large Surface Mining Permit	\$775

Small Surface Mining Permit	\$200
<u>(iv) Transfers.</u>	<u>Fee</u>
Large Surface Mining Permit	\$975
Underground Mining Permit	\$975
<u>(v) Other Actions.</u>	<u>Fee</u>
Bonding Increment	\$500
Completion Report Application	\$650
Blast Plan	\$550
Notice of Intent to Explore	\$65
Pre-applications	\$3,750
Renewal	\$175

(2) Effective January 1, 2022, the permit application fee schedule is as follows:

<u>(i) New Permits.</u>	<u>Fee</u>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$25,525
Large Surface Mining Permit—No Groundwater Pumping	\$17,025
Small Surface Mining Permit	\$675
Underground Mining Permit	\$25,525
<u>(ii) Major Amendments.</u>	<u>Fee</u>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$4,850
Large Surface Mining Permit—No Groundwater Pumping	\$2,000
Underground Mining Permit	\$3,350
<u>(iii) Minor Amendments.</u>	<u>Fee</u>
Large Surface Mining Permit	\$900
Small Surface Mining Permit	\$225
<u>(iv) Transfers.</u>	<u>Fee</u>
Large Surface Mining Permit	\$1,125
Underground Mining Permit	\$1,125
<u>(v) Other Actions.</u>	<u>Fee</u>
Bonding Increment	\$550
Completion Report Application	\$750
Blast Plan	\$675
Notice of Intent to Explore	\$75
Pre-applications	\$4,250
Renewal	\$200

(3) Effective January 1, 2024, the permit application fee schedule is as follows:

<u>(i) New Permits.</u>	<u>Fee</u>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$29,500
Large Surface Mining Permit—No Groundwater Pumping	\$19,750
Small Surface Mining Permit	\$775
Underground Mining Permit	\$29,500
<u>(ii) Major Amendments.</u>	<u>Fee</u>
Large Surface Mining Permit—Groundwater Pumping Authorized	\$5,625
Large Surface Mining Permit—No Groundwater Pumping	\$2,350
Underground Mining Permit	\$3,900
<u>(iii) Minor Amendments.</u>	<u>Fee</u>
Large Surface Mining Permit	\$1,050
Small Surface Mining Permit	\$250
<u>(iv) Transfers.</u>	<u>Fee</u>
Large Surface Mining Permit	\$1,300
Underground Mining Permit	\$1,300
<u>(v) Other Actions.</u>	<u>Fee</u>
Bonding Increment	\$650
Completion Report Application	\$875
Blast Plan	\$775
Notice of Intent to Explore	\$85
Pre-applications	\$4,950
Renewal	\$225

(f) Annual administration fee schedule.

(1) Effective January 1, 2020, the annual administration fee schedule will be as follows:

<u>Permit Category—Permit Status</u>	<u>Annual Fee</u>
Large Surface Mining Permit—Active	\$1,300
Large Surface Mining Permit—Active with Blasting	\$1,675
Small Surface Mining Permit—Active	\$400
Small Surface Mining Permit—Active with Blasting	\$550
Underground Mining Permit—Active	\$1,300
General Permit	\$400
All Permits—Not Started	\$125
All Permits—Inactive	\$125

(2) Effective January 1, 2022, the annual administration fee schedule will be as follows:

<u>Permit Category—Permit Status</u>	<u>Annual Fee</u>
Large Surface Mining Permit—Active	\$1,500
Large Surface Mining Permit—Active with Blasting	\$1,925
Small Surface Mining Permit—Active	\$450
Small Surface Mining Permit—Active with Blasting	\$625
Underground Mining Permit—Active	\$1,500
General Permit	\$450
All Permits—Not Started	\$150
All Permits—Inactive	\$150

(3) Effective January 1, 2024, the annual administration fee schedule will be as follows:

<u>Permit Category—Permit Status</u>	<u>Annual Fee</u>
Large Surface Mining Permit—Active	\$1,750
Large Surface Mining Permit—Active with Blasting	\$2,250
Small Surface Mining Permit—Active	\$500
Small Surface Mining Permit—Active with Blasting	\$700
Underground Mining Permit—Active	\$1,750
General Permit	\$500
All Permits—Not Started	\$175
All Permits—Inactive	\$175

(g) The fees in subsections (e) and (f) will be adjusted by the Department every 2 years, beginning on January 1, 2026, based on the United States Bureau of Labor Statistics Employment Cost Index for State and Local Government Compensation, or an equivalent index recognized by the United States Department of Labor. The adjustment will be based upon the cost difference for the most recent 2-year period prior to the calculation. The fee schedule will be adjusted in increments of \$25. The Department will provide the proposed fee schedule to the Aggregate Advisory Board for review prior to publication. The final adjusted fee schedule will be effective upon publication in the *Pennsylvania Bulletin*.

September 14, 2018

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

Re: Final-Omitted Rulemaking: Electronic Submission of Air Quality General Plan Approval and General Operating Permit Applications (#7-549)
Final Rulemaking: Administration of the Storage Tank and Spill Prevention Program (#7-530)
Final Rulemaking: Noncoal Mining Program Fees (#7-523)

Dear Mr. Sumner:

Pursuant to Section 5(a) of the Regulatory Review Act, please find enclosed copies of one final-omitted rulemaking and two final-form rulemakings for review by the Independent Regulatory Review Commission (IRRC). The Environmental Quality Board (Board) adopted these rulemakings at its August 21, 2018 meeting.

The Electronic Submission of Air Quality General Plan Approval and General Operating Permit Applications (#7-549) amends 25 Pa. Code § 127.621(b) (relating to application for use of general plan approvals and general operating permits) to add the option of electronic means for delivery of applications to the Department of Environmental Protection (Department) for air quality general plan approvals (GPA) and general operating permits (GP).

The existing regulation that governs the air quality GPA and GP application process. § 127.621(b), specifies that the application shall be either hand delivered or transmitted by certified mail return receipt requested to the Department. Adding an electronic means of submission as another method for submitting an air quality GPA or GP application to the Department will provide flexibility to the regulated community and will enhance Department efficiency through the timely processing and potential issuance of these air quality GPAs and GPs.

The owner or operator of a regulated air contamination source or process for which an air quality GPA or GP is available will be affected by this rulemaking. Currently, the Department has 19 air quality GPAs and GPs available that regulate various types of air contamination sources and processes in several industrial categories, including small boilers, burn off ovens, lithographic printing presses, mineral processing, storage tanks for volatile organic liquids, powder metal sintering furnaces, natural gas production, pharmaceutical and specialty chemical production, and petroleum dry cleaning. Within the past five years, the Department has issued 1,922 new air quality GPAs and GPs and 204 renewals for a total issuance of 2,126 GPAs and GPs. The Department expects a surge of new applications once it finalizes the revised GP-5 for

compression stations, processing plants, and transmission stations and the new GP-5a for unconventional natural gas well site operations and remote pigging stations.

An owner or operator of a regulated air contamination source or process for which an air quality GPA or GP is available will benefit by having the option to submit applications for GPAs and GPs by electronic means rather than being limited to hand delivering the application or mailing the application by certified mail with a return receipt requested. Adding the option for electronic means of application delivery is expected to enhance Department efficiency by enabling faster review of these plan approval and permit applications. Faster review may also benefit the regulated industry by facilitating timely implementation of the approved permitted activities.

This final-omitted rulemaking was discussed with, and received the support of, the Air Quality Technical Advisory Committee on June 14, 2018, the Small Business Compliance Advisory Committee on July 25, 2018, and the Citizens Advisory Council (CAC) Policy and Regulatory Oversight Committee on June 15, 2018. The CAC Policy and Regulatory Oversight Committee briefed the members of the CAC on June 19, 2018.

The **Administration of the Storage Tank and Spill Prevention Program (#7-530)** final-form rulemaking amends 25 Pa. Code Chapter 245. The U.S. Environmental Protection Agency (EPA) has codified comprehensive Federal regulations for underground storage tanks (USTs) at 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of USTs. EPA initially promulgated these regulations in 1988 and published final revisions to 40 CFR Part 280 at 80 FR 41566 (July 15, 2015). These revisions, among other things, added secondary containment requirements for new and replaced tanks and piping, added operator training requirements, added periodic operation and maintenance requirements for UST systems, removed certain deferrals, added new release prevention and detection technologies, updated codes of practice, and made editorial and technical corrections. Secondary containment (November 10, 2007) and operator training (December 26, 2009) requirements that meet the Federal requirements into Chapter 245 were incorporated through prior rulemakings.

In its July 15, 2015, Final Rule, the EPA also updated the State Program Approval requirements in 40 CFR Part 281 (relating to approval of state underground storage tank programs). The EPA is requiring that states amend their UST regulations and apply for initial or revised State Program Approval within three years of the effective date of the final EPA rule published at 80 FR 41566.

Currently, the Commonwealth has State Program Approval. The Commonwealth receives approximately \$2.3 million annually in Federal grant funding from the EPA under section 9014 of the Solid Waste Disposal Act (42 U.S.C.A. § 6991m) to aid in administering the UST program. This final-form rulemaking is necessary to ensure continued receipt of Federal grant funds. To comply, Chapter 245 must be updated to be no less stringent than the Federal requirements so the Department can apply for revised State Program Approval. The EPA has not codified companion aboveground storage tank (AST) regulations.

This rulemaking strengthens Pennsylvania's UST regulations by increasing the emphasis on properly operating and maintaining equipment. Lack of proper operation and maintenance of UST systems is the main cause of new releases. Information on sources and causes of releases

shows that in addition to releases from tanks, releases from piping and spills and overfills associated with deliveries have emerged as common problems. In addition, releases at the dispenser are one of the leading sources of contamination at UST facilities. Finally, according to EPA, data shows that release detection equipment at all UST facilities is only successfully detecting approximately 50 percent of releases it is designed to detect. These release detection problems are similarly due in part to improper operation and maintenance.

Finally, the Department is updating Chapter 245 to address a number of issues, especially those pertaining to ASTs, based on observations and experience in implementing and enforcing the regulations since the last comprehensive update.

The amendments included in this rulemaking require that UST equipment be operated and maintained properly. While the current UST regulations require owners and operators to have spill, overfill, and release detection equipment in place for their UST systems, the regulations do not require proper operation and maintenance for some of that equipment. For example, Chapter 245 does not currently require periodic testing of spill prevention equipment that captures drips and spills when a delivery hose is disconnected from the fill pipe.

The new operation and maintenance requirements include:

- A visual inspection of spill prevention equipment and release detection every 30 days.
- A visual inspection of containment sumps and handheld release detection devices annually.
- Testing of spill prevention equipment every three years.
- Inspection of overfill prevention equipment every three years.
- Testing of containment sumps used for interstitial monitoring every three years.
- Annual release detection equipment testing.

In addition to the new operation and maintenance requirements, two other important provisions are included in this final-form rulemaking:

- Requires release detection for emergency generator USTs. Previously, emergency generator USTs were deferred from having to meet release detection requirements.
- Prohibits flow restrictors (ball float valves) as an option for overfill prevention in new UST systems and when these devices need to be replaced.

This rulemaking also addresses some of the more significant issues that the Department has observed in its inspections, oversight and enforcement of Chapter 245 in the following manner:

- Revises current definitions such as "Aboveground storage tank," "Containment structure or facility," "Hazardous substance storage tank system," "Removal-from-service," "Storage tank system," and "Tank handling activities" to provide clarity, ensure consistent implementation, and to correct errors in the existing definitions. For example, the current definition of "Removal from service" implies that such activities only apply to UST systems. The final-form amendment clarifies that the term also applies to AST systems.
- Revises the definition of "Certification categories" to include a new certification category called "Underground storage tank system minor modification."
- Revises the definitions of "Motor fuel," "Pipeline facilities (including gathering lines)," and "Underground storage tank" to be consistent with the Federal definitions at 40 CFR § 280.12.

The Department is revising the definition of “Underground storage tank” to delete the exclusion for “Tanks containing radioactive materials or coolants that are regulated under The Atomic Energy Act of 1954 (42 U.S.C.A. §§ 2011—2297)” and “An underground storage tank system that is part of an emergency generator system at nuclear power generation facilities regulated by the Nuclear Regulatory Commission under 10 CFR Part 50, Appendix A (relating to general design criteria for nuclear power plants).” The exclusion for “A wastewater treatment tank system” is revised to read “A wastewater treatment tank system that is part of a wastewater treatment facility regulated under Section 402 or 307(b) of the Clean Water Act.”

- Adds definitions for “Aboveground storage tank system,” “Containment sump,” “Environmental covenant,” “Repair,” and “Spill prevention equipment.”
- Adds a definition for “Immediate threat of contamination” to clarify which spills from a storage tank into a containment structure or facility are “releases” that potentially require corrective action.
- Deletes the definitions “Actively involved,” “Interim certification,” and “Reportable release” as they are no longer needed.
- Adds a new certification category for minor modifications to allow individuals to perform tank handling activities such as repairs that do not involve excavation without having to obtain the (full) certification to install and modify storage tank systems, and to perform tests of UST systems required by this final-form rulemaking.
- Requires storage tank modification inspection reports to be submitted within 30 days from completion of the inspection.
- Requires overfill prevention for USTs to be permanently installed.
- Excludes USTs used solely for emergency generator purposes from the automatic pump shut-off requirement.
- Requires all ASTs in underground vaults that require an in-service inspection to be inspected within 6 and 12 months of installation and at least every 3 years thereafter due to their history of non-compliance. This mirrors the inspection requirement for USTs.
- Shortens the initial inspection requirement and in-service inspection cycle for small ASTs from 10 years to five years. Based on current in-service inspections, the compliance rate with regulatory requirements is less than 50 percent. Shortening the facility operations inspection cycle for USTs from five years to three years has resulted in increased regulatory compliance.
- Adds that all owners of facilities that are required to have a Spill Prevention Response Plan under current regulation must maintain a written or electronic log. Each log entry is to identify the name of the individual performing tank handling and inspection activities, the individual’s signature or equivalent verification of presence onsite, the company name, the date of work, start and end times, and a brief description of work performed, including tank identification.
- Removes the requirement for a 10-year lining inspection for small ASTs.

The proposed rulemaking was adopted by the Board on October 17, 2017, and published at 48 Pa.B. 1101 (February 24, 2018). Public comments on the proposed rulemaking were accepted through March 26, 2018. The Board received comments from 19 commentators during the

public comment period and the Independent Regulatory Review Commission (IRRC). All comments have been addressed and there are no unresolved issues relevant to this rulemaking.

The implementation of this rulemaking will be carried out as follows: the Department currently operates an extensive outreach program designed to assist owners and operators of storage tanks as well as individuals. This program includes a series of fact sheets that focus on single issues in the storage tank program; periodic seminars and conferences focusing on storage tank technical and administrative issues; training sessions presented by regional and central office training teams on a variety of issues; many guidance documents addressing technical and policy issues; and a great deal of information available on the Department's website. The Department will revise and update applicable fact sheets, guidance documents, forms and publications to reflect changes necessary as a result of the final-form rulemaking.

The Department expects these efforts to continue and to intensify after the effective date of the final-form rulemaking and as phase-in deadlines approach. The Department will also communicate directly with individuals, companies, associations, organizations and groups to assist in the understanding and implementation of the rulemaking.

This final-form rulemaking will affect approximately 7,000 storage tank owners at nearly 12,600 storage tank facilities. Industry sectors potentially affected by the final-form rulemaking include retail motor fuel sales, commercial, institutional, manufacturing, transportation, communications and utilities, and agriculture. Federal, state and local government owners of regulated storage tanks will also be affected.

Department-certified storage tank installers, inspectors and companies will also be required to comply with this final-form rulemaking. There are nearly 875 certified individuals and approximately 350 certified companies.

Owners of existing storage tank systems will be provided with adequate timeframes to adjust and comply with the new requirements. Owners of storage tank systems installed on or after the effective date of the final-form rulemaking must comply with the requirements immediately.

The Department worked with the Storage Tank Advisory Committee (STAC) during the development of this rulemaking. As required by section 105 of the Storage Tank and Spill Prevention Act (Act.) STAC was given the opportunity to provide feedback on rulemaking concepts and to review and comment on draft regulatory language at both the proposed and final-form stages. On March 7, 2017, the STAC voted to unanimously support the proposed amendments and recommended that the Board consider the amendments for publication as a proposed rulemaking. On May 17, 2018, revisions to the proposed rulemaking along with draft final-form regulatory language were reviewed and discussed with STAC. At that time, STAC voted unanimously to concur with the Department's recommendation to move the rulemaking forward in the regulatory review process. The Citizens Advisory Council was kept apprised of developments in the regulatory process on a monthly basis. In addition, final revisions to 40 CFR Part 280 and subsequent proposed changes to Chapter 245 were presented to Department-certified third-party installers and inspectors during annual technical training presented by the Department.

The **Noncoal Mining Program Fees (#7-523)** final-form rulemaking amends 25 Pa. Code Chapter 77. The Department is the agency responsible for implementing the Noncoal Surface Mining Conservation and Reclamation Act (the act). Section 7(a) of the act authorizes the Department to charge and collect a reasonable filing fee from noncoal permit applicants, provided the fees do not exceed the cost of reviewing, administering and enforcing the permit. These fees are used to administer the noncoal mining regulatory program. The Department implements the noncoal mining program through the review of permit applications for the various types of noncoal mining operations and the inspection of these operations to ensure operators' compliance with their permits. There are approximately 1,200 noncoal mining operators in Pennsylvania. These operations range from small quarries that produce less than 2,000 tons of material per year to large quarries that produce millions of tons of aggregate per year. The Department issues permits for the term of the expected mining activity, which also varies from a few years to decades. Operators can request modifications of their permits if their plans change, which require further staff review. The Department inspects permitted noncoal mines for compliance with permits, which require compliance with environmental and safety requirements included in the act, the Clean Streams Law (CSL), and Chapters 77 (Noncoal Mining) and 209a (Occupational Health and Safety: Surface Mining).

The final-form rulemaking includes amendments to 25 Pa. Code § 77.106 (fees) to provide additional funding to sustain the program. The current rate of revenues and expenditures will likely exhaust the reserves by 2020 in the Noncoal Surface Mining Fund, resulting in inadequate funding and potential curtailment of the program. Without the stable funding realized through the imposition of the increased fees, the Department will not be capable of timely issuance, administration, and enforcement of permits to 1,200 operators as required by the Noncoal Act and the CSL. As a result, applicants will not be able to conduct lawful mining activities, which will have a negative impact on the economy. Additionally, inadequate enforcement of existing permits will have a deleterious effect on public health and safety, and the environment.

Because the act prohibits noncoal mining without a permit issued by the Department, timely processing of noncoal operator permits (approximately 500 annually) is vital for Pennsylvania's economy as the noncoal industry is currently a \$20 billion dollar per year industry in the state, which consistently ranks among the top ten noncoal mineral producers in the nation. Citizens who live in affected areas will be protected by adequate inspections, enforcement, and oversight, and citizens across the Commonwealth will benefit from a healthy and protected natural environment.

This final-form rulemaking implements the Department's statutory authorization to collect a reasonable filing fee through two kinds of fees – the permit application fee and the annual administration fee. The permit application fee is intended to cover the Department's cost to review permit applications. The permit fees have been set according to the type of application submitted. The fee amounts are based on the number of hours typically required to review a specific type of permit application.

The annual administration fee is intended to cover the Department's costs to administer the permit. These include, among other things, the cost of performing inspections of the operations, compliance assistance, and other compliance related activities, as well as the tracking of required

reporting and monitoring by permittees. As with the permit fees, the annual administration fees are set based on workload analyses. The annual administration fee schedule reflects the differences between types of operations based on the Department's respective administrative workload. The assessment of the two kinds of fees is necessary to fairly represent the cost to the Department for reviewing, and administering, a noncoal mining permit.

The permit application fee schedule incrementally increases fee amounts. The first phase, to be effective January 1, 2020, includes an increase to reflect current wage and benefit rates resulting in about a 20% increase from current fees. The second phase, to be in effect January 1, 2022, adds about 25% to the fees to account for indirect costs (e.g. information technology, supplies and equipment). The third phase, scheduled to be in effect January 1, 2024, adds about 34% to the fee amounts to account for overhead (e.g. utilities, fuel and training). The phased-in structure will allow regulated entities time to prepare for the full impact of the increase. Beginning January 1, 2026, an adjustment factor will be applied every two years to account for increases in costs by using an index from the Bureau of Labor Statistics. It is anticipated that the fee schedule will close the gap between revenue and expenses.

The amendments increase the cost for permit application fees and annual administration fees. These will impose an added cost to the regulated community, which are approximately 1,200 small businesses. However, the amendments also benefit regulated entities by appropriately funding the regulatory program, which will allow them to continue their operations smoothly. A fully-staffed program can review and issue permits in a timely manner, provide technical assistance, and produce necessary technical guidance documents and policies. This funding also protects public health and the environment from spills or accidents by ensuring the appropriate inspection staff are available. Noncoal mining operations affect many members of the public, as they occur in every county in Pennsylvania except Philadelphia.

To mitigate the impacts on the noncoal operators, the Department introduced an approach that will incrementally increase the fees in three, two-year phases. Also, consistent with current practice, fees vary for different types of operations. For example, permit applications for large noncoal surface mining operations that propose to pump groundwater take significantly more time to review because of their potential hydrologic impact. Therefore, the permit application fee for these operations is higher than for an operation that does not include groundwater pumping. Similarly, if blasting is proposed, then the blasting inspector is involved in the review of the blast plan for the permit application. Therefore, the fee schedule includes a permit application fee for review of blast plans, based on the cost to review those plans. These strategies both account for the Department's workload and avoid charging smaller or simpler operations a higher fee than necessary. In addition, the first phase of the fees has an effective date of January 1, 2020, which provides time for permittees to plan for the increases.

The proposed rulemaking was adopted by the Board on October 17, 2017, and published at 48 Pa.B. 733 (February 3, 2018). Public comments on the proposed rulemaking were accepted through March 5, 2018. Comments were received from one public commentator and from IRRC. All comments have been addressed and no unresolved issues remain.

During the proposed rulemaking process, the Department provided detailed information to the Aggregate Advisory Board. The draft fee report to the Aggregate Advisory Board was reviewed with the Board at their initial meeting on May 13, 2015. The information was provided through a series of meetings from May 2015 through November 2016, when the Board concurred with the Department's recommendation to proceed with the rulemaking process. This final-form rulemaking was reviewed with the Aggregate Advisory Board at its May 9, 2018 meeting. The Board, with the proviso that the actual dates be inserted in the language for when the various schedules come into effect, concurred with the Department's recommendation to proceed with the final-form rulemaking process.

The Department will provide assistance as necessary to facilitate IRRC's review of the enclosed rulemakings under Section 5.1(e) of the Regulatory Review Act.

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

Sincerely,



Laura Edinger
Regulatory Coordinator

Enclosures



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

I.D. NUMBER: 7- 523
SUBJECT: Noncoal Mining Program FLS
AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolerated Regulation
 - a. With Revisions
 - b. Without Revisions

RECEIVED
IRRC
2018 SEP 14 P 12:35

FILING OF REGULATION

DATE

SIGNATURE

DESIGNATION

<u>9-14-18</u>	<u>Shelly Weaver</u>	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY <u>Representative John Maher</u>
<u>9-14-18</u>	<u>Sandy Montgomery</u>	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY <u>Representative Mike Carroll</u>
<u>9/14/18</u>	<u>Susan Weisner</u>	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY <u>Senator Gene Yaw</u>
<u>9/14/18</u>	<u>John C...</u>	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY <u>Senator John Yudichak</u>
<u>9/14/18</u>	<u>Steph F. Hoffman</u>	INDEPENDENT REGULATORY REVIEW COMMISSION <u>David Sumner</u>
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)

